

रजिस्टर्ड डाक ए.डी. द्वारा

: आयुक्त (अपील-I) का कार्यालय केन्द्रीय उत्पाद शुल्क :
सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास,
आंबावाडी, अहमदाबाद- 380015.

क फाइल संख्या : File No : V2(AMS)33/STC-III/2016/Appeal-I 1625-629

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-248-16-17
दिनांक Date 23.02.2017 जारी करने की तारीख Date of Issue _____

श्री उमाशंकर, आयुक्त (अपील-I) केन्द्रीय उत्पाद शुल्क अहमदाबाद द्वारा पारित

Passed by Shri Uma Shankar Commissioner (Appeals-I) Central Excise
Ahmedabad

ग _____ आयुक्त केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश सं _____
दिनांक : _____ से सृजित

Arising out of Order-in-Original No 42/Ref/ST/AC/2016-17 dated 10.06.2016 Issued by:
Assistant Commissioner, Central Excise, Din: Gandhinagar, A'bad-III.

घ अपीलकर्ता / प्रतिवादी का नाम एवं पता Name & Address of The Appellants/Respondents

M/s. Gujarat State Federation of Corperative Sugar Factories Ltd.

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-
Appeal to Customs Central Excise And Service Tax Appellate Tribunal :-

वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ.20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेधाणी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, Meghani Nagar, New Mental Hospital Compound, Ahmedabad - 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9(1)के अंतर्गत निर्धारित फार्म एस.टी- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी।

(ii) 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 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.



(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धारा (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क/ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (उसमें से प्रमाणित प्रति होगी) और आयुक्त/सहायक आयुक्त अथवा उप आयुक्त, केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए सीमा एवं केन्द्रीय उत्पाद शुल्क बोर्ड/ आयुक्त, केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रति भेजनी होगी।

(iii) The appeal under sub section and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 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 Central Board of Excise & Customs / Commissioner or Dy. Commissioner of Central Excise to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रू 6.50/- पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjuration authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. 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.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगा।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, 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 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

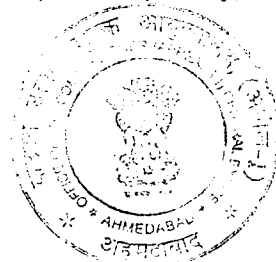
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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.

(4)(i) इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

(4)(i) In view of above, 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."



ORDER-IN-APPEAL

M/s. Gujarat State Federation of Co-operative Sugar Factories Ltd., Sardar Sahakari Khand Bhawan, Plot No.274, Sector-16, 'GH' Road, Gandhinagar Gujarat, (for short - 'appellant') has filed this appeal against OIO No.42/Ref/ST/AC/2016-17 dated 10.06.2016 (hereinafter referred to as "the impugned order"), passed by the Assistant Commissioner, Central Excise, Service Tax Division, Ahmedabad-III (for short - 'adjudicating authority').

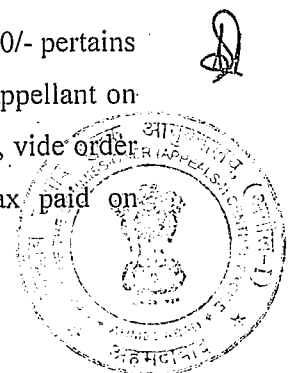
2. Briefly stated, the facts of the case is that the appellant had filed a refund claim for Rs.57,28,940/- before the authority on 25.01.2016/27.01.2016, claiming service tax paid on "Membership of Club Service" pertaining to the period from 2008-09 to 2015-16. The said refund amount was revised as Rs.57,61,995/- on 25.04.2016. The said refund claim was filed by them on the basis of Hon'ble CESTAT's order dated 13.10.2015, pronounced in appellant's own case pertains to the period of 2005-06. The adjudicating authority has rejected the said claim vide the impugned order mainly on the grounds of time barred.

3. Being aggrieved, the appellant has filed the instant appeal on the grounds that the issue involved in the matter was decided by the Hon'ble High Court of Gujarat in the case of Sports Club of Gujarat Ltd; that the Hon'ble Court has held that the provisions of levy of service tax towards 'Membership of Club service' as incorporated/amended by the Finance Act, 2005, to the extent that the said provisions purport to levy of service tax in respect of services purportedly provided by the petitioner club to its members, to be ultra vires. The adjudicating has rejected the claim as time barred which is wrong as Section 11 B is not applicable in so far as limitation is concerned if the provision under which such tax is collected is held unconstitutional. The appellant further submitted that the refund in question for the relevant period required to be granted on the basis of Hon'ble CESTAT's order dated 13.10.2015, as they had paid the tax under protest. They also claimed for Interest for the delay in payment. The appellant cited various case laws in support of their argument.

4. A personal hearing in the matter was held on 24.01.2017. Smt. Shilpa P Dave, Advocate appeared for the same and reiterated the grounds of appeal. She further submitted case citations and argued for payment of interest also.

5. I have carefully gone through the facts of the case, submissions made by the appellant in the appeal memorandum as well as at the time of personal hearing. The limited point to be decided in the matter regarding admissibility of refund claim of service tax paid on "Membership of Club Service" during 2008-09 to 2015.106.

6. At the outset, I observe that the refund claim amounting to Rs.57,28,940/- pertains to the period from 2008-05 to 2015-16 (up to 25.04.2015) was filed by the appellant on the basis judgment pronounced by Hon'ble CESTAT in appellant's own case, vide order dated 13.10.2015. The said judgment allows refund claim of service tax paid on



“Membership of Club Service” for the period pertaining to 2005-06, by following decision of Hon’ble High Court of Gujarat in the case of Sports Club of Gujarat[2013 (31) STR 645-Guj] and in the case of Surat Textile Trader’s Association vide judgment dated 30.09.2015.

7. The adjudicating authority held that:

- [a] Club or Association to its members are subject to tax as per Finance Act, since 2005.
- (b) Tax Appeal has been preferred against CESTAT’s order No.13.10.2015
- [c] The claim hits by limitation of time bar as the appellant had filed the claim after expiry of one year from the ‘relevant date’ as specified in Section 11 B (5)(B) (f) of Central Excise Act.

The decision held by the adjudicating authority, mentioned at [a] and [b] is no more *res integra*, in view of Hon’ble High Court of Gujarat judgments mentioned *supra*. The Hon’ble Court held that levy of service tax on ‘Membership of Club Service’ as per provisions of Section (25a), Section 65 (105zzze) and Section 66 of the Finance Act, 1994 as incorporated/amended by Finance Act, 2005 to the extent that the said provisions purport to levy of service tax in respect of services purportedly provided by the petition club to its member, to be ultra vires. Therefore, I am bound to follow the said decision.

8. As regards [c] above, I observed that the adjudicating has considered ‘relevant date’ as date of payment as explained in clause (f) of sub-clause (5) (B) of Section 11 B of the Act. For the sake of clarity, I reproduced herein below the definition of ‘relevant date’ explained in the section *ibid*.

Section 11 B : Claim for refund of duty and interest, if any, paid on such duty- (1) any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty....before the expiry of one year from the relevant date, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person:

Provided that where an application.....by the act

Provided further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.

Explanation. – For the purpose of this section-

- (A) Refund includes rebate of duty....
- (B) “relevant date” means,-
 - (a) in the case of goods exported.....
 - (b) in the case of goods returned.....
 - © in the case of goods to which...
 - (d) in case where a manufacturer
 - (e) in the case of a person, other than manufacturer
 - (ec) in the case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;
 - (f) in any other case, the date of payment of duty.

Looking into the above referred provisions, I am of the considered view that there are two aspects to be looked into, while deciding the refund case i.e one relating to provisions of unjust enrichment and other relating to provisions of time limit for filing the claim.

9. In the instant case, the appellant has applied for refund of service tax paid on Club or Membership services rendered. Since, the provisions of Section 11 B *ibid* is made applicable to Service Tax, vide Section 83 of the Finance Act, 1994, for considering the refund of tax paid under Service Tax, the procedure, condition and limitation shall be under the provisions of Section 11 B referred to above. Since the question of unjust enrichment part was not questioned by the adjudicating authority, I do not find any merit to discuss the same here. Now the issue comes with regard to time limit for filing the refund claim. The appellant contended that [i] the rejection of the claim in question as time barred by the adjudicating authority is wrong as Section 11 B is not applicable in so far as limitation is concerned if the provision under which such tax is collected is held unconstitutional; and [ii] the refund in question for the relevant period required to be granted on the basis of Hon'ble CESTAT's order dated 13.10.2015, as they had paid the tax under protest.

10. The appellant stated that they had paid the tax under protest. The appellant has not furnished any documental evidence to prove that they had paid the amount in question under protest, thus, the said argument is not tenable. However, I find merit to consider the relevant date for filing the refund claim in question from the date of Hon'ble CESTAT order. I observe that the appellant was paying service tax on 'Club or Membership Service' from 2008-09 onwards for which the refund claim in question arisen. Prior to that period, I further observe that a demand amounting to Rs.7,68,530/- for non-payment of service tax on the said service was confirmed vide OIO dated 28.03.2008, which was finally decided in favour of the appellant by the Hon'ble CESTAT vide order dated 13.10.2015. The Hon'ble CESTAT has decided the levy of service tax on 'Club or Membership', by following the ruling of Hon'ble High Court of Gujarat's decision in the case of M/s Sports Club of Gujarat Ltd. In the said decision, the Hon'ble High Court course has ruled out the levy of service tax on the said service and has been held as *ultra vires*. Thus, in view of the decision of CESTAT, the appellant is not liable to pay service tax on 'club or membership service' from 2005-06 onwards. It is an undisputed fact that the appellant has filed the instant refund claim of Rs.57,61,995/- on the basis of the Hon'ble CESTAT's judgment dated 13.10.2015, pronounced in their own similar issue pertains to the period of 2005-06 onwards as discussed above; the Hon'ble CESTAT has pronounced the said judgment by following Hon'ble High Court of Gujarat's ruling in the case of M/s Sports Club of Gujarat that the levy of service on 'club or membership' is *ultra vires*. Since, the clause (ec) of sub clause (5) (B) of Section 11 B *ibid* clearly stipulates that if any person claiming any refund of duty, if any, paid then the relevant date for considering the refund shall be "*in the case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction*". In the circumstances, the adjudicating authority has wrongly considered the relevant date as 'the date of payment'. The relevant date, in the instant case shall be from the date of judgment of Appellate authority as the service tax paid by the appellant becomes



refundable as a consequence of judgment, decree, order of appellate authority. In this case, the appellant has filed the claim on 25/27.01.2016, consequent to Hon'ble CESTAT's order dated 13.10.2015. Thus, the refund claim is within the time limit.

11. The appellant has relied on various case citations. Since I find that the provisions of Section 11 B of the Act itself allows the refund in question, I do not find worthy to discuss the citations further.

13. The appellant has also claimed interest for the delayed payment. I observe that the appellant has filed the instant claim on 24/27.01.2016. However, a query memo was issued by the jurisdictional officer on 04.03.2016 and the appellant has complied with the query memo only on 25.04.2016. Thus, the refund claim decided vide the impugned order on 10.06.2016 is within the prescribed time period of three months. Therefore, no interest is admissible.

14. In view of above discussion, I set aside the impugned order and allow the appeal. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है। The appeal filed by the appellant stands disposed of in above terms.

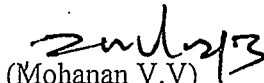


(उमा शंकर)

आयुक्त (अपील्स - I)

Date : 23.02.2017

Attested


(Mohanan V.V)
Superintendent (Appeals-I)
Central Excise, Ahmedabad

By R.P.A.D

To

M/s. Gujarat State Federation of Co-operative Sugar Factories Ltd.,
Sardar Sahakari Khand Bhawan,
Plot No.274, Sector-16, 'GH' Road,
Gandhinagar Gujarat



Copy to:-

1. The Chief Commissioner, Central Excise, Ahmedabad Zone .
2. The Commissioner, Central Excise, Ahmedabad-III
3. The Deputy/Assistant Commissioner, Service Tax division, Gandhinagar.
4. The Assistant Commissioner, System-Ahmedabad -III
- ✓ 5. Guard File.
6. P.A. File.