



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

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- क फाइल संख्या : File No : V2(ST)89/North/Appeals/2019-20/13978 To 13982
- ख अपील आदेश संख्या : Order-In-Appeal No..AHM-EXCUS-002-APP-116 -2019-20
- दिनांक Date : 23-01-2020 जारी करने की तारीख Date of Issue 20/02/2020
- श्री अखिलेश कुमार, आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar Commissioner (Appeals)
- ग Arising out of Order-in-Original No. Div-VII/North/06/Refund/Malabar/19-20
Dated 06/08/2019 Issued by Assistant Commissioner , Central GST , Div-VII ,
Ahmedabad North.
- ध अपीलकर्ता का नाम एवं पता
Name & Address of The Appellants

**M/s The Malabar County Co Op
Housing Service Society Ltd**

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.



(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या ईए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद -380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.



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 पढी 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 not withstanding 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, provided that the pre-deposit amount shall not exceed Rs.10 Crores. 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 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।

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

1. This order arises out of an appeal filed by M/s. Malabar County Co-operative Housing Service Society Limited , having registered office at Malabar County, Behind Nirma University, Near Ambedkar University, Post Chharodi, Ahmedabad-382481 (herein referred to as 'appellant') against Order in Original No. D-VII/North-133/Refund/Malabar/18-19 dated 06.08.2019 [hereinafter referred to as 'the impugned order'] passed by the Assistant Commissioner of Central Tax, Division VII, Ahmedabad North (hereinafter referred to as 'the adjudicating authority').

2. Facts of the case, in brief, are that the appellant is a co-operative society registered vide no. AHM/SA(HA)8684/2015 dated 22.05.2015 with District Registrar, Co-operative Society, Ahmedabad and holding Service Tax Registration Number AAEAT3153ESD001. The appellant has filed Service Tax refund claim for an amount of Rs. 77,70,865/- under Section 11B of the erstwhile Central Excise Act, 1944 as made applicable in the case of Service Tax matter vide Section 83 of the Finance Act, 1994 on the ground that the Service Tax was wrongly paid on one time deposit received from the members under the category of Maintenance and repair service falling under erstwhile Section 65(105)(zzg) of the Finance Act, 1994. The adjudicating authority vide the aforesaid order has rejected the refund claim.

3. Being aggrieved with the impugned order, the appellant preferred this appeal on the grounds that adjudicating authority has erred:

- a. In considering that the members have deposited the one time amount for life time repair and maintenance of the property they own. The said deposit is not taxable and wrongly paid by the society. Hence, they are eligible for refund. As there is payment by mistake, then there is no time-limit for claiming refund. They relied on judgement of Hon'ble High Court in Choice Laboratories in support of their contention.
- b. Hon'ble Supreme Court has taken concept of mutuality in Civil Application no. 4184 of 2009 in case of State of West Bengal v/s Calcutta Club Limited and in Civil Application No.7497 of 2012 in case of Ranchi Club Limited and it was held that the



Finance Act, 1994 does not purport to levy Service Tax on members' clubs in the incorporated form.

4. This appellant placed reliance on the following Judgements:

- (i) Hon'ble Supreme of India in Civil Application No. 4184 of 2009 in case of State of West Bengal & Ors. v/s Calcutta Club Limited and in Civil Application No. 7497 of 2012 in case of Chief Commissioner of Central Excise and Service Tax & Ors. v/s Ranchi Club Limited
- (ii) Karnavati Club Limited v/s CST, Ahmedabad-[2013] 61 VST 141 (CESTAT);
- (iii) Hon'ble High Court of Bombay in case of Commissioner of Service Tax v/s M/s Crescendo Associates-Central Excise Appeal No.9 of 2018;
- (iv) Tanhee Heights Co-operative Housing Society Limited v/s Commissioner of CGST, Mumbai South in CESTAT, Mumbai-Order No.:A-87626-87631/2018;
- (v) Kumar Beheray Rathi v/s Commissioner of Central Excise, Pune-III-2014(34) S.T.R.139(Tri.-Mumbai)

5. Personal Hearing in the case was held on 08.01.2020. Shri Paurav K. Mehta, Chartered Accountant and Shri Anil Diwan, Committee Member, attended hearing on behalf of the appellant and reiterated submissions made in Appeal Memorandum.

6. I have carefully gone through the facts of the case on record, grounds of appeal and oral submissions made by the appellant at the time of hearing.

7. I find that the appellant is a co-operative society registered with the District Registrar, Co-operative Society, Ahmedabad and has paid Service Tax on one time deposit received from the members under the category of Maintenance and Repair Service. They have subsequently claimed to have discharged the service tax liability wrongly and hence filed a refund claim. The appellant's claim was rejected by the adjudicating authority vide the impugned order on the following grounds:

- (i) The association has correctly discharged the Service Tax liability in accordance with the Point of Taxation Rules, 2011.



- (ii) The amount paid towards Service Tax liability cannot be considered as deposit under Section 35 of the Central Excise Act, 1944.
- (iii) The case law of the Sports Club of Gujarat Limited v/s Union of India reported at 2013(31) STR 645 (Guj.) is distinguishable on the ground that the association has collected amount from members for provision of Mandap Keeper Service whereas the issue in instant case is of Repair and Maintenance Service to be provided by the association to its members for which advance has been collected in one installment.
- (iv) The JRO has vide letter dated 25.04.2019 has informed that the claim is time-barred.
- (v) Even though the JRO has vide letter dated 15.07.2019 reported that it is one time deposit and no Service Tax leviable, he has not examined the claim with reference to the Point of Taxation Rules, 2011.

8. I find that the issue involved in this case is of refund of an amount of Rs. 77,70,865/- which the appellant has paid as Service Tax during negative list regime. The amount was self-assessed and paid and returns to this effect were also filed. Subsequently, the appellant, based on the decision of Sports Club of Gujarat Limited 2013(31) STR 645 (Guj), has claimed that they had paid Service Tax erroneously and filed a refund claim. They have during appeal stage placed reliance on the case of Kumar Beheray Rathi v/s Commissioner of Central Excise, Pune-III also of judgement of Hon'ble Supreme Court in case of Calcutta Club Limited and Ranchi Club Limited. I find that the payment of Service Tax has been made in negative list regime and the adjudicating authority has held that the activity of the appellant are not part of negative list under Section 66D of the Finance Act, 1994, therefore, covered under service for the purpose of Act. It is further observed that in the instant case the payment of Service Tax was made by the appellant on self-assessment and Section 70 to the Finance Act, 1994 is reproduced below:

(1) Every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency and with such late fee not



exceeding twenty thousand rupees, for delayed furnishing of return, as may be prescribed.

(2) The person or class of persons notified under sub-section (2) of section 69, shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency as may be prescribed.

It is apparent that the appellant has paid the tax liability on self-assessment and not under protest. Also, the appellant has not contested the assessment hence, he is not eligible for refund. The said finding is supported by the judgement in case of Premier Agencies v/s Commissioner of Central Excise, Nagpur-2010-TMI-75969-CESTAT, Mumbai.

9. It is further observed that the instant refund application is also hit by limitation which has been reported by JRO vide letter dated 25.04.2019 mentioned in O-I-O.

10. I further find that the appellant has relied on judgement of Hon'ble Supreme of India in Civil Application No. 4184 of 2009 in case of State of West Bengal & Ors. v/s Calcutta Club Limited and in Civil Application No. 7497 of 2012 in case of Chief Commissioner of Central Excise and Service Tax & Ors. v/s Ranchi Club Limited wherein the Hon'ble Supreme Court has held that any action taken to levy and collect Service Tax from incorporated members' clubs are declared to be void and of no effect in law. The case in hand is distinguishable in as much as that the judgement of Hon'ble court was in case of Clubs and Association Service. Moreover, the appellant is not party to the judgement hence the judgement is not applicable in the current case *tantum*.

11. In view of the above, the appeal filed by the appellant is rejected.

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



Akhilesh Kumar
 23rd January, 2020.
 (Akhilesh Kumar)
 Commissioner (Appeals)

Attested

(Brijesh Sharma)
Superintendent (Appeals)
Central Excise, Ahmedabad

By Regd. Post A. D

M/s. Malabar County,
Behind Nirma University,
Near Ambedkar University,
Post Chharodi, Ahmedabad-382481

Copy to :

1. The Pr. Chief Commissioner, CGST and Central Excise, Ahmedabad.
2. The Commissioner CGST and Central Excise, Ahmedabad-North.
3. The Deputy /Asstt. Commissioner, Central Excise, Division-VII, Ahmedabad-North.
4. The Deputy/Asstt. Commissioner (Systems), Central Excise, Ahmedabad-North.
- ✓ 5. Guard file
6. PA File

