



केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
केंद्रीय कर भवन, 7th Floor, Central Excise Building,
सातवीं मंजिल, पोलिटेकनिक के पास, Near Polytechnic,
आम्बावाडी, अहमदाबाद-380015 Ambavadi, Ahmedabad-
380015

सत्यमेव जयते
☎ : 079-26305065



टेलीफैक्स : 079 - 26305136

क फाइल संख्या : File No : V2(ST) 145 & 146/A-II /2016-17

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-001-APP-038 & 039-17-18
दिनांक Date 27.07.2017 जारी करने की तारीख Date of Issue

श्री उमाशंकर, आयुक्त (अपील) केन्द्रीय कर, अहमदाबाद द्वारा पारित

Passed by Shri Uma Shankar Commissioner (Appeals) Central Tax, Ahmedabad

ग Assistant Commissioner, Div-II, STC, Ahmedabad द्वारा जारी मूल आदेश सं SD-02/02/AC/2016-17
दिनांक : 31.05.2016 and SD-02/03/AC/2016-17 दिनांक : 31.05.2016 से सृजित

Arising out of Order-in-Original No SD-02/02/AC/2016-17 दिनांक : 31.05.2016 and
SD-02/03/AC/2016-17 दिनांक : 31.05.2016 Issued by:
Assistant Commissioner, Div-II, STC, Ahmedabad

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

M/s. Ahura Restaurants Pvt. Ltd.

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,
Meghani Nagar, New Mental Hospital Compound, 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 accompanied 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-धारा (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/ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (उसमें से प्रमाणित प्रति होगी) और आयुक्त/सहायक आयुक्त अथवा उप आयुक्त, केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए सीमा एवं केन्द्रीय उत्पाद शुल्क बोर्ड/ आयुक्त, केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रति भेजनी होगी।

(iii) The appeal under sub section and (2A) of the section 86 the Finance Act.1994, shall be filed in For 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 or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Central Board of Excise & Customs / Commissioner or Dy. Commissioner of Central Excise 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 adjuration 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. सीमां शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) 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 हैं

- (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 होंगे।

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)(i) 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।

ORDER IN APPEAL

M/s. Ahura Restaurant Pvt. Ltd., 4/B Vasant Vihar Society, Mithakhali Six Road, Near Textile Traders Co-op Bank, Navrangpura-Ahmedabad- (*hereinafter referred to as 'appellants'*) have filed the present appeals against the Order-in-Original number SD-02/02/AC/2016-17 dated 31.05.2016 and SD-02/03/AC/2016-17 dated 31.05.2016 and (*hereinafter referred to as 'impugned orders'*) passed by the Asst. Commissioner, Service Tax, Div-II, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*);

2. The facts of the case, in brief, are that the appellant, registration No. AABC A9983G ST001, is running a takeaway restaurant- known as "TOMATO'S PIZZA & PASTA" situated at food court, Iscon Mall, Ahmedabad. Said takeaway restaurant itself is not having seating arrangement for customers but in front of it seating arrangement like chairs and table are there for eating food on self service basis. Whole mall is centrally air-conditioned. Appellant had not disclosed full, true and correct Information regarding said Service in ST-3 return and did not pay service tax of Rs. 76,863/- during 2013-14 and Rs. 69,109/- during 2014-15. Appellant held a view that as they were selling the readymade food over the counter for take-away and they were not providing any restaurant service and consequently service tax is payable. Duty of Rs. 76,863/- and Rs. 69,109/- was confirmed vide impugned OIO u/s 73(1) with equal penalty u/s 78. Penalty of Rs. 10,000/- was imposed for each FY separately u/s 77(2) for not filing correct ST-3.

3. Appellant is contending that there is no seating and eating arrangement in said take away restaurant moreover they are not providing any waiter serving service in takeaway premises or seating arrangement provided is outside take away premises, therefore they are not providing any restaurant service [Section 65(105)(zzzzv)].

4. Being aggrieved with the impugned order, the appellants preferred an appeal on 15.09.2016 before the Commissioner (Appeals-II) wherein it is contended that they are selling readymade edible dishes i.e goods on which VAT is discharged for takeaway at home and they are not providing any restaurant service. There is sale of service along with sale of food. There is no air-condition service provided by appellant. Moreover there are no waiters

in unit. There activity does not fall under service therefore service tax is not payable.

5. Personal hearing in the case was granted on 02.06.2017. Shri Shreekant S. Shah, CA, appeared before me and reiterated the grounds of appeal. He also stated that he would submit additional submission in seven days. He had submitted additional submission on 08.06.2017.

DISCUSSION AND FINDINGS

6. 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.

7. The Government vide Entry No. 19 of Mega Exemption Notification No. 25/2012-ST as amended vide Notification 3/2013-ST granted exemption from payment of service tax to Restaurants, eating Joints or Mess which are not providing Air-conditioning any part of establishment. Question to be decided is as to whether take away point/premises is restaurant providing service to customers and that too A.C. restaurant.

8. I find that at para 1.10 (1-A) at point (d), (e) and (f) of FAQ of Sixth edition of booklet dated 16.09.2011 published by The Directorate General, Service Tax, New Delhi it has stated as following regarding "RESTAURANT SERVICE" which makes it clear that mere sale of food on MRP basis to take away at home is not chargeable to service tax:

(d). The new levy is directed at services provided by high-end restaurants that are air-conditioned and have license to serve liquor. Such restaurants provide conditions and ambience in a manner that service provided may assume predominance over the food in many situations. It should not be confused with mere sale of food at any eating house, where such services are materially absent or so minimal that it will be difficult to establish that any service in any meaningful way is being provided.

(e). It is not necessary that the facility of air-conditioning is available round the year. If the facility is available at any time during the financial year the Conditions for the levy shall be met.

(f). The levy is intended to be confined to the value of services contained in the composite contract and shall not cover either the meal portion in the composite contract or mere sale of food by way of pick-up or home delivery, as also goods sold at MRP. Finance Minister has announced in his budget speech 70% abatement on this service, which is, inter-alia, meant to separate such portion of the bill as relates to the deemed sale of meals and beverages.

9. Common sitting facility like table-chair, provided by mall owner outside the various food take-away point can not be considered as apart of said food take-away point/premises as no services like food servicing, water supply, customized mill service are provided by said food take away point/premises. Take-away or Home-delivery Orders should not be taxed since no services, amenities etc. of the Restaurants were being offered to the customers in case of Take-away or Home delivery of food. The Service Tax Department of Chandigarh vide its letter C.No. ST-20/STD/Misc./Sevottam/62/12/4693 dated August 13, 2015 ("the Clarification") has clarified that free Home delivery/ Pick-up of food is not liable to Service tax. Dominant intention of such transaction (over the counter sale) is that of 'Sale', as food is not served at Restaurant and no other element of service such as ambience, live entertainment (if any), air conditioning or personalized hospitality is offered. Service tax can be levied if there's an element of 'Service' involved which would typically be the case where food is served in Restaurant.

10. Adjudicating Authority has erred in considering the common seating facility as apart of appellant premises and has failed to establish that there was rendering of service along with sale of food. I am of considered view that activity performed is out of purview of service tax Act and therefore said transaction is not liable to Service tax, being sale in nature. In view of foregoing discussion, I set aside the all the duty confirmed, Interest and penalty imposed under section 78, 77(1) and 77(2) of FA, 1994. Appeal filed by appellant is allowed.

93

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.

U. Shankar
(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

ATTESTED

(R.R. PATEL)

SUPERINTENDENT (APPEAL),

CENTRAL TAX, AHMEDABAD.

To,

M/s. Ahura Restaurant Pvt. Ltd.,

4/B Vasant Vihar Society,

Mithakhali Six Road,

Near Textile Traders Co-op Bank,

Navrangpura- Ahmedabad

Copy to:

- 1) The Chief Commissioner, Central Tax, Ahmedabad.
- 2) The Commissioner, Service Tax ,Ahmedabad.
- 3) The Asst. Commissioner, Service Tax Div-II, APM building, Anandnagar Road, Satellite, Ahmedabad- 15.
- 4) The Asst. Commissioner(System), Central Tax- South Ahmedabad Hq, Ahmedabad.
- 5) The Asst. Commissioner(System), Central Tax- North Ahmedabad Hq, Ahmedabad.
- 6) Commissioner Central Tax- North- Ahmedabad,
- 7) Commissioner Central Tax- South Ahmedabad
- 8) Guard File.
- 9) P.A. File.