

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 **अधीक्षक** 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 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, 1984 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) 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 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 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(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.



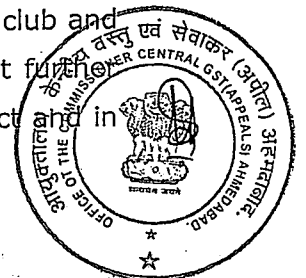
:: ORDER-IN- APPEAL ::

The Assistant Commissioner, Service Tax, Division-III, Ahmedabad (*hereinafter referred to as 'appellant'*) has filed the present appeal against following Orders-in-Original (*hereinafter referred to as 'impugned orders'*) passed in the matter of refund claim filed by M/s. Young Men's Christian Association, S. G. Highway, Ahmedabad (*hereinafter referred to as 'respondents'*);

| S. No. | OIO No. | OIO date | Amount of refund claim (₹) | Date of filing the refund claim | Amount sanctioned (₹) |
|--------|---|------------|----------------------------|---------------------------------|-----------------------|
| 1 | STC/Ref/19/YMCA/DC/Div-III/16-17 | 06.05.2016 | 31,79,368 | 22.04.16 | 31,79,368 |
| 2 | STC/Ref/101/YMCA/K.M.Mohadikar/AC/Div-III/16-17 | 17.10.2016 | 24,73,558 | 22.04.16 | 24,73,558 |

2. Briefly stated the facts of the case are that the respondents had filed refund claims for ₹31,79,368/- and ₹24,73,558/- for the periods January 2016 to March 2016 and April 2016 to June 2016 respectively. They were holding Service Tax registration number AAATY0392HST001 under the category of "Club or Association Services, Mandap Keeper Services, Renting of Immovable Property Services, Restaurant Services and Accommodation Services". They filed the above mentioned refund claims under the category of "Club or Association Services" claiming that under the principle of mutuality, they are not liable to pay Service Tax. The adjudicating authority, vide the above mentioned impugned orders, sanctioned the entire claims of ₹31,79,368/- and ₹24,73,558/-.

3. Both the impugned orders were reviewed by the Principal Commissioner and the Commissioner of Service Tax, Ahmedabad respectively and issued Review Orders number 23/2016-17 dated 03.08.2016 and 44/2016-17 dated 17.01.2017 for filing appeals under section 84(1) of the Finance Act, 1994 on the ground that the adjudicating authority has wrongly sanctioned the refund amounts of ₹31,79,368/- and ₹24,73,558/-. The appellant alleged that the impugned order passed by the adjudicating authority is not legal and proper. The appellant claimed that with effect from 01.07.2012, the new system of taxation of services has been introduced. Beside other changes, the word 'services' has also been defined under Section 65B(44) of the Finance Act, 1994. The appellant stated that the doctrine of mutuality bears no significance in the context of taxable service provided by clubs and association as club and its members are now treated as two separate persons. The appellant further argued that the respondents are incorporated under the companies act in



law, a company is a legal entity which has a separate legal identity from its members.

4. Personal hearing in the case was granted on 12.10.2017 wherein Shri Pravin Dhandharia, Chartered Accountant, on behalf of the said respondents, appeared before me and reiterated the contention of their submission. Shri Pravin further pointed out that the respondents are not hit by the amendments made in Section 65(44)(b) of the Finance Act, 1994 because they are not "Unincorporated Association". He further showed me their "Memorandum of Association and the Article of Association". He has submitted a copy of the order of Hon'ble Supreme Court in their own case.

5. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum submitted by the appellant and oral and written submissions made by the respondents at the time of personal hearing. Now, let me examine the reasons of the appeal and the defense reply given by the respondents.

6. To start with, I find that the appellant has filed the appeals on the ground that under Section 65, the respondents were providing taxable service to the members and 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 department 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;

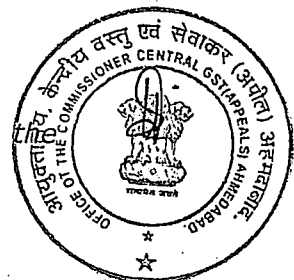
(a) an activity which constitutes merely:-

(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



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

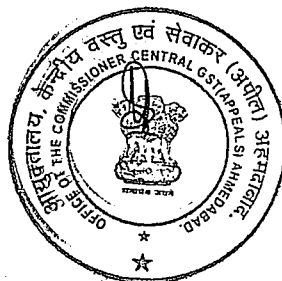
B. the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

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 argument, the respondents 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'. Further, the respondents claimed that they are registered under Bombay Public Trust Act, 1950 and as per that they are got themselves registered in the Office of the Public Trust Registration, Ahmedabad. In support of their claim, they have submitted a registration certificate dated 11.06.1991 issued by the Deputy Charity Commissioner, Ahmedabad Region, Ahmedabad. I found that the said respondents have been allotted "F 300 Ahmedabad" as their Registration Number. A scanned copy of the said certificated is produced below for better understanding.

R. No. 5766 11-6-91

Spec. c./BPT 2.

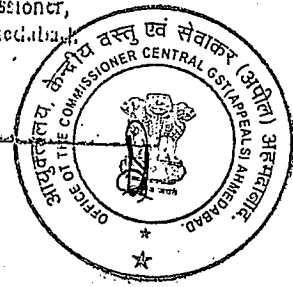
નોંધણીનો દાખલો

આથી દાખલો આપવામાં આવે છે કે ઉપર જણાવેલા સાર્વજનિક ટ્રસ્ટને, આ ૧૯૫૦ના મુખ્યતંત્રી સાર્વજનિક ટ્રસ્ટોના બાબતના (આ ૧૯૫૦ના મુખ્યતંત્રી ૨૯મા) અધિનિયમ અન્વયે નોંધણી કરવામાં આવેલા સાર્વજનિક ટ્રસ્ટ નોંધણી કરેલાં હોય તેને નોંધવામાં આવ્યું છે.

સાર્વજનિક ટ્રસ્ટનું નામ: શ્રી. રામજી મેલકી સીક્રીયટ
 ટ્રસ્ટના સભ્યો: શ્રી. રામજી મેલકી, શ્રી. રામજી મેલકી
 સાર્વજનિક ટ્રસ્ટનો સંચાલક: શ્રી. રામજી મેલકી
 ટ્રસ્ટના દાખલો આપે તે શ્રી. રામજી મેલકી
 નોંધણી નંબર: F 300 Ahmedabad
 મારી સીલ અને તારીખ: 11-6-91



સહી: શ્રી. જી. ભાગલાણી
 Deputy Charity Commissioner,
 Ahmedabad Region, Ahmedabad.



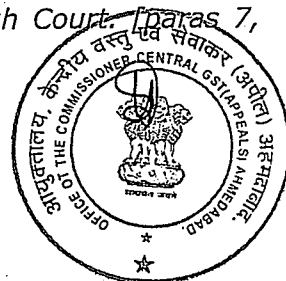
From above, it can be verified that the respondents are incorporated entity and as per explanation on Section 65B (44) supra, their members cannot be treated as distinct person and therefore, the principles of mutuality are very much applicable to them.

6.1. Further, in the case of Ranchi Club Ltd. vs. chief Commissioner of Central Excise and Service Tax, Ranchi Zone, the Hon'ble High Court of Jharkhand proclaimed that rendering of service by the petitioner-club to its members is not taxable service under the Finance Act, 1994. I reproduce below the head note of the said judgment [2012(26) S.T.R. 401 (Jhar.)] for better understanding;

"Club - Incorporated as Company and formed on principle of mutuality - Liability to Service tax for services utilised by members of club, viz. mandap keeper, etc. - HELD : In view of mutuality, if club provides any service to its members, it is not a service by one legal entity to another, and is not liable to Service tax - Explanation to Section 65 of Finance Act, 1994 that 'taxable service includes any taxable service provided or to be provided by any unincorporated association or body or persons to a member', found to be similar to Explanation-I to Section 2(n) of Madras General Sales Tax Act, 1959 including within definition of sale any transfer of property by club to its members, considering which Apex Court in Young Men's Indian Association [1970 (1) SCC 462] had held supply of preparations by club to its members was not a sale as there was no transfer of property from one to another, and even though club had distinct legal entity, it was acting only as an agent for its members - Sections 65(66) and 65(67) of Finance Act, 1994."

Similar view has been reflected 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 Jharkhand High Court in the case of Ranchi Club Ltd., wherein it was held that in a members' club, any transaction between the club and its members cannot be regarded as service. For more clarification, I reproduce, below, the head note of the judgment of Hon'ble High Court of Gujarat;

"Club - Finance Act, 1994 - Sections 65(25a), 65(105)(zzze) and 66 - Service Tax on club rendering service to its members - HELD : It was ultra vires and beyond legislative competence of Parliament - There was no loss of mutuality of club members even if club was incorporated under Companies Act, 1956 - Ranchi Club Ltd. [2012 (26) S.T.R. 401 (Jhar.)] applied - Department's plea that they have not accepted this judgment, rejected - Persuasive value of this judgment was not lost, more so because it had relied on a Full Bench decision of High Court. [paras 7, 7.1, 8]."



6:2. 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. The definition of the word 'Incorporated' in Wikipedia is; "Incorporation is the formation of a new corporation (a corporation being a legal entity that is effectively recognized as a person under the law). The corporation may be a business, a non-profit organization, sports club, or a government of a new city or town". In paragraph 14 of the appeal memorandums, the appellant has claimed that principle of mutuality is not applicable on the respondents as they are incorporated under the Company's Act and in law, company is a legal entity which has separate legal identity from its members. This, this is enough to establish the fact that the appellant considers the respondents to be incorporated. Moreover, looking to paragraph 6 above, I find that the respondents are registered under Bombay Public Trust Act, 1950 and on that basis, they got themselves incorporated under Public Trust Registration, Ahmedabad on 1991. Thus, 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.

7. In view of the above, I hold that as the respondents have wrongly paid the Service Tax against 'Club or Associated Services' during the periods from January 2016 to March 2016 and April 2016 to June 2016 respectively (leviable after the introduction of the Negative List w.e.f. 01.07.2012) and the adjudicating authority has correctly sanctioned the refunds to the respondents.

8. Accordingly, as per the above discussion, I do not find any reason to interfere in the impugned order and reject the appeal filed by the Department.

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

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

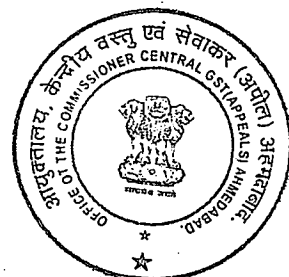
उमा शंकर

(उमा शंकर)

CENTRAL TAX (Appeals),
AHMEDABAD.

ATTESTED

30418
उत्त. वस्तु सेवाकर/SABYASACHI DUTTA
अधीक्षक/SUPERINTENDENT



(S. DUTTA)
SUPERINTENDENT,
CENTRAL TAX (APPEALS), AHMEDABAD.
BY R.P.A.D.

To,
M/s. Young Men's Christian Association,
S. G. Highway,
Ahmedabad

Copy To:-

1. The Chief Commissioner, Central Tax, Ahmedabad zone.
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, Central Tax, Systems, Ahmedabad (North).
5. Guard File.
6. P.A. File.



