



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
केंद्रीय कर शुल्क भवन, 7th Floor, Central Excise Building,
सातवीं मंजिल, पोलिटेकनिक के पास, Near Polytechnic,
आम्बावाडी, अहमदाबाद-380015 Ambavadi, Ahmedabad-380015



☎ : 079-26305065

टेलीफैक्स : 079 - 26305136

क फाइल संख्या : File No : V2(ST)47/RA/A-II/2016-17 / ~~416-19~~ 446-50
ख अपील आदेश संख्या : Order-In-Appeal No. AHM-EXCUS-002-APP-241-17-18
दिनांक Date : 27/12/2017 जारी करने की तारीख Date of Issue 29/01/18

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-Original No STC/REF/96/Karnavati/KMM/AC/Div-III/16-17 Dated 13.10.2016 Issued by Asst Commr Div-III STC Abad, Service Tax, Ahmedabad

ध अपीलकर्ता का नाम एवं पता
Name & Address of The Appellants

**M/s. The Karnavati Club Ltd.
Ahmedabad**

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 :-

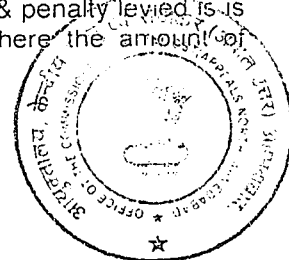
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

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

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, 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 कर आसकेगी 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 न्यायाधीश स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायाधीश 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 accompany ed 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



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-धाराओं एव (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.-7 में की जा सकेगी एवं उसमें साथ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (OIA) (उसमें से प्रमाणित प्रति होगी) और अपर आयुक्त, सहायक / उप आयुक्त अथवा A219K केन्द्रीय उत्पाद शुल्क अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए आदेश (OIO) की प्रति भेजनी होगी।

(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form 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 (Appeals)(OIA)(one of which shall be a certified copy) and copy of the order passed by the Addl. / Joint or Dy. /Asstt. Commissioner or Superintendent of Central Excise & Service Tax (OIO) 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 स्टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjudication 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 एव 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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 43 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 अर्जी 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,

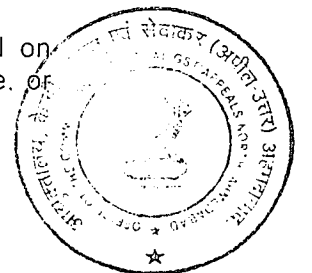
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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(1) इस संदर्भ में, 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(1) 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. Of penalty, where penalty alone is in dispute.



ORDER-IN-APPEAL

The then Assistant Commissioner, Service Tax, Division-III, Ahmedabad (*hereinafter referred to as 'the appellant'*) has filed the present appeal against the Order-in-Original number STC/Ref/96/Karnavati/K.M.Mohadikar/Div-III/2016-17 dated 13.10.2016 (*hereinafter referred to as 'the impugned order'*) passed by the then Assistant Commissioner, Service Tax, Division-III, Ahmedabad (*hereinafter referred to as 'the adjudicating authority'*) pertaining to M/s. Karnavati Club Ltd., S. G. Highway, Ahmedabad (*hereinafter referred to as 'respondents'*).

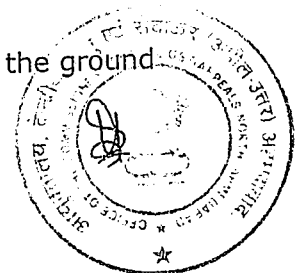
2. The facts of the case, in brief, are that the respondents had filed a refund claim for ₹28,17,769/- on 02.06.2016 for the period 01.10.2015 to 31.03.2016. They are holding Service Tax registration number AAACK7865QST001 under the category of Membership Club or Association Service, Health Club and Fitness Services, Mandap Keeper Services, Renting of Immovable Property Services etc. The adjudicating authority, vide the impugned order, sanctioned the entire amount of ₹28,17,769/-.

3. The impugned order was reviewed by the Principal Commissioner of Service Tax, Ahmedabad and issued a Review Order No. 43/2016-17 dated 28.12.2016 for filing an appeal under section 84 of the Finance Act, 1994. The appellant alleged that the impugned order passed by the adjudicating authority is not legal and proper. The appellant claimed that with effect from 01.07.2012, the new system of taxation of services has been introduced. Beside other changes, the word 'services' has also been defined under Section 65B(44) of the Finance Act, 1994. The appellant stated that the doctrine of mutuality bears no significance in the context of taxable service provided by clubs and association as club and its members are now treated as two separate persons.

4. Personal hearing in the matter was held on 01.12.2017 wherein Shri Vipul Khandhar, Chartered Accountant, on behalf of the said respondents, appeared before me and tabled before me their submission. He stated that since it is an 'incorporated' body, the issue does not apply to them. He explained various case laws and submitted citations and Certificate of Incorporation. He also quoted my previous order number AHM-SVTAX-000-APP-036-17-18 dated 28.06.2017 pertaining to the same issue of the respondents.

5. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum submitted by the appellant and oral and written submissions made by the respondents at the time of personal hearing. Now, let me examine the reasons of rejection and the defence reply given by the respondents.

6. To start with, I find that the appellant has filed the appeal on the ground



that under Section 65, the respondents were providing taxable service to the members and hence, they were not eligible for the refund. In view of this, I find that the Hon'ble High Court of Gujarat vide its judgment dated 25.03.2013 allowed the petition declaring Section 65(25A), Section 65(105)(zzze) and Section 66 of the Finance Act, 1994 as amended by the Finance Act, 2005 to the extent providing levy of Service Tax in respect of the services provided by the club to its members as *ultra virus*, i.e. beyond the powers and therefore, not legal, upholding the principle of mutuality. I agree with the view of the appellant that the case dealt by the Hon'ble High Court of Gujarat was for the period prior to 01.07.2012. I find that the Hon'ble High Court of Gujarat, in its judgment dated 25.03.2013, has not taken into consideration the amendments made in the Act (w.e.f. 01.07.2012). In the new system, the word 'service' has been defined under Section 65B(44) of the Finance Act, 1994 which is printed as below;

"(44) 'service' means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include;

(a) an activity which constitutes merely:-

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ia) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(ii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

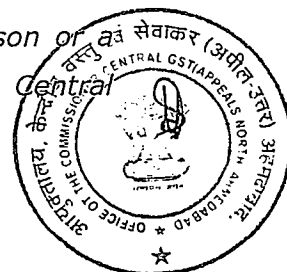
© fees taken in any court or tribunal established under any law for the time being in force.

Explanation 1 for removal of doubts, it is hereby declared that nothing contained in this clause shall apply to;

A. The functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or

B. the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

C. the duties performed by any person as a Chairperson or Member or a Director in a body established by the Central



Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

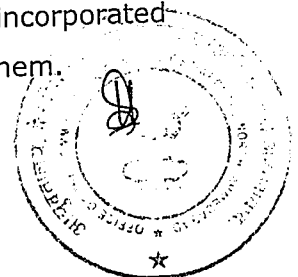
Explanation 2— this clause, the expression "transaction in money or actionable claim" shall not include—

- i. Any activity relating to use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;*
- ii. Any activity carried out, for consideration, about, or for facilitation of, a transaction in money or actionable claim, including the activity carried out—*
 - By a lottery distributor or selling agent on behalf of the State Government, about promotion, marketing, organising, selling of lottery or facilitating in the organising lottery of any kind, in any other manner, by the provisions of the Lotteries (Regulation) Act, 1998 (17 of 1998);*
 - by a foreman of chit fund for conducting or organising a chit in any manner.*

Explanation 3. – For the purpose of this chapter, -

- a. An unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;*
- b. An establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons".*

In view of the above, it is quite clear that unincorporated association or a body of persons and a member are to be treated as distinct entity. In the instant case, in their submission, the respondents have claimed that they are incorporated as company and not an unincorporated association. In support of their claim, the respondents have submitted before me a copy of the Memorandum and Articles of Association. I found that the said appellants are incorporated under the Companies Act, 1956 (No. 1 of 1956) and their Certification of Incorporation number is 04-12-12192 of 1989-90. Thus, in view of the above, it is quite clear that the respondents are an incorporated entity and the principles of mutuality are very much applicable to them.



Further, in the case of Sports Club of Gujarat, the Hon'ble Gujarat High Court held the taxability of services by club to its members is *ultra vires*. It relied on the decision of the Calcutta High Court in the case of Saturday Club Ltd., wherein it was held that in a members' club, any transaction between the club and its members cannot be regarded as service. However, under the Finance Act, the explanation to Section 65B (44) provides a deeming fiction that an unincorporated association or a body of persons ("BOP"), as the case may be, and a member thereof shall be treated as distinct persons and since the concept of mutuality has been done away with the deeming fiction, collections from members become liable for Service Tax if they are in the nature of any activity carried out by society for its members. But, the point to be noticed here is that the explanation inserted uses the words un-incorporated enterprise only. Thus, as per the discussion held above, I am of the view that in the cases where the claimants are an incorporated body, they are eligible for the refund as they are not liable for Service Tax.

7. In view of the above, I hold that as the respondents have wrongly paid the Service Tax against 'Club or Associated Services' during the period 01.10.2015 to 31.03.2016 (leviable after the introduction of the Negative List w.e.f. 01.07.2012) and the adjudicating authority has correctly sanctioned the refund to the respondents.

8. Accordingly, as per the above discussion, I do not find any reason to interfere in the impugned order and reject the appeal filed by the Department.

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

9. The appeals filed by the appellant stand disposed off in above terms.

उमा शंकर

(उमा शंकर)

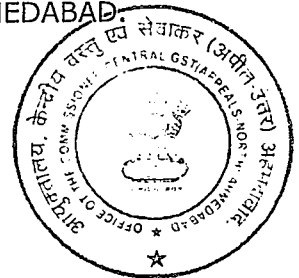
आयुक्त (अपील्स)

CENTRAL TAX, AHMEDABAD

Attested

S. Butta
(S. BUTTA)

Superintendent (Appeals)
Central Tax, Ahmedabad

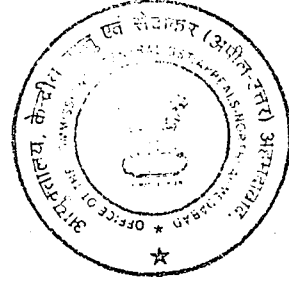


BY R.P.A.D.

To,
M/s. Karnavati Club Ltd.,
S. G. Highway,
Ahmedabad-380 058.

Copy To:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, Central Tax, Ahmedabad.(North).
3. The Deputy/Assistant Commissioner, Central Tax, Division-VI, S. G. Highway (West), Ahmedabad (North).
4. The Assistant Commissioner, Systems, Central Tax, Ahmedabad (North).
5. Guard File.
6. P.A. File.



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