

केन्द्रीय कर आयुक्त (अपील)	
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, केन्द्रीय कर शुल्क भवन सातवीं मजिल पोलिटेक्निक के पास आम्बावाडी, अहमदाबाद-380015	7 th Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015
079-26305065	टेलिफैक्स: 079-26305136

क फाइल संख्या : File No. : V2(STC)119 /North/Appeals/ 17-18

ख अपील आदेश संख्या : Order-In-Appeal No. AHM-EXCUS-002-APP-399-17-18

दिनांक Date : 26-Mar-2018 जारी करने की तारीख Date of Issue 16/4/2018

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-Original No GST/D-VI/O&A/Rajpath/AC/KM/17-18 Dated 11-Jan-2018 Issued by **Assistant Commissioner**, Central GST, Div-VI, Ahmedabad North.

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

M/s Rajpath Club Limited

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 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 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 of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of

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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 एवं (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 (अपील) के आदेश की प्रतियाँ (OIA) (उसमें से प्रमाणित प्रति होगी) और अपर

आयुक्त, सहायक / उप आयुक्त अथवा **अधीक्षक** 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 टिकट 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 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, 1994 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 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 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 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, or penalty, where penalty alone is in dispute.

रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा को हो जहाँ उक्त न्यायाधिकरण की पीठ स्थित है।

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.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / 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 Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

- (3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number 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 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

- (5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

- (6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है। (Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग" (Duty Demanded) -

- (i) (Section) खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेनवैट क्रेडिट की राशि;
- (iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है।

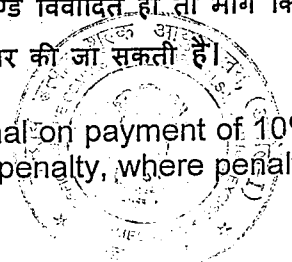
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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.

इस सन्दर्भ में इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो मांग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

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. Rajpath Club Limited, S. G. Highway, Ahmedabad 380058 (henceforth, "appellant") has filed the present appeal against the Order-in-original No. GST/D-VI/O&A/08/Rajpath/AC/KM/17-18 dated 11.01.2018 (henceforth, "impugned order") issued by the Assistant Commissioner, CGST Division-VI, Ahmedabad - North (henceforth, "adjudicating authority").

2. The facts giving rise to this appeal are that during Central Excise Revenue Audit (CERA) of the records of the appellant, it was pointed out that M/s. Swagat Caterers Pvt Ltd had paid Rs.39,79,954/- to the appellant during **Apr-2012 to Jun-2012** towards rent for carrying out outdoor catering business in the Club premises and that the amount so received as rent was liable to service tax under renting of immovable property service. It appeared that renting of immovable property included allowing of permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property. A show cause notice dated 08.09.2017 came to be issued in the matter and in adjudication, service tax demand of **Rs.4,91,922/-** was confirmed alongwith interest. An equal penalty was imposed under section 78 of the Finance Act, 1994 and a penalty of Rs.10,000/- was imposed under section 77 of the Finance Act, 1994.

3. Feeling aggrieved with the impugned order, appellant has preferred this appeal on following main grounds of appeal-

3.1 Appellant states that the Club entered into an agreement with Swagat Caters Pvt Ltd to operate restaurant jointly inside the premises of the Club; that Swagat Caterers Pvt Ltd provided the facility of food and beverages for the members and guests; that in members' club, 'members' and 'Club' both are same entity and hence members' Club is not liable to pay any service tax in allowing its members to use its restaurant service. Appellant has cited Commissioner (Appeals-IV), Central Excise, Ahmedabad's order in their own case and also in the case of **Ahura Restaurants Pvt Ltd**. Appellant has also quoted Calcutta HC's decision in the case of Saturday Club Ltd [2006(3) STR 305(Cal.)] and **Gujarat HC's decision** in the case of Sports Club of Gujarat Limited.

3.2 As per appellant, the activity carried out falls under Restaurant service and since they had no licence to serve alcoholic beverages, the Restaurant service provided was not taxable during 01.05.2011 to 31.03.2013 in view of relevant provisions in this regard.

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3.3 Appellant submits that Swagat Caterers Pvt Ltd sold food to the members of the Club and paid VAT, service tax was not applicable on such transactions as decided in the case of BSNL [2006 STR 161].

3.4 Appellant refers to clause (90a) of section 65 of the Finance Act, 1994 and contends that as per exclusion clause in the definition of renting of immovable property, the building used for accommodation is not covered in the definition of renting of immovable property.

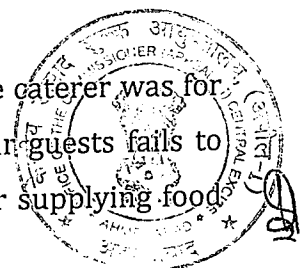
3.5 Appellant argues that show cause notice is time barred as there is no suppression of facts. Appellant also objects to imposition of penalties under section 78 and 77 of the Finance Act, 1994.

4. In the personal hearing held on 23.03.2018, CA Bishan Shah represented the appellant and reiterated the grounds of appeal.

5. I have carefully gone through the appeal. The demand of service tax under 'renting of immovable property service' on certain amount received by the appellant Club from a *Swagat Caterers Pvt Ltd* is under challenge. The challenge is mainly on the ground that the named caterer was engaged to operate restaurant inside the Club premises to supply food and beverages to members and their guests. Appellant clarifies that it was a revenue sharing arrangement with the outside caterer; that the activity falls under restaurant service and not under renting of immovable property service.

5.1 The most relevant fact of the case is that Swagat Caterers Pvt Ltd was engaged and allowed to operate restaurant inside the Club area and for that appellant Club was paid a consideration of Rs.39,79,954/-. The transaction between Swagat Caterers Pvt Ltd and the appellant Club, therefore, is about renting of the space inside the Club area and payment made by Swagat Caterers Pvt Ltd to the Club is for occupying the space inside the Club. Such a transaction where an outside caterer is paying to the Club for occupying certain area in the Club to operate a restaurant falls in the ambit of taxable service of 'renting of immovable property service' specified under section 65(105)(zzzz) of the Finance Act, 1994 and defined as *any service provided or to be provided to any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course of or, for furtherance of, business or commerce.*

5.2 Appellant's argument that the amount received from outside caterer was for providing restaurant service to the members of the Club and their guests fails to convince me as the service tax liability on the charges received for supplying food



and beverages to the members is not an issue here, the issue is leviability of service tax on amount paid by the restaurant operator to the Club. Further, with regard to appellant's reliance on the Orders-in-Appeal passed in the case of **Ahura Restaurant Pvt Ltd** and in **appellant's own case**, I find that in Ahura Restaurant Pvt Ltd case the services provided by Ahura Restaurant Pvt Ltd were held to be not falling under 'outside catering service', and in their own case, the dispute was about taxability of service provided by the Club to the outside caterer under 'business support services'. Thus, both the cases are on different issues and find no applicability in the case on hand.

5.3 Appellant has also cited Gujarat High Court's decision in the case of **Sports Club of Gujarat Ltd v. UOI** [2013(31) STR 645(Guj.)] to state that principle of mutuality was applicable as the restaurant service provided by the Club was provided to its members only. I, however, find that principle of mutuality has no applicability in this matter because here the taxability of service provided by the Club to outside caterer is in question and not the service provided by the Club to its members. When provision of service by the Club is to a third person and not to its members, it is not a service to self but service to another person.

5.4 Under renting of immovable property service, appellant contends that the renting of building used for the purpose of accommodation falls under exclusion clause (d) of section 65(90a) of the Finance Act, 1994. Section 65(90a) in fact defined 'renting of immovable property' and as per Explanation 2, it was declared that renting of immovable property includes allowing or permitting the use of space in an immovable property, **irrespective of the transfer or possession or control of the immovable property**. Therefore, appellant's argument that the caterer was not in possession or control of the restaurant place and hence transaction was not renting of immovable property falls flat in view of Explanation 2 *ibid*.

5.4.1 The exclusion the appellant is talking about is found in the definition of taxable service given under section 65(105)(zzzz) of the Finance Act, 1994 and reads as under –

(d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

According to appellant, they are providing accommodation service and since renting of buildings used for accommodation falls in the exclusion clause, there is no tax liability under renting of immovable property service also. This is a misleading argument as here the restaurant space provided to an outside caterer is not meant

for accommodation; its purpose is to be used as a restaurant area to serve food and beverage. The Club may be having the facility of accommodation, but the tax liability of that accommodation is not the subject issue; the subject issue is the taxability of rent income earned from renting a space used for operating a restaurant. Therefore, this argument of the appellant is nothing but an attempt to hide behind the exclusion provided in clause (d) of section 65(105)(zzzz) of the Finance Act, 1994 which is clearly inapplicable in the present case.

5.5 Therefore, I find that the case is rightly covered under the renting of immovable property service and appellant has failed to pay the applicable service tax for the period Apr-2012 to Jun-2012. With regard to invocation of extended period, the fact remains that the appellant nowhere disclosed the facts and figures relating to renting of restaurant space and the issue came to light only when audit was conducted. The suppression of facts to evade payment of service tax, therefore, is evident in the case and for that reason invocation of extended period is justified. Penalty under section 78 of the Finance Act, 1994 is also justified as the ingredient to attract penalty under section 78 ibid is same as that for invoking extended period. Penalty imposed under section 77 of the Finance Act, 1994 also requires no interference considering that failure to self assess the tax liability correctly and declare the same in ST-3 return is established when it is proved that the appellant did not pay the service tax liability of Rs.4,91,922/-. Also, interest liability under section 75 of the Finance Act, 1994 is automatic when service tax payable was not paid by due dates.

5.6 Resultantly, the appellant is found liable to pay the service tax of Rs.4,91,922/- alongwith interest and penalties imposed under section 77 and 78 of the Finance Act, 1994.

6. The impugned order is accordingly set aside and appeal is allowed.

7. 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

(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Attested

S. Hudda
(Sanwamal Hudda)

Superintendent

Central Tax (Appeals), Ahmedabad



By R.P.A.D.

To,

M/s. Rajpath Club Limited,

S. G. Highway,

Ahmedabad 380058

Copy to:

1. The Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner of Central Tax, CGST Ahmedabad North.
3. The Additional Commissioner, Central Tax (System), Ahmedabad South.
4. The Asstt. Commissioner, CGST Division-VI, Ahmedabad North.
5. ~~Guard File.~~
6. P.A.