



आयुक्त (अपील) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क:
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,

रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

Tele Fax No. 0281 - 2477952/2441142 Email: cexappealsrajkot@gmail.com



सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/64/GDM/2016	02/ST/AC/2016-17	08.09.2016
ख	अपील आदेश संख्या (Order-In-Appeal No.):		

KCH-EXCUS-000-APP-023-2017-18

आदेश का दिनांक / Date of Order:	09.10.2017	जारी करने की तारीख / Date of issue:	11.10.2017
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कुमार संतोष, आयुक्त (अपील), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग अथवा आयुक्त संयुक्त आयुक्त/ उपआयुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरोक्तित जारी मूल आदेश से गुजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham :

घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the Appellant & Respondent :-**
M/s. Conservation Corporation of India P. Ltd., Room No. 11, 2nd Floor, Vandana Commercial, Centra, Plot No. 280, Ward No. 12/B, Ghandhidham, Dist. Kutch-370201

इस आदेश(अपील) से व्यक्ति कोई व्यक्ति निम्नलिखित तरीके से उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दाखल कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

- (A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अन्तर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अन्तर्गत निम्नलिखित जगह की जा सकती है।/
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-
- (i) बर्लीकरण मूल्यांकन से सम्बन्धित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर.के. पुरम, नई दिल्ली, को की जानी चाहिए।/
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.
- (ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सेस्टाट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहामाली भवन असावरी अहमदाबाद- 380016 को की जानी चाहिए।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above
- (iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अन्तर्गत निर्धारित किन्तु नये पत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की सीमा व्याज की सीमा और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सर्वोच्च बैंक के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थान आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा कराया होगा।

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

- (B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अन्तर्गत सेवाकर विधिविधानी, 1994, के नियम 9(1) के तहत निर्धारित पत्र S.T.-5 में चार प्रतियों में की जा सकती है एवं उसके साथ वित्त आदेश के विरुद्ध अपील की नयी प्रतियां, उसकी प्रति साथ में संलग्न की (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की सीमा व्याज की सीमा और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सर्वोच्च बैंक के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थान आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा कराया होगा।

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 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/-.

- (i) विल अधिनियम, 1994 की धारा 86 की उप-धारा (1) एवं (2A) के अंतर्गत दाने की गयी अपील, सेवाकर विधायकनी, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकती एवं उसके साथ अप्रकृत, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (जन्में से एक प्रति प्रस्तुतित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दाने करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। / The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.
- (ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टैट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1994 की धारा 35एक के अंतर्गत, जो की विलीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करने समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि इस 'मॉड' स्वरूप से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत 'मांग किए गए शुल्क' में निम्न शामिल है:
(i) धारा 11 बी के अंतर्गत रकम
(ii) सेलवैट जमा की ली गई राशि राशि
(iii) सेलवैट जमा विधायकनी के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्राधान्य विलीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचारणीय स्थिति अजी एवं अपील को लागू नहीं होगी।
For an appeal to be filed before the CESTAT, 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, 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, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 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.
- (C) **सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, विल संचालन, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद भवन, नई दिल्ली-110001, को किया जाना चाहिए। / A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B &it:
(i) यदि मांग के किसी नुकसान के मामले में, जहां नुकसान किसी मांग को किसी कारखाने से अंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक अंडार गृह से दूसरे अंडार गृह पारगमन के दौरान, या किसी अंडार गृह में या अंडारणे में मांग के प्रसंस्करण के दौरान, किसी कारखाने या किसी अंडार गृह में मांग के नुकसान के मामले में। / In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse
(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे मांग के विनिर्माण में प्रदुक्त कच्चे मांग पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबैट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। / In case of rebate of duty of excise on goods exported to any country or territory outside India of an excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को मांग निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
(iv) स्तिरिधित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इच्छी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा विल अधिनियम (सं. 2), 1998 की धारा 109 के द्वारा नियत की गई तरीक अथवा समावधि पर या बाद में पारित किए गए हैं। / Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) विधायकनी, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संकेतन के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साथ के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। / The above application shall be made in duplicate in Form No. EA-8 as specified under Rule. 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-in-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम ही तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपरोक्त रकम में किया जाना चाहिए। इस लक्ष्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। / One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.
(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) विधायकनी, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्बन्धित करने वाले नियमों की और भी ध्यान आकर्षित किया जाता है। / 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.
(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित विधायक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। / For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in.

:: ORDER-IN-APPEAL ::

000117

M/s. Conservation Corporation of India Private Limited, Khatau Wadi, P.O. Devisar, Taluka Nakhatrana, District Kutch, Gujarat, Pin Code - 370602 (hereinafter referred to as "the appellant") filed the present appeal against the Order-in-Original No. 02/ST/AC/2016-17 dated 08.09.2016 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Service Tax Division, Gandhidham, Kutch (hereinafter referred to as "the lower adjudicating authority").

2. The facts of the case, in brief, are that the appellant is running a resort in name of Infinity Resort of Rann of Kutch and providing taxable services viz. "Rent a Cab Scheme Operator Service", "Dry Cleaning Service", Maintenance or Repairing Service", "Works Contract Service", Accommodation in Hotels, Inn, Guest House, Club or Camp site service. During the course of detailed Manual Scrutiny of ST-3 Returns by the Jurisdictional Range Office and reconciliation carried out with books of accounts, it was found that the appellant had not paid service tax on income shown under head of "Sale of Food and Beverages" during the period from 2012-13 to 2014-15. The income shown under the head of "Sale of Food and Beverages" is nothing but, pertains to taxable service viz. Restaurant Service provided by the appellant to their customers in the establishment of Infinity Resort Rann of Kutch. The appellant did not agree with the observations raised after completion of detailed Manual Scrutiny and vide letter dated 14.03.2016, addressed to the Jurisdictional Range Office, submitted that they have air conditioned rooms but only one restaurant without air conditioning facility; that there is no service tax liability on the appellant as they have non-air conditioned restaurant; that Circulars No. 139/8/2011-TRU dated 10.05.2011 and 173/8/2013-ST dated 07.10.2013 clarified that no service tax liability arises where restaurant is not having air conditioning facility.

2.1 SCN No. IV/15-81ST/ADJ/2015 dated 06.04.2016 alleged that the appellant had earned income as shown under the head of "Sale of Food and Beverages" in their books of accounts which was generated through providing Restaurant Service and the appellant having air conditioning rooms and one non-air conditioning restaurant in a single/same/common establishment, therefore the appellant is liable for service tax on restaurant service in terms of statute of exemption under Sr. No. 19 of Notification No. 25/2012-ST dated 20.06.2012. The SCN proposed recovery of service tax of Rs. 1,54,223/- under the proviso to Section 73(1) of the Finance Act, 1994 (hereinafter referred to as "the Act") along with recovery of interest under Section 75 of the Act and imposition of penalty under Section 76, 77 and 78 of the Act. The lower adjudicating

authority, vide impugned order, confirmed demand of Rs. 1,54,223/- under Section 73(1) of the Act and Rs. 1,54,223/- of service tax and Rs. 84,000/- of penalty appropriated already paid as interest is also payable under Section 75 of the Act; imposed penalty of Rs. 1,54,223/- under Section 78 of the Act and also penalty of imposed under Section 77 of the Act; dropped penalty under Section 76 of the Act.

3. Being aggrieved by the impugned order, the appellant filed the present appeal, *interalia*, on the following grounds:-

3.1 The trade presumed that there was no service tax liability on restaurant service, they were in dilemma and unclear, some of the trade availed exemption benefit as per Sr. No. 19 of the Notification No. 25/2012-ST dated 20.06.2012, amended vide Notification No. 03/2013-ST dated 01.03.2013. The appellant has non-air conditioned restaurant and no license to serve alcoholic beverages and hence they are not liable to pay service tax as per Sr. No. 19 of the Notification No. 25/2012-ST dated 20.06.2012, amended vide Notification No. 03/2013-ST dated 01.03.2013. Circulars No. 139/8/2011-TRU dated 10.05.2011 and 173/8/2013-ST dated 07.10.2013 also clarified that no service tax liability arises on restaurant not having air conditioning facility. The appellant pleaded that they were not liable to pay service tax on restaurant service but they have already paid service tax of Rs. 1,54,223/- along with interest of Rs. 84,000/- and penalty of Rs. 38,556/- also incorrectly and hence all these are liable to be refunded. As the appellant is not liable to pay service tax on restaurant service, there is no question of recovery of interest and imposition of penalty.

4. Shri Mitul A Kanaiya, Advocate attended personal hearing, who reiterated grounds of Appeal. He also submitted written personal hearing submissions to say that they had non-air conditioning restaurant during 2012-13, they have that restaurant non-air conditioned even now till date; they paid service tax under protest because department insisted to pay service tax; that since service tax is not payable, it is required to be refunded to them; that they would make further submissions to establish that they never had air conditioned restaurant, for which 15 days may be granted.

4.1 The appellant vide letter dated 15.09.2017 made following further submissions -

(i) They were registered under Accommodation Services and they have been providing air conditioned rooms on rental basis to the customers and they were paying service tax on the rents; that they were providing food and non-alcoholic beverages; that they are not liable to pay service tax as their restaurant is a separate

establishment without air conditioning facility hence does not come under purview of taxable category of Restaurant Service; that as per Circulars No. 139/8/2011-TRU dated 10.05.2011 and 173/8/2013-ST dated 07.10.2013, no service tax liability arises where restaurant is not having air conditioned facility; that the appellant has paid service tax of Rs. 1,54,223/-; Interest of Rs. 84,000/- and Penalty of Rs. 38,556/- under protest, which were not required to be paid by them and hence liable to be refunded under Section 11B of Central Excise Act, 1944 read with Rule 6(4A) of Finance Act, 1994 or liable to be adjusted against their liability.

4.2 The appellant vide letter dated 10.10.2017 made further submissions that they submitted a copy of Bill No. 701 dated 24.12.2015 for support to their claimed that they didn't charged service tax on restaurant service. The appellant has made repeatedly submissions that they were not liable to pay service tax on restaurant service as per clarifications given under Circular No. 139/8/2011-TRU dated 10.05.2011 and 173/8/2013-ST dated 07.10.2013.

Findings:-

5. I have carefully gone through the facts of the case, the impugned order, appeal memorandum and the written as well as oral submissions of the appellant including during personal hearing.

6. The issue to be decided in the present appeal is whether the appellant is liable to pay service tax on Restaurant Service when the restaurant does not have air conditioning facility or otherwise.

6.1 It is a fact that the appellant is running a resort in the name of Infinity Resorts Rann of Kutch where they have been providing taxable services like short term accommodation services with air conditioned rooms on rental basis and had a restaurant to provide food and non-alcoholic beverages. I find that the appellant had air conditioned rooms for providing accommodation services but did not have air conditioned restaurant.

6.2 The appellant argue that they have/had only one restaurant, which was/is without air conditioning facility and hence they are not liable to pay service tax as per Sr. No. 19 of Notification No. 25/2012-ST dated 20.06.2012, as amended vide Notification No. 03/2013-ST dated 01.03.2013. It is also a fact that the appellant provided food and non-alcoholic beverages to their customers from their restaurant

which not have air conditioning facility. I would like to reproduce Sr. No. 19 of Notification No. 25/2012-ST dated 20.06.2012, which is as below:

"19. Services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having (i) the facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year, and (ii) a licence to serve alcoholic beverages;"

6.3 Notification No. 25/2012-ST dated 20.06.2012 was amended vide Notification No. 3/2013-ST dated 01.03.2013, which substituted Sr. No. 19 as under:

"19. Services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having the facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year;"

6.4 In view of above, services provided in relation to serving of food or beverages by a restaurant, eating joint or mess, having the facility of air conditioning or central air heating in any part of the establishment, at any time during the year only attract service tax. In other words, if restaurant does not have facility of air conditioning or central air-heating in any part of the establishment, then there is no service tax liability. CBEC vide Circular No. 139/8/2011-TRU dated 10.05.2011 has clarified meaning of words "in any part of the establishment" and has stated that if food or beverages are served in the room, service tax cannot be charged as restaurant service. I would like to reproduce the Circular, which is as under:

Circular No. 139/8/2011-TRU, dated 10-5-2011

Subject : Short Term Accommodation Service and Restaurant Service - clarification - Regarding.

Since the levy of service tax on the two new services relating to services provided by specified restaurants and by way of short-term hotel accommodation came into force with effect from 1st May 2011, a number of queries have been raised by the potential tax payers.

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2. These are addressed as follows :

Short Term Accommodation Service:

UC0113

Services Provided by Restaurants:

<p>1.</p>	<p><i>If there are more than one restaurant belonging to the same entity in a complex, out of which only one or more satisfy both the criteria relating to air-conditioning and licence to serve liquor, will the other restaurant(s) be also liable to pay service tax?</i></p>	<p><i>Service tax is leviable on the service provided by a restaurant which satisfies two conditions: (i) it should have the facility of air conditioning in any part of the establishment and (ii) it should have licence to serve alcoholic beverages. <u>Within the same entity, if there are more than one restaurant, which are clearly demarcated and separately named, the ones which satisfy both the criteria is only liable to service tax.</u></i></p>
<p>2.</p>	<p><i>Will the services provided by taxable restaurant in other parts of the hotel e.g. swimming pool, or an open area attached to a restaurant be also liable to service tax?</i></p>	<p><i>The taxable services provided by a restaurant in other parts of the hotel e.g. swimming pool, or an open area attached to the restaurant are also liable to service tax as these areas become extensions of the restaurant.</i></p>
<p>3.</p>	<p><i>Is the serving of food and/or beverages by way of room service liable to service tax?</i></p>	<p><i><u>When the food is served in the room, service tax cannot be charged under the restaurant service as the service is not provided in the premises of the air-conditioned restaurant with a licence to serve liquor. Also, the same cannot be charged under the Short Term</u></i></p>

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		<u>Accommodation head if the bill for the food will be raised separately and it does not form part of the declared tariff.</u>
4.

(Emphasis supplied)

6.5 The appellant has submitted that they did not have facility of air conditioning in any part of the establishment of restaurant and the restaurant was purely separate establishment without facility of air conditioning and also not having license to serve alcoholic beverages, therefore, they are not liable to pay service tax as per clarifications given vide above Circular No. 139/8/2011-TRU dated 10.05.2011.

6.6 The appellant has also submitted that they are having only one non-air conditioned restaurant and only in case of an establishment having two restaurants – one air conditioned and another non-air conditioned with a common kitchen for sourcing the food, then also service tax is payable only on income generated by sale of food from the air conditioned portion as per Circular No. 173/8/2013-ST dated 07.10.2013. The appellant further submitted that they had reiterated the reference of CBEC Circulars No. 139/8/2011-TRU dated 10.05.2011 and 173/8/2013-ST dated 07.10.2013 before the lower adjudicating authority but he did not consider these submissions in his findings. I find that the lower adjudicating authority has held that *"the above circulars, which referred by the noticee not given any relaxation to the assessee as in the current case the restaurant is not clearly demarcated and separately named to satisfy the criteria of exemption."* I find that the appellant was/is having only one restaurant and that too without facility of air conditioning and this fact has not been disputed by the department whereas above Circulars specify *more than one restaurant* and then only condition of demarcation and separately named is required to be examined. In the present case, I find that demarcation or separately named restaurant is not required as the appellant has only one non-air conditioned restaurant. Therefore, the findings of the lower adjudicating authority that the appellant is required to pay service tax under Restaurant service are not correct, legal and proper.

6.7 I find that the appellant has also provided food and non-alcoholic beverages from their non-air conditioned restaurant to their customers inside the room, who stayed in air conditioned rooms. Sr. No. 3 of Circular No. 139/8/2011-TRU dated 10.05.2011, in case of services provided by restaurants, very clearly specify that *"when the food is served in the room, service tax cannot be charged under the restaurant*

service as the service is not provided in the premises of the air-conditioned restaurant with a licence to serve liquor. Also, the same cannot be charged under the Short Term Accommodation head if the bill for the food will be raised separately and it does not form part of the declared tariff." Therefore, the appellant is not liable to pay service tax on restaurant service for the food and non-alcoholic beverages supplied inside rooms from kitchen. It is coming out from the facts of the case that the appellant is running a resort in the name of Infinity Resort Rann of Kutch, where they have been providing short term accommodation service with air conditioned rooms on rental basis and paying service tax on room rent so received. The air conditioned rooms cannot be considered part of the establishment of the non-air conditioned restaurant by any stretch of imagination.

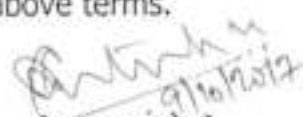
6.8 In view of the above factual and legal position, I am of the considered view that the appellant is not liable to pay service tax on the restaurant service. Since the demand is not sustainable, question of recovery of interest under Section 75 of the Act cannot survive.

6.9 The entire case has been made by the department on the basis of ST-3 returns and detailed scrutiny of ST-3 returns and on nothing else. In such case, allegation of suppression of facts from the department is neither established in the impugned order nor in the SCN. Hence, penalty under Section 78 of the Act is not imposable at all especially when demand does not survive. Imposition of penalty under Section 77 of the Act, for not assessing service tax liability properly and not following procedures of service tax law also does not hold good in view of the facts discussed in foregoing paras. Accordingly, I am left with no option but to set aside the impugned order and allow the appeal, with consequential benefit, if any.

7. In view of above, I set aside the impugned order and allow the present appeal filed by the appellant.

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

7.1 The appeal filed by the appellant stands disposed off in above terms.


(कुमार संतोष)
आयुक्त (अपील्स)

By Speed Post

UCG119

To,

M/s. Conservation Corporation of India Private Limited, Khatau Wadi, P.O. Devisar, Taluka Nakhatrana, District Kutch, Gujarat, Pin Code - 370602	मे. कंजर्वसन कापरिशन ऑफ इंडिया प्राइवेट लिमिटेड, खटाऊ वाडी, पी. ओ. देविसार, नखत्राणा तालुका, कच्छ जिल्ला, गुजरात, पिन कोड - ३७०६०२.
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Copy to:

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
- 2) The Commissioner, GST & Central Excise, Kutch Commissionerate, Gandhidham.
- 3) The Assistant Commissioner, GST & Central Excise Division, Gandhidham.
- 4) Guard File.