

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)191/A-II/2015-16 / 3234-39
ख अपील आदेश संख्या : Order-In-Appeal No. AHM-SVTAX-000-APP-165-16-17
दिनांक Date : 29.11.2016 जारी करने की तारीख Date of Issue 05/12/16
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/117/HCV/Trans/Div-III/15-16 Dated 27.01.2016

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

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

M/s. Transindia Cinemas 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 :-

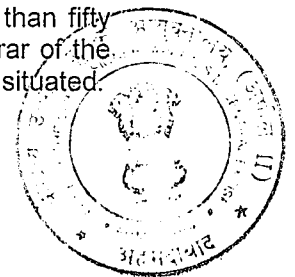
पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद-380016

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 ओर लगाया गया जुर्माना रूप 5 लाख या उससे कम है वहाँ रूप 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूप 5 लाख या 50 लाख तक हो तो रूप 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूप 50 लाख या उससे ज्यादा है वहाँ रूप 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 is 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.

A. J. J.



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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 39फ 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 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 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.



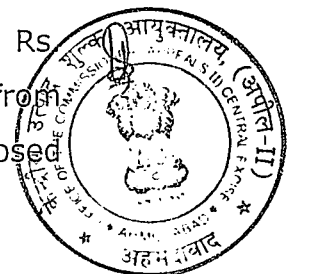
ORDER IN APPEAL

M/s. Transindia Cinemas, Screen Building, Drive-In Road, Thaltej Ahmedabad (*hereinafter referred to as 'appellants'*) have filed the present appeals against the Order-in-Original number STC/Ref/117/HCV/Trans/Div-III/15-16 dated 27.01.2016 (*hereinafter referred to as 'impugned orders'*) passed by the Asst. Commissioner, Service Tax Div-III, APM Mall, Satellite, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*);

2. The facts of the case, in brief, are that the appellants have filed refund claim on 12.06.2014 on the ground that they had let out their immovable property and that the aggregate value for renting for F.Y. 2012-13 was Rs. 22,38,886/- and that they have not charged any service tax separately on this amount and deposited the service tax of Rs. 2,46,350/- and interest of Rs. 9186/-. Reason stated for refund is that Notification No. 29/2012-ST dated 20.06.2012 exempts renting service from so much of service tax to the extent of municipal local tax deposited on said property. Appellant had paid municipal tax of Rs. 18,48,277/- but had not claimed exemption. Appellant re-worked out service tax liability to Rs. 42,968/- after deducting municipal tax. It is stated in claim that appellants are eligible for refund of Rs. 2,12,568/- (246350+9186-42968) but Rs. 1,57,149/- is time barred, therefore refund claim filed is for Rs. 55,148/-.

3. Adjudicating Authority vide impugned OIO refunded claim was rejected on ground of unjust enrichment. It is pointed out in OIO that-

- I. Appellant has nowhere produced any such invoice issued under rule 4A of Service Tax Rule 1994, before adjudicating authority to justify their proposition that they have not charged any service tax from their lessees. Section 11B(1) requires documentary evidence to establish payment of duty.
- II. It is made clear in agreement that municipal taxes and maintenance of property has to be born by the lesser. Rent received is stated to be composite one. Except these specific taxes i.e. corporation tax and maintenance, all other taxes and liabilities were included in composite rental. Therefore amount received is cum service tax.
- III. In ST-3 for 2012-13 net value of taxable service shown is Rs. 19,92,536/- and applicable service tax with interest is shown as Rs. 2,46,277/- and Rs. 22,38,813/- is shown as net amount received from lessee. The difference of the value of taxable service disclosed



(19,92,536) in ST-3 and amount actually received as compensation (22,38,813/-) is Rs. 2,46,277/- .

- IV. Appellant is showing receipt as ex-service tax in Profit and Loss A/c . at the time of filling ST-3 return appellant are assuming said receipt as cum- service tax. There is contradiction in stand taken by appellant.
- V. It would have been a case in favor of the appellant when the income reported and in actually received from the lessees had been reflected in the taxable income in ST-3 and service tax would have been paid on this amount. This is not the case to be and therefore, the burden of service tax has been passed on by the said claimant to the lessees and the claim is hit by limitation of unjust enrichment.

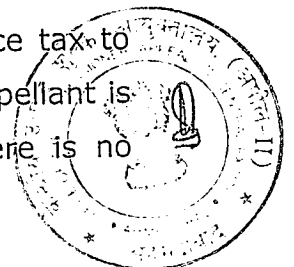
4. Being aggrieved with the impugned order, the appellants preferred an appeal on 28.03.2016 before the Commissioner (Appeals-II) wherein it is contended that-

- I. Rental agreement describes the rental to be charged and no where it is mentioned that service tax shall be charged separately. Therefore it could be perceived that no service tax has been charged.
- II. Nowhere in rental agreement it is stated that amount is to charged inclusive of service tax.
- III. Form no 26AS does talley with the rental income as per profit and loss A/c which is gross rental income.

5. Personal hearing in the case was granted on 08.11.2016 and Shri Kiran Parikh, CA and Advocate G.M. Shah appeared before me and reiterated the grounds of appeal. They further stated that format of ST-3 is such that ST has to be shown separately and submitted CA certificate and Balance sheet.

DISCUSSION AND FINDINGS

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. Notification No. 29/2012-ST dated 20.06.2012 exempts renting service from so much of service tax to the extent of municipal local tax deposited on said property and appellant is eligible for this exemption. Regarding eligibility of exemption, there is no



dispute. Sort question to be decided is as to whether amount paid to appellant is cum-service tax or ex-service tax.

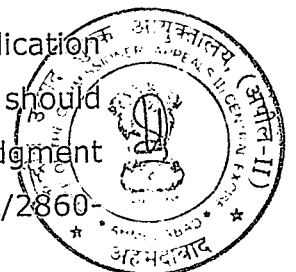
7. Now I take up the documents for scrutiny. Appellant is repeatedly arguing that they have not charged service tax but that is not the question to be decided as to whether or not service tax has been charged by the appellant. Question to be decided is whether or not "composite rent" received is cum-service tax.

8. In normal course of transaction invoice is issued wherefrom it can be seen that amount collected is cum-service tax or ex-service tax. Appellant has not produced before adjudicating authority and before me, the invoice issued under rule 4A of service tax rule but has produced the agreement copy, Balance sheet, P&L A/c, ledger. In absence of invoice other documents submitted are resorted to arrive at conclusion as to whether amount collected is cum-service tax or ex-service tax. P & L A/c and ledger submitted shows that amount collected is ex-service tax. In Balance sheet/P & L also refund amount is shown on assets side. On the basis of appellant records I come to conclusion that amount collected is ex-service tax and service tax is paid from his own pocket. If accounting is accepted then refund can be granted.

9. In the ST-3 return amount received is given treatment of cum-service tax receipt. I find that in own records receipt amount is treated as ex-service tax where as for ST-3 purpose it is treated as cum-service tax. If ST-3 amount is accepted then refund can not be granted because it would lead to unjust enrichment.

10. Now I proceed to scrutinize agreement. I have perused agreement and find that "composite rent" is to be given to lessor i.e appellant. Said "composite rent" includes or excludes service tax is nowhere given in agreement. Definition of "composite rent" is not given in agreement. Only exclusion stated in agreement is municipality tax and maintenance expense but that does not prove that rent received is inclusive of service tax, therefore it is wrongly concluded by the adjudicating authority that "composite rent" received is cum-service tax amount.

11. There is no requirement in section 11B of CEA, 1994 and application form-R under said section that amount receipt disclosed in ST-3 only should be considered for refund. In support of my view ratio of judgment in case of WNS Global Services Pvt. Ltd Vs. CCE- Pune III[Order No. A/2860-



2861/15/SMB dated 06.05.2015] is applicable. Refund should be granted on the basis of own a/c and not on the basis of amount shown in returns. In support of my view , judgment in case of Serco Global Services Pvt. Ltd [2015(39) STR 892 (Tri. Del.)] is applicable. In case of Broadcom India Research Pvt. Ltd [2016(42) STR 79 (Tri. Bang.)] ground of rejecting the refund claim was CENVAT credit shown in ST-3 does not tally with amount of refund claim. The relevant extract of the judgment is reproduced as –

"The next ground is that Cenvat credit shown in the ST-3 returns does not tally with the amount claimed in the refund claims. In my opinion, the refund claim is not based on ST-3 returns and ST-3 return is nothing but a report of transactions that have taken place over a period covered by the returns. On the ground that the figures in ST-3 returns were not correct or there was a substantial difference, refund claim cannot be rejected. For the purpose of consideration of refund claim, the relevant documents on the basis of which credit was taken, nature of service and its nexus and utilization of the service for rendering output service are relevant and merely because there was some mistake in the ST-3 returns, substantive right of assessee for refund cannot be rejected. Therefore, I do not consider it necessary to consider the issue as to whether figures in ST-3 returns tallied with the amounts claimed in the refund claims or not."

12. In view of above discussion I hold that amount received shown in own account to be considered for the refund purpose and said receipt is ex-service tax amount. I allow the appeal.

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

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

उमा शंकर

(उमा शंकर)

आयुक्त (अपील्स - II)

ATTESTED

R.R. Patel

(R.R. PATEL)

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

To,

M/s. Transindia Cinemas,
Screen Building,
Drive-In Road, Thaltej,
Ahmedabad



Copy to:

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



