

केंद्रीय कर आयुक्त (अपील)	
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,	
केंद्रीय कर शुल्क भवन, सातवीं मंजिल पॉलिटेक्निक के पास, आम्बावाडी, अहमदाबाद-380015	Floor: Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015
079-26305065	टेलीफैक्स: 079-26305136

क फाइल संख्या : File No : **V2(ST)0298/A-II/2016-17** / 10021 to 10025
 ख अपील आदेश संख्या : Order-In-Appeal No. **AHM-EXCUS-001-APP-126-17-18**
 दिनांक Date **27-10-2017** जारी करने की तारीख Date of Issue **23-11-17**

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals)

ग Arising out of Order-in-Original No **STC/Ref/182/Regency/KMM/AC/Div-III/16-17**
 Dated **28.02.2017** Issued by Assistant Commr **STC**, Service Tax, Ahmedabad

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

M/s. Regency Plaza Estate Management
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 :-

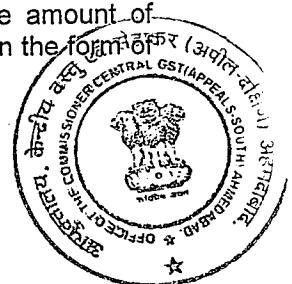
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
 Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैनटल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad - 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी.- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompany ed by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of



crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.

(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.-7 में, की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (OIA) (उसमें से प्रमाणित प्रति होगी) और अपर आयुक्त, सहायक / उप आयुक्त अथवा 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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 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,

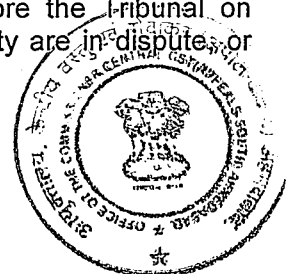
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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.

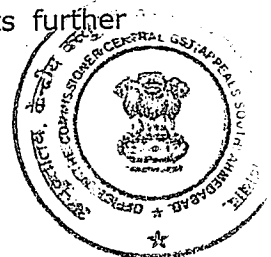


ORDER IN APPEAL

M/s. Regency Plaza Estate Management, 801/802, Anand Nagar Cross Road, Satellite, Ahmedabad (*hereinafter referred to as 'the appellants'*) have filed the present appeals against the Order-in-Original number STC/Ref/182/Regency/K.M.Mohadikar/AC/D-III/16-17 dated 28.02.2017 (*hereinafter referred to as 'impugned order'*) passed by the then Assistant Commissioner, Service Tax, Division-III, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*);

2. The facts of the case, in brief, are that the appellants are registered with the Service Tax department under the categories of "Club and Association Services, Manpower Recruitment/Supply Agency Service and Security/Detective Agency Service" for which they are holding valid registration number AAECR2176BSD001. The appellants filed a claim of refund on 16.06.2016, before the adjudicating authority, amounting to ₹ 52,784/- paid by them towards Club & Association Services during the period October 2015 to March 2016. On scrutiny of the claim certain discrepancies were noticed and accordingly a show cause notice dated 23.11.2016 was issued to the appellants, which was adjudicated by the adjudicating authority. The adjudicating authority, vide the impugned order, rejected the entire amount of ₹ 52,784/- on the ground that the period concerned is out of preview of the order of Hon'ble High Court of Gujarat and therefore not applicable to the case.

3. Being aggrieved with the impugned orders the appellants have preferred the present appeal. The appellants have submitted that the explanation under erstwhile Section 65, as applicable up to 30.06.2012 and the explanation 3(a) under Section 65B(44) as applicable with effect from 01.07.2012 are same in nature and hence, insertion of Explanation 3(a) did not make any difference. Since, the legal position up to 30.06.2012 and with effect from 01.07.2012 is the same, the judgment of Hon'ble Gujarat High Court in the case of Sports Club of Gujarat Ltd. vs The Union of India is equally applicable for the period post 01.07.2012. The appellants further



argued that they are incorporated as company and not an unincorporated association and therefore, no Service Tax is liable to be paid by them and hence, they are eligible for the refund claim. They further claimed that as per principle of mutuality, club and its members are one and the same. Thus, principle of unjust enrichment is also not applicable to their case.

4. Personal hearing in the matter was granted and held on 06.10.2017. Shri Bishen Shah, Chartered Accountant, appeared before me and reiterated the contents of appeal memo in terms of the concept of mutuality in terms of the order of the Hon'ble Gujarat High Court. He also informed that the appellants are an incorporated association.

5. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellants at the time of personal hearing.

6. To start with, I find that the adjudicating authority has rejected the claim on the ground that under Section 65, the appellants were providing taxable service to the members and hence, they were not eligible for the refund. In view of this, I find that the Hon'ble High Court of Gujarat vide its judgment dated 25.03.2013 allowed the petition declaring Section 65(25A), Section 65(105)(zzze) and Section 66 of the Finance Act, 1994 as amended by the Finance Act, 2005 to the extent providing levy of Service Tax in respect of the services provided by the club to its members as *ultra virus*, i.e. beyond the powers and therefore, not legal, upholding the principle of mutuality. I agree with the view of the adjudicating authority that the case dealt by the Hon'ble High Court of Gujarat was for the period prior to 01.07.2012. I find that the Hon'ble High Court of Gujarat, in its judgment dated 25.03.2013, has not taken into consideration the amendments made in the Act (w.e.f. 01.07.2012). In the new system, the word 'service' has been defined under Section 65B(44) of the Finance Act, 1994 which is printed as below;



"(44) 'service' means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include;

(a) an activity which constitutes merely:-

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ia) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(ii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

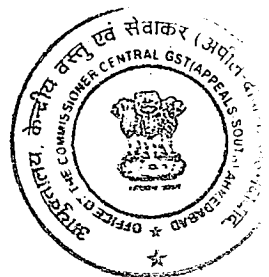
© fees taken in any court or tribunal established under any law for the time being in force.

Explanation 1 for removal of doubts, it is hereby declared that nothing contained in this clause shall apply to;

A. The functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or

B. the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

C. the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.



Explanation 2— this clause, the expression "transaction in money or actionable claim" shall not include—

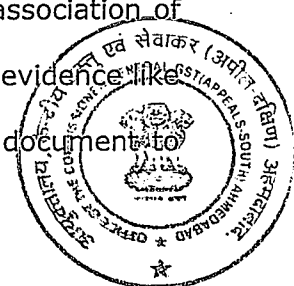
- i. Any activity relating to use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;*
- ii. Any activity carried out, for consideration, about, or for facilitation of, a transaction in money or actionable claim, including the activity carried out—*
 - By a lottery distributor or selling agent on behalf of the State Government, about promotion, marketing, organising, selling of lottery or facilitating in the organising lottery of any kind, in any other manner, by the provisions of the Lotteries (Regulation) Act, 1998 (17 of 1998);*
 - by a foreman of chit fund for conducting or organising a chit in any manner.*

Explanation 3. – For the purpose of this chapter, -

- a. An unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;*
- b. An establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons”.*

In view of the above, it is quite clear that unincorporated association or a body of persons and a member are to be treated as distinct entity. In the instant case, in their grounds of appeal, the appellants have claimed that they are incorporated as company and not an unincorporated association of persons. However, they have failed to submit any documentary evidence like Memorandum and Articles of Association all any other related documents to

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establish the fact that they are incorporated as company. Mere verbal quotes are fruitless unless they are supported by any documentary evidence. Thus, I agree with the adjudicating authority that the principle of mutuality bears no significance in the context of taxable service provided by clubs and association as the same has been legally overcome by the new adjustment of law.

Further, in the case of Sports Club of India, the Hon'ble Gujarat High Court held the taxability of services by club to its members is *ultra vires*. It relied on the decision of the Calcutta High Court in the case of Saturday Club Ltd., wherein it was held that in a members' club, any transaction between the club and its members cannot be regarded as service. Now, this is all the things of past as the specific provisions override the principle of mutuality providing that the entity having separate legal existence considered as Separate person. Under the Finance Act, the explanation to section 65B (44) provides a deeming fiction that an unincorporated association or a body of persons ("BOP"), as the case may be, and a member thereof shall be treated as distinct persons and since the concept of mutuality has been done away with the deeming fiction, collections from members become liable for Service Tax if they are in the nature of any activity carried out by a club for its members. Thus, the explanation to 65B(44) needed to be added to make it amply clear that even if unincorporated club has no separate legal existence but it will be counted as a distinct person from their members in Service Tax laws to attract Service Tax liability.

7. In view of the above, I hold that as the appellants have correctly paid the Service Tax against 'Club or Associated Services' during the period 01.10.2015 to 31.03.2016 (leviable after the introduction of the Negative List w.e.f. 01.07.2012), and the adjudicating authority has rightly rejected the refund claimed by the appellants.

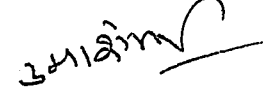
8. Accordingly, as per the above discussion, I do not find any reason to interfere in the impugned order and reject the appeal filed by the appellants.

9. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता





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


(उमा शंकर)

CENTRAL TAX (Appeals),

AHMEDABAD.

ATTESTED


(S. DUTTA)

SUPERINTENDENT,

CENTRAL TAX (APPEALS),

AHMEDABAD.

To, .

M/s. Regency Plaza Estate Management,
801/802, Anand Nagar Cross Road, Satellite,
Ahmedabad.

Copy to:

- 1) The Chief Commissioner, Central Tax, Ahmedabad Zone.
- 2) The Commissioner, Central Tax, Ahmedabad (South).
- 3) The Dy./Asst. Commissioner, Central Tax, Division-VII (Satellite),
Ahmedabad (South).
- 4) The Asst. Commissioner (System), Central Tax Hq, Ahmedabad (South).
- 5) Guard File.
- 6) P. A. File.

