

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(MKS)44/STC-III/2016/Appeal-I

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-295-16-17
दिनांक Date 30.03.2017 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 **24/Ref/ST/DC/2016-17** dated **19.05.2016** Issued by:
Deputy Commissioner, Central Excise, Din: Gandhinagar, A'bad-III.

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

M/s. Vanikar Club

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, मेघाणी 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 रु 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 (सीस्टैट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 25) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 73 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 हैं

- (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 होंगे।

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,

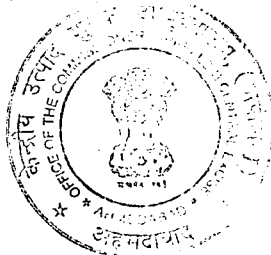
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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

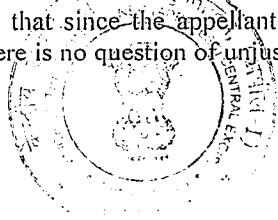
M/s. Vanikar Club, Near Municipal Ground, Mehsana- 384001[for short - 'appellant'] has filed this appeal against OIO No. 24/Ref/ST/DC/2016-17 dated 19.5.2016, passed by the Deputy Commissioner, Service Tax Division, Gandhinagar, Ahmedabad-III Commissionerate[for short - 'adjudicating authority'].

2. Briefly stated, the appellant filed a refund claim of Rs. 3,55,933/- on 3.2.2015, in respect of the financial years 2006-07 to 2008-2009 in respect of service tax paid on income received under membership fees, mandap keeper charges and coaching and training fees. After scrutiny of the said refund claim, a letter dated 15.5.2015 was issued to the appellant seeking clarification in respect of some discrepancies. Thereafter, consequent to a personal hearing on 22.3.2016 the adjudicating authority vide his impugned OIO dated 19.5.2016, rejected the refund on the following grounds:

- the activity carried out by the appellant fell under the taxable category of club's or associations membership services, for which the appellant had obtained the service tax registration;
- that the appellant club is a separate legal entity from the members;
- that the taxability lies on service which is provided or to be provided in the instant case to its members in relation to services for a subscription or any other charges;
- section 11B of the Central Excise Act, 1944, read with Section 83 of the Finance Act, 1994 governs the refund of service tax; the applicability of section 11B ibid, cannot be denied since the refund has been filed under this section; that section 11B states that refund claim may be filed before the expiry of one year;
- that the refund claim filed on 3.2.2015 is hit by limitation period;
- as far as service tax refund in respect of mandap keeper service and health services is concerned, since the service tax on member service is under dispute and not exempted. the value of the same is to be calculated for gross value turnover;
- that it could not be established with relevant documentary evidences that 'club or association service' is in respect of services provided exclusively to the members of the club or to any person other than a bonafide member of the said club.

4. Feeling aggrieved, the appellant has filed this appeal on the grounds that:

- (a) the main income of the appellant is membership fees, coaching and training fees; that the club is providing service to its own members which is service to self; that service to self is out of purview of service tax;
- (b) that they paid tax in respect of mandap keeper and health services to be on a safer side; that if service tax on member service is exempted the value in respect of mandap keeper and health services would be below the exemption limit;
- (c) that as the activity is undertaken by the association for an on behalf of the members, it cannot be stated that the association provided the services to its members;
- (d) the appellant being an association provide sports activities to the members only which would be in the nature of self service and consequently would not attract service tax;
- (e) that they wish to rely on the case of Sports club of Gujarat [2010(20)STR 17], [2013(31) STR 645], Cricket club of India [2015(40) STR 973], Federation of Indian Chambers of Commerce and Industry [2015(38) STR 529], Matunga Gymkhana [2015(38) STR 407], Green Environment Services Cooperative Society Limited [2015(37) STR 961], Chiplun Nagari Sakhari Patsanstha [2015(40) STR 957, YMCA (OIA No. 14/1/15-16 dtd 10.2.2016;
- [f] that since the appellant had erroneously collected the service tax from members there is no question of unjust enrichment;



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[g]that when service tax has not been payable which is not in dispute, the principle of unjust enrichment is not applicable.

5. Personal hearing in the matter was held on 28.2.2017, wherein Ms. R.M.Khandhar, CA. appeared on behalf of the appellant and reiterated the submissions advanced in the grounds of appeal.

6. I find that there is a delay of 28 days in filing this appeal. The appellant has filed a condonation of delay application, in this regard. In terms of proviso to section 35 of the Central Excise Act, 1944, I condone the delay.

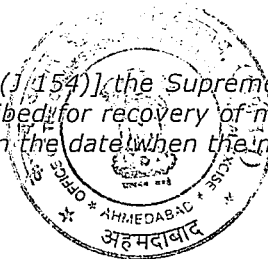
7. I have gone through the facts of the case, the appellant's grounds of appeal, and the oral submissions made during the course of personal hearing. The question to be decided in the present appeal is, whether the refund of the appellant rejected primarily on the grounds of limitation, is correct or otherwise.

8. As far as the issue of rejection of refund on limitation goes, I have already decided the matter in my OIA no. AHM-SVTAX-000-APP-225-16-17, dated 31.01.2017 in the case of M/s. Orient Club of India. Being exactly similar I would like to reproduce the operative part of the OIA, for ease of reference:

*"7. To start with, I find that the adjudicating authority has rejected the refund amount of ₹ 64,67,363/- on account of limitation. In the case of Sports Club of Gujarat vs Union of India, the Hon'ble High Court of Gujarat had held that the levied Service Tax on Club and Association Services vide Section 65(25a), Section 65(105)(zze) and Section 66 of the Finance Act, 1994 as incorporated by the Finance Act, 2005, to the extent that the said provisions purport to levy Service Tax in respect of services purportedly provided is held **ultra vires**, i.e. beyond the powers and therefore, not legal, upholding the principle of mutuality. Thus, when a service becomes ultra vires, i.e. not legal, the duty collected is to be treated as a deposit and therefore, the refund of the same is not bound by the principle of limitation. In this regard, the observation of Hon'ble High Court of Gujarat in the case of Binani Cement Vs Union of India is quoted below as head note;*

"As levy of duty had been declared illegal, its collection could not take colour of Additional Customs Duty, either mistakenly or illegally collected- It is not case of mere illegal or unlawful or irregularly collected Customs duty- It is collection of duty without any authority of law, opposed to Article 265 of the Constitution of India and is thus unconstitutional- In such case, assessee is not bound by limitation under Customs Act, 1962 for claiming refund- Period of limitation prescribed under the Limitation Act, 1963 is applicable".

In Cawasi & Co case [1978 E L T (J 154)], the Supreme Court observed that the period of limitation prescribed for recovery of money paid under a mistake of law is three years from the date when the mistake is known,



be it 100 years after the date of payment. This judgment has been quoted and depended upon by the following judgment of the Andhra Pradesh High Court.

In the case of U Foam Pvt Ltd vs Collector of Central Excise -1988 (36) E L T 551(A P), the issue was that Revenue rejected the refund quoting the time limit under Rule 11 of the Central Excise Rules, 1944, and Section 11B of the Central Excises Act, 1944. The high court held that "the period of limitation to be applied is three years from the date when the assessee discovered the mistake in the payment of duty, or from the date when it came to the knowledge of the assessee that it is entitled to the refund".

In the case of Hexacom (I) Ltd vs CCE, Jaipur - 2003 (156) E L T 357 (Tri -Del), the tribunal held that if any amounts are collected erroneously as representing service tax, which is not in force, there is no bar to the return of such amounts. The time limit under Section 11B of Central Excise Act, 1944 does not apply. The tribunal observed the following, "We have perused the records and heard both sides. It is not in dispute that no Service Tax was leviable during the period in question. Therefore, whatever payment was made did not relate to Service Tax at all. It was merely an erroneous collection by DOT and payment by the appellants. Therefore, provisions relating to refund of Service Tax, including those relating to unjust enrichment, cannot have any application to the return of the amount in question. It is further noted that provisions contained in Section 11D of the Central Excise Act have not been made applicable to Service Tax. Therefore, if any amounts are collected erroneously as representing Service Tax, which is not in force, there is no bar to the return of such amounts. The rejection of refund application was, therefore, not correct".

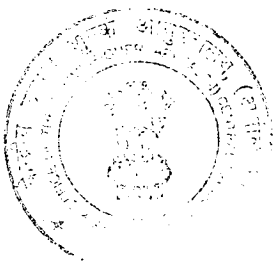
In the case of CCE, Raipur vs. Indian Ispat Works Ltd -2006 (3) S T R 161 (Tri -Del), the Tribunal held that, "The department has allowed the claim of the respondents for the period 16-11-97 to 1-6-98, but rejected the refund claim for the previous period and subsequent period as time barred. The rejection of the claim of refund is wrong as it can be seen from the records, that the amount paid by the respondents is not a tax, but an amount collected by the department without any authority of law".

In the case of CCE, Bangalore vs Motorola India - 2006 (206) E L T 90 (Kar), the high court has held that in the case of claim of refund, limitation under Section 11B of Excise Act is not applicable since the amount paid by mistake in excess of duty and such amount cannot be termed as duty. Thus, the conclusion is clear that if a tax has been collected which is not leviable at all, the time limit given in the tax laws does not apply.

8. *In view of above, I set aside the impugned order with consequential relief to the appellants."*

8.1 In view of the foregoing, the rejection of refund on limitation is not tenable.

9. However, I find that the adjudicating authority has in para 8.10 of the impugned OIO made a remark that it could not be established with relevant documentary evidence that the club or association in respect of which the assessee has purportedly paid service tax has been provided exclusively to the members. The principle of mutuality is applicable only in case service is provided to clubs members. Since the adjudicating authority is not convinced, the appellant is directed to produce all documentary and other evidences to substantiate his claim in this regard.

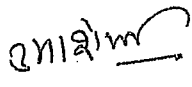


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10. Lastly I find that refund in respect of mandap keeper and health services were rejected on the grounds that since service tax on club or association is not exempted, they were liable to pay services on the aforementioned two services. This was made rejecting the appellant's claim that the value of these two services fell within the threshold exemption limit. Since the Courts have already held that the service of club or association provided by the appellant to its members is *ultra vires*, the adjudicating authority will go into the claim of the appellant in respect of refund of service tax paid on these two services and will examine the claim on merits, keeping in mind the judicial pronouncements in this regard.

11. In view of the foregoing, the impugned OIO is set aside and the appeal is allowed by way of remand. The adjudicating authority would follow the directions in para 9 and 10 supra and also adhere to the principles of natural justice before deciding the issue. Further as mentioned in para 8, the appellant is directed to cooperate with the adjudicating authority and provide all necessary evidences to substantiate his claim.

12. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
12. The appeal filed by the appellant stands disposed of in above terms.


(उमा शंकर)
आयुक्त (अपील्स - I)

Date : 30.03.2017

Attested



(Vinod Lukose)
Superintendent (Appeal-I),
Central Excise,
Ahmedabad.

By RPAD.

To,
M/s. Vanikar Club,
Near Municipal Ground,
Mehsana, Gujarat- 384001

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, Ahmedabad-III.
4. The Assistant Commissioner, System, Service Tax, Ahmedabad-III.
5. Guard File.
6. P. A file

