



S सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

वस्तु एवं सेवा

GST Building, 7<sup>th</sup> Floor,,

कर भवन,

Near Polytechnic,

सातवीं मंजिल, पोलिटेकनिक के पास,

Ambavadi, Ahmedabad-

आम्बावाडी, अहमदाबाद-380015

380015

☎ : 079-26305065

टेलीफैक्स : 079 - 26305136



क फाइल संख्या : File No : **V2(RIP)6/AHD-III/2017-18 / 10796**

ख अपील आदेश संख्या : Order-In-Appeal No. : **AHM-EXCUS-003-APP-0146-17-18**

दिनांक Date : **28.11.2017** जारी करने की तारीख Date of Issue: 15-12-17

**श्री उमाशंकर** आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals) Ahmedabad

ग अपर आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश : **GNR-STX-DEM-DC-18/2017** दिनांक : **04.04.2017** से सृजित

Arising out of Order-in-Original: **GNR-STX-DEM-DC-18/2017**, Date: **04.04.2017** Issued by: Assistant Commissioner, Service Tax, Div: Gandhinagar, Ahmedabad-III.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the **Appellant** & Respondent

**M/s. R world leisure Ltd.**

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

**Revision application to Government of India :**

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

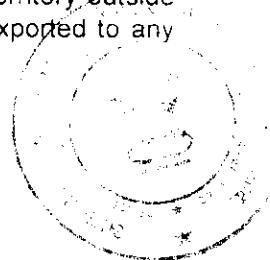
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4<sup>th</sup> Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur 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.

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.



- (ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।
- (c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) 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 and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी 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.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-  
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35- एबी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016.

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

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.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / 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 Asstt. Registrar of a branch of any

nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए, इस तथ्य के होते हुए भी कि लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellate Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 34F के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 43 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 अर्जी एवं अपील को लागू नहीं होंगे।

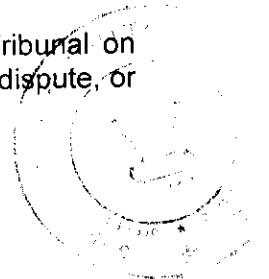
For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 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.

(6)(i) 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।

(6)(i) 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."



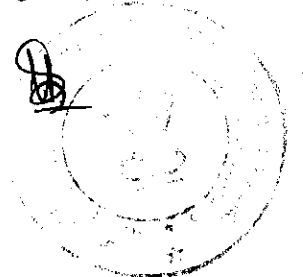
**ORDER-IN-APPEAL**

This order arises out of an appeal filed by M/s. R World Leisure Ltd., Plot No.141, R-21, (Old Rajshree Cinema), Sector-21, Gandhinagar ( in short 'appellant') against Order – in - Original No. GNR-STX-DEM-DC-18/2017 dated 04.04.2017 ( in short 'impugned order') passed by the then Assistant Commissioner, Service Tax Division, Gandhinagar, Ahmedabad-III (in short 'adjudicating authority').

2. Briefly stated that during course of audit of records of the appellant for the period April-2009 to December-2013, it was observed that it had written-off conducting charges of Rs.2,36,71,614/- on 03.05.2013 which pertained to FY 2012-13 and prior to that and not paid service tax on it. On enquiry, it revealed that it had given multiplex viz. R-world at Ahmedabad-Mehsana highway on monthly rent viz. 'Conducting charges' of Rs.21,00,000/- or 0.001% of monthly ticket sale whichever is higher for exhibition of cinematic films and for carrying associated retail activities for a period of 10 years vide agreement dated 26.10.2007 to M/s. Reliance Mediaworks Ltd(in short 'RML') (earlier M/s. Adlabs Films Ltd). Similarly, it had given multiplex viz. Dharam cinema at Rajkot on monthly rent viz. 'Conducting Charges' of Rs.4,25,000/- or 0.001% of monthly ticket sale whichever is higher for exhibition of cinematic films and for carrying associated retail activities vide agreement dtd.24.03.2007. One of the condition in the said agreements was that the RML shall pay said conducting charges to the appellant on or before 5<sup>th</sup> day of each month for the preceding month. On further enquiry, it revealed that conducting charges of Rs.2,16,14,841/- written-off pertained to R-World for the period July-2012 to March-2013 and Rs.14,78,073/- pertained to Dharam cinema for the period January-2013 to March-2013 and Rs.5,78,700/- pertained to earlier period. Hence, SCN dated 26.10.2016 was issued for recovery of service tax of Rs.29,25,812/- alongwith interest under Section 73(1) and 75 of the Finance Act, 1994 respectively and for imposition of penalty under section 78ibid. The adjudicating authority confirmed the demand of Rs.29,25,812/- alongwith interest under section 73(1) and 75ibid and also imposed penalty of Rs.29,25,812/- under section 78ibid.

3. Aggrieved with the impugned order, the appellant filed the present appeal wherein, *interalia*, they submitted that:

- (a) impugned order is a non-speaking order and in violation of principle of natural justice. They had provided details of electricity bills to highlight the fact the theatres remained shut for disputed period for which no demand can be raised upon them. No findings is accorded by the adjudicating authority in the impugned order.
- (b) the department has not considered the fact that completion of any event has not occurred in the facts of the present case to invoke Rule 3 of the Point of Taxation Rules, 2011.
- (c) onus of proof lies on the department to prove that they have provided any service at all to anyone as alleged in the SCN. This onus has not been discharged by the department.

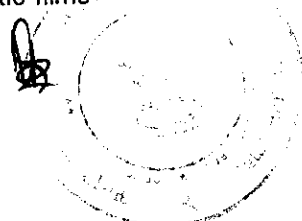


- (d) there is no service involved in the present case as they have not received any consideration towards renting of immovable property, hence no service tax is payable.
- (e) the findings in the impugned order that there is continuous supply of service is erroneous. No demand can be raised once the amount is written-off from the books of accounts of the assessee.
- (f) the amount recorded in the books of account was never accrued to them hence service tax cannot be levied on write-off amount.
- (g) the case of department that Rs.22 crores was agreed to be invested in the agreement dated 03.05.2013 on revenue share basis is towards write-off claim is highly misconceived and baseless to levy service tax on write-off amount.
- (h) issue relating to taxability under 'renting of immovable property service' is pending before the Hon'ble Supreme Court.
- (i) without prejudice, value of consideration which is not fixed in nature cannot be termed as 'rent' to be made taxable under the category of 'renting of immovable property'.
- (j) without prejudice, the computation of liability is incorrect i.e cum-duty benefit may be given to them.
- (k) there is no suppression of facts since the department was aware of the facts. Hence, extended period cannot be invoked in the present case.
- (l) no penalty under section 78 is applicable.
- (m) issue involves confide interpretation of law.

4. Personal hearing in the matter was held on 07.09.2017. Shri Jigar Shah, Advocate, appeared on behalf of the appellant and re-iterated the grounds of appeal. He pointed out 'point of taxation' and other provisions and submitted that the services were not provided and utilised during disputed period; filed written submission containing Section 66B of the Finance Act, 1994, Section 66B(44) definition of service tax, Rule 3 of the Point of Taxation Rules, 2011 and copy of Board's Circular No.144/13/2011-ST dated 18.07.2011; sought 2 week's time to file additional written submission which was received on 08.11.2017 wherein they, interalia, submitted that they have not provided any service during FY 2012-13 and therefore the question of payment of service tax would not arise; that they could not pay even electricity bill for R-World and the electricity supply company issued notice for dtd. 03.03.2012 for disconnection and cut-off of electricity; that there is no supply of services, much less a continuous supply of services; that since the service was virtually ended on 06.04.2012 there is no service at all and requested to allow appeal with consequential relief.

5. I have carefully gone through the appeal memorandum, submissions made at the time of personal hearing and evidences available on records. I find that main issue to be decided is whether an amount Rs.2,36,71,614/- being income from 'Renting of Immovable Properties' written-off on 03.05.2013 by the appellant in its books of accounts is liable to levy of service tax or otherwise. Accordingly, I proceed to decide the case on merits.

6. Prima facie, I find that the appellant had given so called immovable properties viz. R-World and Dharam cinema, which were built for mainly exhibiting cinematic films.



and had entered into Conducting agreement (i.e. Rental agreement) dated 26.10.2007 and 21.03.2007 respectively with RML for monthly rent i.e. conducting charges of Rs.21,00,000/- or an amount equal to 0.001% of monthly ticket sale whichever is higher (for R-World, Gandhinagar), and Rs.4,25,000/- or an amount equal to 0.001% of monthly ticket sale, whichever is higher (for Dharam cinema, Rajkot), respectively. The total demand confirmed consist in two parts viz. For R-World, Gandhinagar Rs.26,71,594/- and Rs.2,54,218/- for Dharam cinema, Rajkot. **This is undisputed fact in the appeal.**

6.1 It is contested that completion of any event has not occurred in the facts of the present case to invoke Rule 3 of the Point of Taxation Rules, 2011. In this connection, I find that said rules was made effective from 01.04.2011. The period covered in the subject SCN dated 26.10.2016 is from April-2012 to March-2013. After 1.4.2011, the liability of service tax is to be determined in terms of provisions contained in Rule 3ibid. For the sake of ease, Rule 3 is reproduced below:

*"3. Determination of point of taxation.- For the purpose of these rules, unless otherwise provided, "point of taxation" shall be :*

*(a) The time when the invoice for the service provided or agreed to be provided is issued:*

*Provided that where the invoice is not issued within the time period specified in Rule 4A of the Service Tax Rules, 1994, the point of taxation shall be the date of completion of provision of the service;*

*(b) In a case, where the person providing the service, receives a payment before the time specified in clause(a), the time, when he receives such payment, to the extent of such payment.*

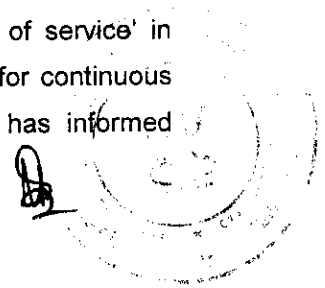
*Provided that for the purpose of clause (a) and (b),-*

*(i) In case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of event in terms of contract, which requires the receiver of service to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service;*

*(ii) Where.....provisions of clause(a).*

*Explanation.- For the purpose of these rule.....each such advance.*

Thus, in view of above Rule 3(b)(i) and para 9 and 6 of said agreements dated 26.10.2007 and 21.03.2007 (wherein one of the condition of these agreement was that the conducting charges shall be payable by RML to the appellant in arrears on or before 5<sup>th</sup> day of each month for preceding month), respectively, I find that theoretically the event is completed on 5<sup>th</sup> day of each month for preceding month and services shall be deemed to have been provided. However, it is necessary to examine practically whether the services were in fact provided or otherwise considering circumstances and facts of the case. I find that the RML had intimated to the appellant regarding shut down of R-World w.e.f. 06.04.2012. This implies that no service is received by the recipient from 06.04.2012 onwards. The revenue has stressed on 'continuous supply of service' in terms of Rule 2(c) of the Point of Taxation Rules, 2011 which provides for continuous supply of service for a period exceeding three months. As the RML has informed



regarding shut down of R-World w.e.f. 06.04.2012, I find that supply of service has come to an end on that date irrespective of terms of agreements. And when there is no receipt of service by the service recipient i.e RML there is no completion of service consequently there cannot be any demand of service tax from 06.04.2012 to 31.03.2013 as during this time the said R-World has remained closed for exhibiting cinematic films(main purpose for which it was taken on rent from the appellant). In their support, the appellant has also produced certificate from the Mamlatdar & Executive Magistrate, Gandhinagar to the effect that they have not paid 'entertainment tax' for the period 06.04.2012 to 31.10.2013( which covers the period under dispute for R-World). This fact itself is an evidence that R-World had remained closed for the purpose for which it was taken on rent. The appellant have also submitted their audited Annual Report for FY 2013-14 which shows that Electricity expenses for FY 2013-14 is Rs.34,76,157/- whereas for FY 2012-13 it was Rs.5,37,339/-. This fact also proves that said R-World was not functional during the period under dispute. I find that to this extent, the demand in respect of R-World is not sustainable as there is no completion of service. My view is also supported by Para 2 of the Board's Circular No.144/13/2011-ST dated 18.07.2011 as under:

"2. These representation have been examined. The Service Tax Rules, 1994 requires that invoice should be issued within a period of 14 days from the completion of the taxable service. The invoice needs to indicate inter alia the **value of service so completed**. Thus it is important to **identify the service so completed**. This would include not only the physical part of providing the service but also the completion of all other auxiliary activities that enable the service provider to be in a position to issue invoice. Such auxiliary activities could include activities like measurement, quality testing etc. which may be essential pre-requisites for identification of completion of service. **The test for the determination whether a service has been completed** would be the completion of all the related activities that place the service provider in a situation to be able to issue an invoice. However such activities do not include flimsy or irrelevant grounds for delay in issue of invoice."

6.2 So far as demand in respect of Dharam Cinema, Rajkot is concerned, I find that demand confirmed is for the period January-2013 to March-2013. The appellant has not submitted any corroborative evidence to substantiate their claim as has been done in case of R-World. I find that after insertion of said Point of Taxation Rules, 2011 w.e.f. 01.04.2011, Rule 3 ibid is very clear about determination of point of taxation event wherein receipt of consideration by the service provider is not a primary/secondary condition to ascertain it. Once the event is completed in terms of agreement entered into between service provider and service receiver i.e. entries made in their books of accounts by both when the invoice under Rule 4A is not issued, it cannot be said that any service have not been provided.

6.3 As regards the contention of the appellant regarding the issue relating to taxability under 'renting of immovable property service' pending before the Hon'ble Supreme Court, I find that decision given by the Hon'ble High Court of Delhi in case of M/s. Home Solution Retail India Ltd. Vs. UOI report in 2009(14) STR-433(Delhi HC) was



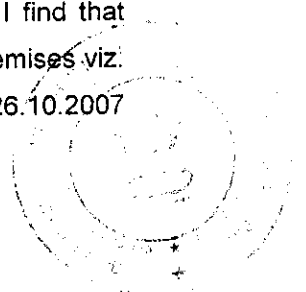


dissented in 2011 and the Hon'ble Supreme Court has admitted the petition and ordered to issued notice and matter has not attained finality. Once the appeal is admitted, correctness or otherwise of judgement becomes wide open. In such appeal, the court is entitled to go into both question of fact as well as law and correctness of judgement is in jeopardy. Appeal is considered to be continuous of suit and a decree becomes executable only when the same is finally disposed of by the court of appeal. Hence, if the appellant had any doubt regarding its taxability, it could have approached the jurisdictional service tax authority for clarification of any doubt at the material time. I find that there is nothing on record to prove that it had approached the authority. Therefore, plea of the appellant is not tenable.

6.4 It is contended by the appellant that value of consideration which is not fixed in nature cannot be termed as 'rent' to be made taxable under the category of 'renting of immovable property'. In this regard, I would like to draw attention to para 9 and 6 of the agreement dtd.26.10.2007 and 21.03.2007 respectively entered into with RML. This para provides for monthly fixed rent of Rs.21,00,000/- and Rs.4,25,000/- or 0.001% of monthly ticket sale whichever is higher. Practically, I find that ticket sale is variable in nature. Had the amount arrived at on ticket sale is more than monthly fixed rent, would the appellant waive it? Answer is no. So, same is the case with revenue sharing i.e. 75% of combined EBIDTA with RML. It implies that whatever the profit will earn by RML, 75% of it will go to appellant. This amount is also variable i.e not fixed even than it will be paid to the appellant for using its immovable property. So, whatever the name is given to consideration i.e revenue sharing to be paid to the appellant for using its property by the RML, ultimately it will be termed as 'rent' only. It is nothing but devise used to escape from service tax liability. Here also, the plea of the appellant is not tenable.

6.5 As regards the contention of the appellant regarding cum tax benefit, I find that nothing is specified in the agreements about service tax liability except fixed monthly charges to be paid by RML as stated in para 2 supra. This implies that service tax liability is on the service provider i.e. appellant. In absence of any specific provisions in the said agreement in this regard, it cannot be accepted that the value of taxable service provided should be treated as cum tax. Further, Annexure-B to the SCN dated 26.10.2016 clearly shows that amount received by the appellant from RML is basic charges plus service tax at appropriate rate for the undisputed period (i.e. April-2012 to June-2012 for R-World and April-2012 to December-2012 for Dharam cinema). It also implies that the appellant has collected the service tax separately in addition to the basic amount and the service recipient has also paid it separately. Hence, basic amount cannot be considered as cum-tax value and accordingly plea of the appellant is not tenable.

6.6 As regards suppression of facts and invocation of extended period, I find that though the appellant has taken service tax registration and given so called premises viz. R-World and Dharam cinema on rent and entered into agreements dated 26.10.2007





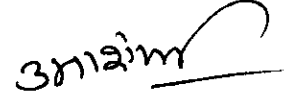
and 21.03.2007 respectively with RML, the department came to know the lapse on the part of appellant only when the audit of its records was conducted for the period under consideration. I find that responsibility lies on the appellant to assess correct service tax liability and is under obligation to furnish correct value of services in terms of provisions of section 70 of the Finance Act, 1994 and file STR-3 accordingly. I find that the appellant has totally failed in this regard. If they had any doubt on the subject matter, it could have approached the jurisdictional service tax authority for any clarification in the matter. I find that there is no such evidence available on record in this regard. So, it proves their malafide beyond doubt hence extended period of limitation under proviso to section 73(1)ibid is correctly invoked.

6.7 As regards imposition of penalty under section 78, I find that since malafide intention of the appellant is proved beyond doubt as discussed in para supra, imposition of penalty under section 76ibid is justified for demand in respect of Dharam cinema, Rajkot.

7. The appellant has quoted numerous case laws in support of their case. I have carefully gone through these case laws. I find that most of the case laws pertains to direct tax i.e. income-tax which is irrelevant in the present appeal being indirect tax looking into facts of the case.

8. In view of the above discussion and findings, I partially allow the appeal for demand in respect of R-World, Gandhinagar and dis-allow the appeal for demand in respect of Dharam cinema, Rajkot and uphold the impugned order to that extent.

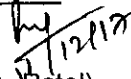
9. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।  
The appeal filed by the appellant stands disposed of in above terms.



(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Attested:

  
(B.A. Patel)  
Superintendent(Appeals)  
Central Tax, Ahmedabad.

**BY SPEED POST TO:**

M/s. R World Leisure Ltd.,  
Plot No.141, R-21, (Old Rajshree Cinema),  
Sector-21, Gandhinagar.

**Copy to:**

- (1) The Chief Commissioner, Central Tax, Ahmedabad Zone.
- (2) The Commissioner, Central Tax, Gandhinagar.
- (3) The Assistant Commissioner, Central Tax Division, Gandhinagar.
- (4) The Asstt. Commissioner(System), Central Tax HQ, Gandhinagar.  
(for uploading the OIA on website)
- (5) Guard file
- (6) P.A. file.

