

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)92/A-II/2016-17 / 1420 to 1424  
ख अपील आदेश संख्या : Order-In-Appeal No. AHM-SVTAX-000-APP-078-16-17  
दिनांक Date : 17.08.2016 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-01/23/DC/HM/2014-15 Dated 31.10.2014  
Issued by Assistant Commr STC, Service Tax, Ahmedabad

घ अपीलकर्ता का नाम एवं पता Name & Address of The Appellants  
M/s. Indian Institute of Management 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 :-

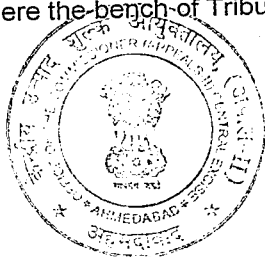
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-  
Under Section 86 of the Finance Act 1994 an appeal lies to :-

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 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 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.



9 July

(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 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 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 अर्जी 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,

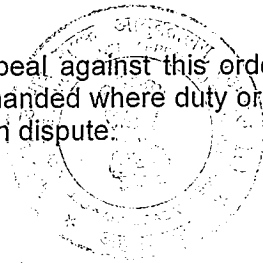
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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.



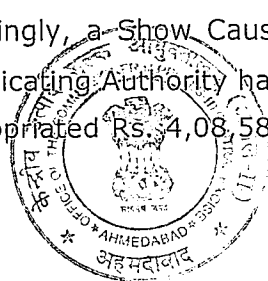
**ORDER-IN-APPEAL**

This order arises on account of an appeal filed by M/s Indian Institute of Management, IIM Road, Vastrapur, Polytechnic, Ahmedabad-380 015 (hereinafter referred to as 'the Appellant') against Order-in-Original NO.SD-01/23/DC/IIM/2014-15 Dated 31.10.2014 (hereinafter referred to as the 'impugned order' for the sake of brevity) passed by the Deputy Commissioner, Service Tax, Division-I, Ahmedabad (hereinafter referred to as the "Adjudicating Authority" for the sake of brevity). Appeal is restored to original No. as per the CESTATE remand order.

2. Briefly stated the facts of the case are as under:-

(i) The appellant is engaged in providing the services under the category of "Management Consultancy Services" besides so many other services and holding Service Tax Registration No. AAATI1247FST001. During the course of Audit for the year 2011-12, it was noticed that the appellant has provided services viz. Renting of Immovable Property Services and also Supply of Accommodation Services and not paid service tax being exempted on Rent receipt of Rs. 53,97,500/- i.e. Licence fees recovered from the staff and students in respect of the residential quarters to them and also on abatement value of Rs.45,71,720/- in terms of Notification No.01/2006-ST dated 01.03.2006 in respect of Supply of Accommodation Services. The appellant has not maintained separate records as per sub-rule (2) of Rule 6 of the Cenvat Credit Rules,2004 ( hereinafter referred to as 'CCR,2004' for sake of brevity) and therefore they were required to pay /reverse an amount of Rs.5,09,283/-, at the rate of 5% of the taxable value of Rs. 1,01,85,655/- of the said exempted services in terms of the provisions of sub-rule (3) of Rule 6 of the Cenvat Credit Rules,2004 alongwith interest thereon and also penalty in view of the provisions of Section 73(4A) of the Finance Act,1994. On being pointed out , the appellant has informed that they had reversed/paid such Service Tax of Rs.1,00,696/- in the month of June-2012 i.e. next financial year and therefore, they are required to pay/reverse the remaining amount of Rs.4,08,587/-. Further, the appellant had also paid the interest of Rs.12,045/- and penalty of Rs.8,030/- vide Challan No. 0510 dated 31.01.2013 on the amount of Rs.1,00,696/-. The remaining amount of Rs.4,08,587/- had been recovered from the appellant in the month of February-2013. However, the appellant had not paid the interest as well as penalty on the said amount of Rs.4,08,587/-. Thus, the appellant had failed to pay/reverse the cenvat credit in respect of exempted services and also failed to declare the value realized towards such exempted services in their ST-3 returns filed for the year 2011-12 and also failed to correctly assess Service Tax that is to say reversal of Cenvat credit in terms of sub-rule (3) of Rule 6 of the Cenvat Credit Rules,2004 on the value of exempted services..

(ii) Accordingly, a Show Cause Notice dated 19.09.2013 was issued to the appellant. The Adjudicating Authority had confirmed the demand of Rs 4,08,587/- short paid and also appropriated Rs. 4,08,587/- paid by them against the said demand and



also ordered to pay interest at the appropriate rate under Section 75 of the Finance Act, 1994. Also imposed penalties of Rs.10,000/- under Section 78 of the Finance Act, 1994 for suppressing the facts from the department.

3. Being aggrieved with the impugned order, the appellant has filed the present appeal followed with written submission on the grounds which are interalia mentioned as under:-

(i) As the appellant had followed all the procedures as per Rule 6(3A) of CCR,2004, except intimation for the option to the Department initially which is undisputed facts; that merely due to non-intimation of the option, the appellant would not become liable for the payment of Service Tax on exempted value of services; that they had paid the attributable Cenvat credit in respect of input/input services used in the manufacture of exempted finished goods by following the procedure under Rule 6(3A) *ibid*. Further, ST-3 Returns filed for the relevant period do reflect that they opted for the Rule 6(3A) of CCR,2004. Reliance is placed on various decisions of the higher judicial forum in support of their contention.

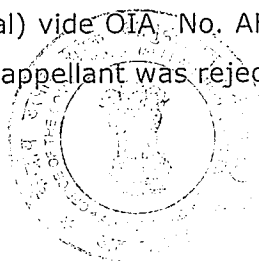
(ii) The appellant has rightly availed the Cenvat credit and the same has not been utilized for payment of duties and also on being pointed out, reversed the same. Hence, pleaded to drop the proceedings of interest under Section 75 and also penalty under Section 78 of the Finance Act, 1994. Reliance is placed on various decisions of the higher judicial forum in support of their contention.

(iii) The SCN issued on 19.09.2013 covering the period of 2011-12 and the facts was in the knowledge of the Department from 2009 onwards and hence, the extended period of limitation can not be invoked in the present case as there was no suppression, willful misstatement on their part.

(iv) Thus, as stated above penalty under Section 78 *ibid* can not be imposed. Further, the SCN simply alleges suppression however, it does not bring any evidence/facts which establishes the said suppression. Further, issue involved in the present case is of interpretation of law and hence, penalty can not be imposed. Reliance is placed on various decisions of the higher judicial forum in support of their contention.

4. Personal hearing was granted on 07.09.2015 wherein Shri Vipul Kandhar, Chartered reiterated the contents of the appeal memorandum and also put forth the citations viz. 2015 (320) ELT 157(Tri. Mumbai) and also a SCN No.STC/4-37/O&A/2014-15 dated 30.09.2014 in their support.

5. There was delay of 3 days in filing the appeal. The appellant had neither filed any Condonation of Delay Application nor pleaded during the personal hearing held therefore Commissioner (Appeal) vide OIA No. AHM-SVTAX-000-APP-076-15-16 dated 19.10.2015 appeal filed by the appellant was rejected being time barred.



9

6. Being aggrieved with the OIA No. AHM-SVTAX-000-APP-076-15-16 dated 19.10.2015, the appellant filed the present appeal before CESTAT. CESTAT vide order No. A/10103/2016 dated 17.02.2016 ordered to Commissioner (Appeal) to restore the appeal of the appellant to original Number and hear the same on merit.

7. Again personal hearing was granted on 02.08.2016 wherein Shri Vipul Khandhar, Chartered reiterated the contents of the appeal memorandum and stated that option under Rule 6(3) is filed late. Further stated that there is no time limit and rules have been amended retrospectively. Appellant made additional submission.

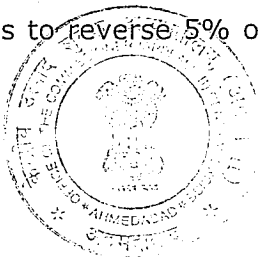
#### **DISCUSSION AND FINDING**

8. I have carefully gone through the facts of the case on records, grounds of the Appeal Memorandum, and written/oral submissions made by the appellants at the time of personal hearing. Looking to the facts narrated above with regard to the payment of the entire Service Tax of Rs.4,08,587/- during the investigation and subsequent appropriation thereto under the impugned order, which can be considered as compliance towards fulfillment of mandatory pre-deposit in pursuance to the amended provisions of Section-35 F of the Central Excise Act, 1944 as made applicable to Service Tax matter vide Section-83 of the Finance Act,1994 made effective from 06.08.2014, I dispense with the requirement of pre-deposit and proceed to decide the appeal of the appellant.

9. Since separate record as required under rule 6(2) was not maintained for dutiable and exempted service provided, the department has raised show cause calculating reversal under rule 6(3) where as it was contended by appellant before adjudicating authority that they have reversed as per rule 6(3A) of CCR, 2004. On the basis of afore-said observations, the department asked the appellant to pay 5% of the value of exempt services and disallowed the method adopted for computing reversal [proportionate reversal as per Rule 6(3A)] by the appellant.

10. Proportional reversal made under Rule 6 (3A) of CCR 2004 is not disputed., It is also not disputed that renting service and accommodation service provided by appellant is exempted for purpose of calculating proportional credit for reversal under Rule 6 (3A) of CCR 2004. Dispute is that when the appellant is allowed to choose between two modes of payment at his option, can the department mandate the appellant to follow a particular mode of payment favorable to the Revenue, merely because appellant has not followed the procedural requirement of intimating his choice beforehand? Can a substantive benefit be denied to an appellant for not following a procedural requirement?

11. I find that it is prior requirement in rule 6 to intimate for availing option of facility under Rule 6 (3A). it is department's view that that in absence of such option appellant has to reverse 5% of exempted service value. Department cannot force the

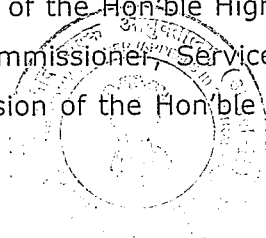


appellant to exercise a particular option for any such procedural lapse. The non-compliance of the procedures is only a procedural lapse and can be condoned. Since the appellant has made such reversal of CENVAT Credit for the purpose of and as per method prescribed in Rule 6(3A), the objective of the said rule has been complied with. Demand raised by the adjudicating authority has no legs and therefore cannot be sustained. My view is supported judgements in case of M/s Aster Pvt. Ltd vs. CC & CE, Hyderabad-III [2016-TIOL-1035-CESTAT-HYD] . The issue under consideration is squarely covered by the said judgment. In Rathi Daga Vs. CCE, Nashik [2015(38) STR 213 (Tri. Mum.)] and Foods, Fats & Fertilisers Ltd. Vs. CCE, Guntur [2009(247) ELT 209 (Tri. Bang.)], it has been held that the condition in Rule 6(3A) to intimate the department is only a procedural one and that such procedural lapse is condonable and denial of substantive right for such procedural failure is unjustified.

12. In view of the facts and discussion herein above, the appellant's claim of compliance of the procedure under Rule 6(3A) ibid needs to be re-examined and re-looked into and in the interest of justice, it would be just and proper to remit the matter to the Adjudicating Authority to decide the case afresh so as to verify whether the amount reversed by the appellant was as per the procedure as prescribed under Rule-6(3A) of Cenvat Credit Rules, 2004 or not, after due compliance of the principles of natural justice and after proper appreciation of the evidences that may be put forth by the appellant before him. Further regarding invoking extended period limitation period I find that adjudicating authority at para 11 of impugned OIO has stated that ST-3 return filed but there is no mention of option exercised. Where as SCN at para 9 states that exempted value service is not declared in ST-3. Appellant has also argued that there was no suppression as department was aware of facts as ST-3 return for same has been filed.

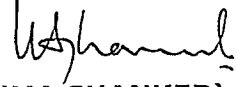
13. Case is remanded back for verifying the facts whether the appellant has reversed the appropriate amount of cenvat credit as per Rulle-6(3A) of Cenvat Credit Rules, 2004 or not and for verifying the documentary evidences that may be submitted by appellant to substantiate that limitation period is invokable or not.

14. The appellant is also directed to put all the evidences before the Adjudicating Authority in support of their contention as well as any other details/documents etc. that may be asked for by the Adjudicating Authority when the matter is heard in remand proceedings before the Adjudicating Authority. Adjudicating authority is directed to pass fresh order. These findings of mine are supported by the decision/order dated 03.04.2014 of the Hon'ble High Court, Gujarat in the Tax appeal No.276//2014 in the case of Commissioner, Service Tax, Ahmedabad V/s Associated Hotels Ltd. and also by the decision of the Hon'ble CESTAT, WZB Mumbai in case of




Commissioner of Central Excise, Pune-I Vs. Sai Advantium Ltd and reported in 2012 (27) STR 46 (Tri. - Mumbai).

15. The appeal filed by the appellant is disposed off by way of remand in above terms.



(UMA SHANKER)  
COMMISSIONER (APPEAL-II)  
CENTRAL EXCISE, AHMEDABAD.

ATTESTED



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

**BY R.P.A.D.**

M/s Indian Institute of Management,  
IIM Road, Vastrapur, Polytechnic,  
Ahmedabad-380 015

**Copy To:-**

1. The Chief Commissioner, Central Excise, Ahmedabad zone, Ahmedabad.
2. The Commissioner, Service Tax, Ahmedabad.
3. The Deputy/Assistant Commissioner, Service Tax, Div.I, Ahmedabad.
4. The Assistant Commissioner, System-Ahmedabad
5. P.A. File.
6. Guard File.



