

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)048/A-II/2016-17/ 97 - 101  
ख अपील आदेश संख्या : Order-In-Appeal No..AHM-SVTAX-000-APP-225-16-17  
दिनांक Date : 31.01.2017 जारी करने की तारीख Date of Issue 08/02/17

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

Passed by Shri Uma Shanker Commissioner (Appeals-II)

*A. file*

ग \_\_\_\_\_ आयुक्त सेवाकर अहमदाबाद : आयुक्तालय द्वारा जारी मूल आदेश सं  
\_\_\_\_\_ दिनांक : \_\_\_\_\_ से सृजित

Arising out of Order-in-Original No SD-02/Ref-299/DRM/2015-16 Dated 31.03.2016 Issued  
by Assistant Commr STC, Service Tax, Ahmedabad

घ अपीलकर्ता का नाम एवं पता Name & Address of The Appellants  
M/s. The Orient Club 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 :-

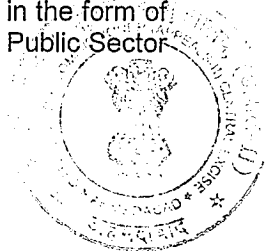
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-  
Under Section 86 of the Finance Act 1994 an appeal lies to :-

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 accompany ed 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.



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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, 1994 की धारा 34फ 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 "मॉग 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 अर्ज़ी 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 मॉग 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. The Orient Club, Kavi Nhanalal Marg, Ellisbridge, Ahmedabad (hereinafter referred to as 'appellants') have filed the present appeal against the Order-in-Original No. SD-02/Ref-299/DRM/2015-16 dated 31.03.2016 (hereinafter referred to as 'impugned order') by the Assistant Commissioner, Service Tax, Div-II, 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 ₹20,57,416/- on 28.09.2015 for the period 01.04.2014 to 31.03.2015. They were holding Service Tax registration number AAAAT5128PST001 under the category of Membership Club or Association Service and Restaurant Service, other taxable services – other than the 119 listed.

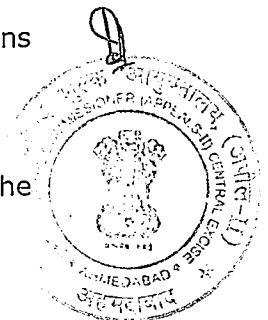
3. On scrutiny of the claim certain discrepancies were noticed and accordingly a show cause notice dated 15.10.2015 was issued to the appellants, which was adjudicated by the adjudicating authority. The adjudicating authority, vide the impugned order, sanctioned an amount of ₹12,98,372/- and rejected an amount of ₹7,59,044/- on account of time bar as prescribed by Section 11B of the Central Excise Act, 1944.

4. Being aggrieved with the impugned order, the appellants preferred the present appeal. They stated that the adjudicating authority has failed to follow the judicial discipline. They claimed that the ratio of judgment of Hon'ble High Court of Gujarat has held that provisions purport to levy Service Tax in respect of services purportedly provided by the club to its members is *ultra vires* and that Section 11B of the Central Excise Act, 1944 is applicable to tax and not to the amount of deposit which they had paid due to misunderstanding. They have pleaded before me to drop the impugned order to sanction the refund amount of ₹7,59,044/-.

5. Personal hearing in the case was granted on 21.12.2016 wherein Shri Shreekant S. Shah, on behalf of the said appellants, appeared before me and reiterated the contention of their submission.

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



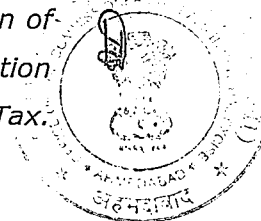
refund amount of ₹64,67,363/- on account of limitation. In the case of Sports Club of Gujarat vs Union of India, the Hon'ble High Court of Gujarat had held that the levied Service Tax on Club and Association Services vide Section 65(25a), Section 65(105)(zze) and Section 66 of the Finance Act, 1994 as 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*, i.e. beyond the powers and therefore, not legal, 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".*

In Cawasi & Co case [1978 E L T (J 154)] the Supreme Court observed that the period of limitation prescribed for recovery of money paid under a mistake of law is three years from the date when the mistake is known, be it 100 years after the date of payment. This judgment has been quoted and depended upon by the following judgment of the Andhra Pradesh High Court.

In the case of U Foam Pvt Ltd vs Collector of Central Excise -1988 (36) E L T 551(A P), the issue was that Revenue rejected the refund quoting the time limit under Rule 11 of the Central Excise Rules, 1944, and Section 11B of the Central Excises Act, 1944. The high court held that *"the period of limitation to be applied is three years from the date when the assessee discovered the mistake in the payment of duty, or from the date when it came to the knowledge of the assessee that it is entitled to the refund"*.

In the case of Hexacom (I) Ltd vs CCE, Jaipur - 2003 (156) E L T 357 (Tri -Del), the tribunal held that if any amounts are collected erroneously as representing service tax, which is not in force, there is no bar to the return of such amounts. The time limit under Section 11B of Central Excise Act, 1944 does not apply. The tribunal observed the following, *"We have perused the records and heard both sides. It is not in dispute that no Service Tax was leviable during the period in question. Therefore, whatever payment was made did not relate to Service Tax at all. It was merely an erroneous collection by DOT and payment by the appellants. Therefore, provisions relating to refund of Service Tax, including those relating to unjust enrichment, cannot have any application to the return of the amount in question. It is further noted that provisions contained in Section 11D of the Central Excise Act have not been made applicable to Service Tax."*



Therefore, if any amounts are collected erroneously as representing Service Tax, which is not in force, there is no bar to the return of such amounts. The rejection of refund application was, therefore, not correct".

In the case of CCE, Raipur vs. Indian Ispat Works Ltd -2006 (3) S T R 161 (Tri - Del), the Tribunal held that, "The department has allowed the claim of the respondents for the period 16-11-97 to 1-6-98, but rejected the refund claim for the previous period and subsequent period as time barred. The rejection of the claim of refund is wrong as it can be seen from the records, that the amount paid by the respondents is not a tax, but an amount collected by the department without any authority of law". In the case of CCE, Bangalore vs Motorola India - 2006 (206) E L T 90 (Kar), the high court has held that in the case of claim of refund, limitation under Section 11B of Excise Act is not applicable since the amount paid by mistake in excess of duty and such amount cannot be termed as duty. Thus, the conclusion is clear that if a tax has been collected which is not leviable at all, the time limit given in the tax laws does not apply.

8. In view of above, I set aside the impugned order with consequential relief to the appellants.

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

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

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

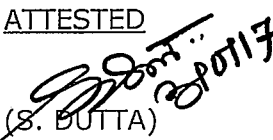


(उमा शंकर)

आयुक्त (अपील्स - II)

CENTRAL EXCISE, AHMEDABAD.

ATTESTED

  
(S. BUTTA)

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

BY R.P.A.D.

To,  
M/s. The Orient Club,  
Kavi Nhanalal Marg, Ellisbridge,  
Ahmedabad- 380 006

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-II, A'bad.
4. The Assistant Commissioner, System-Ahmedabad
5. Guard File.
6. P.A. File.

