: : आयुक्त (अपील्स) 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

रजिस्टर्डडाकए.डी. द्वारा :- **DIN-20230164SX000000B080**

क	अपील / फाइलसंख्या/ Appeal /File No.	मूलआदेशसं / OIO No.	दिनांक/ Date
	V2/1/RAJ/2022	**09/ADC/BP/Sub-Commr/2021-22**	29-10-2021

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

RAJ-EXCUS-000-APP-408-2022

आदेश का दिनांक / Date of Order: **28.12.2022** जारी करने की तारीख / Date of issue: **04.01.2023**

श्री शिव प्रताप सिंह, आयुक्त (अपील्स), राजकोट द्वारा पारित /

Passed by **Shri Shiv Pratap Singh**, 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 the **Appellant** & Respondent :-

M/s. Essar Power Gujarat Limited, Post box No. 7, EGPL 44 km. milestone, Jmanagar- Okha Highway, Jam Khambhalia-361305.

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 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 असार्वा 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 duty demand/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,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 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/-.

(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" 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-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 गईं 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।
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 variousnumbers 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

अपील आदेश /ORDER-IN-APPEAL

M/s Essar Power Gujarat Limited, Post Box No.7, EGPL 44 KM Milestone, Jamnagar-Okha Highway, Jam Kambhalia-361 305 (hereinafter referred to as the appellant) has filed appeal No. V2/1/RAJ/2022 against Order-in-Original No. 09/ADC/BP/Sub-Commr/2021-22 dated 9.10.201 (hereinafter referred to as 'impugned order') passed by the Additional Commissioner, Central Excise & CGST, Rajkot (hereinafter referred to as 'the adjudicating authority')

2. The facts of the case in brief are that during the course of audit of the records of appellant it was noticed that the appellant has paid an amount of Rs.8,38,91,179/- as demurrage charges to overseas parties and/ or their agents during the period April 2015 to June 2017 and it falls under Section 66E(e) of the Finance Act 1994 as a 'Declared Service' and the appellant was liable to pay service tax on it under Reverse Charge Mechanism (RCM). It was also noticed that the appellant had earned an amount of Rs.3,77,12,289/- as dispatch money from overseas parties and it falls under Section 66E(e) of the Finance Act 1994 as a 'Declared Service' and the appellant was liable to pay service tax on it. Accordingly a show cause notice was issued demanding service tax of Rs.1,75,53,361/- and proposing to impose penalty under Section 76,77 and 78 of the Finance Act, 1994. The adjudicating authority, by the impugned order, confirmed the demand and imposed penalty of Rs.1,75,53,361/- under Section 78, Rs.10,000/- under Section 77(1) and Rs.10,000/- under Section 77(2) of the Finance Act, 1994.

3.1 Being aggrieved, appellant filed the present appeal wherein they, *inter alia,* submitted that;

- The levy of service tax was only on a 'service', which under clause 44 of Section 65B of the Finance Act 1994 mean any activity carried out by a person for another for consideration, and included a 'declared service'. 'Declared service' under clause 22 of Section 65B itself meant any activity carried out by a person for another person for consideration and declared as such under Section 66E.
- Only when an activity was declared as a service under Section 66E of the Finance Act, 1994 would it constitute a 'declared service' and would thus amount to 'service' under clause 44 of Section 65B ibid and consequently would attract levy of service tax under Section 66B of the Finance Act, 1994.
- Agreeing to the obligation of (a) to refrain from an act, (b) to tolerate an act or a situation and (c) to do an act as per clause (e) of Section 66E of the Finance Act, 1994 had to be direct and cannot be inferred or presumed from any attendant circumstances.

- The question whether demurrage amount which was paid by the appellant in terms of Article 10.5 of the agreement to the Singapore seller had to be examined by the adjudicating authority in order to ascertain whether it amounted to the Singapore seller agreeing to the obligation to tolerate an act of the appellant, resulting in delay of unloading at the discharge port in India, beyond the period prescribed in the lay-time.
- There was no analysis of the appellant's agreement dated 16th March 2015 with the Singapore seller, to ascertain or pinpoint such an agreement with such an obligation and whether mere payment of demurrage charges was a consideration for Singapore seller for its tolerating the appellant's delayed discharge of coal.
- The adjudicating authority ought to have considered and appreciated the findings of Hon'ble Tribunal in the case of *South Eastern Coal Fields Ltd-2020-TIOL-1711-CESTAT-DEL* as below:
  a. The consideration contemplated in the agreements was for supply of coal, materials or for availing various types of services.
  b. There is a marked distinction between the 'conditions to a contract' and 'considerations for the contract'. The discharge terms under Article 10 of the agreement, which also include demurrage and dispatch money, merely provided for timely discharge of coal at the destination port and there is nothing in the agreement from which it can be inferred that the Singapore seller has agreed to the obligation to tolerate the delayed discharge of the cargo by the appellant on payment of discharge money as consideration for such tolerance.
  c. There has 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. Recovery of demurrage charges for delayed discharge of cargo by Singapore seller from the appellant cannot be said to be towards any service.
  d. An agreement has to be read a whole so as to gather the intention of the parties.
  e. Recovery of liquidated damages/ penalty from the 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.
  f. The activities that are contemplated under Section 66E(e), when one party agrees to refrain from an act or to tolerate an act or to 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.

- The adjudicating authority has erred in failing to consider the decisions relied upon by the appellant on the ground that the said decisions pertained to the period prior to 1st July 2012. The adjudicating authority failed to appreciate that the Hon'ble Tribunal's decision in *South Eastern Coal Fields Ltd (supra)* dealt with the period from July 2012 to March 2016.
- The adjudicating authority failed to appreciate that assumption in the show cause notice was mis-conceived as for attracting the levy of service tax, there has to be an agreement for tolerating non-performance of a contract, for which consideration in the form of fines for liquidated damages is paid.
- The adjudicating authority failed to consider the other submission of the appellant in connection with the demurrage amount that since this amount had been included in the value for the purpose of assessment and payment of customs duty in terms of Section 14 of the Customs Act, 1962, no service tax could be levied on the demurrage amount as there was no separate agreement to treat it as a service.
- The payment of demurrage was nothing but an adjustment to the price of coal, and not a consideration towards any service.
- It was erroneously presumed in the show cause notice that the dispatch money payable to the appellant by Singapore seller for faster discharge of the cargo would come in the category of 'declared service' as agreeing to the obligation to do an act.
- Hon'ble Supreme Court in *Bhayana Builders-2018 (10)GSTL.118* held that for an amount to be treated as 'consideration' the same is required to have nexus with the activity covered by the agreement and in the absence of such a nexus, the amount cannot be treated as consideration.
- Without prejudice to above, the said service was provided by appellant located in India to Singapore seller located in non-taxable territory. Under rule 3 of Place of Provision of Service Rules, 2012, the place of provision of a service in the facts of this case shall be the location of the recipient of service. Since the recipient of service, in this case, is Singapore, even if it is assumed to a taxable service, will not attract any service tax.
- Demand for the period 1st April 2017 to June 2017 only would be within time, provided the demand was otherwise sustainable on merits
- In terms of settled law as decided by the Hon'ble Supreme Court in a catena of judgments, that for invoking extended period of limitation, it has to be shown that an assessee committed fraud, suppression or willful mis-

statement or contravened the provisions of law with an intent to evade payment of service tax.

- The appellant has been filing Service Tax returns and has provided all the information that was required in law. The appellant was not required to inform the department that it has not paid service tax on demurrage charges and dispatch money since it was under a bonafide belief that no service tax was payable. The assessing officer was free to scrutinize the returns filed along with records of the appellant and if they did not raise any issue regarding payment of service tax on demurrage charges and dispatch money, it cannot be said that the appellant committed any fraud, suppression etc with an intent to evade payment of service tax.
- In the case of *Chemphar Drugs-1989 (40) ELT.276 (SC)*, it is held that for invoking extended period, the department had to show that such fraud or mis-statement or suppression on the part of the assessee was done in a positive way and mere inaction of the assessee was not sufficient o uphold such strong allegations.
- Since the demand of service tax was not tenable on merits and/ or extended period of limitation, there is no question of paying any interest.
- The allegation of fraud or suppression etc with intent to evade payment of service tax could not be sustained in this case and consequently the appellant cannot be held liable to imposition of any penalty under Section 78 of the Finance Act, 1994.
- Since Section 78 has been invoked for imposing penalty, the general penalty under Section 77 of the Finance Act, 1994 could not be imposed on the appellant.

5. Shri Abhishek Deodhar, Chartered Accountant appeared for personal haring in virtual mode on 22.12.2022 and reiterated the submissions made in the appeal. He submitted that the demurrage amount paid and dispatch amount received do not represent any service but are in the nature of mere price adjustments to encourage faster clearance and to discourage the delay in clearance of imported coal. Even if these are considered as service, the place of provision of service being outside India, based on location of the recipient applying rule 3, the same are not taxable. He submitted that there are numerous judgments of High Courts/Tribunals holding that liquidated damages paid cannot be considered as consideration for providing service. He also referred to a new Circular No.178/2022 dated 03.08.2022 in this regard in the context of GST. However, the concept being the same under GST and Service Tax regime, he requested to set aside the impugned order.

6. 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 demurrage charges paid and dispatch money received are considerations towards tolerating any act under Section 66E of the Act and whether the Appellant is liable to pay service tax on them.

7.1 Before going to the merits of the case, it would be prudent to examine the legal provisions covering the issue on hand, which are discussed in subsequent paragraphs.

7.2 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."*

7.3 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."*

7.4 Further, to satisfy the definition of service contained 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.

8.1 On examining the present case in backdrop of the above legal provisions, I find that the point to be decided in the instant case is as to whether the amount paid by the Appellant to their overseas seller as demurrage charges for delayed discharge of cargo 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 discharge of cargo beyond lay time as per the contract. It is undisputed that there was an agreement between the appellant and their overseas seller, as per which, the appellant was liable to pay demurrage charges for time lost after expiration of allowable lay time. Thus, both parties had agreed for compensation in the event of breach of contract. Here, it is pertinent to examine the provisions contained in Section 53 of the Indian Contract Act, which 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)

9.2 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 colour of consideration as arrived upon 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 paid by the Appellant would definitely amount to a compensation towards the excess charges paid by the seller. Mere payment of money, which is in the nature of a compensation, cannot be treated as consideration for any activity.

9.4 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 coal. The consideration contemplated under the agreements would have been for execution of such contracts as per the contours of the contracts. The intention of the parties certainly would not be 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. Moreover, it has been clarified by the Board vide its Circular No.121/2/2010-S.T., dated 26-4-2010 that detention charges are in the nature of 'penal rent' and such charges are not subjected to service tax. The said Circular is reproduced below:

"Subject :Service tax on Container Detention Charges - Regarding.

Generally marine containers are temporarily brought into a customs territory and have to be re-exported within a specified period. Normally, a Full Container Load is taken out of the port and the activity of stuffing or de-stuffing takes place at the premises of the exporter/importer. The shipping companies/steamer agent provide a pre-determined period within which the container (that has gone out of the port) is to be returned. This is called as 'pre-holding period' and the duration of the same is mentioned in the contract. In case there is any delay on the part of the customer in returning the container, the charges known as 'detention charges' are collected over and above the contracted amount by the shipping line.

3. Representations have been received in the Board that service tax has been demanded on such 'detention charges' under the 'Business Support Service (BSS)' or 'Business Auxiliary Service (BAS)'.

4. The issue has been examined. To retain the container beyond the pre-holding period is neither a service provided on behalf of the client (Business Auxiliary Service) nor is it an infrastructural support in the business of either the shipping lines or the customer (Business Support Service). Such charges can at best be called as 'penal rent' for retaining the containers beyond the pre-determined period. Therefore, the amount collected as 'detention charges' is not chargeable to service tax."

Since demurrage is a charge levied by the shipping line to the importer in cases where they have not taken delivery of the full container and move it out of the port/terminal area for unpacking within the allowed free days, applying the analogy of the clarification given by the Board as above, it is evident that demurrage charge is not a consideration towards providing any service, but it is one type of penal rent and no service tax is attracted.

9.5 In view thereof, I am of the considered view that the amount paid by the Appellant, in the form of demurrage charges to their foreign seller, for failure to discharge the cargo within normal lay time, have to be considered 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. 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. I, therefore, hold that said transactions do not per se constitute any 'service' or 'Declared Service' as envisaged under Section 65B(44) and Section 66E(e) of the Act, respectively and consequently the appellant is not liable to pay service tax under RCM .

10. As regarding the dispatch amount is concerned, it is the quite opposite of the demurrage charges. In this case, when the lay time is saved, the seller rewards the appellant by paying an amount proportionate to the time saved. Thus it can be seen that in this transaction also there is no element of service involved. It is in the nature of an incentive given to the appellant for expeditious clearance of goods from the vessel. Thus, in the case of dispatch money also, the agreement is not for tolerating an act or to do an act but it merely reduced the price of the coal payable by the appellant. In view thereof, I am of the considered

view that the dispatch money paid by the seller, for expeditious clearance of cargo before normal lay time, have to be considered in the nature of a trade discount and such incentive does not, *per se,* amount to a consideration for tolerating an act or doing an act under a covenant. 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.

11.1 In this regard, I rely on the Order passed by the Hon'ble CESTAT, New Delhi in the case of *South Eastern Coalfields Ltd* 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."

(Emphasis supplied)

11.2 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(46) GSTL 409, wherein it has been held that;

***"22.** It is, thus, clear that where service tax is chargeable on any taxable service with reference to its value, then such value shall be determined in the manner provided for in (i), (ii) or (iii) of sub-section (1) of Section 67. What needs to be noted is that each of these refer to "where the provision of service is for a consideration", whether it be in the form of money, or not wholly or partly consisting of money, or where it is not ascertainable. In either of the cases, there has to be a "consideration" for the provision of such service. Explanation to sub-section (1) of Section 67 clearly provides that only an amount that is payable for the taxable service will be considered as "consideration". This apart, what is important to note is that the term "consideration" is couched in an "inclusive" definition.*

***23.** A Larger Bench of the Tribunal in Bhayana Builders (P.) Ltd. v. Commissioner of Service Tax [2013 (32) S.T.R. 49 (Tri. - LB)] observed that implicit in the legal architecture is the concept that any consideration, whether monetary or otherwise, should have flown or should flow from the service recipient to the service provider and should accrue to the benefit of the latter. The concept of "consideration", as was also expounded in the decision pertaining to Australian GST Rules, wherein a categorical distinction was made between "conditions" to a contract and "consideration for the contract". It has been prescribed under the said GST Rules that certain "conditions" contained in the contract cannot be seen in the light of "consideration" for the contract and merely because the service recipient has to fulfil such conditions would not mean that this value would form part of the value of the taxable services that are provided.*

***24.** This precise issue was considered by a Division Bench of this Tribunal in M/s. South Eastern Coalfields Ltd. wherein certain clauses providing penalty for non-observance/breach of the terms of the contract entered during the course of business came up for consideration. The case of Department was that the amount collected by the appellant towards compensation/penalty was taxable as a " declared service" under Section 66E(e) of the Finance Act. After considering the decision of a Larger Bench of the Tribunal in Bhayana Builders and the decisions of the Supreme Court in Commissioner of Service Tax v. M/s. Bhayana Builders [2018 (2) TMI 1325 = 2018 (10) G.S.T.L. 118 (S.C.)] and*

Union of India v. Intercontinental Consultants and Technocrats [2018 (10) G.S.T.L. 401 (S.C.)] as also the decision pertaining to Australian GST Rules, the Bench observed as follows :

... ...

27. Ultimately, the Tribunal has held as follows :

"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."

... ...

***29.** A Division Bench of the Tribunal in K.N. Food Industries examined the provisions of Section 66E(e) in the context of an assessee manufacturing for and on behalf of M/s. Parley and clearing the same upon payment of central excise duty. In a situation when the capacity of the assessee was not fully utilized by M/s. Parley, ex gratia charges were claimed so as to compensate the assessee from financial damage or injury. The Department invoked the provisions of [Section] 66E(e) to levy tax on the amount so received. The Tribunal held that the ex gratia charges were for making good the damages due to the breach of the terms of the contract and did not emanate from any obligation on the part of any of the parties to tolerate an act or a situation and cannot be considered to be towards payment for any services. The relevant portion of the decision is reproduced below :*

*"4. ******* ******* ********

We find that appellant is admittedly manufacturing confectionaries for and on behalf of the M/s. Parle and is clearing the same upon payment of Central Excise duty on the basis of MRP declared by M/s. Parle. It is only in situation when the appellants capacity, as a manufacturer, is not being fully utilized by M/s. Parle, their claim of ex gratia charges arises so as to compensate them from the financial damage/injury. As such, ex gratia amount is not fixed and is mutually decided between the two, based upon the terms and conditions of the agreement and is in the nature of compensation in case of low/less utilization of the production capacity of the assessee.

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In the present case apart from manufacturing and receiving the cost of the same, the appellants were also receiving the compensation charges under the head ex gratia job charges. The same are not covered by any of the Acts as described under Section 66E(e) of the Finance Act, 1994. The said sub-clause proceeds to state various active and passive actions or reactions which are declared to be a service namely; to refrain from an act, or to tolerate an act or a situation, or to do an act. As such for invocation of the said clause, there has to be first a concurrence to assume an obligation to refrain from an act or tolerate an act etc. which are clearly absent in the present case. In the instant case, if the delivery of project gets delayed, or any other terms of the contract gests breached, which were expected to cause some damage or loss to the appellant, the contract itself provides for compensation to make good the possible damages owning to delay, or breach, as the case may be, by way of payment of liquidated damages by the contractor to the appellant. As such, the contracts provide for an eventuality which was uncertain and also corresponding consequence or remedy if that eventuality occurs. As such the present ex gratia charges made by the M/s. Parle to the appellant were towards making good the damages, losses or injuries arising from "unintended" events and does not emanate from any obligation on the part of any of the parties to tolerate an act or a situation and cannot be considered to be the payments for any services."

11.3 I also rely on Order No. 41702-41706 / 2021 dated 26.7.2021 passed by the Hon'ble CESTAT, Chennai in the case of M/s Neyveli Lignite Corporation Ltd & others, wherein the Hon'ble Tribunal, in identical facts of recovery of amount as liquidated damages, held that consideration received by the Appellant, in the form of liquidated damages from their supplier for not completing the task within the time schedule, is not subjected to service tax under Section 66E(e) of the Finance Act, 1994.

12. In view of above discussions, I hold that the Appellant is not liable to pay service tax on demurrage charges paid and dispatch money received. I, therefore, set aside the service tax demand on this count. Since, the demand is set aside,

recovery of interest under Section 75 and imposition of penalty under Section 77 and 78 are also required to be set aside and I order accordingly.

13. In view of the above discussion and findings, I set aside the impugned order and allow the appeal.

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

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

सत्यापित / Attested
Superintendent
Central GST (Appeals)
Rajkot

28-12-2022

(शिव प्रताप सिंह/ SHIV PRATAP SINGH)
आयुक्त (अपील)/Commissioner (Appeals)

By R.P.A.D.

सेवा में, एस्सार पावर गुजरात लिमिटेड पोस्ट बॉक्स ७, EGPL 44 KM माइलस्टोन जामनगर-ओखा हाइवे जाम खम्बालिया-361 305	To M/s Essar Power Gujarat Limited, Post Box No.7, EGPL 44 KM Milestone, Jamnagar-Okha Highway, Jam Kambhalia-361 305

प्रतिलिपि:-

1) मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद
2) प्रधान आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, राजकोट आयुक्तालय, राजकोट
3) ऊप आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, मंडल –II, जामनगर ।
4) गार्ड फ़ाइल।