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

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)/54/Ahd-I/2017-18
Stay Appl.No. NA/2017-18

112740/131

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-318-2017-18
दिनांक Date : 12-02-2018 जारी करने की तारीख Date of Issue

20/2/2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. SD-01/07/AC/KK Nagar/2017-18 दिनांक: 19.05.2017 issued
by Assistant Commissioner, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
Kendriya Karamchari Nagar Cop[erative housing Society
Ahmedabad

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) केंद्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त 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 प्रक्रिया 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.

(b) 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.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

... 2 ...



(ख) 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 मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) 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.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) 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 ड्यूटी क्रेडिट 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।

(d) 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 दिनांक 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 रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- को 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 ओ-20, न्यू मेटल हॉस्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. 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. Registrar 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 आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पड़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

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 notwithstanding 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 अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.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 is 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 अपील के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। 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।

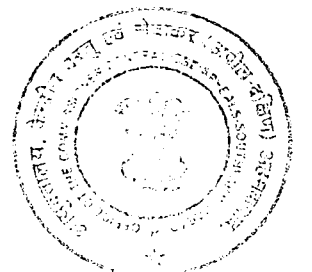
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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 मांग 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

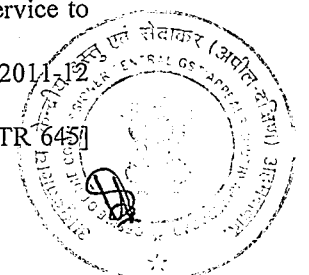
This appeal has been filed by M/s. Kendriya Karmachari Nagar Cooperative Housing Society, Near Rannapark, Ghatlodiya, Ahmedabad- 380 061 [for short – ‘appellant’] against OIO No. SD-01/07/AC/KKNagar/2017-18 dated 19.5.2017, passed by the Assistant Commissioner, Division I, Service Tax Commissionerate [for short – ‘adjudicating authority’].

2. Briefly, the facts are that a case was booked against the appellant and consequent to completion of investigation, a show cause notice dated 12.1.2017, was issued to the appellant *inter alia* alleging that though, the appellant had rendered Business Auxiliary Service and Renting of Immovable Property, he failed to discharge the service tax of Rs. 3,88,963/- for the period from 2011-12 to 2014-15. The notice therefore demanded the service tax not paid along with interest and further proposed penalty under sections 77(2) and 78 of the Finance Act, 1994 on the appellant.

3. This notice was adjudicated vide the aforementioned impugned OIO wherein the adjudicating authority confirmed the demand of Rs. 2,79,460/- pertaining to BAS along with interest and also imposed penalty under sections 77 and 78 of the Finance Act, 1994. The demand of Rs. 1,09,503/- was dropped by the adjudicating authority on the basis of principle of mutuality.

4. Feeling aggrieved, the appellart has filed this appeal raising the following averments:

- that the impugned OIO is not in accordance with the provisions of the Finance Act and is required to be quashed and set aside;
- that the appellant is a Cooperative Housing Society registered under the Gujarat Cooperative Society Act having registration no. G 6740 and is having its own constitution[bye law] as per the Cooperative Society Act;
- that as per the objects (No.2) the society’s land has to be plotted for constructing residential houses of the members as well as provisions were to be made for common plot, for the welfare of the residents;
- that the administration of the society is handled by the representatives elected from amongst members who are government servants; that for certain welfare activities, third parties assistance was taken but it does not mean that the society has conducted some business activities and earned profit out of such activities; that all the receipts are received from the members alone and therefore the collections are made for themselves to a common account and no second person exists; therefore mutuality terms are applicable in this case;
- that the worksheet clearly shows that the amount was received from the members only;
- that the appellant had sourced the services of decorator at times and the decorator collects the charges on behalf of the society and after deduction of the cost of service/supply, deposits the balance amount to the appellant; that this cannot be considered as commission received from the decorator; that these amounts were received from the members only; that since the representatives cannot always remain present, the collection was made on behalf of the society;
- that the appellant was not engaged in providing taxable service to any client or service by one to another in view of the mutuality;
- that in this transaction the existence of two different parties is missing it is purely a service to self;
- that the receipts produced clearly depict that in the accounts of the appellant for the year 2011-12 it was receipt from members only; that there was no motive for any profit;
- that they would like to rely on the case of The Sport Club of Gujarat Ltd [2013(31) STR 645] and Ranchi Club Ltd [2012(26) STR 401];
- that the provisions of BAS are not applicable to the appellant.



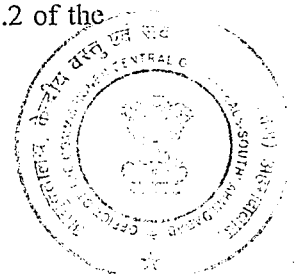
5. Personal hearing in the case was held on 2.2.2018 wherein Shri B R Parmar, Consultant, Shri P. G.Pillai, Vice Chairman and Shri K K Ninama, Secretary, appeared on behalf of the appellant. The Learned Consultant reiterated the grounds of appeal and pleaded mutuality of members and society and stated that this was akin to a 'club'. They submitted additional submissions and a copy of the registration certificate. On going through the additional submission, it is observed that the appellant has reiterated the grounds of appeal further highlighting the fact that all the receipts [on which service tax is demanded under BAS] were from the members of the appellant and therefore the collections were made for themselves to a common account and that no second persons exists; that the detailed worksheet indicated details of receipt of Rs. 27.31 lacs.

6. I have gone through the facts of the case, the grounds of appeal, the additional written submissions and the oral averments raised during the course of personal hearing. I find that the question to be decided is whether the appellant is liable to pay service tax on the amount reflected in the books of accounts as commission under business auxiliary services.

7. The show cause notice in para 2 states that M/s. New Ganesh Decoration had been allotted a contract for supply of vessel, mandap, light; that the decorators give 25% commission, collected from those who used the plots. The para further goes to state that the chairman of the appellant stated that they had taken help from mediators; that the society's materials were provided and wherever additional requirement was to be provided it was provided by the mediators; that of the charges collected from members, after deducting their own expenses M/s. Ganesh Decoration, remitted such charges to the society on behalf of the members; that these were maintenance charges paid by members to the society; that the society had not paid any amount to the decorator nor had they received any amount as commission from the decorator. I further find that the adjudicating authority in his finding holding the commission to be taxable under BAS, had held as follows :

28.2."In the present case, service provided to the member by the decorator and received consideration from them. After receiving the consideration, some portion of amount given to the society by the decorator. Thus amount received indirectly by the society is nothing but commission. The plea of the said society that the object of co-op housing society cannot be termed or concluded as service to or by a client and/or the service is one to another is not acceptable. Thus the provision laid down in "Business Auxiliary Service" is applicable in their case."

8. The appellant however, as is already mentioned is a cooperative housing society formed by the Central Government Employees, has provided a worksheet depicting the receipt of the entire amount of Rs. 27,13,206/- from its various member during the year 2011-12 for plot maintenance along with certain receipts. In-fact in the very first statement recorded on 6.10.2016, the Chairman of the appellant, had informed that it was not a *commission* but was shown as *commission income* through mistake. I further notice that in the following years, there was no such income, but the same was shown under Plot Maintenance Charge [para 3.2 of the



notice]. This gives credence to their averment that what was shown as commission was nothing but plot maintenance charges, which from the year 2012-13 was posted and showed under the correct heading viz. "plot maintenance charge".

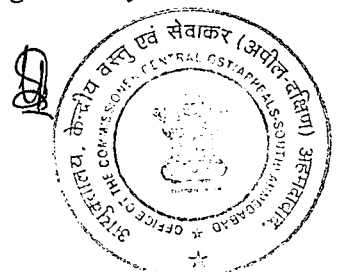
8.1 Even otherwise, since the adjudicating authority has held that it is taxable since it is a commission income of the appellant, the activity of the appellant needs to fall within the ambit of 'commission agent'. I find that under the explanation under Section 65(19) of the Finance Act, 1994, commission agent has been defined as:

- [*Explanation.* — For the removal of doubts, it is hereby declared that for the purposes of this clause, —
- (a) "commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person —
- (i) deals with goods or services or documents of title to such goods or services; or
 - (ii) collects payment of sale price of such goods or services; or
 - (iii) guarantees for collection or payment for such goods or services; or
 - (iv) undertakes any activities relating to such sale or purchase of such goods or services;

I find that the revenue has failed to prove that the appellant had acted on behalf of New Ganesh Decoration; that they had dealt with services or documents of title of such services; that they collected payment of sale of services; that they guaranteed for collection or payment of such services; that they undertook any activities relating to sale or purchase of services. In fact, rather than collecting any payment on behalf of the New Ganesh Decoration, I find that it is the other way round. Revenue has failed to prove that the appellant had acted as a commission agent. Simply because an income finds a mention in the books of account as a 'commission income' would not make the appellant liable for service tax under BAS. It has to be proved that the appellant performed an act which finds a mention under the definition of *commission agent*. Since revenue has failed on this part, I find that the confirmation of the demand by the adjudicating authority is not legally tenable.

9. The adjudicating authority has further held that no service tax is payable under *Renting of immovable service* on the plot maintenance charges for the years 2012-13, 2013-14 and 2014-15. Following the same logic, the amount wrongly shown as commission, which actually was plot maintenance charges should also not be leviable to service tax.

10. As I have already held, the adjudicating authority has failed to show as to how the appellant had provided business auxiliary services to the decorator. There is no clarity in this front. The clarification of the Cooperative Housing Society, clearly shows that while the amount was not commission, it was plot maintenance charges collected from the members of the society and therefore, this is a clear case of mutuality and following the case laws of The Sport Club of Gujarat Ltd [2013(31) STR 645] and Ranchi Club Ltd [2012(26) STR 401]. In view of the foregoing discussion, the confirmation of the demand under BAS by the adjudicating authority is not legally tenable and is therefore set aside.



11. Hence, the impugned OIO is set aside and the appeal is allowed.

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

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

उमा शंकर

(उमा शंकर)

आयुक्त (अपील्स)

Date : .2.2018

Attested

Vinod Lukose

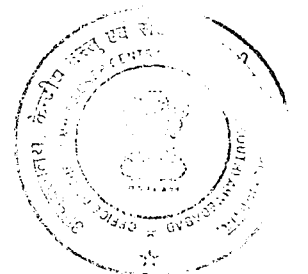
(Vinod Lukose)
Superintendent (Appeal),
Central Tax,
Ahmedabad.

By RPAD.

To,
M/s. Kendriya Karmachari Nagar
Cooperative Housing Society,
Near Rannapark,
Ghatlodiya,
Ahmedabad- 380 061.

Copy to:-

1. The Chief Commissioner, Central Excise, Ahmedabad Zone .
2. The Commissioner, Central Excise, Ahmedabad North.
3. The Deputy/Assistant Commissioner, Central Excise Division-SG Highway East, Shahjanand Arcade, 4th floor, Memnagar, Ahmedabad.
4. The Assistant Commissioner, System, Central Excise, Ahmedabad North.
5. Guard File.
6. P.A.



11

