

आयुक्त (अपील - II) का कार्यालय केन्द्रीय उत्पाद शुल्क
सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास,
आंबावाडी, अहमदाबाद— 380015.

क फाइल संख्या : File No : V2(ST) 11/RA/A-II/2015-16 & 7198 7 7203

ख अपील आदेश संख्या Order-In-Appeal No. AHM-SVTAX-000-APP-008-16-17

दिनांक Date : 22.04.2016 जारी करने की तारीख Date of Issue 22.04/16

श्री उमा शंकर,, आयुक्त (अपील-II) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals-II)

ग _____ आयुक्त सेवाकर अहमदाबाद : आयुक्तालय द्वारा जारी मूल आदेश सं

_____ दिनांक : _____ से सृजित

Arising out of Order-in-Original No. AHM/SVTAX/000/ADC/008/15-16 Date : 08.07.2015

Issued by Asstt. Commr., Div-III, Service Tax, Ahmedabad

घ प्रतिवादी का नाम / Name & Address of the Respondent

**M/s. Navratna S G Highway Properties Ltd,
Ahmedabad**

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

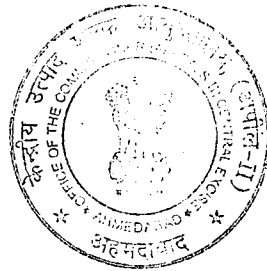
सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-

Appeal To Customs Central Excise And Service Tax Appellate Tribunal :-

वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20,
न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal
(CESTAT) at O-20, Meghani Nagar, New Mental Hospital Compound,
Ahmedabad - 380 016.



(ii) अपीलिय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायापीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायापीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.

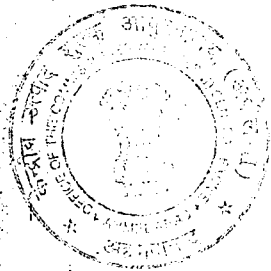
(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (OIA) (उसमें से प्रमाणित प्रति होगी) और अपर आयुक्त, सहायक / उप आयुक्त अथवा A219 केन्द्रीय उत्पाद शुल्क, अपीलिय 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 स्थान 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 अपीलिय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में वर्णित 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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ के अंतर्गत सेवाकर को भी लागू की गई है। द्वारा निर्धारित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल हैं -

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

⇒ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

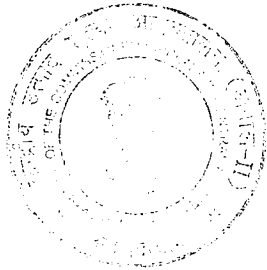
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

⇒ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

4(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।

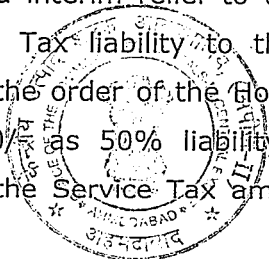
4(1) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.



:: ORDER-IN- APPEAL ::

The Deputy Commissioner, Service Tax, Division-III, Ahmedabad (*hereinafter referred to as 'the appellant'*) has filed the present appeal against the Order-in-Original number AHM-SVTAX-000-ADC-008-15-16 (*hereinafter referred to as 'the impugned order'*) passed by the Additional Commissioner, Service Tax, Ahmedabad (*hereinafter referred to as 'the adjudicating authority'*) pertaining to M/s. Navratna S.G. Highway Properties P. Ltd., (Now M/s. Gulmohar Park Mall Pvt. Ltd.) 1, Basement, Gulmohar Park, Satellite Road, Ahmedabad (*hereinafter referred to as 'respondent'*).

2. The facts of the case, in brief, are that the respondents are centrally registered with the Service Tax department holding Service Tax Registration number AACCN2111QST001 under the category of 'Renting of Immovable Properties Services'. The respondents had rented out various spaces to different persons on the basis of proper lease agreements. The rent received from their clients was not inclusive of the elements of Service Tax since the activity of 'renting of immovable property' was not then considered as liable to Service Tax in view of litigation before the Hon'ble High Court of Delhi [Home Solution Retail India vs. Union of India reported as 2009(14) S.T.R. 433 (Delhi)]. As per the decision of the Hon'ble High Court of Delhi, in the above case, the Central Government, vide Finance Act, 2010, substituted the provisions of sub-clause (zzzz) of clause (105) of the Section 65 of the Finance Act, 1994 to read as service provided or to be provided "to any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course or for furtherance of business or commerce". The said amendment was made effective retrospectively from 01.06.2007. The Hon'ble High Court of Bombay, vide judgment dated 04.08.2011, upheld the validity of amendment with retrospective effect. Accordingly, the department raised demand for Service Tax on the property owners throughout the country for the period effecting from 01.06.2007 onwards. The respondents paid Service Tax for the past period from 01.06.2007 by considering the gross amount along with interest notwithstanding the fact that the gross amount collected by them was not inclusive of Service Tax. Meanwhile, in another round of litigation, the RAI (Retailers Association of India) challenged the judgment of Hon'ble High Court of Bombay before the Hon'ble Supreme Court. The Hon'ble Supreme Court, vide order dated 14.10.2011, granted interim relief to the petition directing the RAI to deposit 50% of Service Tax liability to the credit of Central Government. The RAI complied with the order of the Hon'ble Supreme Court and paid an amount of ₹56,63,270/- as 50% liability. The respondents, accordingly, filed a refund claim for the Service Tax amount they had paid.



However, vide letter dated 16.05.2012, they informed the department that due to delay in processing their refund claim they would adjust their Service Tax liability with the refund amount. Accordingly, they adjusted a total amount of ₹32,45,888/- for the months of April, May and June 2012 respectively by considering the said amount as excess Service Tax paid under Rule 6(4)(A) of the Service Tax Rules, 1994 against their Service Tax liability of ₹34,67,256/-. However, it was seen that they have short paid Service tax amounting to ₹32,67,727/- (₹32,45,888/-+₹21,839/-) for the period April to June 2012. Thus, a show cause notice, dated 11.03.2014 were issued to the respondents as to why the above short paid amount should not be recovered from the respondents along with interest and penalties under appropriate Sections of the Finance Act, 1994. The adjudicating authority, vide the impugned order, rejected the demand of ₹32,45,888/- and confirmed ₹21,839/- along with interest and penalties under appropriate Sections of the Finance Act, 1994 out of the total short paid amount of ₹32,67,727/- as proposed in the said show cause notice.

3. The impugned order was reviewed by the Commissioner of Service Tax, Ahmedabad and issued Review Order No. 10/2014-15 dated 06.10.2015 for filing an appeal under section 84(1) of the Finance Act, 1994 on the ground that the adjudicating authority has wrongly adjusted the amount of ₹32,45,888/- against the Service Tax liability of the respondents. That the respondents cannot avail the credit of the 50% amount deposited by the RAI. If in the event of the final decision of the Hon'ble Supreme Court is delivered in favour of RAI, then the latter would be eligible for a refund of the 50% amount deposited. Therefore, the respondents have wrongly taken and utilized the said CENVAT credit and which is a pure violation of the interim order passed by Hon'ble Supreme Court. Thus, the appellant has requested for an order for recovery of wrongly availed CENVAT credit of ₹32,45,888/- by the respondents along with interest and penalty.

4. Personal hearing in the matter was granted and held on 05.04.2016. Shri Aditya Shah, authorized representative of the respondents, appeared before me and produced written submission.

5. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and written submissions made by the respondents at the time of personal hearing.

6. I find that the respondents are the owners of the property known as Gulmohar Park and have rented out various spaces to their clients under proper lease agreements. The respondents were collecting rent exclusive of the element of Service Tax since the activity of renting of immovable property



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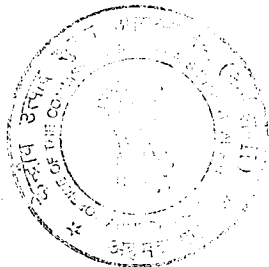
was not considered as liable to Service Tax. However, consequent to the decision of the Hon'ble High Court of Delhi dated 18.04.2009, the Central Government, vide Finance Act, 2010, substituted the provisions of sub-clause (zzzz) of clause (105) of Section 65 of the Finance Act, 1994 and the amendment was made effective retrospectively from 01.06.2007. As per the judgment of Hon'ble High Court of Bombay and other High Courts of Gujarat, Orissa, Punjab and Haryana, the department raised demands for Service Tax on the property owners throughout the country. The respondents paid Service Tax for the past period from 01.06.2007 along with interest. Meanwhile, the Hon'ble Supreme Court granted interim relief to the RAI and directed it to deposit 50% of Service tax liability to the government exchequer. Thus, the respondents adjusted the said 50% of Service Tax terming it as the excess amount of Service Tax paid. In this regard, I find that the adjudicating authority as well as the respondents has wrongly called it as excess amount as the respondent is no where related to the RAI. I agree with the appellant that this amount of 50% Service Tax arose mainly because of the petition filed by the RAI and if in the event of the final decision of the Hon'ble Supreme Court is delivered in favour of RAI, then the latter would be eligible for a refund of the amount deposited. Therefore, I do not find any merit in permitting the respondents to take credit of the said amount by the adjudicating authority as the respondents have no legal right over the said amount. I find that it is not legal and proper on the part of the respondents to take and utilize the CENVAT credit of RAI to settle/ adjust their own tax liability which is not permissible under the law. In view of the above, I order that the department recover ₹32,45,888/-, which has been erroneously adjusted by the respondents, along with interest and penalty at appropriate rate and under appropriate Sections of the Finance Act, 1994.

7. In view of the facts and discussions hereinabove, the appeal filed by the Department is allowed and I order to recover ₹32,45,888/- along with interest and penalty from the respondents.

Uma Shanker

(UMA SHANKER)

COMMISSIONER (APPEAL-II)
CENTRAL EXCISE, AHMEDABAD.



ATTESTED

S. Dutta
(S. DUTTA)

250416
SUPERINTENDENT (APPEAL-II),
CENTRAL EXCISE, AHMEDABAD.

To,
M/s. Navratna S.G. Highway Properties P. Ltd.,
(Now M/s. Gulmohar Park Mall Pvt. Ltd.),
1, Basement, Gulmohar Park,
Satellite Road,
Ahmedabad

Copy to:

The Chief Commissioner, Central Excise, Ahmedabad.

The Commissioner, Service Tax, Ahmedabad.

The Addl. Commissioner, Service Tax, Ahmedabad.

The Dy./Asst. Commissioner, Service Tax, Division-III, Ahmedabad.

The Asst. Commissioner(System), Service Tax Hq, Ahmedabad.

Guard File.



