

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)147 /A-II/2015-16 / 2241 to 2246
ख अपील आदेश संख्या : Order-In-Appeal No..AHM-SVTAX-000-APP-0101.-16-17
दिनांक Date : 26.09.2016 जारी करने की तारीख Date of Issue 05/10/16
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 सुजित

Arising out of Order-in-Original No STC/Ref/93/HCV/Raj/Div-III/15-16 Dated 14.12.2015

Issued by Assistant Commissioner, Div-III, Service Tax, Ahmedabad

घ अपीलकर्ता का नाम एवं पता Name & Address of The Appellants

M/s. Raj Enterprise 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
हॉस्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

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

(ii) अपीलीय 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 न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ 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 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

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(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 A219K 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 35फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 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 रुपए 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,

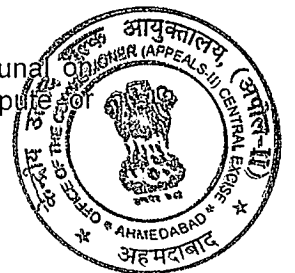
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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

M/s. Raj Enterprise , 402, Twinkle Complex, Nr. Dhananjay Tower, Satellite, Ahmedabad- 380 015 (*hereinafter referred to as 'appellants'*) have filed the present appeals on 12.02.2016 against the Order-in-Original number STC/Ref/93/HCV/ Raj/Div-III/15-16 dated 14.12.2015 (*hereinafter referred to as 'impugned orders'*) passed by the Deputy Commissioner, Service Tax, Div-III, APM Mall, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*).

2. The facts of the case, in brief, are that the appellant (STC No. AAJFR 0130M SD001) has entered in to Joint Venture Agreement dated 24.04.2007, effective up to 31.03.2013, with Das Prakash Restaurant & Ice cream Parlor Pvt. Ltd (*hereinafter referred to as 'said company'*), a company registered under Companies Act, 1956 to start food chain business. Appellant were required to provide infrastructure and said M/s Das Prakash Restaurant & Ice cream Parlor Pvt. Ltd was required to extend expertise in running franchise business. Appellant, as per agreement, was getting 20% of net monthly revenue or Rs. 50,000/- whichever is higher. Appellant had not paid service tax up to 31.03.2013 (i.e. agreement period) on whatever appellant received as it was profit for them from revenue sharing business. Appellant had received profit sharing income of Rs. 15,18,752/- and rent income of Rs. 6,00,000/- in 2012-13 on which service tax was not paid as it was considered profit from business.

3. Though the agreement was not in force after 31.03.2013 the business continued and appellant received 20% of net revenue in 2013-14 for which service tax return has been filed considering receipt as renting of immovable property. Appellant has filed a refund claim for Rs. 2,41,620/- on 23.12.2014 under provisions of section 11B of CEA 1944. It is claimed that instead of paying 2,12,491/- an amount of Rs. 4,54,111/- has been paid by mistake vide challan dated 28.12.2013 for service tax of Financial Year 2013-14 on taxable service rendered of Rs. 17,19,185/-. For scrutiny of claim documents for period for 2012-13 and 2013-14 i.e ST-3 return for, GAR-7 challan, form 26 AS, Balance sheet along with profit and loss A/c was called for but was not provided by the appellant hence a show cause notice dated 05.03.2015 was issued proposing to reject the claim as documents were not submitted. No any other reason was stated to reject the claim. Appellant submitted required document in personal hearing dated 30.03.2015 and 01.10.2015.

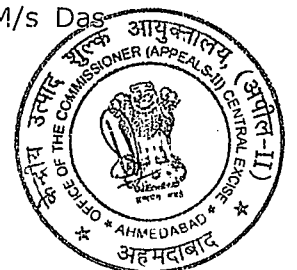
4. Show cause notice dated 05.03.2015 was adjudicated by impugned OIO vide refund was rejected on ground that appellant has failed to substantiate that there has been an excess payment of Service Tax of Rs. 2,41,620/- and



ambiguity prevails so far as the discharge of tax liability for financial year 2012-13 is concern. Moreover adjudicating authority was apprehensive of that Rs. 4,54,111/- shown as current liability in balance sheet & P/L A/c of 2013-14 was inclusive of service tax not paid for 2012-13. Another reason quoted in impugned OIO is that no concert reasons have been placed on record as to how unique value of Rs. 4,54,111/- was arrived while paying service tax for 2013-14. Further it is sated that service tax burden has been passed on to the recipient company therefore it being the case of unjust enrichment refund can not be passed.

5. Being aggrieved with the impugned order, the appellants preferred an appeal on 12.02.2016 before the Commissioner (Appeals-II) wherein it is argued by appellant that-

- I. Impugned OIO is travelling beyond the show cause notice dated 05.03.2015 as appellant is never put to show cause as to why refund shall be rejected.
- II. Income out of joint venture agreement to be treated as a profit out of restaurant activity business, which is a part of share from joint venture business. Such receipt can't be treated taxable income which is liable to tax under service tax.
- III. In balance sheet Rs. 4,54,111/- is on Asset side and not on liability side meaning by this is reflection of payment done (receivable) and not amount due. If this amount is payable, then it will be reflected at liability side of balance sheet.
- IV. In 2012-13 income was below exemption limit hence ST-3 was not filed and this is not valid reason for denial of refund.
- V. Assumption that service tax burden has been passed on to the said M/s Das Prakash Restaurant & Ice cream Parlor Pvt. Ltd is totally wrong. From available data, it is very much clear that appellant has started to charge and collect service tax only w.e.f. 01.04.2013. Appellant has produced the certificate dated 01.01.2016 issued by the Chartered Accountant Shri Pankaj R. Shah & Co. wherein it is stated that; appellant had not received/collected any amount towards the service tax from on M/s Das Prakash Restaurant & Ice cream Parlor Pvt. Ltd from period 01.04.2007 to 31.03.2013. So burden of service tax is not passed on M/s Das Prakash Restaurant & Ice cream Parlor Pvt. Ltd from 01.04.2007 to 31.03.2013. Also the burden of excess amount of service tax paid of Rs. 2,41,620/- has not been passed on to M/s Das Prakash Restaurant & Ice cream Parlor Pvt.



DISCUSSION AND FINDINGS

6. Personal hearing in the case was granted on 17.08.2016. Shri Pankaj R. Shah, Chartered accountant, appeared before me and reiterated the grounds of appeal. They stated that they have shown in Balance Sheet on Assets and not as liability on the amount of refund.

7. I have carefully gone through the facts of the case on records; grounds of appeal in the Appeal Memorandum and oral submissions made by the appellants at the time of personal hearing.

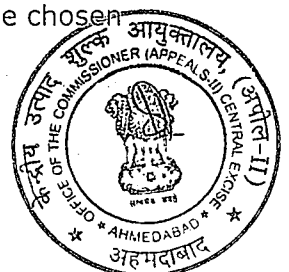
8. I find that from para 8.1 of impugned OIO the adjudicating authority is convinced that -

- I. The data deducted from Balance sheet and profit and loss A/c for the F.Y. 2013-14 Rent Income is Rs. 19,31,675/- (Inclusive of service tax of Rs. 2,12,491/-) and Rs. 17,19,185/- (exclusive of service tax).
- II. The data deduced from invoices and income ledger for the F.Y. 2013-14, The rent income is Rs. 19,31,675/- (inclusive of service tax of Rs. 2,12,491/-) and Rs. 17,19,185/- (exclusive of service tax).
- III. Data deduced from Form 26 AS, rent income is Rs. 17,19,185/-.
- IV. The data deduced from the half yearly returns for the period April-September 2013 and October-March 2013-14, the taxable value of rent is Rs. 17,19,185/- and service tax of Rs. 2,12,491/-.

9. In para 8.2 of impugned OIO it is stated that..." Thus, on a superficial view of the above data which indicates that the taxable value of the service provided by the said claimant during the financial year 2013-14 was Rs. 17,19,185/- and accordingly they were liable for paying an amount of Rs. 2,12,491/- only, it appears that the claimant has rightly contended that they have paid an excess amount of Rs. 2,41,620/- [4, 54,111 - 2,12,491]. However, I find that on deeper scrutiny of documents submitted with claim, it appears that situation is not so explicit and there exist ambiguities and certain question requires to be answered before maintainability of the refund is fortified....."

10. Following so called ambiguities are pointed out in impugned OIO for rejecting the refund claim.

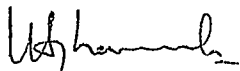
- I. It is nowhere been substantiated by the claimant as to why and under which circumstances this unique figure of Rs. 4,54,111 was only to be chosen as the amount to be paid.



- II. Figure of Rs. 4,54,111 has been reflected in the balance sheet & P/L A/c for F.Y. 2013-14 under the head of "current liabilities" , subsequent to which assets and liabilities sides of the balance sheet has been neutralized.
- III. Service tax registration was given on 07.11.2012. Claimant has not filed ST-3 return for period Oct-Dec 2012-13 for income received of Rs. 21,18,752/- and has not paid service tax. [Note- the adjudicating authority by mistake has shown the data as of period 2012-13 as data of 2013-14 in para 8.4(i) of impugned OIO.]

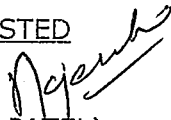
11. I find that above I to III ambiguities stated has not be brought out in show cause notice dated 05.03.2015. I find that adjudicating authority has travelled beyond show cause notice. Further had these ambiguities been therein show cause notice , then also it would not have been proper to reject the refund on that basis as long as data of 2012-13 deducted from Balance ,profit and loss A/c, invoices, income ledger and are in agreement with the data deduced from the half yearly returns for the financial year 2013-14. All documents stated at para 8(i) to 8(iv) shows service tax payable as Rs. 2,12,491/- for financial year 2012-13 and adjudicating authority has not held these data to be wrong. Merely on ground that Figure of Rs. 4,54,111 has been reflected in the balance sheet on 'current liability side' , STC returns not filed for previous period (period other then claim period) and claimant not clarifying how unique figure of Rs. 4,54,111 was paid vide challan dated 28.12.2013 refund is rejected. I find that original adjudicating authority has rejected the refund claim on assumption and presumption which is not backed by any concrete evidence and beyond the scope of SCN. I therefore hold that these grounds are not just and proper for rejecting the claim. I do not find any reason to reject the claim.

12. In view of above, appeal filed by the appellants is allowed.


(UMA SHANKER)

COMMISSIONER (APPEAL-II)
CENTRAL EXCISE, AHMEDABAD.

ATTESTED


(R.R. PATEL)

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

To,

M/s. Raj Enterprise ,
402, Twinkle Complex,
Nr. Dhananjay Tower, Satellite,
Ahmedabad- 380 015



Copy to:

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
- 2) The Commissioner, service tax, Ahmedabad
- 3) The Additional Commissioner, C.Ex, Ahmedabad
- 4) The Dy./Asst. Commissioner, Service tax, Div-III, APM Mall, Ahmedabad.
- 5) The Asst. Commissioner(System), Service tax. Hq, Ahmedabad.
- 6) Guard File.
- 7) P.A. File.

