केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

सत्यमेव जयते

केंद्रीय कर भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

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1746-1752

क फाइल संख्या : File No : V2(ST)/51/Ahd-I/2017-18
Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-381-2017-18**
दिनाँक Date : **27-02-2018** जारी करने की तारीख Date of Issue 02.3.2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित
Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **AHM-SVTAX-000-ADC-43-44-2016-17** दिनाँक: **23/3/2017** issued by AdditionalCommissioner, Central Tax, Ahmedabad-South

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

Parthiv Patel
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 a 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) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त 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 प्रकिया 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।

D/L

(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 मामलें 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 डयूटी केडिट 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 दिनाँक 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 रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की 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 अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

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 मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी 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. Registar 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 ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

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 not withstanding 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 अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.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 in 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 अपीलो 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 माँग 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 order arises out of the appeal filed by Parthiv Patel, 13, Nilima Park Society, Behind Rasranjan, Vijay Char rasta, Navrangpura, Ahmedabad (hereinafter referred to as "the appellant") against the Order In Original No. AHM-SVTAX-000-ADC-43-44-2016-17 dated 23.03.2017 (hereinafter referred to as "the impugned order"), passed by the Additional Commissioner of Service Tax, Service Tax Commissionerate, Ahmedabad (hereinafter referred to as "the adjudicating authority") alongwith the condonation of delay application.

2. The facts of the case, in brief are that two OIO dated 07.03.2012 and 29.03.2013 issued in respect of SCN 12.10.2011 (20.10.2011) demanding Rs. 42,84,800/- in respect of Indian Cement-Chennai Super King IPL and 14.09.2012 demanding Rs. 8,93,113/- in respect of Kochi Cricket Pvt. Ltd. IPL, respectively, were remanded back to adjudicating authority vide OIA dated 06.08.2013 and No. AHM-SVTAX-000-APP-14-15 16.04.2014 respectively, to bifurcate the amount received by appellant, player of IPL, in taxable part (sponsorship fees) and non-taxable part (playing fees) after considering contract.

3. Both the OIA`s were appealed by Department in CESTATA on ground that Commissioner Appeal has no power to remand back. CESTAT vide order No. A/10668/2016 dated 22.07.2016 upheld OIA dated 16.04.2014 dated 16.04.2014. Another Departmental appeal in respect of OIA dated 06.08.2013 is still pending in CESTAT. In remand proceeding vide impugned OIO 23.03.2017, held combine for said two SCN, it is held by the adjudicating that whole match fees received is taxable.

4. Being aggrieved with the impugned order dated 23.03.2017, the appellants preferred an appeal on 04.07.2017 before the Commissioner (Appeals), CGST, Ahmadabad wherein it is contended that 10% of match fees received is towards taxable part (sponsorship fees).

5. Personal hearing in the case was granted on 06.02.2018. Shree Hemal Desai, CA, appeared before me and reiterated the grounds of appeal and submitted additional submission dated 06.02.2018. He Points out Hon`ble Calcutta H.C. decision in case of Saurav Ganguli. He further submitted that Page 13 of contract shows that the advertisement (taxable service) is to the extent of 10% of contract value.

DISUSSION AND FINDINGS

6. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral/written submissions made by the appellants, evidences produced at the time of personal hearing. Looking to the circumstances narrated by appellant player, delay of 29 days in filing appeal is hereby condoned.

7. I find that in earlier OIA`s vide which earlier two OIO`s were remanded back to bifurcation of fees towards promotional activity and playing fees and extending exemption of small scale service provider notification if found eligible on re-quantification of duty liability. Adjudicating authority could not arrive at bifurcation of fees, therefore concluded that whole fees are towards promotion fees which is evident from para 13.8.2 where in it is stated that ....." On examining the whole contract along with the schedule to the contract, I am unable to find any clear cut indication towards bifurcation of player fees towards match playing fees and promotional activity fees."

8. From para 13.8.4 it appears that adjudicating authority has counted deduction of remuneration towards penalty fees as fees towards promotional activity. For example player was to make 10 appearances for promotional activity. In case of failure to appear 5% fees was required to be deducted. Adjudicated concluded those fees of said 10 appearances is 50% of remuneration. I am considered view that penalty fees can not be considered as taxable value main service.

9. Question before me is whether or not adjudicating authority is correct in holding whole composite fees received by appellant player as promotional activity/ sponsorship fees. In judgment delivered by Hon`ble High Court of Calcutta in case of Saurav Ganguly (IPL Player) Vs. UOI [WP 3137 (W) of 2013] it is held at para 70 of order that..

"(70) In so far the letter/instruction dated 26 July, 2010 issued by the CBEC is concerned, the material portion thereof has been extracted above in this judgment. The petitioner is aggrieved by the instruction in the said letter to the effect that, in case the players (in IPL) are paid composite fee for playing matches and for participating in promotional activities, the component of promotional activities should be segregated for charging service tax and if it cannot be done then service tax should be leviable on the total composite amount. Having considered the submissions made in this regard and the decisions cited, **I am of the view that the Board of Central**

Excise and Customs in its administrative capacity is not entitled to impose its views on its various subordinate authorities exercising quasi-judicial functions to interpret a particular provision of a statute in a particular manner. A circular/instruction/letter cannot create tax liability. The statutory provisions relating to service tax do not provide that the fees received by an IPL player would attract service tax. This is admitted by the Department even in the said circular which states, inter alia, that charges for playing matches will fall outside the purview of taxable service. If the statute does not provide for levying service tax on fee received for playing matches, such a liability cannot be created by issuing a letter/instruction/circular. A circular cannot travel beyond the statute. **The statute does not provide that if a player receives a composite amount for playing matches and promotional activities and the segregation of the two elements is not possible, then the composite entire amount may be taxed.** Such an act on the part of the Department will be de hors the statute and without jurisdiction or authority of law. It will also be in contravention of Art. 265 of the Constitution of India. The Central Board of Excise and Customs cannot seek to legislate by issuing circulars/instructions. As observed by the Hon'ble Supreme Court in the case of Ratan Melting & Wire Industries (supra), the clarifications/circulars issued by the Central Govt. or the State Govt. represent merely their understanding of the statutory provisions. In my opinion, if such circulars/instructions/clarifications are contrary to or inconsistent with the statutory provision in question or seek to create a liability which the statute does not contemplate, such circular/instruction is liable to be struck down. A misconceived and legally untenable interpretation of a statutory provision and/or an erroneous understanding thereof, which if applied by the quasi-judicial authorities will unduly prejudice the citizens of the country, cannot be allowed to stand.

Accordingly the impugned circular/instruction dated 26 July, 2010 is quashed to the extent it states that if composite fee received for playing matches and for participating in promotional activities cannot be segregated, then service tax should be levied on the total composite amount."

10. Appellant IPL player was selected and contracted under agreement because of his skill, efficiency, performance and experience as a cricketer alone, and not for any skills of a player to undertake Promotional Activity. His cricketing skill and not the "promotional skill", is the reason for giving remuneration. The performance of a player during a season (whether good or substandard) does not affect the amount of remuneration. If player is unavailable for playing match then 90% of fees is deducted, which shows that playing fees is 90% of contract amount.

11. **KOCHI CRICKET P. LTD.** [SCN dated 14.09.2012 –period 2011-12, ST amt 8,93,113/-]..... Schedule 1 para 1(a) of agreement is very specific and categorical about 10% of allocation of Match fees towards sponsorship and promotional activities. Para 4.4 lays down stipulation

regarding reduction of players fees by 5% in respect of each appearance in certain condition but in para 4.3 it is said that aggregate reduction of player fees will not exceed 10% of player fees in respect of each season. From these clauses it is established that only 10% of players fees are attributed towards promotional activities. The contract is very clear about bifurcation of services in taxable (sponsorship service) and non-taxable service (playing fees) as clause 4.3 inter alia says that....." and it is agreed that an amount be equal to 10% of Player fee shal be attributed to the Player`s performance and this obligation....."

12. **M/s India Cement- CHENNAI SUPER KING** [SCN dated 20.10.2011- period 2007-08, 2008-09 & 2009-10, total S.Tax demand of Rs. 42,84,800/-]..... para 1.2 of agreement shows retention of 10% of Match fees pertaining to Promotional activities. Para 4(a) says that franchise will be entitled to reduce player fees by 90% of amount if player is unavailable, which shows that playing fees is 90 % of contract amount. Para 1.2(a) says that player is entitle to retain 10% fees in the event he does not fulfill conditions laid down in para 1.1(a)[medical fitness to play]and 1.1(b)([NOC from cricket board]. This indicates that even though player is unable to play for IPL, he would be paid 10% fees, as they pertain to promotional activity.

13. Department had classified the service under Business support service (BSS). I find that appellant was under full control of franchisee and to act in manner instructed by franchise. The appellant was not providing any service as an independent individual worker. His status was that of an employee rather that individual worker. He was purchased member of team serving under franchisee and was not providing service to franchisee in individual. In that scenario I hold that appellant was not providing "BSS" as defined under section 65(104c) and taxable u/s 65(105)(zzzq). My view is supported by judgment delivered by Hon`ble High Court of Calcutta in case of Saurav Ganguly (IPL Player) Vs. UOI [WP 3137 (W) of 2013]

14. I find that CBEC Circular No. 334/4/2006- TRU dated 28.02.2006, it is very clear that Brand promotion is not service which not included in scope of "BSS". "Brand Promotion Service" was notified as taxable service from 01.07.2010, there for, I hold that, appellant is liable to pay service tax from 01.07.2010 under category of "Brand Promotion Service".

15. In view of above I hold that 10% of contract fees is chargeable to service tax for above both the contract. Now I shall dwell on imposition of penalty. I find that payments have been received in cheque and they have accounted for the same and same has been declared in returns. It was matter of interpretation of board's instruction dated 26 July, 2010 issued by the CBEC as to whether service tax has to be paid on 100% match fees (Saurav Ganguli case supra) or match fees corresponding to brand promotion service, which travelled upto Hon`ble High Court. Further I find that earlier also SCN was issued to appellant so department was aware of whole issue of non payment of service tax on entire match fees. Therefore, there is no suppression involved. As it is question of interpretation of Circular/instruction and there is no intention on the part of appellant to claim wrongful input service, I hold that penalty should not be imposed and accordingly I wave penalty imposed, by following catena of decisions in this regard.

i. Gujarat Intelligent Security2010 (19) S.T.R. 270 (Tri. – Ahmd)
ii. AVL India Pvt. Ltd.- 2017 (4) GSTL. 59 (Tri.-Del)

16. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

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

(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

ATTESTED

(R.R. PATEL)

SUPERINTENDENT (APPEAL),

CENTRAL TAX, AHMEDABAD

To,

Parthiv Patel,

13, Nilima Park Society,

Behind Rasranjan, Vijay Char rasta,

Navrangpura, Ahmedabad

Copy to:

1) The Chief Commissioner, Central Tax, Ahmedabad South .
2) The Commissioner Central Tax, CGST,Ahmedabad South.
3) The Addl. Commissioner, Central Tax, CGST, Ahmedabad South
4) The Asst. Commissioner, Central Tax, Div-II, Ahmedabad South
5) The Asst. Commissioner(System), Hq, Ahmedabad South.
6) Guard File.
7) P.A. File.