



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

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

केंद्रीय कर भवन,

7th Floor, GST Building,

Near Polytechnic,

सातवीं मंजिल, पॉलिटेक्निक के पास,

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परिचय पत्रक ए.डी. द्वारा

फाइल संख्या : File No : V2(ST)10/EA-2/Ahd-South/2018-19
Stay Appl.No. /2018-19

अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-106-2018-19

दिनांक Date : 20-11-2018 जारी करने की तारीख Date of Issue

23/12/2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

Arising out of Order-in-Original No. CGST/WS08/Ref-18(ST)/PV/18-19 दिनांक: 14.06.2018 issued by Asst Commissioner, Div-VIII South, Central Tax, Ahmedabad-South

अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
Young Men's Christian Association
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 case may be against such order, to the appropriate authority in the following way :

सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India :

(i) 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 प्रकृति 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.

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



(a) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के क्रेडिट के मामले 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.

(c) 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.

प्रारंभिक उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट गान्ध की गई है और ऐसे आदेश जो इस मसल पर नियम के प्राविक आशुक्त, 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.

(e) केंद्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दा प्रतिया में अपील आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ प्रत्येक आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के शक्त के साथ टीआर-6 मालान 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) भिन्न आवेदन के साथ जहाँ रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ 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.

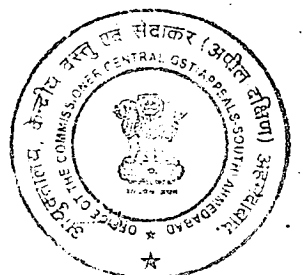
सीमा शुल्क, केंद्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(a) केंद्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(a) अकालिका परिच्छेद 2 (i) क में बताए अनुसार के अलावा की अपील, अपील के मामले में सीमा शुल्क, केंद्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में आ 20, न्यू मेटल हॉस्पिटल कंपाउण्ड, मेघानी नगर, अहमदाबाद-380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at C-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.

यदि इस आवेदन में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीरा का भुगतान उपर्युक्त रूप में 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 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 Appellate Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

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 लिखा जाना 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.

यदि अपील संबंधित मामलों का 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.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (रिस्ट्रेट), 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) संड 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.

यदि अपील 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, while penalty alone is in dispute."



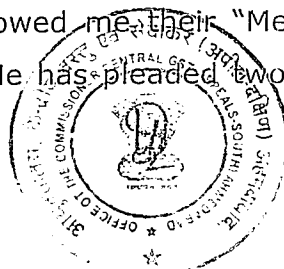
:: ORDER-IN- APPEAL ::

The Assistant Commissioner, CGST, Division-VIII, Ahmedabad-South (*hereinafter referred to as 'appellant'*) has filed the present appeal against the Order-in-Original number CGST/WS08/Ref-18(ST)/PV/18-19 dated 14.06.2018 (*hereinafter referred to as 'impugned order'*) 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'*);

2. Briefly stated the facts of the case are that the respondents had filed a refund claim for ₹27,37,181/- for the period April 2017 to June 2017. 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 claim 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 claim of ₹27,37,181/-.

3. The impugned order was reviewed by the Commissioner, CGST, Ahmedabad-South and issued Review Order number 05/2018-19 dated 17.09.2018 for filing an appeal under section 84(1) of the Finance Act, 1994 on the ground that the adjudicating authority has wrongly sanctioned the refund amount of ₹27,37,181/-. 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 had been introduced. Beside other changes, the word 'services' had 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 and under the 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 25.10.2018 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 pleaded two days time to



allow him to submit additional documents in favour of the respondents which he has complied with.

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 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.

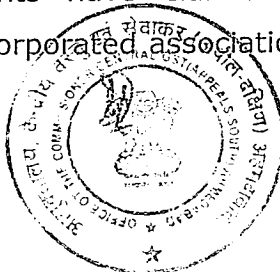
Explanation 2— this clause, the expression "transaction in money or actionable claim" shall not include—

- 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 argument, the respondents have claimed that they are incorporated as company and not an unincorporated association. In support of



"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 period from April 2017 to June 2017 (leviable after the introduction of the Negative List w.e.f. 01.07.2012) and the adjudicating authority has correctly sanctioned the refund 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

(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 (South).
3. The Assistant Commissioner, CGST, Div-VIII, Ahmedabad (North).
4. The Assistant Commissioner, Central Tax, Systems, Ahmedabad (North).
- ✓ 5. Guard File.
6. P.A. File.