DIN-20201064SW000004EB688

आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

सत्यमेव जयते

NATION TAX MARKET

☎ 07926305065- टेलेफैक्स07926305136

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)36/Ahd-South/2020-21/15850 TO 15854

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-38 to 45/2020-21**

दिनाँक Date : **17-09-2020** जारी करने की तारीख Date of Issue 09/10/2020

श्री अखिलेश कुमार आयुक्त (अपील) द्वारा पारित

Passed by Shri. Akhilesh Kumar, Commissioner (Appeals)

ग Arising out of Order-in-Original No **As per Order in Appeal** issued by Deputy Commissioner, Div-VI, Central Tax, Ahmedabad-South.

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

M/s Gujarat Chamber of Commerce & Industry,
Shri Ambica Mills Building, Ashram Road, Ahmedabad-380009.

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 issued under the Central Excise Act 1944,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।

केन्द्रीय वस्तु एवं सेवाकर (अपील), अहमदाबाद
OFFICE OF THE COMMISSIONER CENTRAL GST (APPEALS), AHMEDABAD

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

(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) **केंद्रीय जीएसटी** अधिनियम, 2017 की धारा 112 के अंतर्गतः–

Under Section 112 of CGST act 2017 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 2nd **माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद** –380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. 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)

(7)

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।

6(I) 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."

II. **Any person aggrieved by an Order-In-Appeal issued under** the Central Goods and Services Tax Act,2017/Integrated Goods and Services Tax Act,2017/ Goods and Services Tax(Compensation to states) Act,2017,may file an appeal before the appellate tribunal whenever it is constituted within three months from the president or the state president enter office.

ORDER-IN-APPEAL

Eight Appeals have been filed by M/s. Gujarat Chamber of Commerce & Industry, Shri Ambica Mills Building, Ashram Road, Ahmedabad-380009 (here-in-after referred to as the "*appellant*"), against the Orders-in-Original (here-in-after referred to as the "*impugned orders*") issued by the Deputy Commissioner of CGST & Central Excise, Division-VI, Ahmedabad South Commissionerate (here-in-after referred to as the "*adjudicating authority*"). Hereinafter in this order Show Cause Notice will be referred as "*SCN*". The details in respect of the appeals are as under :

Srl. No.	Order-in-Original No. and Date	Period involved	Ref. Claim filed on	Amount	Appeal No.
1	CGST-VI/Ref-07/GCCI/DC/DRS/2020-21 Dated : 12.06.2020	2010-11	27.01.2020	534060	V2(ST)35/Ahd-South/2020-21
2	CGST-VI/Ref-08/GCCI/DC/DRS/2020-21 Dated : 12.06.2020	2011-12	27.01.2020	1697127	V2(ST)36/Ahd-South/2020-21
3	CGST-VI/Ref-09/GCCI/DC/DRS/2020-21 Dated : 12.06.2020	2012-13	27.01.2020	1042129	V2(ST)37/Ahd-South/2020-21
4	CGST-VI/Ref-10/GCCI/DC/DRS/2020-21 Dated : 12.06.2020	2013-14	27.01.2020	1797886	V2(ST)38/Ahd-South/2020-21
5	CGST-VI/Ref-11/GCCI/DC/DRS/2020-21 Dated : 12.06.2020	2014-15	27.01.2020	1568492	V2(ST)39/Ahd-South/2020-21
6	CGST-VI/Ref-12/GCCI/DC/DRS/2020-21 Dated : 12.06.2020	2015-16	27.01.2020	1528904	V2(ST)32/Ahd-South/2020-21
7	CGST-VI/Ref-13/GCCI/DC/DRS/2020-21 Dated : 12.06.2020	2016-17	27.01.2020	2058967	V2(ST)33/Ahd-South/2020-21
8	CGST-VI/Ref-14/GCCI/DC/DRS/2020-21 Dated : 12.06.2020	April-2017 to June-2017	27.01.2020	655193	V2(ST)34/Ahd-South/2020-21
		TOTAL		10882758	

2. The facts of the cases, in brief, are that the appellant was registered with the Service Tax Department for providing services under various categories such as Club & Association Service, Mandap Keeper Service, Renting of Immovable Property Service, Legal Consulting Service, Technical & Inspection and Certification Agency Service, Sponsorship Service and Selling of Space or Time Slots for Advertisement and was holding Service Tax Registration No. AAATG3759NST001.

3. On 25.03.2013, the Hon'ble Gujarat High Court in the case of Sports Club of Gujarat Ltd., Rajpath Club Ltd. and Karnavati Club Ltd. v/s. Union of India (S.C.A. No. 13654, 13655 and 13656 of 2005 respectively) held that the erstwhile Section 65(25a), Section 65(105)(zzze) and Section 66 of the Finance (No.2) Act, 1994 as incorporated/amended by the Finance Act, 2005 is ultra vires to the extent that the said provisions purport to levy service tax in respect of services purportedly provided by the petitioner club to its members. Being aggrieved with the said judgement of Hon'ble Gujarat High Court, the Department preferred appeal before the Hon'ble Supreme Court. The Hon'ble Supreme Court finally decided the matter in case of M/s. Calcutta Club Ltd. reported at 2019-TIOL-449-SC-ST-LB on 03.10.2019 and under pra-82 held as under :

"82. We have already seen how the expression "body of persons" occurring in the explanation to Section 65 and occurring in Section 65(25a) and (25aa) does not refer to an incorporated company or an incorporated cooperative society. As the same expression has

been used in Explanation 3 post-2012 (as opposed to the wide definition of "person" contained in Section 65B(37), it may be assumed that the legislature has continued with the pre-2012 scheme of not taxing members' club when they are in the incorporated form. The expression "body of persons" may subsume within it persons who come together for a common purpose, but cannot possibly include a company or a registered cooperative society. Thus, Explanation 3(a) to Section 65B(44) does not apply to members' clubs which are incorporated."

"84. We are therefore of the view that Jharkhand High Court and Gujarat High Court are correct in their view of the law in following Yong Men's Indian Association (supra). We are also of the vie that from 2005 onwards, the Finance Act of 1994 does not purport to levy service tax on members' clubs in the incorporated form."

4. Pursuant to the said decision of Hon'ble Gujarat High Court, followed by the decision of Hon'ble Supreme Court, the appellant filed eight refund claims for the service tax paid by them in the relevant years, the details of which have been shown in the table hereinabove, contending that they being an incorporated member's organization are not liable to pay service tax. On verification of the refund claims, it was found that all the claims were liable for rejection and therefore Show Cause Notice was issued in all the claims separately. The said Show Cause Notices were adjudicated by the adjudicating authority separately and all the refund claims were rejected vide the impugned orders, after discussing the issue at length and by relying upon the judgement of Hon'ble Supreme Court of India, in case of M/s. Mafatlal Industries Ltd. v/s. Union of India [1997(89)ELT 247(SC)] and in view of the provisions contained in Section 11B of the Central Excise Act, 1944 as made applicable to the Service Tax by Section 83 of the Finance Act, 1994. The refund claims were rejected on the grounds that

(i) the appellant was registered as a 'Society' under the Societies Registration Act, 1860 for doing "business" only and they were neither registered nor acting as club or association like Sports Club of Gujarat Ltd., Karnavati Club or Rajpath Club, and thus were not covered under Club or Association but can be covered under 'Society' only;

(ii) they have not produced any proof that the service was rendered to their members for a subscription or any other amount;

(iii) during the relevant period, the tax had been paid under self-assessment and had never been paid under protest at any point of time and therefore the time limit prescribed under Section 11B of the Central Excise Act, 1944 would be applicable in the matter;

(iv) the scrutiny of refund claims revealed that the said refund claims not only included the amount of service tax paid by the appellant in respect of Club and Association Service, but also included the amount of service tax paid by them in respect of the Mandap Keeper Service and Technical & Inspection and Certification Agency Service though the judgement of Gujarat High Court and Apex Court had been delivered in respect of Club and Association Service only and thus the said judgements can not be made applicable to the services other than Club and Association Service;

(v) the appellant did not submit any proof regarding the non-availment of cenvat credit in view of the position that if the service under the Club & Association Service is considered as non-taxable, the procedure under Rule 6(3) of the Cenvat Credit Rules, 2004 is required to be followed.

5. Being aggrieved with these impugned orders, the appellant preferred the appeals on the grounds that

(a) the relationship between the members and club/association is governed by the principle of mutuality and thus can not be considered as different entities; in case of Saturday Club Ltd. reported at 2005(180)ELT 437(Cal.), Calcutta High Court has held that in members club there is no question of two sides and member and the club are same entity where one may be called as principal and the other as agent;

(b) they relied upon following judgements :

(i) Ranchi Club Ltd. reported at 2012(26)STR 401(Jhar.) wherein it was held that if club provides any service to its members may be in any form including as mandap keeper, then it is not a service by one to another;

(ii) Dalhousie Institute reported at 2005(180)ELT 18(Cal.) wherein it was held that members using the facility of club can not be termed to be client of the club;

(iii) Secretary, The Madras Gymkhana Club Employees Union reported at 1968(1) SCR 742 under which it was held that the club is identified with its members at a given point of time and thus it cannot be said that the club has an existence apart from the members.

(iv) Young Men's Association reported at 1970(26)STC 241(SC) under which it was held that the Association were merely acting as agents for and on be-half of the members.

(v) Rolls Royce Industries Power (I) Ltd. reported at 1970(26)STC 241(SC) under which it was held that the Association were merely acting as agents for and on be-half of the members.

(vi) Toyota Kirloskar Auto Parts Ltd. reported at 2007(210)ELT 390(T).

(vii) Precot Mills Ltd. reported at 2006(2) STR 495(T).

(viii) Bankipur Club Ltd. reported at 1997(226 ITR 97(SC).

(ix) Chelmsford Club reported at 2000(243 ITR 86(SC).

(x) Darjeeling Club Ltd. 1985(153) ITR 676.

(c) they are society and make available facilities exclusively for their members & their guests and recoup expenses and thus element of mutuality exists;

(d) they are an incorporated organization, not liable to pay service tax and thus they are eligible for refund of service tax paid;

(e) the Federation of Indian Chamber of Commerce and Industry (FICCI) was a party in the decision rendered by the Hon'ble Apex Court in case of M/s. Calcutta Club Ltd. and they being a member of FICCI, the said decision is applicable to them also; for this they rely upon the decision in case of Retailers Association reported at 2012(26) Taxmann.Com 234(SC)which was made applicable to its members i.e. Shoppers Stop;

(f) the judgement of Supreme Court is applicable to everyone especially a member of the association and thus the time period starts from the date of the decision of the Court as per the explanation (eb) under Section 11B of the Central Excise Act, 1944;

(g) Circular No. 165/16/2012-ST is referred which states that the accounting codes stated are merely for statistical purposes and not for anything else and since all amount are received from members only, the principle of mutuality applies and they are eligible for the services rendered to members which include technical testing and mandap keeper also.

(h) regarding the cenvat credit they state that the refund has been claimed in respect of the amount paid in cash only and hence question of availment of cenvat credit does not arise.

6. Personal hearing in these cases was accorded to the appellant on 28.08.2020. Shri Bishen Shah, Chartered Accountants, on behalf of the appellant, appeared for the hearing. He reiterated the submissions made in the Appeal Memorandum. He also relied upon the judgement of Hon'ble Gujarat High Court in Surat Tennis Club reported at 2016(42)STR 821(Guj) to contend that the judgement passed by Hon'ble Supreme Court in Calcutta Club Ltd. is in rem and hence they are eligible for refund.

7. I have carefully gone through the facts of the case available on records and submissions made by the appellant in the Appeal Memorandum and during the course of personal hearing. All the appeals pertain to the same appellant and the issue involved in all the appeals is common or same. The issue involved in all these appeals is that whether the refund is admissible to the appellant considering the judgement dated 25.03.2013 of Gujarat High Court in SCA No.13654, 13655 and 13656 of 2005 in case of Sports Club of Gujarat Ltd. and others, followed by the judgement of Hon'ble Supreme Court reported at 2019(29) GSTL 545(SC) and whether the refund claims are hit by bar of limitation as prescribed under Section 11B of the Central Excise Act, 1944 as made applicable to the Service Tax by Section 83 of the Finance Act, 1994.

8(i). It is observed that the appellant filed the refund claims on the basis of the judgement of Hon'ble Gujarat High Court followed by the judgement of Hon'ble Supreme Court. It is further observed that the Hon'ble Gujarat High Court had in that case held that the Section 65(25a), Section 65(105)(zzze) and Section 66 of the Finance (No.2) Act, 1994 as incorporated/amended by the Finance Act, 2005 to be ultra vires to the extent that the said provisions purport to levy service tax in respect of services purportedly provided by the petitioner club to its members. Further, the judgement of Hon'ble Supreme Court in case of M/s. Calcutta Club Ltd. reveal that the Section 65(25a), Section 65(105)(zzze) and Section 66 of the Finance Act, 1994 in respect of 'club or association' service were interpreted and explained by the Apex Court in detail. In result, under para 84, the Apex Court held as under

> *"We are also of the view that from 2005 onwards, the Finance Act, 1994 does not purport to levy service tax on the members' clubs in the incorporated form"..*

It is pertinent to mention here that the appellant was not the party either in the case before the Hon'ble Gujarat High Court or in the case before Hon'ble Supreme Court.

8(ii). In view of above, it can be inferred that the said sections of the Finance Act, 1994 have not been declared as unconstitutional or ultra vires by the Apex Court and they still hold their place in the said Act. It is pertinent to mention here that where, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition only as held by the Hon'ble Apex Court in case of M/s. Mafatlal Industries Ltd. [1997(89)ELT 247(SC)].

8(iii). Since the issue in these appeals pertains to the refund of service tax, it is very much necessary to look into the judgement pronounced by the Hon'ble Supreme Court (comprising nine justice) in case of M/s. Mafatlal Industries Ltd. [1997(89)ELT 247(SC)]. The said judgement of the Apex Court deals with the provisions of the Refund under Central Excise Act, 1944 and continues to hold ground. It is necessary to mention here that the adjudicating authority has also relied upon this Judgement of the Apex Court in the impugned orders. Since the said judgement of the Apex Court comprised of 9 Justice and deals with the Refund under the Excise Law (as made applicable to service tax law also), it becomes necessary that the said judgement should be taken into consideration while deciding the present issue (which is also pertaining to Refund).

8(iv). The relevant portions of the said judgement of Hon'ble Apex Court in case of M/s. Mafatlal Industries Ltd. is reproduced as under :

(a) *Refunds of Central Excise and Customs Duties – All claims for refund except where levy is held to be unconstitutional, to be preferred and adjudicated upon under Section 11B of the Central Excise Act, 1944 or under Section 27 of the Customs Act, 1962 and subject to claimant establishing that burden of duty has not been passed on to third party – no civil suit for refund of duty maintainable – Writ jurisdiction of High Courts under Article 226 and of Supreme Court under Article 32 unaffected by said Section 11B or Section 27 but writ court to have due regard to the provisions of Central Excise and Customs Act and to refuse grant of relief where burden of duty passed on to third party – Favourable order not to result in automatic refund and claimant to prove burden of duty not passed on to third party.*

(b) *Refund – Bar of unjust enrichment – Incidence of duty – Refund of duty either under Central Excise Act, Customs Act, in a civil suit or a writ petition grantable only when it is established that burden of duty has not been passed on to others – Person ultimately bearing the burden of duty can legitimately claim its refund otherwise amount to be retained by the State – Section 11B of the Central Excise Act, 1994 – Section 27 of the Customs Act, 1962 – Section 72 of the Contract Act and Articles 32 and 226 of the Constitution of India.*

(c) *Section 11B of the Central Excise Act, 1944 and Section 27 of the Customs Act, 1962 both before and after 1991 amendments are valid and constitutional as per proposition initiated by Supreme Court in Kamala Mills' case – 1966(1)SCR 64.*

(d) *99(i) Where a refund of tax duty is claimed on the ground that it has been collected from the petitioner/plaintiff - whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter - by mis-interpreting or mis-applying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by mis-interpreting or mis-applying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactment before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf.*

.....

The said enactments including Section 11B of Central Excises and Salt Act and Section 27 of the Customs Act do constitute "law" within the meaning of Article 265 of the Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded, as the case may be, under the authority of law. *Both the enactments are self-contained enactments providing for levy, assessment, recovery and refund of duties imposed thereunder. Section 11-B of the Central Excises and Salt Act and Section 27 of the Customs Act, both before and after the 1991 (Amendment) Act are constitutionally valid and have to be followed and give effect to. .....*

(ii) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition.

This principle is, however, subject to an exception : where a person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be re-opened on the basis of a decision on

another person's case; this is the ratio of the opinion of Hidayatullah, CJ. in Tilokchand Motichand and we respectfully agree with it.

.....

(iv) It is not open to any person to make a refund claim on the basis of a decision of a Court or Tribunal rendered in the case of another person. He cannot also claim that the decision of the Court/Tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment or levy has become final in his case, he cannot seek to reopen it nor can he claim refund without re-opening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17(1)(c) of the Limitation Act, 1963, has no application to such a claim for refund.

.....

(ix) The amendments made and the provisions inserted by the Central Excises and Customs Law (Amendment) Act, 1991 in the Central Excises and Salt Act and Customs Act are constitutionally valid and are unexceptionable.

.....

(e) Where a duty has been collected under a particular order which has become final, the refund of that duty can not be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to law. So long as that order stands, the duty can not be recovered back nor can any claim for its refund be entertained. It is un-understandable how an assessment/adjudication made under the Act levying or affirming the duty can be ignored because some years later another view of law is taken by another court in another person's case. Nor is there any provision in the Act for re-opening the concluded proceedings on the aforesaid basis. In short, no claim for refund is permissible except under and in accordance with Rule 11 and Section 11B. An order or decree of a court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken. If this theory is applied universally, it will lead to unimaginable chaos. Therefore the theory of mistake of law and the consequent period of limitation of 3 years from the date of discovery of such mistaken of law can not be invoked by an assessee taking advantage of the decision in another assessee's case. All claims of refund ought to be and ought to have been, filed only under and in accordance with Rule 11/Section 11B and under no other provision and in no other forum. An assessee must succeed or fail in his own proceedings and the finality of the proceedings in his own case can not be ignored and refund ordered in his favour just because in another assessee's case a similar point is decided in favour of the manufacturer/assesee.

(f) If a levy or imposition is held to be unconstitutional or illegal or not exigible in law, i.e. without jurisdiction, it is open to the assessee to take advantage of the declaration of the law so made, and pray for appropriate relief inclusive of refund on the ground that tax was paid due to mistake of law, provided he initiates action within the period of limitation prescribed under the Limitation Act. ..... If the levy or imposition was held to be unconstitutional or illegal or not exigible in law, in a similar case filed by some other person, the assessee who had already lost the battle in a proceeding initiated by him or has otherwise abandoned the claim can not, take advantage of the subsequent declaration rendered in another case where the levy is held to be unconstitutional, illegal or not exigible in law.

(g) As regards to time limit, the second proviso to Section 11B (as amended in 1991) expressly provides that "the limitation of six months shall not apply where any duty has been paid under protest". Now, where a person proposes to contest his liability by way of appeal, revision or in the higher courts, he would naturally pay the duty, wherever he does, under protest hence time limit would have no application to such cases.

(h) Refund of "unconstitutional levy" i.e. where the provisions of the Act under which duty/tax is levied is struck down as unconstitutional – Person paying such tax entitled to refund – Claim for such refund not governed by Rule 11/Section 11B of the Central Excise Act, 1944 – Right for refund do arise under Article 265 of the Constitution but there is no automatic or unconditional right of refund – Such refund claimable either by filing civil suit under Section 72 of the Contract Act or by filing writ petition under Artcile 32 or 226 of the Constitution of India – Such refunds subject to claimant establishing that burden of duty not pass on to third party – Social and economic justice – Article 38, 39 and Preamble to the Constitution of India.

(i) Where the petitioner-plaintiff has not himself suffered any loss or prejudice (having passed on the burden of the duty to others), there is no justice or equity in refunding the tax (collected without the authority of law) to him merely because he paid it to the State. It would be a windfall to him. As against it, by refusing refund, the monies would continue to be with the State and available for public purposes..... The preamble of Constitution and the Article 38 and 39 do demand that where a duty can not be refunded to the real persons who have bore the burden, for one or other reason, it is but appropriate that the

said amounts are retained by the State for being used for public good. Accordingly even looked at from the constitutional angle, the right to refund of tax paid under an unconstitutional provision of law is not an absolute or an unconditional right.

9. The relevant part of Section 11B of the Central Excise Act, 1944 as made applicable to the Service Tax by Section 83 of the Finance Act, 1994 reads as under :

Section 11B : Claim for refund of duty and interest, if any, paid on such duty –

(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 12A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person :

Provided *.....*

Provided *further that, the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.*

(2) If, on receipt of any such application, the Assistant Commissioner or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

Provided .....

Provided further .....

(3) Notwithstanding anything to the contrary contained in any judgement, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4).....

(5)....

Explanation *– For the purpose of this section, -*

(A) .....

(B) "relevant date" means –

(a) .....

(b) .....

(c) .....

(d) .....

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(ea) .....

(eb) .....

(ec) in case where the duty becomes refundable as a consequence of judgement, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgement, decree, order or direction;

(f) in any other case, the date of payment of duty.

[emphasis supplied]

10. On perusal of the relevant points of the judgement of the Hon'ble Apex Court as mentioned in para 8(iv) here-in-above, it is observed that

(i) the Section 11B is constitutionally valid and any refund claim is required to be dealt with under provisions of Section 11B of the Central Excise Act, 1944 as made applicable to the Service Tax by Section 83 of the Finance Act, 1994;

(ii) where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff by mis-interpreting or mis-applying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or by mis-interpreting or mis-applying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactment before the authorities specified thereunder and within the period of limitation prescribed therein (*which herein the present case is Section 11B of the Central Excise Act, 1944*);

(iii) where, a refund of tax/duty is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. However it was further clarified that this principle is, subject to an exception that where a person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be re-opened on the basis of a decision on another person's case;

(iv) It is not open to any person to make a refund claim on the basis of a decision of a Court or Tribunal rendered in the case of another person. He cannot also claim that the decision of the Court/Tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment or levy has become final in his case, he cannot seek to reopen it nor can he claim refund without re-opening such assessment/order on the ground of a decision in another person's case;

(v) Where a duty has been collected under a particular order which has become final, the refund of that duty can not be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to law. So long as that order stands, the duty can not be recovered back nor can any claim for its refund be entertained;

(vi) If the levy or imposition was held to be unconstitutional or illegal or not exigible in law, in a similar case filed by some other person, the assessee who had already lost the battle in a proceeding initiated by him or has otherwise abandoned the claim can not, take advantage of the subsequent declaration rendered in another case where the levy is held to be unconstitutional, illegal or not exigible in law

(vii) the second proviso to Section 11B expressly provides that the limitation shall not apply where any duty has been paid under protest. *However if an assessee opts to pay the duty/tax under protest it will be mandatory on part of him to approach the proper authority for contesting such levy. It would be unacceptable that the said assessee files the protest and then sits idle and does not contest/oppose the said levy before proper authority and wait for the others to do so. In short whenever an assessee opts to pay the duty/tax under protest, he will have to contest/challenge such levy before the proper authority and then and then only the duty/tax paid by the said assessee would be considered to be paid under protest during the pendency of such litigation initiated by the said assessee*.

(viii) where assessee fails challenging, constitutional validity of levy, he can not take advantage of the declaration of unconstitutionability obtained by another person on another ground – Right to refund or restitution neither automatic nor unconditional – Civil suit to be filed subject to time limit of Section 17(1)(c) of the Limitation Act – Section 11B of the Central Excise Act, 1994.

(ix) Section 11B of Central Excises and Salt Act and Section 27 of the Customs Act do constitute "law" within the meaning of Article 265 of the Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded, as the case may be, under the authority of law.

11(i). In view of the discussion already held in para-8 and para-10 above and in view of the judgement of Apex Court in case of M/s. Mafatlal Industries Ltd., it can be said

that the appellant has paid the tax under the provisions of the Finance Act, 1994 and therefore the Refund is required to be considered under the provisions of said Act only. Section 11B of the Central Excise Act, 1944 deals with the refund of duty/tax as made applicable to the Service Tax under Section 83 of the Finance Act, 1994. The judgement of the Apex Court in case of M/s. Mafatlal Industries Ltd. is relevant in case of Refund. It says that in absence of the unconstitutional levy of tax, the refund can be dealt with only under that particular Act/law under which the tax is levied. In the present case, Section 11B of the Central Excise Act, 1944 will be applicable for refund of Service Tax as the same is made applicable to the service tax law under Section 83 of the Finance Act, 1994. However, where the levy of the tax is held unconstitutional, the same can not be dealt with under Section 11B of the Central Excise Act, 1944 and a suit or writ petition before High Court or Supreme Court is required to be filed. In view of the judgement of the Hon'ble Apex Court, the refund claim filed by the appellant is required to be processed under the provisions of Section 11B of the Central Excise Act, 1944 as made applicable to the Service Tax under Section 83 of the Finance Act, 1994.

11(ii). The above referred judgement of the Apex Court in case of M/s. Mafatlal Industries Ltd. also says that where the assessee is not satisfied with the levy of some duty/tax, he is required to lodge the protest and required to fight the case before proper authority. In the cases on hand, the appellant has paid the service tax under self-assessment. They have not put forth any evidence that they have ever challenged/contested the levy of the said tax or assessment done by them. They even failed to produce the order/judgement of any Higher authority in their own case which shows that they have contested the levy of tax. The judgement of Gujarat High Court followed by the judgement of Hon'ble Supreme Court (on the basis of which the appellant has filed the refund claims) was pronounced in case of some other assessees and the appellant was not a party in the said judgement. Therefore, in absence of any litigation or appeal on part of the appellant, the service tax paid by them can not be treated as paid under protest. Thus, it is not open for the appellant, to take advantage of the order/judgement issued by the Courts in favour of some other assesses. Therefore, service tax paid by the appellant has become final and the judgement pronounced by the Courts in the matter of some other assessees can not be made applicable in their case. Since the appellant failed to establish that the tax was paid under protest, the second proviso of the Section 11B (which says that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest) would not be applicable in case of the appellant. The appellant has submitted in their grounds of appeal that the relevant date in their case would be the date of judgement of Supreme Court in case of M/s. Calcutta Club Ltd. (which is 03.10.2019). However the same can also not be considered as the same does not pertain to the appellant and pertain to some other assesses. Therefore, I find that the refund claims of the appellant were rightly rejected by the adjudicating authority as time barred being filed beyond the period of one year as the relevant date in their case would be the payment of duty. It is the contention of the appellant that they were considered as Society by the adjudicating authority which can be to be incorporated one and hence inferred that the tax was paid by them under mis-

interpretation or mis-application of provisions of the Finance Act, 1994. However, as per the judgement of the Apex Court in case of M/s. Mafatlal Industries Ltd., where tax/duty is levied by mis-interpreting or mis-applying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactment before the authorities specified thereunder and within the period of limitation prescribed therein. Therefore, the refund claims filed by the appellant can be dealt only under the provisions of Section 11B of the Central Excise Act, 1944 as made applicable to the Service Tax by Section 83 of the Finance Act, 1994. In view of the above, the appeals filed by the appellant are liable for rejection on merits.

11(iii). The appellant has submitted that the Federation of Indian Chamber of Commerce and Industry (hereinafter referred to as *'FICCI'*) was a party in the decision rendered by the Hon'ble Apex Court in case of M/s. Calcutta Club Ltd. and they being a member of FICCI, the said decision is applicable to them also. By placing reliance upon the decision in case of Retailers Association reported at 2012(26) Taxmann.Com 234(SC), they contended that the said judgement was made applicable to its members i.e. Shoppers Stop. However, it is seen that C.A. No.8390/2011 was pertaining to M/s. Retailers Association and C.A. No.8391-8393/2011 were pertaining to M/s. Shoppers Stop. Thus, M/s. Shoppers Stop was already a party in the case before the Hon'ble Supreme Court by way of C.A. No.8391-8393/2011. Since the matter was common, it was obvious for the Apex Court not to issue separate order in case of M/s. Shopper Stop when the order issued in respect of M/s. Retailers Association could have been made applicable in case of M/s. Shoppers Stop also, who was also a party vide C.A. No.8391-8393/2011. Thus, it is clear that the appellant has tried to take a interpretation which can not be accepted being on wrong belief/footing and hence is not accepted. Over and above, any judgement delivered by any Court, in which FICCI is a party, can not be made applicable to every assessee who are member of FICCI, for the reason being that FICCI and its assesses-member have distinct identity under the eyes of law. For applying the judgement to a particular assessee-member, the FICCI should have represented the case of such assessee-member before the Court of Law. The appellant failed to putforth any evidence which shows that FICCI has represented them in the relevant case. I find that the adjudicating authority has also discussed this issue in impugned orders and come to conclusion that the appellant was not an "Appellant" or "Respondent" in the said decision. It is also pertinent to mention that even for sake of imagination, if it is presumed that appellant was aware that FICCI is representing their case, they should have made the payment of tax under protest and should have brought such facts to the knowledge of Department. No such action or documents has been seen in the case on hand. Thus, it is nothing but a vague argument putforth by the appellant just to make their case fall within the purview of the judgement of Hon'ble Apex Court in case of M/s. Calcutta Club Ltd. and hence not acceptable.

11(iv). I have gone through the judgement of Hon'ble High Court of Gujarat in case of Surat Tennis Club 2016(42)STR 821(Guj) which the appellant has relied upon during hearing. It is observed that in that case the department had issued SCN to the club which

was under process of adjudication. The facts of instant case are different in as much as the applicant have paid under sef-assessment and which was never challenged before any authority. Hence, the case law relied by appellant is distinguished.

12. The appellant has neither paid the tax under protest nor filed any case before any higher authority including any court of law at relevant point of time. They remained silent till the judgement of Hon'ble Supreme Court was delivered in case of some other assesses which can not be made applicable in their case in view of the principles laid down by the Apex Court itself in case of M/s. Mafatlal Industries Ltd. Therefore, the relevant date to be considered for the refund in their case would be the date on which the tax was paid. The refund claims have been filed on 27.01.2020 which pertain to the period 2010-11 to 2016-17 and for the period April-2017 to June-2017 and as such they were beyond the period of one year as prescribed under Section 11B of the Central Excise Act, 1944 as made applicable to the Service Tax by Section 83 of the Finance Act, 1994.

13. In view of above, I did not find any reason to interfere the impugned orders and uphold the same. The appeals filed by the appellant are rejected.

17th September 2020.

(Akhilesh Kumar)
Commissioner (Appeals)

Date : .09.2020

Attested

(Jitendra Dave)
Superintendent (Appeal)
CGST, Ahmedabad.

BY R.P.A.D. / SPEED POST TO :
M/s. M/s. Gujarat Chamber of Commerce & Industry,
Shri Ambica Mills Building, Ashram Road,
Ahmedabad-380009.

Copy to :-

1. The Principal Chief Commissioner, CGST & Central Excise, Ahmedabad Zone.
2. The Principal Commissioner/Commisoner, CGST & Central Excise, Ahmedabad South Comm'rate.
3. The Addl./Jt. Commissioner (Systems), CGST & Cen. Excise, Ahmedabad South Comm'rate.
4. The Dy./Asstt. Commissioner, CGST & Cen. Excise, Division-VI, Ahmedabad South Comm'rate.
5. Guard File.
6. P.A. File.