



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
केंद्रीय कर शुल्कभवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015



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क फाइल संख्या : File No : V2(ST)0105/A-II/2017-18

ख अपील आदेश संख्या : Order-In-Appeal No. **AHM-EXCUS-001-APP-237-17-18**

दिनांक Date : 29-12-2017 जारी करने की तारीख Date of Issue 16-1-2018

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-Original No SD-02/Ref-20/VIP/2017-18 Dated 15.05.2017

Issued by Assistant Commr STC, Service Tax, Ahmedabad

ध अपीलकर्ता का नाम एवं पता

Name & Address of The Appellants

M/s. Rajpath Club Limited

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 :-

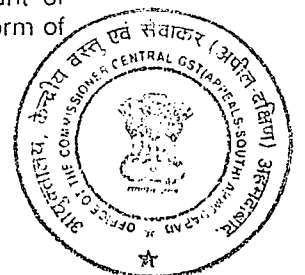
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मेन्टल 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 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 वहा 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 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 प्रांत 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 मामला का 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, 1984 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) 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 रुपए 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 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,

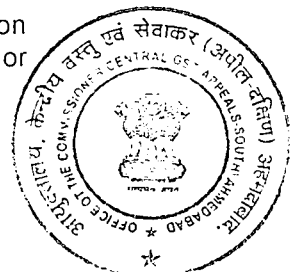
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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 ::

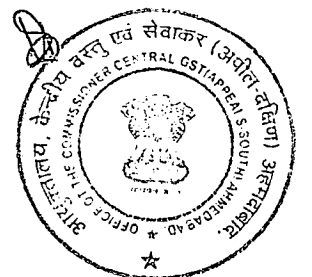
M/s. Rajpath Club Ltd., S. G. Road, Ahmedabad (*hereinafter referred to as 'appellants'*) have filed the present appeal against the Order-in-Original No. SD-02/Ref-20/VIP/2017-18 dated 15.05.2017 (*hereinafter referred to as 'impugned order'*) by the then Assistant Commissioner, Service Tax, Div-II, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*).

2. Briefly stated the facts of the case are that the appellants had filed a refund claim for ₹20,46,47,216/- on 21.02.2017 for the period 01.04.2016 to 30.09.2016. They are holding Service Tax registration number AAACR7379AST001 under the category of Club or Association Service, Security Detection Agency Service, Manpower Recruitment/ Supply Agency Service, Works Contract Service, Outdoor Catering Service and other taxable services – other than the 119 listed.

3. On scrutiny of the claim certain discrepancies were noticed and accordingly a show cause notice dated 13.04.2016 was issued to the appellants, which was adjudicated by the adjudicating authority. The adjudicating authority, vide the impugned order, rejected the entire amount of ₹20,46,47,216/- on the ground that the appellants are not incorporated under Companies Act, 2013 as they are not having share capital and not having the Certificate of Commencement required under Section 149 of the Companies Act, 1956. Also, the period concerned is out of preview of the order of Hon'ble High Court of Gujarat and therefore not applicable to the case.

4. Being aggrieved with the impugned order, the appellants preferred the present appeal. They stated that the appellant club is a member's club without any shareholders and makes available facilities exclusively for its members. The appellant club is a mutual undertaking and does not carry out any trade or business and therefore, the club and the members are the same entity. They further claimed that the appellant club is incorporated as company and is not an unincorporated association. They are incorporated under the Companies Act, 1956 as a company limited by guarantee. The company that is limited by shares are required to obtain the Certificate of Commencement under Section 149 of the Companies Act, 1956. In view of the above, they have pleaded before me to drop the impugned order to sanction the refund amount of ₹20,46,47,216/-.

5. Personal hearing in the case was granted on 20.12.2017 wherein Shri Bishan R. Shah, on behalf of the said appellants, appeared before me and reiterated the contention of their submission.



6. To start with, I find that the adjudicating authority has rejected the claim on the ground that the appellants are not incorporated under Companies Act, 2013 as they are not having share capital and not having the Certificate of Commencement required under Section 149 of the Companies Act, 1956. The adjudicating authority also quoted that as under Section 65, the appellants were providing taxable service to the members 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

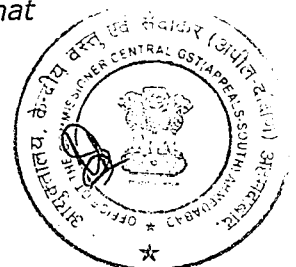
(ii) a transaction in money or actionable claim;

(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.

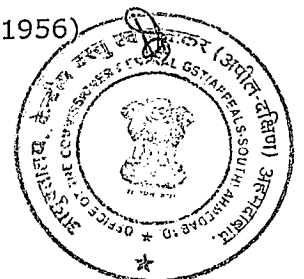
Explanation 2— this clause, the expression "transaction in money or actionable claim" shall not include—

- 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. In support of their claim, the appellants have submitted before me a copy of the Memorandum of Association and Articles of Association. I found that the said appellants are incorporated under the Companies Act, 1956 (No. 1 of 1956)



and their Certification of Incorporation number is 2446/1973-74. Thus, in view of the above, it is quite clear that the appellants are incorporated entity and the principles of mutuality are very much applicable to them.

7. Further, regarding the issue that the appellants are not incorporated under Companies Act, 2013 as they are not having share capital and not having the Certificate of Commencement required under Section 149 of the Companies Act, 1956, it is a fact that a Public and Private Limited company, having share capital, cannot commence business until it has obtained the certificate of commencement of business (COB) from the concerned Registrar of Companies. However, under the erstwhile Companies Act, 1956, a private company could start its business immediately upon receiving certificate of incorporation. Private companies were not required to obtain a certificate of commencement of business from concerned Registrar of Companies under section 149 of Companies Act, 1956. As per section 11 of Companies Act, 2013, now all newly incorporated Public and Private Companies having Share Capital would be required to obtain certificate of commencement of business from concerned Registrar of Companies before commencing the business or exercise of borrowing powers. Rajpath Club Limited was registered at Registrar of Companies Ahmedabad on 14 December, 1973 and is categorised as Company Limited by Guarantee and a Guarantee and Association company. Rajpath Club Limited's Corporate Identification Number (CIN) is U92410GJ1973GAP002446 and Registration Number is 002446. Thus, it is quite clear that as the appellants were incorporated prior to the commencement of Companies Act, 2013, they are not required to obtain the Certificate of Commencement of Business. Further, the date of incorporation of a company may not be the date of commencement of business. A private company and a public limited company not having share capital are not required to comply with any other formalities and may commence its business activities immediately after obtaining the certificate of incorporation from the concerned Registrar of Companies. A private limited company, which has converted into public limited company, is also not required to obtain certificate of commencement of business.

8. 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. However, 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 society for its members. But, the point to be noticed here is that the explanation inserted uses the words unincorporated enterprise only. In paragraph 34 of the impugned order, the adjudicating authority has claimed that the appellants are not incorporated as they were neither having share capital nor having the certificate of commencement. I have already confirmed above that they have produced the certificate of incorporation before me and hence there is no denying that they are incorporated body and principles of mutuality will be applicable to them.

9. In view of the above, I hold that the appellants have correctly claimed that they are eligible for the refund under the principles of mutuality. In view of above, I set aside the impugned order with consequential relief to the appellants.

10. The appeal is hereby disposed off in terms of the discussion held above.

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

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

उमा शंकर

(उमा शंकर)

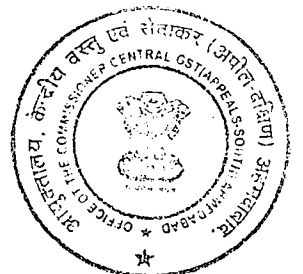
आयुक्त (अपील्स)

CENTRAL TAX, AHMEDABAD.

ATTESTED

(S. DUTTA)

SUPERINTENDENT (APPEAL),
CENTRAL TAX, AHMEDABAD.



BY R.P.A.D.

To,
M/s. Rajpath Club Ltd.,
S. G. Road,
Ahmedabad- 380 059.

Copy To:-

1. The Chief Commissioner, Central Tax, Ahmedabad zone, Ahmedabad.
2. The Commissioner, Central Tax, Ahmedabad (North).
3. The Deputy/Assistant Commissioner, Central Tax, Division-VI, S. G. Highway (West), Ahmedabad (North).
4. The Assistant Commissioner, System, Central Tax, Ahmedabad (North).
5. Guard File.
6. P.A. File.

