


<b>केंद्रीय कर आयुक्त (अपील)</b>		
<b>O/O THE COMMISSIONER (APPEALS) CENTRAL TAX</b>		
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आम्बावाडी, अहमदाबाद-380015		
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क फाइल संख्या : File No : V2(ST)041/A-II/2017-18 / h025 to h029  
 ख अपील आदेश संख्या : Order-In-Appeal No.. AHM-EXCUS-001-APP-118-17-18  
 दिनांक Date : 24-10-2017 जारी करने की तारीख Date of Issue 27-11

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-Original No SD-02/49/AC/16-17 Dated 20.03.2017 Issued  
 by Assistant Commr STC, Service Tax, Ahmedabad

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

**M/s. Hotel Rock pvt ltd**  
**Ahmedabad**

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 :-

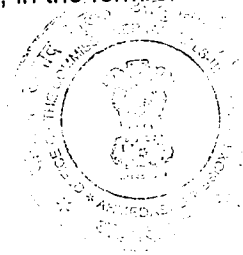
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-  
 Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मेंटल हास्पिटल 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 और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और 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 A219K केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए आदेश (OIO) की प्रति भेजनी होगी।

(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST-7 as prescribed under Rule 9 (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise (Appeals)(OIA)(one of which shall be a certified copy) and copy of the order passed by the Addl. / Joint or Dy. / Asstt. Commissioner or Superintendent of Central Excise & Service Tax (OIO) to apply to the Appellate Tribunal.

2. 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 (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1988 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है -

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

⇒ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन 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,

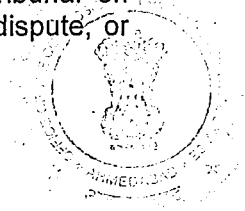
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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.

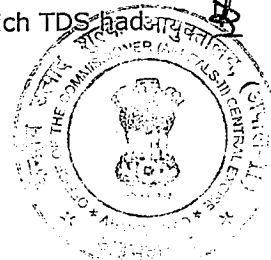


**ORDER-IN-APPEAL**

This appeal has been filed by M/s. Hotel Rock Pvt. Ltd., Opp Samartheshwar Mahadev, Law Garden, Ellisbridge, Ahmedabad (hereinafter referred to "as the appellants") against the Order-in-Original number SD-02/49/AC/2016-17 dated 20.03.2017 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner of Central Excise, Gandhinagar (hereinafter referred to as "the adjudicating authority").

2. Brief facts of the case are that the appellants are engaged in providing taxable services of 'Mandap Keeper' and are holding Service Tax registration number AAACH3879HST001. On the basis of third party data, an inquiry was conducted by the departmental officers, at the premises of the appellants. During inquiry and reconciliation of income, it was noticed that they had short paid Service Tax amounting to ₹ 5,08,603/-. During further investigation for the year 2010-11, it was revealed that they were providing services under 'Sale of Space or Time for Advertisement other than Print Media' and were not paying Service Tax on it. The Service Tax payable under that category, for the period 2010-11, was quantified to ₹ 3,29,944/-. Accordingly, a show cause notice, dated 27.12.2016, was issued to the appellants which was adjudicated by the adjudicating authority vide the impugned order. The adjudicating authority confirmed the demand of ₹ 8,38,547/- ( ₹ 5,08,603/- + ₹ 3,29,944/-) under Section 73 of the Finance Act, 1994. The adjudicating authority also ordered to recover interest on the above confirmed demand under Section 75 of the Finance Act, 1994. He further imposed penalty of ₹ 20,000/- ( ₹ 10,000/- + ₹ 10,000/-) under Section 77 and ₹ 8,38,547/- ( ₹ 5,08,603/- + ₹ 3,29,944/-) under Section 78 of the Finance Act, 1994.

3. Being aggrieved, the appellants have filed the present appeal on the ground that they have availed abatement @ 40% on the services of mandap keeper service as per exemption Notification number 01/2006 and paid Service Tax on the remaining 60% as applicable for the FY 2010-11 and FY 2011-12. They had not availed credit on inputs and had availed and utilized credit on input service of ₹ 1,02,014/- while paying Service Tax inadvertently for the FY 2010-11 and 2011-12. They had reversed the said credit on input service along with interest. They have submitted a revised calculation after taking abatement benefit which, they said; they are willing to pay during adjudication process. Regarding the Service Tax amount on hoarding income, the appellants informed that they have recalculated the Service Tax and concluded that they were supposed to pay ₹ 2,99,134/- instead of ₹ 3,29,944/-. They paid the amount of ₹ 2,99,134/- as Service Tax payable on the service of Sale of Space or Time for Advertisement other than Print Media vide challan number 51039 dated 25.01.2017. They alleged that the adjudicating authority did not consider their revised calculation and the CENVAT credit reversal by them has also been overlooked. Regarding imposition of penalty under Section 78 of the Finance Act, 1994, the appellants quoted that their intention was not mala fide and they were under the impression that hoarding income was not taxable. Further, they have shown all their transactions in their financial statements on which TDS had been deducted as per Income Tax provisions.



4. A personal hearing in the matter was held on 11.10.2017 and Shri Tapan Choksi, Chartered Accountant, appeared for the same and reiterated the grounds of appeal.

5. I have carefully gone through the facts of the case on records, appeal memorandum and oral submissions made by the appellants at the time of personal hearing. I find that the appellants had failed to pay Service Tax amounting to ₹ 5,08,603/- on Mandap Keeper, Restaurant Service and Room Accommodation Service and ₹ 3,29,944/- on the service of Sale of Space or Time for Advertisement other than Print Media. Going through the contents of the show cause notice and the impugned order, I come to the conclusion that the appellants were very much aware of the fact and the modus operandi adopted by the appellants was a well thought plan on the part of the appellants. They are simply trying to come clean by quoting that they had availed input service credit inadvertently and did not pay Service Tax on hoarding income as they were not aware that the said service is liable for Service Tax. The appellants pleaded before me that they had reversed the CENVAT credit on input service and paid Service Tax on the service of Sale of Space or Time for Advertisement other than Print Media as per their own revised calculation. I find that the revised calculation has no relation with the one calculated during the period of verification undertaken by the departmental officers. In the impugned order, the adjudicating authority has cited the incidence of payment by the appellants, in the paragraph 17 only where details of personal hearing are mentioned. This shows that the argument of the appellants is unfounded and has no relevance at all. I find that the appellants are simply trying to beat behind the bush with intention to perplex the department. In view of the above, I find that the adjudicating authority has rightly confirmed the demand of ₹ 8,38,547/- (₹ 5,08,603/- + ₹ 3,29,944/-) under Section 73 of the Finance Act, 1994 and ordered interest under Section 75 and imposed penalty under Sections 77 and 78 of the Finance Act, 1994.

6. Now comes the issue of the plea of the appellants that penalty under Section 78 should not be imposed on them as they were under the impression that the hoarding income is not taxable and moreover, as they have shown all their transactions in their books of account, there is no suppression of facts involved. Section 78 of the Finance Act, 1994, is used to levy penalty when Service Tax has been not levied or not paid or short levied or short paid or erroneously refunded **with the intention** of evading payment of Service Tax due to following reasons (hereinafter referred as Service Tax evasion with **malafide intention**):

- fraud; or
- collusion; or
- willful mis-statement; or
- suppression of facts; or
- contravention of any provisions or rules.

Therefore, if the Service Tax is evaded with any malafide intention then section 78 is applicable. Now looking to the structure of the case, I come to the conclusion that the intentions of the appellants were malafide as they were well aware of the facts, circumstances. Further, regarding their argument that no suppression can be invoked as they have clearly indicated in TDS certificates, Income Tax returns and other financial statements; I would like to quote the judgement of Hon'ble CESTAT,

Mumbai in the case of M/s. Daichi Karkaria Ltd. vs. CCE, Pune-I where the Hon'ble CESTAT, Mumbai proclaimed that *"....if some information is available in various reports and returns which are to be formulated in compliance to other statutes, it does not lead to a conclusion that the utilization of credit for the activity of renting is known to the Department. The Department is not supposed to know each and every declaration made outside the Central Excise and Service Tax law. Even if the Financial Report is available to the audit, the same is meaningless in the sense that it does not indicate that input Service Tax credit utilized to pay the tax liability on such renting of property. The appellant's argument on limitation is rejected."*

7. Accordingly, as per the above discussion, I do not find any reason to interfere with the impugned order and reject the appeal filed by the appellants.

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

8. The appeals filed by the appellants stand disposed off in above terms.

*उमा शंकर*

(उमा शंकर)

CENTRAL TAX (Appeals),

AHMEDABAD.

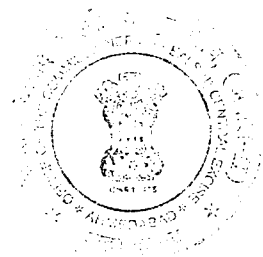
ATTESTED

*S. Dutta*  
(S. DUTTA)

SUPERINTENDENT,

CENTRAL TAX (APPEALS),

AHMEDABAD.



**BY R.P.A.D**

To,  
M/s. Hotel Rock Pvt. Ltd.,  
Opp Samartheshwar Mahadev,  
Law Garden, Ellisbridge,  
Ahmedabad-380 006.

**Copy to:-**

1. The Chief Commissioner, Central Tax Zone, Ahmedabad.
2. The Commissioner, Central Tax, Ahmedabad (South).
3. The Dy. / Asstt. Commissioner, Central Tax, Division- VI (Vastrapur).
4. The Addl./Joint Commissioner, (Systems), Central Tax, Ahmedabad (South).
- ~~5.~~ Guard file.
6. P.A file.

