आयुक्त का कार्यालय, (अपीलस)
Office of the Commissioner,

केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate- Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
: 079-26305065 **टेलेफैक्स** : 079 - 26305136

क फाइल संख्या : File No : **V2(ST)72 /North/Appeals/2018-19** 6214to6217

ख अपील आदेश संख्या : Order-In-Appeal No..**AHM-EXCUS-002-APP-57-18-19**

दिनाँक Date : **30-Aug-18** जारी करने की तारीख Date of Issue 10/9/2018

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals)

ग Arising out of Order-in-Original No **CGST/A'bad-North/Div-VII/S.Tax-DC-003-18-19** Dated **20-Apr-18** Issued by **Deputy Commissioner ,** Central GST , Div-VII , Ahmedabad North.

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

M/s Karam Hospitality Service

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता हैः–
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 अपीलः–
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 सकतीः–
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, 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 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 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 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–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. यथासंशोधितं 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 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, 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(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.

ORDER IN APPEAL

M/s. Karm Hospitality Service, 101, Shivalik Yash Complex, Pallav Cross Road, 132 Feet Ring Road, Naranpura, Ahmedabad (hereinafter referred to as *'the appellants')* have filed the present appeal against Order-in-Original number CGST/A'bad-North/Div-VII/S. Tax-DC-003-18-19 dated 20.04.2018 (hereinafter referred to as the *'impugned order')* passed by the then Deputy Commissioner, Central GST, Division-VII, Ahmedabad-North (hereinafter referred to as the *'adjudicating authority')*.

2. The facts of the case, in brief, are that the appellants were holding Service Tax registration number AALFK2704NSD002 with the Service Tax Commissionerate, Ahmedabad and engaged in providing services under the categories of 'Restaurant Service'. As per intelligence gathered, it was noticed that the appellants had been engaged in providing taxable service since April 2013, however, they had neither filed ST-3 returns nor paid Service Tax. Thus, the officers of preventive section visited their premises and after thorough investigation, their total Service Tax liability was worked out to be ₹17,95,118/- on the taxable value received by the appellants during the F.Y. 2013-14, 2014-15 and 2015-16 (up to August 2015). Thus, a show cause notice, dated 06.06.2017, was issued to the appellants which was adjudicated by the adjudicating authority vide the impugned order. The adjudicating authority, vide the impugned order, confirmed the demand of Service Tax amounting to ₹17,95,118/- under Section 73 read with Section 68 of the Finance Act, 1994 and ordered to appropriate ₹3,00,000/- already paid by the appellants. He also demanded interest on the above said amounts under Section 75 of the Finance Act, 1994 and imposed penalty under Sections 77(1), 77(2) and 78 of the Finance Act, 1994.

3. Being aggrieved with the impugned order the appellants have preferred the present appeal. The appellants have submitted that take away food was never taxable. They further argued that they fall under the declared service as per Section 66E(f) of the Finance Act, 1994 w.e.f. 01.07.2012 and the

Circular number 80/4/2004-ST was yet not withdrawn and hence, cannot be considered to be ineffective. The circular, according to the appellants, is still valid. The circular has clearly stated that the food, home delivered by the restaurants, is not chargeable to Service Tax. The appellants further quoted Circular number 173/8/2013-S.T. dated 07.10.2013 and contended that according to the said circular, an assessee selling their goods at MRP over the counter which are being referred to as take away food in the trade and industries, is clarified to be not taxable as per serial number 3 of the circular. The appellants stated that inspite of informing the adjudicating authority about the non-taxability of take away foods, the latter did not consider the argument of the former. Had that been considered, the demand of Service Tax would have been reduced to ₹ 7,99,137/-. Further, the appellants appealed that the adjudicating authority had not considered their submissions with regard to admissibility of Cenvat credit paid on rent by them to M/s. Hiral Square which were used in providing restaurant service. They pleaded that in the explanation mentioned in Rule 2C of the Service Tax Rules, 2006, it is suggested that for the purpose of abatement of taxable value to the tune of 60%, under this rule, Cenvat credit is not available on goods classifiable under Chapter 1 to 22 of the Central Excise tariff Act, 1985. It does not restrict Cenvat credit of Service Tax paid on input services viz. Renting of Immovable property which was used for providing restaurant service by the appellants. Had the adjudicating authority considered the said input tax credit, the re-quantified demand of Service Tax of ₹ 7,99,137/- would have been reduced to ₹ 1,52,817/-.

4. Personal hearing in the matter was granted and held on 06.08.2018 wherein Shri Pravin Dhandharia, Chartered Accountant, appeared before me on behalf of the appellants and reiterated the contents of appeal memo.

5. I have carefully gone through the facts of the case on records, grounds of the Appeal Memorandum, the Written Submission filed by the appellants and oral submission made at the time of personal hearing.

6. To begin with, I find that the appellants have filed the appeal citing the following two main reasons;

(i) The adjudicating authority did not consider reduction of Service Tax liability on take away food

(ii) The adjudicating authority did not consider submission of the appellants with regard to admissibility of Cenvat credit of Service Tax paid on rent.

Now, I will discuss the above two issues in detail.

6.1. Regarding the first issue that the adjudicating authority did not consider reduction of Service Tax liability on take away food, I find that the appellants have contended that former included the value of tax free services in the total taxable value and accordingly quantified the Service Tax to be ₹ 17,95,118/-. I find that the appellants have submitted their argument regarding non-taxability of take away food but said argument has neither been considered in the show cause notice nor in the impugned order. In page 3 of the show cause notice, the appellant's argument and their worksheet is reflected. The said worksheet shows a column pertaining to tax free sales i.e. take away/home delivery service. Further, in paragraph 3.1 (page 4) of the impugned order, same worksheet has been reproduced. The adjudicating authority, nowhere, has denied the authenticity of the said worksheet neither he has denied the existence of take away foods. However, the adjudicating authority has countered the worksheet, submitted by the appellants, stating that after introduction of negative list regime, w.e.f. 01.07.2012, all the services that do not fall under negative list, are taxable. The appellants have quoted CBEC instruction issued from file number 332/09/2011-TRU dated 27.07.2011 and the circular number 173/8/2013-ST dated 07.10.2013 and argued that takeaway foods and MRP based foods are out of the Service Tax sphere. I fully agree with the argument of the appellants and consider that the take away foods are exempted products. The Service Tax Department of Chandigarh vide its letter C.No. ST-20/STD/Misc./Sevottam/62/12/4693 dated August 13, 2015 ("the Clarification") has clarified that free Home delivery/ Pick-up of food is not liable to Service tax. The Department explained the matter further by stating that the dominant intention of such transaction is that of 'sale' as food is not served at restaurant and no other element of service such as ambience, live entertainment (if any), air conditioning or personalized hospitality is offered. It is further stated that Service Tax can be levied if there is an element of 'service' involved which would typically be the case where food is served in a restaurant. This made it amply clear that all extra services ordinarily chargeable are not available

when a customer chooses not to eat at the restaurant and hence not available for taxation. When a customer is not using the waiter's services or the entertainment of the restaurant, he should not be taxed for it. Thus, the clarification has gone a long way in giving clarity to service tax applicability. Further, restaurant service is a declared service as per clause (i) of section 66E of the Finance Act, 1994 and provision of the same is as under:

"(i) service portion in any activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity."

From the above provision it is crystal clear that Service Tax is payable only on service portion of transaction. Inferences drawn from the above explanations are quite evident that as far as take away or free home deliveries are concerned, they are out of purview of Service Tax. So, the take away is fully exempt, hence, no Service Tax liability arises since it is a mere sale of eatables with absence of any service element. If a restaurant is undertaking expenses in order to install and operate air conditioners for the customers, the law sees it as a taxable service. When the restaurant decides to deliver food to the homes of the customers or allows them to pack the food and take it away then they cannot extract tax towards the air conditioner for them because they have no use for it. Further, as far as MRP based items are concerned, it is clarified in circular No. 173/8/2013-ST dated October 17, 2013 that value of goods sold on MRP fixed under Legal Metrology Act shall be excluded from the total amount for determination of taxable service. It is also stated that MRP items are branded cold drinks, juices, chocolates, potato chips, energy drinks, etc. which are first purchased from dealers/wholesalers and then sold as it is, without any modification. This activity is also termed as "trading of goods". Hence, no liability arises for MRP based items sale under Service Tax. Thus, as per the discussion above, I consider that the appellants are liable for the benefit of tax exemption on the take away foods and accordingly uphold the quantification submitted by the appellants.

6.2. Now comes the second issue i.e. denial of Cenvat credit pertaining to the rent paid on immovable property. On going through the show cause notice, I find that the issue has been discussed in the investigation part of the said notice however, nothing has been discussed in the charging section of the same. Similar view has also been taken in the impugned order where nothing has been discussed in the finding section. In view of the above, I, considering the same as a non-issue matter, drop the issue without indulging myself in further discussion.

7. In view of my above discussions and findings, I set aside the impugned order and allow the appeal with consequential relief.

8. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

8. The appeal filed by the appellants stands disposed off in above terms.

(उमा शंकर)

आयुक्त (अपील्स)

CENTRAL TAX, AHMEDABAD.

ATTESTED

(S. DUTTA) 07.09.18

SUPERINTENDENT (APPEALs),

CENTRAL TAX, AHMEDABAD.

To,

M/s. Karm Hospitality Service,

101, Shivalik Yash Complex,

Pallav Cross Road, 132 Feet Ring Road,

Naranpura, Ahmedabad.

Copy to:

1) The Chief Commissioner, Central Tax, Ahmedabad Zone.
2) The Commissioner, Central Tax, Ahmedabad-North.
3) The Dy./Asst. Commissioner, CGST, Div-VII, Ahmedabad-North.
4) The Asst. Commissioner (System), Central Tax, Hq, Ahmedabad-North.
5) Guard File.
6) P. A. File.