रजिस्टर्ड डाक ए.डी. द्वारा

दूरभाष : 26305065

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

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क फाइल संख्या : File No : **V2(ST) 2/RA/A-II/2016-17 & V2(ST) 5/RA/A-II/2016-17** / 2733-2737

ख अपील आदेश संख्या Order-In-Appeal No. **AHM-SVTAX-000-APP-0138 to 139-16-17**

दिनाँक 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 _____ दिनाँक : _____ से सृजित

Arising out of Order-in-Original No. **STC/REF/141/HCV/YMCA/Div-III/15-16** Date : **10.02.2016** & **STC/REF/141/HCV/YMCA/Div-III/15-16** Date : **10.02.2016** Issued by Asst Commr Div-III STC Abad, Service Tax, Ahmedabad

ध **प्रतिवादी का नाम / Name & Address of the Respondent**

**M/s. Young Mens Christian Association Ahmedabad, 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, Meghani Nagar, New Mental Hospital Compound, 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 विरूद्ध 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 ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी। स्टे के लिऐ आवेदन– पत्र के साथ रूपए 500/– 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. Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(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 A2l9k 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 शर्तो पर अनुसूची–1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रू 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, 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 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 अर्ज़ी एवं अपील को लागू नहीं होगे।

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 'appellant')* has filed the present appeal against following Orders-in-Original *(hereinafter referred to as 'impugned orders')* passed in the matter of refund claim filed by M/s. Young Men's Christian Association, S. G. Highway, Ahmedabad *(hereinafter referred to as 'respondents')*;

| Sr. No | OIO No. | OIO date | Amount of refund claim sanctioned (₹) | Rev. Order No. | Rev. Order date |
|---|---|---|---|---|---|
| 1 | STC/Ref/141/HCV/YMCA/Div-III/15-16 | 10.02.16 | 25,68,919 | 36/2015-16 | 18.03.16 |
| 2 | STC/Ref/161/HCV/YMCA/Div-III/15-16 | 25.02.16 | 33,13,096 | 02/2016-17 | 08.04.16 |

**2.** The facts of the case, in brief, are that the respondents are holding Service Tax Registration number AAATY0392HST001 under the categories of "Mandap Keeper Services, Renting of Immovable Property Services, Restaurant Services and Accommodation Services". The respondents and had filed refund claims amounting to ₹25,68,919/- and ₹33,13,096/- on 10.11.2015 and 10.02.2016 respectively paid by them as Service Tax during the periods July'15 to September'15 and October'15 to December'15 respectively for "Club or Association Services". The said refund claims were filed by the respondents in view of the Hon'ble High Court of Gujarat in the case of Sports Club of Gujarat vs UOI.

**3.** The adjudicating authority, vide the impugned orders number STC/Ref/141/HCV/YMCA/Div-III/15-16 dated 10.02.2016 and STC/Ref/161/HCV/YMCA/Div-III/15-16 dated 25.02.16 sanctioned the refund claims of ₹25,68,919/- and ₹33,13,096/- respectively.

**4.** Both the impugned orders were reviewed by the Principal Commissioner of Service Tax, Ahmedabad and issued Review Orders number 36/2015-16 dated 18.03.2016 and 02/2016-17 dated 08.04.2016 for filing appeals under section 84(1) of the Finance Act, 1994 on the ground that the adjudicating authority has wrongly sanctioned the refund amounts of ₹25,68,919/- and ₹33,13,096/- under Section 11B without discussing the applicability of unjust enrichment. The appellant further stated that the respondents were not a party before the Hon'ble High Court of Gujarat and hence the judgement of High Court is not applicable to the respondent.

**5.** Personal hearing in the matter was granted and held on 15.09.2016. Shri pravin Dhandharia, CA appeared before me and reiterated the contents of his submission. He further stated that under the Principles of Mutuality, even if the respondents have collected money from their members, Unjust Enrichment will not be applicable to them.

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

**7.** The issue pertains to applicability of unjust enrichment in the refund claims sanctioned by the adjudicating authority. The respondents had filed the claims in view of the decision of Hon'ble High Court of Gujarat in the case of Sports Club of Gujarat vs Union of India. The judgment of the Hon'ble High Court of Gujarat is based on the 'Principles of Mutuality'. I also have the same view that any transaction by the club with its member is not a transaction between two parties. The question of unjust enrichment will arise only when there is the existence of two or more distinctly separate parties. But when the respondents are dealing with their members, we find that they are not separate entities. The Hon'ble High Court proclaimed that;

> *"The petitioner is giving service to its members but the club is formed on the principle of mutuality and, therefore, any transaction by the club with its member is not a transaction between two parties. However, being a company, it may enter into a transaction with anybody, a 3rd person, not a member, then in that situation, this club becomes a legal entity and can certainly enter into any transaction and such transaction are not on the principle of mutuality and, therefore, may be liable to any tax as a transaction between two parties. However, when the club is dealing with its members, it is not a separate and distinct individual. It is submitted that in identical facts and circumstances, however, in the matter of imposition of sales tax, when the club was expressly included in the statutory definition of 'dealer' under Madras General Sales Tax Act, 1959, so as to bring the club within the purview of taxing statute of the Madras Sales Tax, the Hon'ble Supreme Court, in the case of the Joint Commercial Tax Officer Vs. The Young Mens' Indian Association, considered the definition of the 'dealer' by which the club was declared dealer and after considering the definition of sale as given in the Act of 1959 and explanation-I appended to Section 2(n), specifically declaring the sale or supply or distribution of goods by a club to its members whether or not in the course of business was declared deemed to be a sale for the purpose of the said Act. In that situation, Hon'ble Supreme Court considered the issue that the club is rendering service or selling any commodity to its members for a consideration then whether that amounts to sale or not.* ***Hon'ble***

***Supreme Court held that it is a mutuality which constitutes the club and, therefore, sale by a club to its member and its services rendered to the members, is not a sale by club to the members***".

In the case of Commissioner of Income Tax Vs. Ranchi Club Limited, the Hon'ble Patna High Court affirmed that no one can earn profit out of himself on the basis of principle of mutuality and held that income tax cannot be imposed on the transaction of the club with its members.

**8.** In view of the above discussion it has been made very clear that a club and its members are not different but a single entity. Therefore, I am of the view that the respondents could not have passed on the burden of tax paid to their members and hence, the principle of Unjust Enrichment will not be applicable here. Hon'ble CESTAT, Ahmedabad has held in Karnavati Club Ltd. Vs The Commissioner of Service Tax, Ahmedabad {2013(31)S.T.R. 445(Tri-Ahmd)} that members of the club were not separate as a client or customer and hence, Service tax could not be imposed for the facility provided to its own members. In paragraph 11 of the said order, the Hon'ble Tribunal quotes that;

*"It can be seen from the above reproduced paragraph that their Lordships have come to a categorical conclusion that the members of the club cannot be seen separately as a client or customer and the mandap or the club is one and the same. Since the Service Tax is sought from the club and it has been set aside at the show cause notice stage, by the Hon'ble High Court, it cannot be said that club has passed on the incidence of Service Tax liability to its members, as the members are not separate from the club, is the ratio of their Lordships. If that be so, it cannot be said that by claiming the refund from self, the club itself will be unjustly enriched. Services rendered to self cannot be equated with the services rendered to a client or customer".*

Thus, it could not be said that by claiming refund from self, the respondent would be unjustly enriched.

**9.** In the Review Order, I find that the appellant has quoted that the judgment of the High Court of Gujarat is not applicable to the respondent as they were not a party of the petition in the case of Sports Club of Gujarat Vs the Union of India. I find the view is quite incorrect as the judgment of apex court is applicable to anybody whether a party of the case or not. Moreover, by stating that 'the judgment is not applicable to the respondents as they were not party to it', the appellant has inadvertently accepted that had the respondents been party to the case, the judgment would have been applicable to them. Further, As per Board's Circular No. 1006/13/2015-CX dated 21.09.2015;

"2. In this regard, attention is invited to the judgment of Hon'ble

Supreme Court dated 14thOctober2008 [2008(231) E.L.T.22(SC)/2008-TIOL-104-SC-CX-CB] in case of M/s Ratan Melting & Wire Industries Vs Commissioner of Central Excise, Bolpur. In the said judgment Hon'ble Supreme Court has held at para 6 & 7 that-

*"6.Circular and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not to a view expressed in a decision of this court or the High Court. So far as the clarification/circulars issued by the central Government and of the state Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the court to declare what the particular provision of statute says and it is not for the Executive. Looked at from other angle, a circular which is contrary to the statutory provisions has really no existence in law...*

*7. to lay content with the circular would mean that the valuable right of challenge would be denied to him and there would be no scope for adjudication by the High Court or the Supreme Court. That would be against very concept of majesty of law declared by Supreme Court and the binding effect in terms of Article 141 of the Constitution.*

3. Therefore, it is clarified that Board Circulars contrary to the judgments of Hon'ble Supreme Court become *non-est* in law and should not be followed."

Also, in paragraph 2 of the said Review Order the appellant has quoted the verdict of the Hon'ble High Court agreeing to the fact that levy of Service Tax by the club to its members is ***ultra vires*** i.e. beyond the powers and therefore, not legal. The term 'legal' or 'illegal' is equally applicable to everyone whether the person is a party to an issue or otherwise. How could a matter become ***ultra vires*** to Sports Club of Gujarat Ltd., Rajpath Club Ltd. and Karnavati Club Ltd. and ***intra vires*** to the respondents? Therefore, the plea of the appellant that as the respondents were not a party to the case and hence the verdict of Hon'ble High Court is not applicable to them, is legally not tenable. In the case of Union of India and Others Vs Kamlakshi Finance Corporation, the Hon'ble Supreme Court quoted that;

*"The High Court has, in our view,rightly criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities; The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors*

*who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws".*

Also, in the case of Karnavati Club Ltd. Vs Union of India, in paragraph 25 of the order, the Hon'ble High Court of Gujarat has proclaimed that;

*"In taxation matters, where a High Court is concerned with the interpretation of an all India statute, it should be a practice and policy that if one High Court has interpreted a provision or section of a taxing statute which is an all India statute and therefore is no other view in the field, another High Court must ordinarily accept that view in the interest of uniformity and consistency in matter of application of taxing statute so as to avoid the challenge of discrimination in application and administration of tax matters. Such principle has been laid down in Maneklal Chunilal & Sons v. Commissioner of Income Tax (1953) 24 I.T.R. 375; Commissioner of Income Tax v. Chimanlal J. Dalal & Co. (1965) 57 I.T.R. 285, Commissioner of Income Tax v. Tata Sons Pvt. Ltd. (1974) 97 I.T.R. 128 and J. D. Patel v. Union of India 1975 G.L.R. 1083. We are, therefore, in respectful agreement with the view taken by the Calcutta High Court in the decision referred to in Dalhousie Institute and Saturday Club cases (supra)".*

Thus, in view of above, the statement tabled by the appellant does not hold any ground.

**10.** In view of the facts and discussions hereinabove, I reject the appeal filed by the Department and uphold the impugned order.

**11.** अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

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

(उमा शंकर)
आयुक्त (अपील्स - II)
CENTRAL EXCISE, AHMEDABAD.

ATTESTED

(S. DUTTA) 01/11/16
SUPERINTENDENT (APPEAL-II),
CENTRAL EXCISE, AHMEDABAD.

To,

M/s. Young Men's Christian Association,

S. G. Highway, Ahmedabad

**Copy to:**

1. The Chief Commissioner, Central Excise, Ahmedabad.
2. The Commissioner, Service Tax, Ahmedabad.
3. The Dy./Asst. Commissioner, Service Tax, Division-III, Ahmedabad.
4. The Asst. Commissioner(System), Service Tax Hq, Ahmedabad.
5. Guard File.
6. P.A. File.