

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)140 /A-II/2015-16 /1466 से 1470

ख अपील आदेश संख्या : Order-In-Appeal No.. AHM-SVTAX-000-APP-072 -16-17

दिनांक Date : 16.08.2016 जारी करने की तारीख Date of Issue 26/08/16

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 SD-02/REF-209/DRM/2015-16 Dated 31.12.2015

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

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

M/s. QX KPO Services Pvt Ltd 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:-

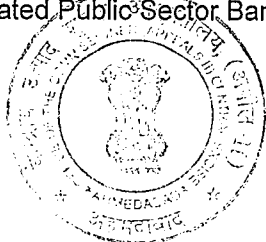
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, 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.



4. file

(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 A2J9k 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 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) 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 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,

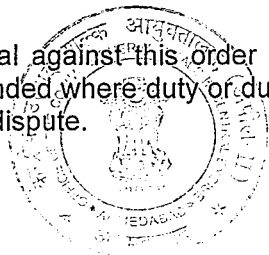
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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 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

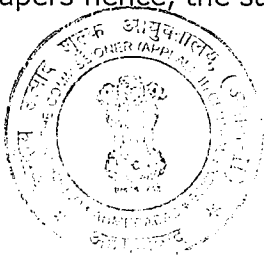
This order arises on account of an appeal filed by M/s QX KPO Services Pvt. Ltd., 201 & 401, GNFC Info Tower, S. G. Highway, Bodakdev, Ahmedabad (hereinafter referred to as the '*the appellants*' for sake of brevity) against Order-in-Original No. SD-02/Ref-209/DRM/2015-16 dated 31.12.2015 (hereinafter referred to as the '*impugned order*' for the sake of brevity) passed by the Assistant Commissioner, Service Tax, Division-II, Ahmedabad (hereinafter referred to as the '*adjudicating authority*' for the sake of brevity).

2. Briefly facts of the case are that the appellants are registered with the Service Tax Department under the category of "Rent-a-Cab Service, Security/ Detective Agency Service, Manpower Recruitment/ Supply Agency Service, Business Auxiliary Service, Legal Consultancy Service' and holding Registration No. AAACQ1087GST001. They filed a refund claim of ₹16,23,999/- on 06.10.2015 for the quarter April 2015 to June 2015 under Notification number 27/2012-C.E.(NT) dated 18.06.2012 (hereinafter referred to as '*the said Notification*' for sake of brevity) before the proper authority in prescribed format. The adjudicating authority, vide the impugned order, sanctioned the refund of ₹15,24,427/-, out of ₹16,23,999/- in terms of provisions of Rule 5 of CENVAT Credit Rules, 2004 read with Section 11B of the Central Excise Act, 1944 made applicable to the Service Tax matter vide Section 83 of the Finance Act, 1994 and Notification No. 27/2012 C.E.(NT) dated 18.06.2012 and rejected the refund claim of ₹99,572/- (₹16,179/- + ₹81,884/- + ₹1,509/-) on the following grounds;

(a) As stated at Paragraph 6 of the impugned order, Invoices number GCL/AHM/BGC/APR/0001/2014 dated 30.04.2015, GCL/AHM/BGC/june/0001/2014 dated 01.06.2015 and GCL/AHM/BGC/APR/0001/2015 dated 30.05.2015 issued by M/s. Genius Consultant Ltd. involving Service Tax of ₹6,402/-, ₹3,609/- and ₹6,168/- respectively, the appellants claimed that the service was related to background verification of employees. Hence, an amount of ₹16,179/- was rejected.

(b) As stated at Paragraph 6 again of the impugned order, in respect of Invoices number 014/15 dated 02.05.2015, 015/15 dated 30.04.2015, 27/15 dated 30.05.2015, 28/15 dated 30.05.2015, 43/15 dated 06.07.2015 and 44/15 dated 06.07.2015 issued by M/s. Somnath Catering Services involving Service tax of ₹20,671/-, ₹2,375/-, ₹23,004/-, ₹2,093/-, ₹31,371/- and ₹2,370/- respectively, the appellants claimed that the service was related to outdoor catering service. Hence, an amount of ₹81,884/- was rejected.

(c) As stated at Paragraph 8 of the impugned order, an invoice dated 27.06.2015 of M/s. HDFC Bank involving Service Tax of ₹1,509/- was not submitted with the claim papers hence, the said amount was rejected.



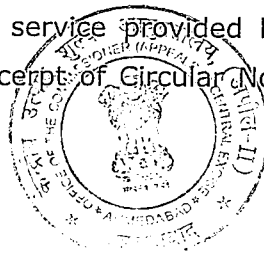
3. Being aggrieved with the impugned order, the appellants filed the present appeal on the grounds that they are in the business of outsourcing services and their main assets are their employees. Hence, in order to provide quality services to their customers they recruit qualified and talented people. To verify correctness of information or documents of qualifications of their employees, they had appointed the consultancy firm M/s. Genius Consultant Ltd. to conduct detailed background verification of their employees and hence, refund should not be denied to them. Regarding the issue of outdoor catering, they argued that they are working 24/7 as they cater overseas customers. So food facility becomes pre-requisite for them to be provided to their employees. The catering service should be considered as an eligible input service because absence of such service would adversely impact the quality and efficiency of the services exported. For the non-inclusion of the invoice of HDFC Bank, they informed that the amount of ₹1,509/- was actually negative amount which the appellants had reversed in their Service Tax claim upon reversal of Service Tax by HDFC Bank. The said amount, according to the appellants, had been already reduced from the claim and therefore, adjudicating authority cannot further reduce the claim by disallowing the said amount. In support of their claim they have attached bank statement showing the reverse transaction.

4. Personal hearing in the case was granted on 02.08.2016 wherein Shri Tushar Shah, CA, appeared on behalf of the appellants and reiterated the contents of the appeal memorandum.

5. I have carefully gone through the facts of the case on records, grounds of the Appeal Memorandum, and oral submissions made by the appellants at the time of personal hearing. I find that there are three reasons involved for rejection of the part claim of the refund viz., (i) Invoices pertaining to background verification, (ii) Invoices pertaining to outdoor catering service and (iii) Non-inclusion of invoice of HDFC Bank.

6. Regarding the first issue, I find that the appellants have informed that they hire a consultancy firm for the verification of genuinity of their employees. I agree to their claim that the said activity is part of their business as in absence of the said activity the quality of their service might go down. Companies do verify the correctness and integrity of their employees to remain at the safer side. The impugned order, surprisingly, is mute on the reasons for rejection of the said amount. The adjudicating authority should have properly verified the documents related to this and countered the arguments of the appellants. In view of the above discussion, I allow the appeal pertaining to the issue of background verification of the employees.

7. With regard to the rejection of refund of (the second issue) pertaining to outdoor catering service, the appellants contended that they are working 24/7 as they cater overseas customers. The argument submitted by the appellants is that without proper food, the quality and efficiency of the service provided by them would go down. In this regard, they have quoted the excerpt of Circular No. 120/01/2010-ST dated 19.01.2010 as below;



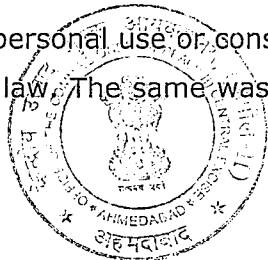
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3.1.2 Therefore, the phrase, used in mentioned in Notification No. 5/2006-CX (NT) to show the nexus also needs to be interpreted in a harmonious manner. The following test can be used to see whether sufficient nexus exists. In case the absence of such input/input service adversely impacts the quality and efficiency of the provision of service exported, it should be considered as eligible input or input service. In the case of BPOs/call centers, the services directly relatable to their export business are renting of premises; right to use software; maintenance and repair of equipment; telecommunication facilities; etc. Further, in the instant example, services like outdoor catering or rent-a-cab for pick-up and dropping of its employees to office would also be eligible for credit on account of the fact that these offices run on 24x7 basis and transportation and provision of food to the employees are necessary pre-requisites which the employer has to provide to its employees to ensure that output service is provided efficiently. Similarly, since BPOs/call centers require a large manpower, service tax paid on manpower recruitment agency would also be eligible both for taking the credit and the refund thereof. On the other hand, activities like event management, such as company-sponsored dinners/picnics/tours, flower arrangements, mandap keepers, hydrant sprinkler systems (that is, services which can be called as recreational or used for beautification of premises), rest houses etc. prima facie would not appear to impact the efficiency in providing the output services, unless adequate justification is shown regarding their need.

However, the definition of "input service" under Cenvat Credit Rules, 2004 has been amended drastically w.e.f. April 2011 and because of such amendments, majority of interpretations and settled positions have changed. One of them is specific exclusion of catering service from the definition of "input service". It is a settled position of law that in case, circulars are in conflict with the rules, the rules will prevail. Rule 2 (I) of Cenvat Credit Rules excludes outdoor catering from the definition of input service under clause (c), which is as under;

(C) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as leave or Home Travel Concession, when such services are used primarily for personal use or consumption of employee;

In the definition of input service Government has specifically used the words such as ".....used primarily for personal use or consumption of any employee", and every word has its meaning in the law. The same was also held by Hon'ble Supreme Court in the



case of Union of India Vs. Hansoli Devi - 2002 (9) TMI 799 - SUPREME COURT, wherein it has observed that "the legislature never waste its words or say anything in vain and a construction which attributes redundancy to legislation will not be accepted except for compelling reasons". The intention of exclusion of such services by the Government appears to be to negate claims for expenses that are passed off as business expenses, but are personal in nature. However, this exclusion is only when such services are used primarily for personal use or consumption by any employee. This exclusion will not apply in other cases. In Circular No.943/4/2011-C., dated 29.04.2011 wherein it was clarified that outdoor catering service is per se not an ineligible input service but it is not eligible for credit only when it is used for personal use or consumption of any employee or a sub-group of employees. Further, in this connection, recently one decision was published in the case of M/s. Hindustan Coca Cola Beverages Pvt. Ltd. v/s CCE, reported in 2014 (12) TMI 596 - CESTAT MUMBAI, wherein the Hon'ble CESTAT, Mumbai Bench held that post 2011, catering service is excluded from input service definition only when such service is primarily for personal use or consumption of any employee. Thus, I proclaim that the appellants are not eligible for refund relating to outdoor catering service.

8. Regarding the third and final issue of rejection of an amount pertaining to non-submission of invoice of HDFC Bank, the appellants have claimed that said amount was reversed by them in their Service Tax claim and the adjudicating authority cannot disallow the amount. Once again, the issue is not discussed in the impugned order. The statement of the appellants should have been verified by the adjudicating authority vis-à-vis related documents. I find that this part of the impugned order is a non-speaking one and needs to be remanded back for verification as to whether the appellants have actually reversed the said amount in their Service Tax claim or otherwise.

9. The appeal filed by the appellant is disposed off as per the discussion held above.


(UMA SHANKER)

COMMISSIONER (APPEAL-II)
CENTRAL EXCISE, AHMEDABAD.

ATTESTED


(S. DUTTIA) 220816

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

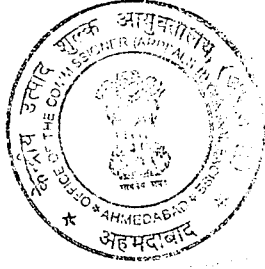


BY R.P.A.D.

To,
M/s QX KPO Services Pvt. Ltd.,
201 & 401, GNFC Info Tower,
S. G. Highway, Bodakdev,
Ahmedabad-380 054.

Copy To:-

1. The Chief Commissioner, Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, Service Tax, Ahmedabad.
3. The Assistant/Deputy Commissioner, Service Tax, Division-II, Ahmedabad.
4. The Assistant Commissioner, (System) Service Tax, Ahmedabad
5. Guard File.
6. P.A. File.





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