आयुक्त का कार्यालय) ,अपीलस(
Office of the Commissioner,
केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate-Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बॉवाड़ी अहमदाबाद ३८००१५.
CGST Bhavan,Revenue Marg,Ambawadi,Ahmedabad-380015
. ☎ 26305065-079 : टेलेफैक्स 26305136 - 079 :
Email- commrappl1-cexamd@nic.in

DIN-20211064SW00002252BF

स्पीड पोस्ट 3900 TO 3908

क फाइल संख्या : File No : GAPPL/COM/STP/1368/2020-Appeal-O/o Commr-CGST-Appl-Ahmedabad

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-26/2021-22**
दिनाँक Date : **18.10.2021** जारी करने की तारीख Date of Issue : **27.10.2021**

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original Nos. **07/DC/D/AKJ/2020-21 dated 17.09.2020**, passed by Deputy Commissioner, Central GST & Central Excise, Div-III, Ahmedabad-North.

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

Appellant- M/s. Roquette Riddhi Siddhi P. Ltd., 51-52, Riddhi Siddhi Nagar, Viramgam Becharji Road, Junapadhar, Viramgam, Ahmedabad.

Respondent- Deputy Commissioner, Central GST & Central Excise, Div-III, Ahmedabad-North.

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 प्रकिया 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 मामलें 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 डयूटी 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 इए-8 में दो प्रतियां में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक 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 रूपये या उससे कम हो तो रूपये 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. Registar 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 ओदश 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 हैं।

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 अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.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 in 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 अपीलो 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

M/s. Roquette Riddhi Siddhi P. Ltd, 51-52, Riddhi Siddhi Nagar, Viramgam Becharji Road, Junapadhar, Viramgam, Ahmedabad (hereinafter referred to as '*the appellant*') have filed the instant appeal against the OIO No.07/DC/D/AJK/2020-21 dated 17.09.2020 (in short '*impugned order*') passed by the Deputy Commissioner, Central GST, Division-III, Ahmedabad North (hereinafter referred to as '*the adjudicating authority*').

2. The facts of the case, in brief, are that during the course of audit of records of the appellant, conducted by the officers of Central GST Audit, Ahmedabad, it was noticed that during the period F.Y. 2016-17 to June, 2017, the appellant in their financial accounts have shown an income of Rs.2,70,420/- under the head 'Notice Pay Income'. This amount was recovered from their employees who have resigned and left the company before the expiry of the notice period. The company has entered into an agreement with all their employees and as per the agreement, any employee can leave the company only after completion of the notice period and if they leave early, they are liable to pay certain amount to the company or the company is legally eligible to recover this amount from the employees. Audit observed that such activity is taxable under declared service defined under Section 66E(e) "*agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act*". It appeared that the notice pay recovered by the appellant is for tolerating an act of leaving the employment by employees before the completion of notice period; as such service is provided by an employer to an employee during the course of employment and not covered under exclusion clause of service, hence taxable.

2.1 Further, it was also noticed that the appellant for the same period had shown an income of Rs.5,73,754/- as canteen charges recovered from the salary of their employees against Canteen Services provided to them. However, in terms of Factories Act, 1948, the appellant mandatorily has to provide space as well as food for their worker/ employees without any consideration, therefore, the amount collected as consideration from workers as canteen charges is taxable.

3. Based on the audit observation, a Show Cause Notice (SCN for brevity) SCN No. 254/19-20 dated 21.02.2020 was issued vide F.No.VI/1(b)-177/IA/AP-38/C-VI/18-19 to the appellant invoking extended period of limitation and proposing; demand and recovery of **Rs.1,26,626/-** [Rs.40,563/- (Notice Pay) + Rs.86,063 (Canteen charges)] under proviso to Section 73(1) of the Finance Act (F.A), 1994; recovery of interest on aforesaid demand under Section 75 and imposition of penalty under Section 78 (1) of the Act ibid. The said SCN was adjudicated by the adjudicating authority vide the impugned order, wherein he confirmed and ordered recovery of service tax demand of Rs.86,063/- alongwith interest and also imposed equivalent penalty of Rs.86,063/- under the relevant provisions. The adjudicating authority by finding that the provision of service by an employee to the employer in the course of or in relation to his employment falls under exclusion clause of Section 66B(44) and by following the judicial pronouncement of Hon'ble High Court of Madras in W.P. No.35728 to 35734 of 2016 dated 07.11.2019, dropped the demand of Rs.40,563/-.

4. Aggrieved by the demand confirmed in the impugned order, the appellant preferred the present appeal, mainly on following grounds:-

a) Canteen charges collected from the employees does not fall within the ambit of the service definition as a provision of service by an employee to the employer in relation to employment is excluded.

b) They have more than 250 employees hence are required to maintain canteen under Factories Act. The canteen service is outsourced to the outdoor caterers and the food is provided to the employees in a non-air conditioned facility. For catering of food to the employees, catering charges is paid by the appellant to the caterer, who in turn pays service tax to the government and the appellant is not taking the credit of such taxes paid. Therefore, charging service tax again from the appellant for the same service would amount to double taxation.

c) They placed reliance on the judgment of Hon'ble High Court of Andhra Pradesh, passed in the case of M/s. Bhimas Hotels Pvt. Ltd Vs UoI, wherein it was held that food provided to employees cannot be termed as rendering of services, as the same is undertaken as a part of their industrial obligation, hence not taxable.

d) Government vide Notification No.25/2012-ST has exempted services provided in relation to serving of food or beverages by a restaurant, eating joints or a mess in a non-air-conditioned facility. Subsequently, vide Notification No. 14/2013 dated 22.10.2013, the scope of exemption was widened even to the canteens which have air-condition facility in the factory. Thus, it was never the intention of the government to exempt the canteen services provided in an air-conditioned facility and to tax the canteen services when provided in a non-air-conditioned facility.. Reliance placed on UoI Vs M/s. Ranbaxy Laboratories Ltd. [2008 (5) TMI 653-S.C] & Advance Ruling in the case of Caltech Polymers Pvt. Ltd. [2018 (12) G.S.T.L. 350 (A.A.R. - GST)

e) Interest not chargeable as there was no service tax liability.

f) Penalty u/s 78 cannot be imposed in the absence of deliberate defiance of law or non-compliance of service tax provisions. Reliance placed on 2012 (27) STR 25; (1987) AIR 2316 (SC); 1978 (2) ELT (J159) SC.

5. Personal hearing in the matter was held on 17.09.2021 through virtual mode. Ms. Bhagyashree Dave & Ms. Disha Barbhaya, Chartered Accountants, appeared on behalf of the appellant. They reiterated the submissions made in the appeal memorandum.

6. I have carefully gone through the facts and circumstances of the case, the impugned order passed by the adjudicating authority, submissions made in the appeal memorandum and the evidences available on records. The issue to be decided under the present appeal is whether the amount recovered by the appellant from their employees against canteen charges is liable for service tax or not.

7. The contention of the department is that the activity of supply of food by the appellant to the employees in their canteen against a consideration falls within the ambit of clause (i) of Section 66(E) of the F.A, 1944 and should be considered as service in terms of Section 65B (44) of the Act. The appellant on the other hand have contended that the activity of providing food to employees is an obligation under Factories Act and by virtue of Notification No.25/2012-ST and Notification No. 14/2013, the government has exempted services relating to serving of food in a canteen whether in a non-air-conditioned facility or air-conditioned facility in the factory.

8. Section 46 of the Factories Act, 1948, deals with provision of canteen facility in factories. Excerpts from Factories Act, 1948 are reproduced below:-

Section 46 – Canteens

(1) The State Government may make rules requiring that in any specified factory wherein more than two hundred and fifty workers are ordinarily employed, a canteen or canteens shall be provided and maintained by the occupier for the use of the workers.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for –

(a) the date by which such canteen shall be provided

(b) the standards in respect of construction, accommodation, furniture, and other equipment of the canteen;

(c) ***the foodstuffs to be served therein and the charges which may be made therefor;***

(d) the constitution of a managing committee for the canteen and representation of the workers in the management of the canteen;

1*(dd) the items of expenditure in the running of the canteen which are not to be taken into account in fixing the cost of foodstuffs and which shall be borne by the employer;)

(e) the delegation to the chief inspector,subject to such conditions as may be prescribed,of the power to make rules under clause (c).

The Factories Act, 1948 mandates that a factory having more than 250 workers, shall, provide and maintain a canteen for giving food to the workers and charges can be recovered but the items of expenditure in running the canteen has not to be taken into account in fixing the cost of foodstuffs and such expenses shall be borne by the employer. As a general practice, the companies outsource the given requirement to the third party caterers wherein the caterers provide canteen services within the employer's factory. In many cases, the employer charges a nominal amount (canteen charges) from the employees for providing the food in the factory premises. In the present case also the appellant taking note of the fact that provision of canteen service is a statutory requirement provided the canteen services as failure to provide the same would attract penal provision. Therefore, department's contention that the appellant is bound to provide space and food without any consideration is erroneous as there is no bar for charging the food except that the items of expenditure in running the canteen are not to be included in the food charges.

8.1 The question, thus, arises is whether the amount charged as canteen expenses is taxable or not. The word '**service**' is defined in sub-section (44) of Section 65B of the Act, as;

"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

(ii) 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

(iii) 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;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

As per the above definition, to come within the purview of the definition of the expression 'service', there should be an activity, such activity should be carried out by a person for another, and it should be carried out for a consideration. Also, the activities which are covered under the declared service category will automatically become service. Section 66E specifically mentions few services as '*declared services*' among which clause (i) *includes service portion in an 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.* So, the activity of providing food to the employees is a taxable service, in terms of aforementioned definitions.

8.2 However, Central Government vide item no. 19 of Notification No. 25/2012 dated 20.06.2012, exempted *"services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having (i) the facility of air-conditioning or central air heating in any part of the establishment, at any time during the year and (ii) a licence to serve alcoholic beverages."* from the whole of the Service Tax leviable thereon under Section 66B of the Finance Act, 1994. Subsequently, vide Notification No.14/2013 dated 22/10/2013, item no.19A was inserted wherein exemption was extended to *" services provided in relation to serving of food or beverages by a canteen maintained in a factory covered under the Factories Act,1948 (63 of 1948) , having the facility of air-conditioning or central air heating at any time during the year."*

The wordings of the above referred Notification No.25/2012-ST and Notification No. 14/2013-ST at item no. 19 and 19A, respectively, clearly imply that restaurant, eating joints or mess not having the facility of air conditioning or central air heating or a licence to serve alcoholic beverages are exempted from service tax with effect from 01-07-2012 vide Notification No.25/2012, dated 20.06.2012 and the canteens covered under the Factories Act,1948, having the facility of air-conditioning or central air heating are also exempted from service tax with effect from 22.10.2013 as per Notification No. 14/2013-ST, dated 22.10.2013.

8.3 Maintaining canteen for employees is a statutory requirement under the Factories Act and as canteen is a place where service provided is in relation to food, the benefit of exemption granted under Notification No.25/2012- ST and Notification No. 14/2013-ST can be extended to a factory canteen irrespective of the fact whether

the facility is having air-conditioning or central air heating or not. There is no ambiguity that eating joint or a mess surely covers canteen irrespective of the facility or location of the establishment, as service provided therein is in relation to serving of food and eligible for the exemption under Notification No.25/2012- ST.

As this aspect was not considered by the adjudicating authority while examining the demand, I find his interpretation that providing food against a consideration is taxable, is irrational especially when there is no bar on charging for such services. The intention of the government to subsequently include canteen having air conditioning or central air heating facility, was not to exclude the canteens which did not have such facility as not extending the benefit of above exemption to such canteens would tantamount to creating a dichotomy in legal parlance.

9. In view of the above discussion, I find that the demand is not sustainable. When the demand is not legally sustainable, question of interest and penalty does not arise.

10. In view of the above, I set-aside the impugned order and allow the appeal filed by the appellant.

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

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

18th October, 2021.

(Akhilesh Kumar)
Commissioner (Appeals)

Date: .10.2021

Attested

(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad

By RPAD/SPEED POST

To,

M/s. Roquette Riddhi Siddhi P. Ltd, - **(Appellant)**
51-52, Riddhi Siddhi Nagar,
Viramgam Becharji Road, Junapadhar,
Viramgam,
Ahmedabad

The Deputy Commissioner, - **(Respondent)**
CGST, Division-III,
Ahmedabad North
Ahmedabad-382210

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North. (For uploading the OIA)
4. Guard File.
5. P.A. File