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)55 to 58/STC-III/2016/Appeal-I 1499 to 1503

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-298 to 301-16-17
दिनाँक Date **30.03.2017** जारी करने की तारीख Date of Issue 3/4/17

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 ____________ ______ दिनाँक : ________________ से सृजित

Arising out of Order-in-Original No 94 to 97/Ref/ST/AC/2016-17 dated 14.09.2016 Issued by: Assistant Commissioner, Central Excise, Din: Mehsana, 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 :-

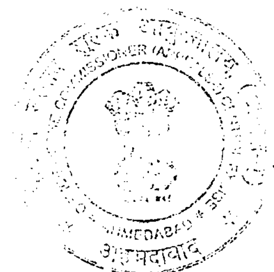
वित्तीय अधिनियम,1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:–
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ.20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, 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 विरूद्ध 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 ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां 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 शर्तो 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, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ 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 होगे।

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,

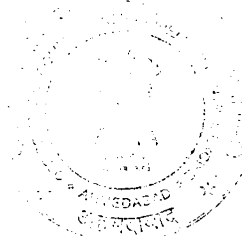
Under Central Excise and Service Tax, "Duty demanded" shall include:

(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

This order covers four appeals filed by M/s Vanikar Club, Near Municipal ground, Mehsana-384 001 (hereinafter referred to as 'the appellant') against Order-in-Original No.94 to 97/Ref/ST/AC/2016-17 dated 14/09/2016 (hereinafter referred to as 'the impugned orders') passed by the Assistant Commissioner, Service Tax Division, Ahmedabad-III (hereinafter referred to as 'the adjudicating authority'). The appellant is holding Service Tax registration No. AAAAV0298GST001 under the categories of 'Club and Associated Services', 'Health club and Fitness Centre' and 'Mandap Keeper Services'. The following refund claims were filed by the appellant in respect of Service Tax paid on income received under membership fees, Mandap keeper charges and coaching and training fees:

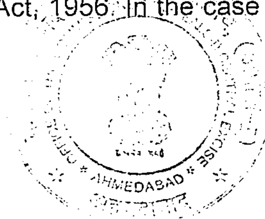
S.N.	Period of refund claim	Date of filing claim	Refund Amount (Rs.)
1.	F.Y.2009-10 & F.Y.2010-11	01/04/2016	3,79,845/-
2.	F.Y.2011-12 & F.Y.2012-13 (April-June) & F.Y.2012-13 (July-March)	01/04/2016	3,87,447/-
3.	F.Y. 2013-14	01/04/2016	3,93,869/-
4.	F.Y. 2014-15	01/04/2016	4,57,602/-
	TOTAL		16,18,763/-

2. The refund claims were filed on the ground that the appellant was a sport club exclusively for the members providing coaching and training facilities to its members on mutuality principle Service Tax was paid regularly on its income in the form of membership fees and coaching and training fees and vide letter dated 04/05/2013, it had had informed the department that the payment of Service Tax was under protest. The refund applications were rejected by the adjudicating authority on the ground that the refund claims for the period prior to 16/05/2013 is by all means hit by limitation and it could not be established with relevant documentary evidence that 'Club or Association Service' in respect of which the appellant had paid Service Tax was provided exclusively to the members of the club and no part had been provided to any other person other than a *bona fide* member of the said club.

3. The common grounds of appeal filed by the appellants, inter alia, are as follows:

1) The appellant being member' association was formed to provide sports and health services to the members as a social responsibility and was working on mutuality principle. The activities were undertaken by the association for and on behalf of the members and hence it could not be treated as service to the members. The basic requirement for Service Tax is that there should be a service provider and a service recipient. In the present case the sports activities was services to self and did not attract Service Tax. The association did not have any independent existence or identity of its own.

2) In the case of J.J.SPORTS CLUB OF GUJARAT LTD. vs U.O.I. – 2010 (20) S.T.R. 17 (Guj.) it has been held by Hon'ble Gujarat High Court in the context of Mandap Keeper services that a member of the club is not a client of the club. Again in the case of J.J.SPORTS CLUB OF GUJARAT LTD. vs U.O.I. – 2013 (31) S.T.R. 345 (Guj.), it was held by Hon'ble Gujarat High Court that Sections 65(25a), 65(105(zzze) and 66 of Finance Act, 1994 pertaining to Service Tax on club services to members was *ultra vires* and beyond legislative competence of parliament and there was no loss of mutuality of club members even if club was incorporated under Companies Act, 1956. In the case of



CRICKET CLUB OF INDIA LTD. vs C.S.T., Mumbai – 2015 (40 S.T.R. 973 (Tri. Mumbai), relying on the decision of Hon'ble Gujarat High Court, CESTAT, Mumbai decided that principle of mutuality applies squarely to assessee as members of club and entrance fees was one-time payment visited upon members of clubs or associations for inclusion into restricted group constituting membership of club or association and Service Tax was not leviable on such entrance fees and tax paid was liable to be refunded without invoking unjust enrichment.

3) The appellant has also relied upon a catena of similar case laws such as (i) FICCI vs C.S.T. - 2015 (38) S.T.R. 529 (Tri. –Del.); (ii) MATUNGA GYMKHANA vs C.S.T., MUMBAI – 2015 (38) S.T.R. 407 (Tri. –Mum.); (iii) green environment services co-op society ltd. VS U.O.I. – 2015 (37) S.T.R. 961 (Guj.); (iv) CHIPLUN NAGARI SHAKARI PATSANTHAN LTD. vs CCE, KOLHAPUR – 2015 (40) S.T.R. 957 (Tri. – Mumbai); (v) O.I.A. No. AHM-SVTAX-000-APP-00141-15-16 dated 10/02/2015 in the matter of Y.M.C.A.

4) Regarding unjust enrichment the Service Tax was collected erroneously and hence unjust enrichment was not applicable as upheld in (i) VYANKTESH REAL ESTATE DEVELOPERS vs C.C.E., NAGPUR – 2014 (35) S.T.R. 589; (II) C.C.E.&C&S.T. vs IFFCO – 2014 (35) S.T.R. 492 (All.); (iii) SUNRAJ CONSTRUCTION vs C.C.E, NAGPUR – 2014 (35) S.T.R. 108 (Tri. – Mumbai); (iv) C.S.T., DELHI vs A.P. ENGINEERS – 2014 (34) S.T.R. 795 (Tri. – Del.); (v) KARNAVATI CLUB LTD. vs C.S.T., AHMEDABAD – 2013 (31) S.T.R. 445 (Tri. – Ahmd.)

4. Personal hearing in the matter of all the four appeals was held on 20/03/2017. Smt. Ruchana M. Khandhar, C.A, appeared on behalf of the appellant and reiterated the grounds of appeal. The learned C.A. also made additional written submissions.

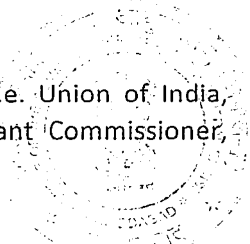
5. I have gone through the facts of the case and submissions made in the appeal memorandum. The refund claims have been rejected on the following grounds:

1) The refund claims for the period prior to 16/05/2013 is by all means hit by limitation period as the protest for payment of duty was lodged only on 16/05/2013.

2) The entire refund is not admissible because as per amendment by the Finance Act, 2011, which was clarified by CBEC vide letter No. DOF 334/3/2011-TRU dated 28/02/2011 in respect of 'Club of Association' to its members are already subject to tax since 2005.

6. On examining the findings in the impugned orders it is seen that the adjudicating authority has not at all considered the principle of mutuality while rejecting the refund claims. As regards the decision of Hon'ble High Court of Gujarat in the case of SPORTS CLUB OF GUJARAT LTD. vs UNION OF INDIA – 2013 (31) S.T.R. 645 (Guj.), the adjudicating authority has held that this decision was based on the decision by Hon'ble Jharkhand High Court in the case of RANCHI CLUB LTD. vs CHIEF COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX, RANCHI ZONE – 2012 (26) S.T.R. 401 (Jhar.), wherein department had preferred an appeal before the Hon'ble Supreme Court. Unless there is clear mention that the decision of Hon'ble High Court in the case of SPORTS CLUB OF GUJARAT LTD. vs UNION OF INDIA – 2013 (31) S.T.R. 645 (Guj.) has been stayed or overruled, it is not proper to brush aside the ratio of this decision which has a direct bearing on the facts of the instant case. The principle laid down by Hon'ble High Court of Gujarat is as follows:

"7. Learned Advocate Mr. Ravani appearing for the Authorities i.e. Union of India, Commissioner of Central Excise, and Deputy Commissioner/Assistant Commissioner,



Service Tax Cell, vehemently opposed the petitions and submitted that the Department has not accepted the aforesaid judgment. Learned advocate submitted that the Department has filed SLP before the Hon'ble Apex Court and the judgment is under challenge. Merely because the judgment is not accepted by the Department, its persuasive value is not lost and it can always be considered by this Court for its persuasive value, more particularly when the said judgment has relied upon a decision of the Full Bench of Patna High Court in the matter of *Commissioner of Income-tax* v. *Ranchi Club Ltd.*, 1992 (1) PLJR 252 (Pat) (FB), which is referred to by the Division Bench.

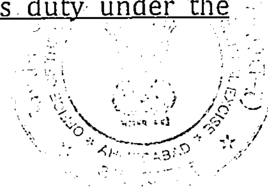
7.1 Learned advocate for the Department also submitted that there is no question of mutuality because the club is a legal entity as it is incorporated under the Companies Act. This Court is unable to accept the submissions made by learned advocate for the Department because they were the very facts before the Division Bench for consideration and learned advocate for the Department could not set out any convincing grounds on which this Court should not follow the decision of the Division Bench of Jharkhand High Court.

8. In the result, these petitions are allowed and it is hereby declared that Section 65(25a), Section 65(105)(zzze) and Section 66 of the Finance (No. 2) Act, 1994 as incorporated/amended by the Finance Act, 2005 to the extent that the said provisions purport to levy service tax in respect of services purportedly provided by the petitioner club *to its members*, to be *ultra vires*. Rule is made absolute with no order as to costs."

Hon'ble High Court of Gujarat has clearly stated *supra* that merely because the decision in RANCHI CLUB LTD. vs CHIEF COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX, RANCHI ZONE – 2012 (26) S.T.R. 401 (Jhar.) is not accepted by the department, its persuasive value is not lost. In the instant case, the decision of Hon'ble High Court of Gujarat in the case of SPORTS CLUB OF GUJARAT LTD. vs UNION OF INDIA – 2013 (31) S.T.R. 645 (Guj.) has not been distinguished in the impugned order and hence its persuasive value cannot be disregarded. Therefore, following the principle laid down by Hon'ble Gujarat High Court, the levy of Service Tax on the impugned service provided to the club members by the club has to be treated as *ultra vires*. Therefore, on merits there was no ground to reject the refund claims.

7. On considering the issue of limitation, I find that it is settled law that when the levy of duty in a given situation is held to be *ultra vires*, any payment or collection on such account has to be treated as without authority of law and period of limitation under the Limitation Act does not apply to the refund of such payments. I rely on the ratio of the decision of Hon'ble High Court of Gujarat in the case of BINANI CEMENT LTD. vs UNION OF INDIA – 2013 (288) E.L.T. 193 (Guj.) where is has been held as follows:

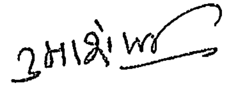
"**23.** Despite this *prima facie* conclusion we have reached, there is a reason why we are inclined to hold that what is collected by the respondents from the petitioners can never be described as a Customs duty. We say so because the very levy has been declared to be unauthorized by the Supreme Court in the case of *Commissioner of Central Excise & Customs, Bhubaneswar-I* v. *Tata Iron & Steel Co. Ltd.* (supra). The Apex Court held that in absence of any notification under Section 7 of the Coal Mines Act, the Customs Department could not levy any duty from the importers relying solely on the notification issued under Section 6 of the Coal Mines Act. Such notification could authorize only collection of additional duty of excise. That being so, the collection of the amount from the petitioners could not take the colour of additional duty of customs either mistakenly or illegally collected. It is a case where the duty was collected without any authority of law. Such collection of duty is not illegal or unlawful or irregularly collected Customs duty under the



Customs Act, but a duty collected without authority of law and therefore opposed to Article 265 of the Constitution of India and is thus unconstitutional. In that view of the matter, the petitioners cannot be bound by the limitation prescribed in the Customs Act, 1962 for claiming refund of excess duty or duty collected illegally. The period of limitation prescribed under the Limitation Act would apply."

Similarly in the case of HEXACOM (I) LTD. vs COMMISSIONER OF CENTRAL EXCISE, JAIPUR – 2003 (156) E.L.T. 357 (Tri.-Del.), it was held by CESTAT, Delhi that the payments made towards services on which no Service Tax was leviable at that time did not relate to Service Tax at all and therefore there is no bar in the return of such amounts under the provisions of refund. In view of the above, I find that in the instant case as the levy of service tax on service provided by a club to its members has been held as *ultra vires,* the resultant refund applications are not barred by limitation. The adjudicating authority has held that the refund prior to launching of protest was hit by limitation. Considering that the payments did not have legal validity as per the order of Hon'ble Gujarat High Court, this finding is not sustainable. Accordingly, I set aside the impugned orders and allow the appeals.

8. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।
The appeals filed by the appellant stand disposed of in above terms.



(उमा शंकर)
आयुक्त (अपील्स - I)
Date: 30/03/2017

Attested

(K.P. Jacob)
Superintendent (Appeal-I)
Central Excise, Ahmedabad

BY R.P.A.D.

To,
M/s Vanikar Club,
Near Municipal Ground,
Mehsana – 384 001.

Copy to:

1. The Chief Commissioner of Central Excise Zone, Ahmedabad.
2. The Commissioner of Central Excise, Ahmedabad-III.
3. The Additional Commissioner(Systems) Central Excise, Ahmedabad - III
4. The A.C. / D.C., Service Tax Division -Gandhinagar, Ahmedabad-III
5. Guard file
6. P. A.