

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)2/A-II/2016-17 / 2704-2708
ख अपील आदेश संख्या : Order-In-Appeal No. AHM-SVTAX-000-APP-0135-16-17
दिनांक Date : 31.10.2016 जारी करने की तारीख Date of Issue 08/11/16

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 STC/Ref/135/HCV/YMCA/Div-III/15-16 Dated 05.02.2016
Issued by Assistant Commr STC, Service Tax, Ahmedabad

घ अपीलकर्ता का नाम एवं पता Name & Address of The Appellants
M/s. Young Mens Christian Association 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, मेधाणी 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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

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

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

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

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. Young Men's Christian Association, S. G. Highway, Ahmedabad (*hereinafter referred to as 'appellants'*) have filed the present appeal against the Order-in-Original No. STC/Ref/135/HCV/YMCA/Div-III/15-16 dated 05.02.2016 (*hereinafter referred to as 'impugned order'*) by the Deputy Commissioner, Service Tax, Div-III, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*).

2. Briefly stated the facts of the case are that the appellants had filed a refund claim for ₹1,12,19,617/- (according to the impugned order, later on, the appellants revised the amount to ₹1,08,17,992/-) on 29.09.2015 paid by them during the period 2014-15 in respect of 'Club or Association Service' and other services pertaining to "Mandap Keeper Services, Renting of Immovable Property Services and Accommodation Services".

3. On scrutiny of the claim certain discrepancies were noticed and accordingly a show cause notice dated 18.11.2015 was issued to the appellants, which was adjudicated by the adjudicating authority. The adjudicating authority, vide the impugned order, sanctioned an amount of ₹47,52,254/- and rejected an amount of ₹64,67,363/- on account of time bar.

4. Being aggrieved with the impugned order, the appellants preferred the present appeal. They stated that the impugned order is a non-speaking one and the adjudicating authority has crossed the jurisdiction of two separate issues and tried to overrule along with the refund order. They further stated that they have submitted protest letters before the range authorities time to time but the adjudicating authority has not considered that. They have pleaded before me to drop the impugned order to sanction the refund along with applicable interest for causing delay in processing the refund.

5. Personal hearing in the case was granted on 15.09.2016 wherein Shri Pravin Dhandharia, Chartered Accountant, on behalf of the said appellants, appeared before me and reiterated the contention of their submission. He further stated that since the Hon'ble High Court of Gujarat has struck down duty liability, anything paid on the account is deposit and limitation under 11B of the Central Excise Act, 1944 is not applicable on it.

6. 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. Now, let me examine the reasons of rejection and the defense reply given by the appellants.

7. To start with, I find that the adjudicating authority has rejected the refund amount of ₹64,67,363/- on account of limitation. The appellants argued that as they have submitted letter of protest in the range, the rule of limitation as prescribed in Section 11B of the Central Excise Act, 1944, would not apply. The adjudicating authority, in sub-para (i) and (ii) of paragraph 4.3 of the impugned order, records that none of the challans, submitted by the appellants, shows the payment made under protest. Also, as the appellants have submitted the letters of protest to the Range office and not before the adjudicating authority hence, their payment of tax under protest for the purpose of claiming the refund beyond time limit does not hold good. In this regard, let me discuss the procedure for payment under protest. The

procedure for the payment under protest is not given in the legal statute exists as on date, however the procedure for payment under protest under central excise was provided under Rule 223B of Central Excise Rules 1944, which was not brought to the present Central Excise Rules 2002. The CBE&C Supplementary provision carries the same procedure that is enumerated as under;

- a) *The assessee should inform the Superintendent or Inspector of Central Excise in writing giving reasons for paying duty under protest and a dated acknowledgement would be given to him.*
- b) *He would mark invoices or monthly/quarterly return indicating the goods on which duty is paid 'under protest'. If it is a lump-sum duty payment in respect of past demand, he may record the fact of duty payment under protest in the Personal Ledger Account [against debits] CENVAT Account [against debits] and the Daily Stock Account.*
- c) *If a case is appealed against by the assessee or where the appeal period for further appeal is available, he may continue to pay duty under protest. However, if decision is not in his favour and he exhausts the appellate remedy or does not appeal within stipulated period, the assessee should not have any right to pay duty under protest.*

Supplementary provision is legally backed with the transitional provision under Rule 33 of the Central Excise Rules, 2002. However, this is not having any legal relevance as far as the Service Tax is concerned. The payment of Service Tax under protest can be made by making a letter to the department clearly indicating the fact and reason for payment under protest. Further the self-assessment returns may also specifically indicate that such payment is made under protest.

Earlier endorsing the payment challan 'TR-6' by "payment under protest" was widely used for making the payment under protest, however due to the change in the payment system and in e-filing arena the importance of such practice has lost.

Therefore, the disputation of the adjudicating authority, that the request of the appellants for under protest payment cannot be considered as no challan is accordingly endorsed, does not hold any ground.

8. Further, in sub-para (ii) of the paragraph 4.3, the adjudicating authority claims that the appellants, vide their letter dated 26.12.2015, received in the Range Office on 29.12.2015, had filed their protest letter for the first time. However, I find that the appellants had submitted their very first protest letter in the Range Office on 29.12.2014 for the period April 2014 to September 2014. After that, they have religiously submitted protest letters in the Range Office for the periods October'14, November'14, December'14, January'15, February'15 and March'15. As all the above mentioned letters are bearing official dated endorsement of Service Tax Division-III, the claim of the adjudicating authority falls flat in this regard. Also, in the same sub-para, the adjudicating authority states that the appellants had submitted the protest letters in the Range Office and as the letters were not marked to the jurisdictional Deputy Commissioner, their protest letters become null and void. In this regard, I proclaim that the Range Office is part of the Divisional Office and both the entities are bound by the principle of mutuality i.e. both the offices are treated as a single outfit and therefore, the argument of the adjudicating authority is baseless. In view of the above, I find that the principle of limitation will not be applicable to the refund claim and accordingly.

the impugned order needs to be set aside as per the discussions above and the refund amount of ₹64,67,363/- needs to be sanctioned to the appellants.

9. Further, in the case of Sports Club of Gujarat vs Union of India, the Hon'ble High Court of Gujarat had held that the levied Service Tax on Club and Association Services vide Section 65(25a), Section 65(105)(z) and Section 66 of the Finance Act, 1994 as incorporated by the Finance Act, 2005, to the extent that the said provisions purport to levy Service Tax in respect of services purportedly provided is held *ultra vires* upholding the principle of mutuality. Thus, when a service becomes *ultra vires*, i.e. not legal, the duty collected is to be treated as a deposit and therefore, the refund of the same is not bound by the principle of limitation. In this regard, the observation of Hon'ble High Court of Gujarat in the case of Binani Cement Vs Union of India is quoted below as head note;

"As levy of duty had been declared illegal, its collection could not take colour of Additional Customs Duty, either mistakenly or illegally collected- It is not case of mere illegal or unlawful or irregularly collected Customs duty- It is collection of duty without any authority of law, opposed to Article 265 of the Constitution of India and is thus unconstitutional- In such case, assessee is not bound by limitation under Customs Act, 1962 for claiming refund- Period of limitation prescribed under the Limitation Act, 1963 is applicable".

10. Regarding the issue of whether the appellants are eligible for the interest for the delayed sanction of refund or not, I find that initially the refund claim was filed on 29.09.2015 amounting to ₹1,12,19,617/- (later on the appellants revised the amount to ₹1,08,17,992/-). Out of the above amount, the adjudicating authority, vide the impugned order, has rejected an amount of ₹64,67,363/-. Thus, the appellants pleaded before me for the interest for delayed sanction of refund claim.

10.1. I find that payment of interest on sanctioning of refund beyond three months from the date of receipt of the application of refund claim till the date of refund of such duty is governed by the provisions of Section 11BB of the Central Excise Act, 1944 made applicable to the Service Tax cases vide Section 83 of the Finance Act, 1994. Section 11BB *ibid* is reproduced as under for better appreciation of the issue in appeal;

"SECTION [Interest on delayed refunds. 11BB. — If any duty ordered to be refunded under sub-section (2) of section 11B to any applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate, [not below five per cent] and not exceeding thirty per cent per annum as is for the time being fixed [by the Central Government, by Notification in the Official Gazette], on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty"

Further, payment of interest on sanctioning of refund beyond three months from the date of receipt of the application of refund claim till the date of refund of such duty is a settled issue in pursuance to the various judgments passed by the higher judicial forums as well as the issue has already been clarified by the CBEC also from time to time. The CBEC Circular No.670/61/2002-CX dated 01.10.2002 being relevant in this case, is *interalia* reproduced as under;

"In this connection, Board would like to stress that the provisions of section 11BB of Central Excise Act, 1944 are attracted automatically for any refund sanctioned beyond a period of three months. The jurisdictional Central Excise Officers are not required to wait for instructions from any superior officers or to look for instructions in the orders of higher appellate authority for grant of interest."

Further, I find that the issue in question is also decided by the higher judicial forums in the following judgments, wherein it is held that the interest should be paid from the expiry of three months from the date of receipt of refund application.

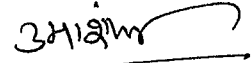
- J.K.cement Works V/s ACC- 2004(170) ELT 4 (Raj. H.C.)- Also maintained by S.C.-2005 (179) ELT A150 (S.C.)
- Ranbaxy laboratories V/s Union of India, 2011 (273) ELT.3.(SC)
- Kerala Chemicals & Protines Ltd.- 2007 (211) ELT 259- (Tri. Bang.)
- CEX,Pune-III V/s Movilex Irrigation Ltd.-2007 (207) ELT 617 (Tri. Mumbai)

10.2. In view of above, I find force in the contention of the appellants. Accordingly, I hold that the appellants are eligible of the interest at such rate for the time being fixed by the Central Government by Notification in the Official Gazette on such refund amount from the date immediately after the expiry of three months from the date of such application of refund till the date of refund of such Service Tax.

11. The appeal is hereby disposed off in terms of the discussion held above.

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

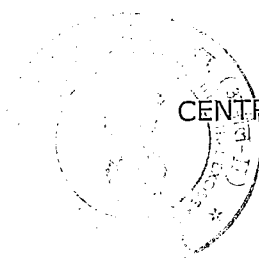
12. The appeals filed by the appellant stand disposed off in above terms.



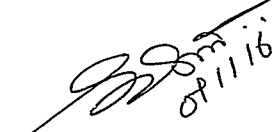
(उमा शंकर)

आयुक्त (अपील्स - II)

CENTRAL EXCISE, AHMEDABAD.



ATTESTED


(S. DUTTA)
SUPERINTENDENT (APPEAL-II),
CENTRAL EXCISE, 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 Excise, Ahmedabad zone, Ahmedabad.
2. The Commissioner, Service Tax, Ahmedabad.
3. The Deputy/Assistant Commissioner, Service Tax, Division-III, A'bad.
4. The Assistant Commissioner, System-Ahmedabad
5. Guard File.
6. P.A. File.

