केंद्रीय कर आयुक्त (अपील)
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
सत्यमेव जयते केंद्रीय कर शुल्कभवन, 7th Floor, Central Excise Building,
सातवीं मंजिल,पोलिटेकनिक के पास, Near Polytechnic,
आम्बावाडी अहमदाबाद-380015 Ambavadi, Ahmedabad-380015
079-26305065 टेलेफैक्स : 079 - 26305136

क फाइल संख्या : File No : **V2(ST)0253/A-II/2016-17** /10413 to 10417

ख अपील आदेश संख्या : Order-In-Appeal No..**AHM-EXCUS-001-APP-179-17-18**

दिनाँक Date :21-11-2017 जारी करने की तारीख Date of Issue 06-12-17

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

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

ग Arising out of Order-in-Original No **SD-02/24/AC/16-17** Dated **30.11.2016** **Issued by Assistant Commr STC,** Service Tax, Ahmedabad

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

M/s. Sunit SudhirBhai Choksi

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 मैन्टल हास्पिटल कम्पाउण्ड, मेधाणी 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 विरूद्ध 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 वहां 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 वहां 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 A2l9k 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 को शर्तो पर अनुसूची–1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रू 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 वर्णित 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, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ 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 अर्ज़ी एवं अपील को लागू नहीं होगे।

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,

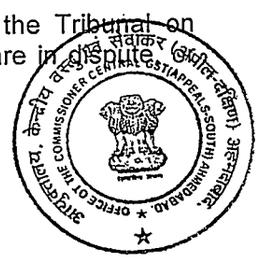
Under Central Excise and Service Tax, "Duty demanded" shall include:

(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. Sunit Sudhirbhai Choksi, Sona Rupa Apartments, 62, Opp. Lal Bungalow, C G Road, Ahmedabad [for short – '*the appellant*'] has filed this appeal against OIO No. SD-02/24/AC/2016-17 dated 30.11.2016 passed by the Assistant Commissioner, Division II, Service Tax, Ahmedabad Commissionerate[for short –'adjudicating authority'].

2. Briefly the facts are that during the course of audit of the appellant, it was observed that they had wrongly availed CENVAT credit of Rs. 87,251/- in the financial years 2013-14 and 2014-15, on *outdoor catering services* rendered by M/s. Havmor Restaurant and M/s. Somani Caterers. Consequently, a show cause notice dated 6.6.2016, was issued to the appellant *inter-alia* proposing recovery of the wrongly availed CENVAT credit along with interest. The show cause notice further proposed penalty on the appellant.

3. This notice was adjudicated vide the aforementioned OIO dated 30.11.2016 wherein the adjudicating authority confirmed the demand of the wrongly availed CENVAT credit along with interest and further imposed penalty on the appellant under sections 76 and 78 of the Finance Act, 1994.

4. Feeling aggrieved the appellant has filed this appeal, raising the following contentions:

- that they were providing the services of construction of residential complex and had availed outdoor catering services for the event held at their project launch which is a part of the marketing and promotion; that the past and prospective customers were invited to boost the booking for the project; that the outdoor catering services is related to the output services and axiomatic nexus is prevalent between the input services and output services;
- that the outdoor catering services were availed for business promotion and marketing of the project; that advertisement and sales promotion activity shall form a part of input services;
- that such expenses incurred on catering is one-time expense and is in the nature of sales promotion/advertising of the product;
- that as per clause(ii) of the definition of input services, it is clearly mentioned that advertisement and business promotion activity falls under the definition of input services;
- that they would like to refer to the case of M/s. Monarch Catalyst P Ltd[2016(9) TMI 286-CESTAT MUM], Ultratech Cement Limited [2015(11)TMI 607-CESTAT New Delhi], IBM India Limited [2014(10) TMI 452];
- that since the event management service was rendered for their customers and employees for sales promotion, the CENVAT credit cannot be denied;
- that since the appellant is not liable to reverse the credit availed there is no question for imposing penalty and interest on the appellant;
- that if the department seeks to invoke the extended period on grounds other than those mentioned in the statute, then such invocation is bad in law;
- that the appellant had a bonafide belief that CENVAT credit of service tax paid on outdoor catering service can be availed by the appellant , therefore taking into account the provisions of Section 80 no penalty is leviable under sections 77 and 78 of the Finance Act, 1994.

5. Personal hearing in the case was held on 1.11.2017. Ms. Nisha Vora, CA, appeared on behalf of the appellant and reiterated the grounds of appeal; that an additional submission would be submitted within seven days. However, no further submission was received till date.

6. I have gone through the facts of the case, the grounds of appeal and the oral contentions raised during the course of hearing. The issue to be decided is whether the appellant is eligible for input service credit on outdoor catering services.

6.1. I find that the adjudicating authority has denied the credit on outdoor catering services on the following grounds:

- the said appellant has wrongly availed CENVAT credit paid on catering service as input service for their output service *construction of residential complex service* during the period from 2013-14 to 2014-15;
- that the services rendered by the caterers was not thir input service for providing construction services;
- that for any service to qualify as input service, it must be used for providing output service and there must be some nexus between the input service and output service which appeared non-existant in the present case, hence the CENVAT credit taken on catering service was not admissible to them;
- that the appellant has not produced any documentary evidence to substantiate their claim that the CENVAT credit availed by them on the input service of outdoor catering and restaurant has any relation with their output service.

I find that the adjudicating authority has quoted the definition of input service as defined under Rule 2(l) of CENVAT Credit Rules, 2004, and hence I do not wish to reproduce the same. The appellant's contention is that they had availed outdoor catering services for the event held at their project launch and hence it is a part of the marketing and promotion; that the past and prospective customers were invited to boost the booking for their project.

7. When a caterer provides services in connection with catering at a place other than his own but including a place provided by way of tenancy or by a person receiving such service, then such service is very well within the ambit of "*outdoor catering service*". I find that the disputed input service viz. outdoor catering service, is excluded from the definition of input service. The exclusion clause was effective w.e.f. 1-4-2011 and Clause (C) of the said exclusion specifically excludes the services provided in relation to outdoor catering, when such services are used primarily for personal use or consumption of any employee. In the instant case, the said services are used by the appellant for inauguration of their project. However, no proof has been submitted either to the adjudicating authority or with this appeal papers to substantiate this claim. In the circumstances, the said service is very well covered in the exclusion part. The appellant has relied on the decision of Hon'ble High Court of Gujarat in case of M/s. Monarch Catalyst P Ltd [2016(9) TMI 286-CESTAT MUM], Ultratech Cement Limited [2015(11)TMI 607-CESTAT New Delhi]. The adjudicating authority has already dealt with the same and I agree with the findings of the adjudicating authority in this regard. As far as the reliance of the appellant on the case of M/s. IBM India Limited [2014(10) TMI 452], is concerned, the head notes of the said case as mentioned in EXCUS [2014 (35) S.T.R. 384 (Tri. - Bang.)] states as follows

Cenvat credit of Service Tax - Input Service - Outdoor Catering services - Eligibility - Credit denied on the ground that services not covered under 'outdoor catering services' - *HELD* Reclassification of service to be considered at receiving end - Whether services covered under definition of input service is required to be considered - Services were received for business and

sales promotion - Hence, credit cannot be denied - Rules 2 and 3 of Cenvat Credit Rules, 2004. *[para 2]*

But, I find that the re-classification of the service as held by the Hon'ble Tribunal, cannot be done without any proof being submitted to substantiate the contention. The appellant has I find, not submitted any proof to substantiate his claim. Therefore, I do not find the appellant's reliance on the said case law to be tenable.

8. Even otherwise, in cases where, the definition of *input services*, have been amended to exclude such services, such exclusion on 01.04.2011 was conscious decision on part of the legislature having knowledge of earlier judicial decisions on such subject, yet it chose to exclude these items from the definition of input service and wisdom of the legislature cannot be questioned in the guise of interpretation or hardship. Moreover, the interpretation cannot add words to the definition, where definition is unambiguous and crystal clear. The Hon'ble High Court of Bombay in the case of Nicholas Piramal (India) Limited [2009 (244) ELT 321 (Bom)], has on the question of Interpretation of Rules, made the following observation:

- *We may only mention that hardship cannot result in giving a go-by to the language of the rule and making the rule superfluous. In such a case it is for the assessee to represent to the rule making authority pointing out the defects if any. Courts cannot in the guise of interpretation take upon themselves the task of taking over legislative function of the rule making authorities. In our constitutional scheme that is reserved to the legislature or the delegate.*
- *Hardship or breaking down of the rule even if it happens in some cases by itself does not make the rule bad unless the rule itself cannot be made operative. At the highest it would be a matter requiring reconsideration by the delegate.*
- *It is never possible for the Legislature to conceive every possible difficulty. As noted a provision or a rule can occasion hardship to a few, that cannot result in the rule being considered as absurd or manifestly unjust.*
- *In our opinion, the rule must ordinarily be read in its literal sense unless it gives rise to an ambiguity or absurd results.*

I find that the Hon'ble Tribunal had pronounced eligibility of CENVAT credit on various items, before 2011. Despite the Legislature being aware of these judgments/decisions, yet it chose to restrict the credit by changing the definition in 2011, by excluding certain services and inputs. Hon'ble Supreme Court has very categorically stated "Courts cannot add words to a statute or read words into it which are not there". (Parmeshwaran Subramani [2009 (242) ELT 162 (SC)]. Moreover, in the guise of interpretation, no intention can be added, when intention of legislature is very clear. In view of the foregoing, I agree with the view taken by the adjudicating authority that the CENVAT credit was wrongly availed by the appellant as far as the issue is concerned.

9. Further, I find that in case of M/s AET Labaroatory Pvt Ltd [2016-42-STR-720 Tri, Ban], the Hon'ble Tribunal has held that:

> "The exclusion clause was effective w.e.f. 1-4-2011 and Clause (C) of the said exclusion specifically excludes the services provided in relation to outdoor catering and health insurance or life insurance, etc. Admittedly such services, prior to 1-4-2011, have been held to be covered by the definition of input services. In fact, the need for exclusion would arise only when the services are otherwise covered by the definition. Legislation, in its wisdom, has excluded certain services from the availment of Cenvat credit w.e.f. 1-4-2011, when such services are otherwise covered by the main definition clause of input service. To interpret the said exclusion clause, in such a manner, so as to hold that such services have direct or indirect nexus with the assessee's business

and thus would be covered by the definition, would amount to defeat the legislative intent. It is well settled that the legislative intent cannot be defeated by adopting an interpretation which is clearly against such intent. As such, I find no justifiable reason to allow the credit in respect of the two disputed services and I uphold the confirmation of denial of Cenvat credit and demand of interest thereon."

10. In view of the foregoing, I am of the considered view that the appellant is not eligible for availing CENVAT credit on service tax paid on outdoor catering service. In the circumstance, the same is required to be recovered with interest. The appellant has contended that extended period is not invocable. I do not find any merit in the contention, because had the audit not pointed out the wrong availment, it would never have seen the light of day. I therefore, find this to be fit case for invocation of extended period.

11. As regards the penalty, looking into the facts of the case, I do not find any merit to interfere with the findings of the adjudicating authority in the impugned order. Hence, the penalty imposed is upheld.

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

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

उमा शंकर

(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date : 21.11.2017 ~~10.2017~~

Attested

(Vinod Lukose)
Superintendent,
Central Tax(Appeals),
Ahmedabad.

By RPAD.

To,
M/s. Sunit Sudhirbhai Choksi,
Sona Rupa Apartments,
62, Opp. Lal Bungalow,
C G Road,
Ahmedabad

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Principal Commissioner, Central Tax, Ahmedabad South Commissionerate.
3. The Deputy/Assistant Commissioner, Central Tax, Division VII, Ahmedabad South.
4. The Additional Commissioner, System, Central Tax, Ahmedabad South Commissionerate.
5. Guard File.
6. P.A.