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.
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DIN- 20220464SW00000057E6

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स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/1390/2021 -Appeal-O/o Commr-CGST-Appl-Ahmedabad

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-91/2021-22**
दिनाँक Date :**31.03.2022** जारी करने की तारीख Date of Issue : **19.04.2022**

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

ग Arising out of Order-in-Original Nos. **39/ADC/2020-21/MLM dated 29.01.2021**, passed by the Additional Commissioner, CGST & C. Ex., Ahmedabad-North.

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

Appellant- M/s. Karnavati Club Ltd., Sarkhej-Gandhinagar Highway, Ahmedabad-380058.

Respondent- The Additional Commissioner, Central GST & Central Excise, 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 पूवोक्त 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 केडिट 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 प्रतियों 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 हैं। 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

The present appeal has been filed by M/s. Karnavati Club Ltd., Sarkhej-Gandhinagar Highway, Ahmedabad-380058 (in short '***the appellant***') against the OIO No: 39/ADC/2020-21/MLM dated 29.01.2021 (in short '*impugned order*') passed by the Additional Commissioner, Central GST, Ahmedabad North (in short '*the adjudicating authority* ').

2. The facts of the case, in brief, are that during the course of audit on records of the appellant, conducted by the officers of Central GST, Ahmedabad (Audit) Commissionerate, on verification of records of the appellant for the F.Y. 2013-14 (from October, 2013) to F.Y. 2017-18 (upto June 2017), following observations were raised;

a. Short payment of service tax to the tune of Rs.77,62,689/- on renting of space and other infrastructure facilities to various entities. Apart from the agreed rent charged for such facilities, they also recovered an amount of Rs.5,78,49,566/- towards reimbursement of electricity burning expenses. The appellant has not entered into any contractual agreement with the recipient of serviceto act as 'pure agent' to incur expenses in the course of providing taxable service and were also not engaged in supply of electricity, hence, it appeared that the consideration received as reimbursement were liable to service tax.

b. Reconciliation of income shown in the financial records with those shown in ST-3 returns revealed a difference of Rs.4,93,29,151/- on which service tax liability of Rs.70,03,176/- was not discharged. These were purportedly the amounts received as advances against booking made and subsequently adjusted towards value of services provided at the time of final settlement, hence, taxable.

c. Scrutiny of ST-3 returns revealed that they transferred and utilized the Cenvat credit of Education Cess and Secondary High Education Cess for payment of basic duty amounting to Rs.75,246/- which was not permissible under CCR, 2004.

d. Reconciliation of ledgers with ST-3 returns showed short payment of service tax of Rs.48,497/- under legal charges paid to Advocate.

e. Availed ineligible CENVAT credit of Rs.11,05,749/- of tax paid on input services,used for organizing events (musical nights, fashion show, hasya darbar, dayro, drama) which were exempted under Notification No.25/2012-ST dated 20.06.2012.As the output service was exempted, CENVAT credit appeared to be not admissible in terms of Rule 6(1) of the CCR, 2004.

2.1. On the basis of the above audit observation, Show Cause Notice (SCN) No. VI/1(b) CTA/Tech-7/SCN/Karnavati/2019-20 dated 16.04.2019 was issued proposing recovery of the above service tax amounts along with interest, proposing appropriation of amount Rs.31,749/- already paid towards the proposed demand. Imposition of penalty under Section 78(1) of the F.A., 1994, was also proposed. The said SCN was adjudicated vide the impugned order, wherein the aforesaid service tax demands were confirmed along with interest and the amount of Rs.31,749/- already paid was appropriated against the confirmed service tax demand of Rs.48,497/-. Equivalent penalty u/s 78(1) of the F.A., 1994, was also imposed.

3. Aggrieved by the impugned order, the appellant has filed appeal on the grounds that;

- Electricity is a good, chargeable to nil rate of central excise duty, therefore service tax is not applicable on supply of electricity under Chapter V of the Finance Act, 1994. They relied on various judicial pronouncements some of them are Kiran Gems Pvt. Ltd – 2019(25) GSTL 62 (Tri-Ahmd); ICC Reality (India) Pvt Ltd. – 2013(32) STR 427 (Tri-Mumbai); South Eastern Coalfields Ltd -2019 (22) GSTL 393 (Tri-Del); Intercontinental Consultants & Technologies- 2013(29) STR-9 (Del).
- Hon'ble Apex Court in the SLP (C) No. 22909 of 2013 [2019-TIOL-449-ST-LB] decided that service tax is not applicable, on them. The amount of deposits added with advances while deciding the service tax liability needs to be deducted. Further, the amount of advances is also required to be deducted after excluding service tax value. The club and its members are one and the same and there cannot be a service between a club and its members and the same is established in their own case before Hon'ble High Court of Gujarat. SCA-13654, 13655, 13656 of 2005 of Sports Club of Gujarat Ltd., Rajpath Club & Karnavati Club v/s U.O.I.
- Cenvat credit of Education Cess and Secondary High Education Cess paid on Customs duty is admissible based on the decision of Hon'ble Karnataka High Court passed in the case of Shree Renuka Sugars Ltd. –(2014) 302 ELT 33.As per Hon'ble Apex Court decision passed in SLP (C) No. 22909 of 2013, service tax is not applicable, hence, question of wrong utilization of Cess does not arise.
- The demand of Rs.48,497/- is baseless as the tax liability was discharged under reverse charge mechanism and since Rs.31,749/- was already paid before issuance of SCN, liability to pay interest & penalty does not arise.
- As CENVAT credit availed is reversed at the time of filing of refund, thus the credit availed cannot be considered as availed. As the same was reversed on monthly basis before issuance of SCN, interest and penalty not applicable.
- SCN for similar period is already issued in refund matter covering same period, hence demand not sustainable. They placed reliance on Nizam Sugar Factory-2008(9) STR 314(SC), Cona Industries- 2017(352) ELT 12 (Bom).
- In terms of Section 173 of the CGST Act, Chapter V of the Finance Act, 1994 was omitted therefore saving clause of Section 174(2) cannot be extended to service tax.The SCN issued by one authority and adjudicated by another is not maintainable. Reliance is placed on decisions passed in the case of OWS Warehouse Services LLP-2018 (19) GSTL 29, Sulabh International (W.P-1599/2019), Brindavan Beverages- 2007 (213) ELT 487.
- SCN is time barred as reimbursement of electricity charges were included in profit and loss account and was issued beyond normal period as suppression was not invoked. It was also issued prior to issuance of final audit report. They relied on catena of decisions.Reliance placed on various decisions Magus Metals – 2017 (355 ELT 323, Blue Star Ltd-2015 (322) ELT 820.
- Penalty under Section 78(1) & Rule 15(3) not imposable as the facts regarding service rendered and payment of service tax were reflected in ST-3 returns and income received were also reflected in the books of accounts hence suppression

with intent to evade payment of tax cannot be alleged. Further the issue whether electricity is goods or not relates to interpretation hence penalty not imposable. Reliance placed on various decisions Mundra Port & SEZ- 2009 (18) STR 314, Haryana Roadways Engg.-2001 (131) ELT 662.

4. Personal hearing in the matter was held on 12.11.2021 through virtual mode. Shri Bishan R. Shah, Chartered Accountant, appeared on behalf of the appellant. He reiterated the submissions made in the appeal memorandum.

5. 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 as well as in the submissions made at the time of personal hearing and the records submitted by the appellant. It is observed that the issues to be decided under the present appealare as under;

i) Whether the service tax demand of Rs.77,62,689/- on reimbursement of electricity burning expensesis legal & proper?
ii) Whether service tax amount of Rs.70,03,176/- demanded on the differential income of Rs.4,93,29,151/- is legal & proper?
iii) Whether CENVAT credit of Education Cess and Secondary High Education Cess amounting to Rs.75,246/- is admissible?
iv) Whether service tax amount of Rs.48,497/- demanded on legal charges is legal &proper?
v) Whether CENVAT credit amount of Rs.11,05,749/- in respect of tax paid on input services used for organizing events like musical nights, fashion show, hasyadarbar, dayro, drama, is admissible or otherwise?

The demand pertains to period October, 2013 to June, 2017.

6. As regards the demand of **Rs.77,62,689/-,** it is alleged that appellant had let out its space and infrastructure facilities to various entities like TGB, Avakar Decorators etc. and, apart from agreed rent for such facilities, they also recovered amounts as reimbursement of electricity burning expenses. They had not paid service tax on such reimbursable expenses. The demand was confirmed by the adjudicating authority on the grounds that the appellant has recovered Rs.11/- per unit against the actual cost of electricity of Rs.8/-per unit, which was more than the actual expense incurred. He also observed that in some cases a lumpsum amount was recovered and while in others the recovery has been on actual consumption basis. He held that since the appellant were not engaged in supply of electricity and the amount collected was not paid to the third party, for the goods or service so procured, in capacity as pure agent, therefore, in terms of Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006, the exclusion of such expenditure or costs from taxable value is not admissible. However, the appellant,on the other hand, are contending that electricity is a good, attracting 'nil' rate of central excise duty and since the charges collected were towards supply of electricity, it shall not attract service tax levy.

6.1 It is observed that the appellant, apart from charging rent from the entities, also collected reimbursable amount towards electricity cost/expenses incurred by them. The fact that in some cases they had recovered cost on actual consumption basis, while in others they charged lumpsum amount or recovered higher than the actual cost, is not disputed by the appellant. By applying the ratio of decision passed by Hon'ble High Court in the case of Srijan Reality (P) Ltd, -2019(24) GSTL 169 (Cal.), I find that although electricity is a 'goods', as held in *National Thermal Power Corpn. Ltd.-(2002) 5 SCC (3),* and is capable of being traded but since the appellant does not have the requisite licence to trade in electricity, the activity of the appellant cannot be treated as a trade. Similarly, the appellant cannot claim to be selling electricity as a 'goods' as, they are not licensed under the Electricity Act, 2003, to sell electricity. In fact, for appellant, electricity is an input for their output service which they were procuring on their own account for providing the taxable service. Therefore, the argument put forth by the appellant that the electricity charges collected are part of supply of electricity, which is goods and not exigible to service tax, does not hold any ground.

6.2 Regarding the issue whether the reimbursable amount received by the appellant towards electricity charges should form a part of gross value of taxable service provided or otherwise, I find that in terms of Section 67(1) of the Finance Act, 1994, where service tax is chargeable on any taxable service with reference to its value, then such value shall be the gross amount charged by the service provider for such service, where provision of service is for a consideration in money.

6.3 I also find that the term 'consideration' prior to 14.05.2015, included *'any amount that is payable for the taxable services provided or to be provided.'* But after 14.05.2015, vide explanation (a) the term *'consideration'* was amended to include:-

> *(i) any amount that is payable for the taxable services provided or to be provided;*
>
> ***(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;***
>
> *(iii) any amount.... distributor or selling agent gets such ticket.]*

6.4 Thus, prior to amendment made in section 67, any amount payable for the taxable services was covered and no specific inclusion was provided. However, after amendment made on 14.05.2015, the scope of consideration was expanded to include any reimbursable expenditure or cost incurred by the service provider and charged to service tax. I find that this interpretation was taken by the Hon'ble Apex Court in the case ofIntercontinental Consultants & Technologies- reported at 2018 (10) G.S.T.L. 401 (S.C.),wherein the Apex Court, held that;

> *" 24. In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services.* ***As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule of the Rules went much beyond the mandate of Section 67.*** *We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such*

service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service.

*29. In the present case, the aforesaid view gets strengthened from the manner in which the Legislature itself acted. **Realising that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service. Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax.** Though, ….wherein it was observed as under :"*

[Emphasis Supplied]

Thus, in light of above decision, I find that the charges collected by the appellant towards electricity cost/expenses,for the period prior to 14.05.2015, shall not form part of the taxable value. Therefore, I find that the demand, interest & penalty to that extent are not legally sustainable in view of the judgement of Hon'ble Supreme Court supra.

6.5 However, for the period subsequent to amendment made in definition of 'consideration' under Section 67 (i.e. after 14.05.2015), any reimbursable expenditure or costs incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service. Moreover, it is also noticed that the electricity expenses incurred by the appellant were not on behalf of the service recipient, as the bills raised by the electricity company were not in the name of the service recipient. Also, there is no contractual agreement with the recipient of service, to act a pure agent, to incur such cost in the course of providing taxable service, thus, the criterion prescribed for pure agent, under Rule 5(2) of the Service tax Valuation Rules, 2006, is not fulfilled by the appellant. Thus, in terms of Section 67 of the F.A., 1944 and Rule 5(1) of valuation Rules, 2006, all reimbursable expenses incurred by the appellant shall be included in the gross value, charged for the taxable service. Accordingly, I find that the demand for the period subsequent to 14.05.2015, shall sustain on above grounds.

6.6 I have gone through the judgments relied upon by the appellant, in support of their contention against the demand of Service Tax on the reimbursement of electricity burning expenses. I find that the said judgments are pertaining to the demand of Service Tax for the period prior to negative list regime. It is pertinent to mention that after introduction of negative list of services regime, the scope of leviability of Service Tax and the inclusion of expenditures under the definition of consideration (w.e.f. 14.05.2015) has been widened extensively. Further, it is observed that the appellant in the present case has neither contended nor produced any supporting evidences that they had recovered cost on actual consumption basis only. It is also undisputed fact that the appellant does not have requisite license to sell electricity under the Electricity Act, 2003 and hence, they cannot claim to have sold the electricity as a 'goods'. I also find that the judgment in case of Srijan Reality (P) Ltd, - 2019 (24) GSTL 169 (Cal.) issued by Hon'ble High Court of Calcutta would hold judicial precedence over the

judgments issued by different Tribunals on the similar issue, which have been relied upon by the appellant. Accordingly, I find that the judgments relied upon by the appellant would not be applicable to the facts of the present case.

7. Regarding the second issue, I find that the service tax amount of **Rs.70,03,176/-** was confirmed,asadvance income of Rs.4,93,29,151/- collected against bookings made by various service recipient which were subsequently adjusted against the final settlement of accounts, but were not reflected in the ST-3 returns. The appellant have sought deduction of deposits and other miscellaneous charges collected on Acqua Aerobics, Football/Cricket tournament, membership list sale, housie income, cancellation charges for lawn and hall etc., from the taxable value, claiming that the club and its members are same entity and there cannot be a service between a club and its members, as established in their own case before Hon'ble High Court of Gujarat. SCA-13654, 13655, 13656 of 2005 of Sports Club of Gujarat Ltd., Rajpath Club & Karnavati Club v/s U.O.I.

7.1 I have gone through the above judgment passed in the appellant's own case *reported at - 2010 (20) S.T.R. 144 (S.C.)].* Further, I find that the Hon'ble Apex Court, on similar issue in the case of State of West Bengal Vs Calcutta Sports-*2019 (29) G.S.T.L. 545 (S.C.),* upheld the principle of mutuality for a member's club and held that no transaction between incorporated members club and members can be taxed under the Finance Act, 1994. In light of above judgment and the judgments passed in the case of appellant - *2010 (20) S.T.R. 169 (Guj.)* and decision passed in the case of Sports Club of Gujarat Ltd. Vs UOI by Hon'ble High Court of Gujarat -*2013 (31) S.T.R. 645 (Guj.),* I find that the activities undertaken by the club, if provided to its members in any form, is not a service by one to another, in the light of the decisions referred above as crucial facts of existence of two legal entities in such transaction is missing. However, so far as the services provided by the club to other than members are concerned, the same would be taxable. The appellant has claimed that the miscellaneous charges were collected from their own members, however they have not produced any documentary evidence to substantiate this claim. Further, as the appellant also provided same services to clients, who are not their members, it becomes crucial to decide whether the advance collected were actually towards the services rendered to their own members or otherwise. The appellant have in appeal memorandum provided bifurcation of amounts of deposit and amount of receipts from members. These were not considered by adjudicating authority. Hence, it would be prudent that the same may be examined by adjudicating authority. I, therefore, remand the case back to the original adjudicating authority to re-examine this issue considering the aspects discussed above, and pass a speaking order after ascertaining correct factual position in the case and merits in the contentions of the appellant. The appellant is also directed to produce relevant documents before the adjudicating authority, justifying their above claim.

8. It is further observed that the demand of **Rs.75,246/-**was raised on the contention that the appellant had transferred the unutilized credit of Education Cess and Secondary High Education Cessand utilized the same for payment of Basic duty, which was in contravention to proviso (1) & (2) of Rule 3(7)(b) of the CCR, 2004. The adjudicating authority held that in terms of Notification No.22/2015-CE(NT) dated 29.10.2015, after 01.06.2015, Cess on input services were subsumed in the service tax, therefore credit of such Cess is not admissible.

8.1 I find that in terms of Notification No.22/2015-CE(NT) dated 29.10.2015, after 01.06.2015, the credit of cess paid on input service in respect of the invoice, bill, challan etc. received by the service provider on or after the 1st June, 2015, shall be available for utilization for payment of service tax on output service, as the cess got subsumed with service tax rate and it was not possible for the service providers to utilize such credit for payment of cess. However, the credit balance of Education cess and SHE cess available with the assessees as on 01.06.2015, in respect of the invoices received prior to 01.06.2015, shall lapse, if the same were not utilized for payment of cess though available. Therefore, unutilized credit of Rs.36,044/- & Rs.39,202/- transferred in basic credit, shown in ST-3 returns of October, 2015 to October,2016, is not admissible, as such credit pertained to the period prior to 01.06.2015, and not available for payment of basic duty, which I find was rightly denied. The argument that credit of Rs.75,246/- was reversed before issuance of SCN, is also factually incorrect as the adjudicating authority also made a specific observation that the credit reversed does not match with the SCN amount. In the absence of any documentary proof, I find that the demand sustains and found to be legal & proper. Further, the reliance placed on the decision of Hon'ble Karnataka High Court passed in the case of Shree Renuka Sugars Ltd. –(2014) 302 ELT 33 by the appellant is also misplaced, as there the issue dealt was that the sugar cess being a duty of excise and not a fee, assessee entitled to take Cenvat credit thereof. Whereas, in the instant case, I find that the issue is regarding utilization of Education Cess and Secondary High Education Cess credit for payment of basic duty, in terms of Rule 3(7)(b) of the CCR, 2004. I also find that Hon'ble CESTAT, Ahmedabad in the case of Fieldman Engineers Pvt. Ltd. - 2018 (363) E.L.T. 1067 (Tri. - Ahmd.), rejected the appeal covering similar issue as of the present appeal. Hence, I find that the contentions of appellant are not legally sustainable.

9. The service tax demand of **Rs.48,497/-** onlegal charges was raised as on reconciliation of the amounts shown as paid to Advocates from their ledgers vis-a vis their ST-3 returns filed, short payment was noticed. This fact is, however, denied by the appellant but they have not placed any concrete evidence before me to substantiate their denial, hence not acceptable. I find that, in terms of Notification No.30/2012-ST dated 20.06.2012, the service tax liability on the appellant under reverse charge was 100%. The appellant has accepted the quantification made in SCN, except for F.Y. 2013-14, and have arrived at liability of Rs. 31,749/-, which they have paid. However, they have not provided any evidence in support of their claim of no tax under this head for F.Y. 2013-14. They also argued that since payment of Rs.31,749/- was made

before issuance of SCN, interest & penalty is not imposable. I find that payment of Rs.31,749/-, made though before issuance of SCN, was at the instance of department, and it does not liberate them from the liability to pay interest & penalty, on the entire confirmed demand of Rs.48,497/-. Therefore, the demand of service tax of Rs.48,497/-, alongwith interest, is justifiable & legally sustainable.

10. Further, the CENVAT credit of **Rs.11,05,749/-**of tax paid on the input services *(like decoration, photography, video recording, band service, stage light, sound system, event management services*) was rejected, as they were utilized for organizing events (*like musical nights, fashion show, hasya darbar, dayro, drama etc*)which were exempted vide Sr.No. (47) of Notification No.06/2015-ST dated 01.03.2015. I find that once the output service is exempted, in terms of Rule 6(1) of the CCR, 2004, the CENVAT credit of input services used for rendering such exempted service is not admissible. The argument that credit reversed on monthly basis while filing refund should be treated as credit not availed, is also factually not correct, as at para-52 of the SCN and at para-87 of the impugned order, it is categorically mentioned that the disputed amount was not reversed by the appellant. Even otherwise, reversal of credit at the time of claiming refund of the same amount cannot discharge them from the above tax liability, which arose, due to utilization of inadmissible Cenvat credit. The argument that demand is time barred, as SCN for similar period already issued in the case of refund, is also unreasonable, as notice proposing denial of CENVAT credit and notice proposing rejection of refund of said credit, are dealing with two different issues and has to be perceived & dealt differently. Hon'ble Supreme Court decision in the case of *Nizam Sugar Factory* - 2006 (197) E.L.T. 465 (S.C.) is not relevant in the facts of this case as in that case the department has issued the first show cause notice for normal period and thereafter have issued a second show cause notice alleging suppression, which is not so in the present case. In the present case, I find one SCN was issued for CENVAT denial while the other for rejecting refund of said credit. Hence, the credit has been rightly denied and is recoverable alongwith interest & penalty.

11. Further, I am not in agreement with the argument that in terms of Section 173 of the CGST Act, Chapter V of the Finance Act, 1994 was omitted, therefore, saving clause of Section 174(2) cannot be extended to service tax, hence the SCN is not maintainable. I find that the Hon'ble High Court of Gauhati has, in the case of Laxmi Narayan Sahu -2018 (19) GSTL 626 (Gau),passed judgement wherein the writ petition was dismissed.Hon'ble High Court has held that:

> *"33.A conjoint reading of the provisions laid down in paragraph 37 of Kolhapur Canesugar Works Ltd. (supra) and Sections 173 and 174(2)(e) would lead to a conclusion that although Chapter V of the Finance Act of 1994 stood omitted under Section 173, but the savings clause provided under Section 174(2)(e) will enable the continuation of the investigation, enquiry, verification etc., that were made/to be made under Chapter V of the Finance Act of 1994."*

12. From the discussion held above, it is clear that the appellant has intentionally suppressed the taxable value by purposely excluding the expenses incurred by them and showing them as reimbursable expenses. Further, they had intentionally

transferred and utilized inadmissible CENVAT credit of Education Cess and Secondary Higher Education Cess. They also suppressed the value of taxable services received by them in ST-3 returns vis-à-vis their financial ledgers, with an intent to evade taxes and willfully availed ineligible CENVAT credit of input service which they knew were to be used for provision of exempted services. All these acts of willful mis-statement and suppression of facts on the part of the appellant, with an intent to evade payment of Service Tax makes them liable to raise the demand against them invoking the extended period of limitation under proviso to Section 73(1) of the F.A, 1994. When the demand sustains there is no escape from the liability of interest, hence the same is, therefore, recoverable under Section 75 of the F.A., 1994.

13. Further, I find that the imposition of penalty under Section 78 is also sustainable, as the demands were raised based on detection noticed during scrutiny of records by audit. Section 78(1) of the Finance Act, 1994, provides penalty for suppressing the value of taxable services *'by reason of fraud or collusion'* or *'willful misstatement'* or *'suppression of facts'* with *'the intent to evade payment of service tax'.* Since the issues covered in the present appeal are on settled issues, the appellant cannot bring into play the interpretation plea to avoid penalty. It is the responsibility of the appellant to correctly assess their tax liability and pay the taxes. Collection of charges in excess of electricity expenses, availing of inadmissible credit of cess, availing inadmissible credit of input services used in rendering exempted services, non-payment of taxes on legal charges, definitely expose the willful mis-statement and suppression of fact on the part of the appellant, with an intent to evade taxes. Hence I find that the said act of willful mis-statement and suppression of facts with an intent to evade payment of tax, made the appellant liable to impose penalty on them under the provisions of Section 78 (1) of the Finance Act, 1994.

14. On careful consideration of the relevant legal provisions, judicial pronouncements and submission made by the appellant, I pass the Order as below:

(1) As regards the demand of Service Tax amounting to Rs. 77,62,689/- on reimbursement of electricity burning expenses:

(i) I set aside the impugned order to the extent of demand of Service Tax alongwith interest and penalty in respect of electricity cost/expenses recovered by the appellant prior to 14.05.2015, as discussed in Para 6.4 above.

(ii) I uphold the impugned order to the extent of demand of Service Tax confirmed alongwith interest and penalty, in respect of electricity cost/expenses recovered by the appellant for the period subsequent to 14.05.2015, as discussed in Para 6.5 above. Accordingly, I remand the matter back to the adjudicating authority, only for the purpose of re-quantification of the Service Tax leviable, for the period subsequent to 14.05.2015, alongwith penalty and interest leviable thereon.

(2) As regards the demand of Service Tax amounting to Rs. 70,03,176/- confirmed in respect of differential income of Rs. 4,93,29,151/- alongwith interest and penalty, I set aside the impugned order and remand the matter back to the adjudicating authority, to decide it afresh as discussed in Para-7.1 above, following the principles of natural justice. The appellant is also directed to produce the relevant documents before the adjudicating authority, in support of their contentions.

(3) As regards the CENVAT credit of Education Cess and Secondary Higher Education Cess amounting to Rs. 75,246/- disallowed and ordered to be recovered alongwith interest as well as imposition of penalty of Rs. 75,246/-, as discussed in Para-8.1 above, I uphold the impugned order and appeal filed by the appellant is rejected to that extent.

(4) As regards the demand of Service Tax amounting to Rs. 48,497/- confirmed in respect of legal charges alongwith interest and penalty, as discussed in Para-9 above, I uphold the impugned order and appeal filed by the appellant is rejected to that extent.

(5) As regards the CENVAT credit amounting to Rs. 11,05,749/- disallowed and ordered to recover alongwith interest as well as imposition of penalty of Rs. 11,05,749/-, as discussed in Para-10 above, I uphold the impugned order and appeal filed by the appellant is rejected to that extent.

15. अपीलकर्ताद्वारादर्जकीगईअपीलकानिपटाराउपरोक्ततरीकेसेकियाजाताहै।
The appeal filed by the appellant stand disposed off in above terms.

(अखिलेश कुमार)
आयुक्त (अपील्स)

Date: 31.3.2022

Attested

(M.P.Sisodiya)
Superintendent (Appeals)
CGST, Ahmedabad

By RPAD/SPEED POST

To,
M/s. Karnavati Club Ltd., - **Appellant**
Sarkhej-Gandhinagar Highway,
Ahmedabad-380058

The Additional Commissioner - **Respondent**
CGST, Ahmedabad North
Ahmedabad

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