



सत्यमेव जयते

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

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क फाइल संख्या : File No : V2(STC)8 &9/EA2 /North/Appeals/2018-19

6887 / 06891

ख अपील आदेश संख्या : Order-In-Appeal No. AHM-EXCUS-002-APP-80&81-18-19

दिनांक Date : 22-Oct-18 जारी करने की तारीख Date of Issue 3/10/2018

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-Original No GST-06/Refund/04&05/AC/KMM/2018-19
Dated 10-Apr-18 Issued by **Assistant Commissioner** , Central GST , Div-VI ,
Ahmedabad North.

घ अपीलकर्ता का नाम एवं पता

Name & Address of The Appellants

M/s Karnavati Club Ltd

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:-

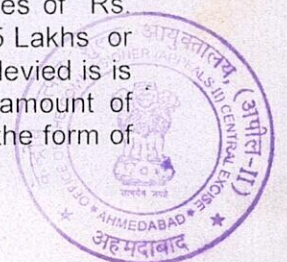
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मेंटल हॉस्पिटल कम्पाउण्ड, मेघाणी 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 ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ 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 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



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 भेजी 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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 35F 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, or penalty, where penalty alone is in dispute.



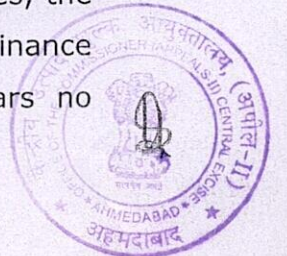
ORDER-IN-APPEAL

The Assistant Commissioner, CGST & C. Excise, Division-VI, Ahmedabad-North (*hereinafter referred to as 'the appellant'*) has filed two appeals against the below mentioned Orders-in-Original (*hereinafter referred to as 'the impugned orders'*) passed by the Assistant Commissioner, CGST, Division-VI, Ahmedabad-North (*hereinafter referred to as 'the adjudicating authority'*) pertaining to M/s. Karnavati Club Ltd., S. G. Highway, Ahmedabad (*hereinafter referred to as 'respondents'*);

Sr No	OIO No.	OIO date	Amount of refund claimed (₹)	Amount of refund claim sanctioned (₹)
1	GST-06/Ref/05/AC/KMM/Karnavati/18-19	10.04.18	1,80,69,019	1,80,69,019
2	GST-06/Ref/04/AC/KMM/Karnavati/18-19	10.04.18	4,93,04,973	4,78,23,290

2. The facts of the case, in brief, are that the respondents had filed the above mentioned refund claims on the ground that they are a company incorporated under the Companies Act, 1956. They were 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 orders, sanctioned the entire amount of ₹1,80,69,019/- in the case of the 1st refund claim and in the case of 2nd refund claim, an amount of ₹4,78,23,290/- was sanctioned and an amount of ₹14,81,683/- was rejected.

3. The impugned orders were reviewed by the Commissioner of CGST and C.Ex., Ahmedabad-North and issued Review Orders number 16/2018-19 and 17/2018-19 dated 18.07.2018 for filing appeals 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 when the levy of Service Tax had become '*ultra vires*' then why did the respondents make payment of duty as they were of the view that Service Tax was not at all leviable on them. Thus, the Service Tax collected, if refunded to the respondents, would become sheer profit to the club in the form of unjust enrichment. Further, the appellant stated that Section 73A(2) of the Finance Act, 1994 clearly states that if an amount has been collected as Service Tax which was not required to be collected, same is required to be credited to the exchequer of Central Government. Also, 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



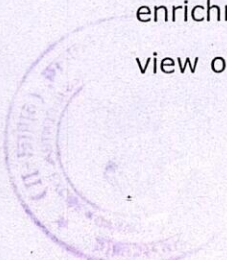
significance in the context of taxable service provided by clubs and association as club and its members are now treated as two separate persons.

4. Personal hearing in the matter was held on 11.10.2018 wherein Shri Bishan Shah, 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 further informed me that CESTAT, West Zonal Bench, Ahmedabad has allowed this issue in favour of M/s. Rajpath Club. He submitted a copy of the said CESTAT's order in support of his claim *Order no A/10785/2018 dt 26/04/18* by

5. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandums 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, in the grounds of appeal, has claimed that as 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, then why the respondents have collected and paid Service Tax to the government exchequer. The appellant further argued that the Service Tax collected, if refunded back to the respondents, will be nothing but profit to the club in the form of unjust enrichment as the said amount would never be returned to the persons utilizing the club services. Now, this is quite a strange argument on the part of the appellant as how the appellant can confirm the fact that the refund amount would not be returned to the individual members. An entity can pay Service Tax even if that is not leviable. Section 73A(2) of the Finance Act, 1994 very well clarifies that. If the entity had collected an amount in the form of Service Tax (even if it is not leviable), same has to be definitely **deposited** in the government exchequer. So, I find that when any amount is not legally payable to Government, it becomes '**deposit**' and thus there need not be any elaborate procedure for claiming refund.

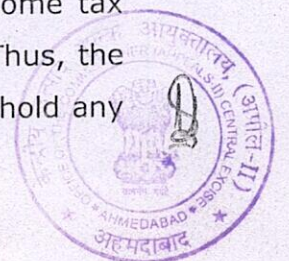
7. Further, the appellant has argued that if the amount is refunded back to the respondents, it would become sheer profit to the club in the form of unjust enrichment. In view of this, I find that the respondents had filed the claims in view of the decision of Hon'ble High Court of Gujarat in the case of Sports Club



of Gujarat vs Union of India. The judgment of the Hon'ble High Court of Gujarat is based on the 'Principles of Mutuality'. I also have the same view that any transaction by the club with its member is not a transaction between two parties. The question of unjust enrichment will arise only when there is the existence of two or more distinctly separate parties. But when the respondents are dealing with their members, we find that they are not separate entities. The Hon'ble High Court proclaimed that;

*"The petitioner is giving service to its members but the club is formed on the principle of mutuality and, therefore, any transaction by the club with its member is not a transaction between two parties. However, being a company, it may enter into a transaction with anybody, a 3rd person, not a member, then in that situation, this club becomes a legal entity and can certainly enter into any transaction and such transaction are not on the principle of mutuality and, therefore, may be liable to any tax as a transaction between two parties. However, when the club is dealing with its members, it is not a separate and distinct individual. It is submitted that in identical facts and circumstances, however, in the matter of imposition of sales tax, when the club was expressly included in the statutory definition of 'dealer' under Madras General Sales Tax Act, 1959, so as to bring the club within the purview of taxing statute of the Madras Sales Tax, the Hon'ble Supreme Court, in the case of the Joint Commercial Tax Officer Vs. The Young Mens' Indian Association, considered the definition of the 'dealer' by which the club was declared dealer and after considering the definition of sale as given in the Act of 1959 and explanation-I appended to Section 2(n), specifically declaring the sale or supply or distribution of goods by a club to its members whether or not in the course of business was declared deemed to be a sale for the purpose of the said Act. In that situation, Hon'ble Supreme Court considered the issue that the club is rendering service or selling any commodity to its members for a consideration then whether that amounts to sale or not. **Hon'ble Supreme Court held that it is a mutuality which constitutes the club and, therefore, sale by a club to its member and its services rendered to the members, is not a sale by club to the members**".*

In the case of Commissioner of Income Tax Vs. Ranchi Club Limited, the Hon'ble Patna High Court affirmed that **no one can earn profit out of himself on the basis of principle of mutuality** and held that income tax cannot be imposed on the transaction of the club with its members. Thus, the first argument of the appellant regarding unjust enrichment does not hold any



ground at all.

8. Now comes the second argument of the appellant that with effect from 01.07.2012, the new system of taxation of services has been introduced and 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. 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 a 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.



8.1. 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 unincorporated 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.

9. In view of the above, I hold that as the respondents have wrongly paid the Service Tax against 'Club or Associated Services' (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.

10. Accordingly, as per the above discussion, I do not find any reason to interfere in the impugned orders and reject the appeals filed by the Department.

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

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

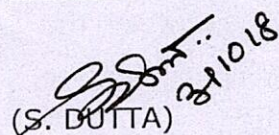
उमा शंकर

(उमा शंकर)

आयुक्त (अपील्स)

CENTRAL TAX, AHMEDABAD.

Attested


(S. DUTTA) 24/10/18

Superintendent (Appeals)
Central Tax, Ahmedabad



BY R.P.A.D.

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

Copy To:-

1. The Chief Commissioner, Central Tax, Ahmedabad zone, Ahmedabad.
2. The Commissioner, Central Tax, Ahmedabad (North).
3. The Dty/Asstt. Commissioner, Central Tax, Div-VI, Ahmedabad (North).
4. The Assistant Commissioner, System, Central Tax, Ahmedabad (North).
5. Guard File.
6. P.A. File.

