CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 02

SERVICE TAX APPEAL NO. 12846 of 2018

[Arising out of OIA-AHM-EXCUS-002-APP-023-24-18-19 dated 16/07/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD-II]

COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX-CGST & CENTRAL EXCISE-AHMEDABAD NORTH .....**Appellant**
Custom House... First floor, Old High Court Road,
Navrangpura, Ahmedabad,
Gujarat-380009

VERSUS

RAJPATH CLUB LTD .....**Respondent**
S G Road,
Ahmedabad,
Gujarat

APPEARANCE:
Shri Girish Nair, Assistant Commissioner (AR) for the Appellant
Shri Bishan R. Shah, CA for the Respondent

CORAM:
HON'BLE MR. SOMESH ARORA, MEMBER (JUDICIAL),
HON'BLE MR. C. L. MAHAR, MEMBER (TECHNICAL),

FINAL ORDER NO. 11447/2024

Date of Hearing: 25.06.2024
Date of Decision: 28.06.2024

C. L. MAHAR

The brief facts of the matter are that M/s. Rajput Club Ltd had filed two refund claims of Rs. 9,16,60,128/- and Rs. 2,07,32,505/- of Service Tax already paid by them under the category of "Club or Association Services" during the period October - 2016 to March - 2017 and April - 2017 to June - 2017 respectively. The original adjudicating authority, learned assistant Commissioner vide Order-In-Original No. GST-06/REF/20/AC/KNN/Rajpath/17-18 and Order-In-Original No. GST-06/REF/21/AC/KNN/Rajpath/17-18 both dated 28th November, 2017 has sanctioned the entire amount of Rs. 9,16,60,128/- and 2,07,32,505/- respectively as refund of Service Tax.

2. The Commissioner of CGST and Central Excise Ahmedabad North was of the view that the Order-In-Original is not legal and proper and after review the same an appeal was filed before the Commissioner (Appeals) which has been decided by the impugned order in appeal No. AHM-EXCUS-002-APP-023-24-18-19 dated 27th June, 2018, wherein the learned Commissioner (Appeals) has found that the respondent club namely M/s. Rajpath Club has wrongly paid Service Tax under the category of "Club and Association Services" and he found that the original adjudicating authority has correctly sanctioned the refund claims filed by the respondent club. The department is before us against the above mentioned impugned order in appeal dated 16.07.2018.

3. The department in their appeal memo as primarily pointed out that impugned order in appeal is legally not sustainable on following grounds:

> *"24. Further regarding question of principle of mutuality after 01.07.2012, in a case of M/s Emerald Leisures Limited, Mumbai (Formerly Apte Amalgamations Ltd) before AUTHORITY FOR ADVANCE RULINGS (Central Excise, Customs and Service Tax) DATED 11th day of September, 2015 in Ruling No. AAR/ST/10/2015 in Application No. AAR/44/ST/07/2014, it was held, in para 15 & 27, that*
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> > *"15. Applicant also relied upon the judgments of the Hon'ble High Court in case Saturday Club Ltd us. A.C Service Tax Cell, Calcutta | 2006 (3) STR 305 (Cal) | and Sports Club of Gujarat Itd vs. U.O.1 [2013 (31) STR 645 (Guj) J to emphasize that in view of principles of mutuality, no service tax is payable by the applicant. The Hon'ble High Court observed that principally there should be existence of two sides / entities for having transaction as against consideration in a members club, there is no question of two sides members and club, both are same entity. We observe that with effect from 01.07.2012, new system of taxation of services has been introduced by the Government. Besides other changes, the word "service" has also been defined under Section 65B (44) of the Finance Act, 1994. Explanation 3 (a) to said Section states that for the purposes of this chapter, an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons. Therefore, deeming provision has been introduced with effect from 01.07.2012 to the effect that the club and members are deemed to be separate persons. In view of these recent changes, the judgments of Hon'ble High Courts relied upon by the applicant, are no more applicable to facts of the case before us. Therefore, the contention of the applicant that club and its members are not two distinct persons, is incorrect.*
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> > *"27. In view of the above, we rule as under;*

(a) The relationship between the applicant and members of the club should be considered as provision of "service" by one person (service provider) to another person (service receiver) for the purpose of Section 65B (44) of the Finance Act, 1994 read with Sections 66B, 66D and Section 66E of the Finance Act, 1994 and accordingly, the Membership fee, Annual fee and other charges received from members from time to time be liable for Service Tax."

From the above it is clear that the assessee is not eligible for refund, as the said claim relates to the period from October 2016 to March 2017 and April 2017 to June 2017 i.e. after 01.07.2012 and therefore it is out of the purview of the order of Hon'ble High Court Gujarat dated 25.03.2013 in the case of Sports Club of Gujarat Ltd & others [2013(31)S.T.R.645 [Guj]. The said case is distinguishable from the instant case for the reason that facts obtaining here are different from those in the cited case.

25. Further, the assessee is registered with the Service Tax department as 'Club' under the constitution of business for providing 'club or association service to its members. Hence, the assessee le. M/s. Rajpath Club Ltd., S. G. Road, Ahmedabad which is working as club is an entity distinct from its members. Thus, the services rendered by M/s. Rajpath Club Ltd., S. G. Road, Ahmedabad as a club to its members are not hit by the bar of mutuality. Hence, service tax collected and paid by the M/s. Rajpath Club Ltd., S. G. Road, Ahmedabad for provision of Club or association service is legal and correct. Therefore, no refund can be claimed by the assessee for collection and payment of such legally correct taxes.

26. Further the findings of the Commissioner (Appeal) that any transaction by the club with its member is not a transaction between two parties and therefore, the question of unjust enrichment does not arise, is also not legally correct. As discussed above, since the club (incorporated entity) and its members are separate and distinct entity, if the refund is granted to the club, it would become sheer profit to the club in form of unjust enrichment. Moreover, Rule 73A(2) has laid down basic principal i.e. "Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government".

27. Therefore, in view of the above facts and reasons, Order-in-Appeal No.AHM-EXCUS-002-APP-023-24-18-19 dated 27.06.2018, passed by the Commissioner (Appeals), Ahmedabad in case of CGST & C.Ex, Ahmedabad vs. M/s. Rajpath Club Ltd., S. G. Road, Ahmedabad is not proper and legal and deserves to be set aside."

4. We have heard both sides, we find that the matter is no longer res-integra as the Hon'ble Supreme Court in its decision in case of State of West Bengal and Ors. Vs Calcutta Club Ltd and Chief Commissioner of Central Excise and Service Tax Vs Ranchi Club Ltd reported under 2019 (10) TMI 160 (SC) has already decided the matter in favour of respondent, the

relevant extract of the Supreme Court's decision (supra) are reproduced here below:

> *72. The definition of "club or association" contained in Section 65(25a) makes it plain that any person or body of persons providing services for a subscription or any other amount to its members would be within the tax net. However, what is of importance is that anybody "established or constituted" by or under any law for the time being in force, is not included. Shri Dhruv Agarwal laid great emphasis on the judgments in DALCO Engineering Private Limited v. Satish Prabhakar Padhye and Ors. Etc. (2010) 4 SCC 378 (in particular paragraphs 10, 14 and 32 thereof) and CIT, Kanpur and Anr. v. Canara Bank (2018) 9 SCC 322 (in particular paragraphs 12 and 17 therein), to the effect that a company incorporated under the Companies Act cannot be said to be "established" by that Act. What is missed, however, is the fact that a Company incorporated under the Companies Act or a cooperative society registered as a cooperative society under a State Act can certainly be said to be "constituted" under any law for the time being in force. In R.C. Mitter & Sons, Calcutta v. CIT, West Bengal, Calcutta (1959) Supp. 2 SCR 641, this Court had occasion to construe what is meant by "constituted" under an instrument of partnership, which words occurred in Section 26A of the Income Tax Act, 1922. The Court held:*
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>> *"The word "constituted" does not necessarily mean "created" or "set up", though it may mean that also. It also includes the idea of clothing the agreement in a legal form. In the Oxford English Dictionary, Vol. II, at pp. 875 & 876, the word "constitute" is said to mean, inter alia, "to set up, establish, found (an institution, etc.)" and also "to give legal or official form or shape to (an assembly, etc.). Thus the word in its wider significance, would include both, the idea of creating or establishing, and the idea of giving a legal form to, a partnership. The Bench of the Calcutta High Court in the case of R.C. Mitter and Sons v. CIT ((1955) 28 ITR 698, 704, 705] under examination now, was not, therefore, right in restricting the word "constitute" to mean only "to create", when clearly it could also mean putting a thing in a legal shape. The Bombay High Court, therefore, in the case of Dwarkadas Khetan and Co. v. CIT [(1956) 29 ITR 903, 907], was right in holding that the section could not be restricted in its application only to a firm which had been created by an instrument of partnership, and that it could reasonably and in conformity with commercial practice, be held to apply to a firm which may have come into existence earlier by an oral agreement, but the terms and conditions of the partnership have subsequently been reduced to the form of a document. If we construe the word "constitute" in the larger sense, as indicated above, the difficulty in which the learned Chief Justice of the Calcutta High Court found himself, would be obviated inasmuch as the section would take in cases both of firms coming into existence by virtue of written documents as also those which may have initially come into existence by oral agreements, but which had subsequently been constituted under written deeds."*
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> *73 It is, thus, clear that companies and cooperative societies which are registered under the respective Acts, can certainly be said to be constituted under those Acts. This being the case, we accept the argument on behalf of the Respondents that incorporated clubs or associations or prior to 1st July, 2012 were not included in the service tax net.*

74. The next question that arises is - was any difference made to this position post 1st July, 2012?

75. It can be seen that the definition of "service" contained in Section 6858(44) is very wide, as meaning any activity carried out by a person for another for consideration. "Person" is defined in Section 658(37) as including, inter alia, a company, a society and every artificial juridical person not falling in any of the preceding sub-clauses, as also any association of persons or body of Individuals whether incorporated or not.

76. What has been stated in the present judgment so far as sales tax is concerned applies on all fours to service tax; as, if the doctrine of agency, trust and mutuality is to be applied qua members' clubs, there has to be an activity carried out by one person for another for consideration. We have seen how in the judgment relating to sales tax, the fact is that in members' clubs there is no sale by one person to another for consideration, as one cannot sell something to oneself. This would apply on all fours when we are to construe the definition of "service" under Section 65B(44) as well.

77. However, Explanation 3 has now been incorporated, under sub-clause (a) of which unincorporated associations or body of persons and their members are statutorily to be treated as distinct persons.

78. The explanation to Section 65, which was inserted by the Finance Act of 2006, reads as follows:

"Explanation: For the purposes of this section, taxable service includes any taxable service provided or to be provided by any unincorporated association or body of persons to a member thereof, for cash, deferred payment or any other valuable consideration:"

79. It will be noticed that the aforesaid explanation is in substantially the same terms as Article 366(29-A) of the Constitution of India. Earlier in this judgment qua sales tax, we have already held that the expression "body of persons" will not include an incorporated company, nor will it include any other form of incorporation including an incorporated co-operative society.

80. It will be noticed that "club or association" was earlier defined under Section 65(25a) and 65(25aa) to mean "any person" or "body of persons" providing service. In these definitions, the expression "body of persons" cannot possibly include persons who are incorporated entities, as such entities have been expressly excluded under Section 65(25a) (i) and 65(25aa)(i) as "anybody established or constituted by or under any law for the time being in force". "Body of persons", therefore, would not, within these definitions, include a body constituted under any law for the time being in force.

81. When the scheme of service tax changed so as to introduce a negative list for the first-time post 2012 services were now taxable if they were carried out by "one person" for "another person" for consideration. "Person" is very widely defined by Section 65B(37) as including individuals as well as all associations of persons or bodies of individuals, whether incorporated or not. Explanation 3 to Section 65B(44), instead of using the expression "person" or the expression "an association of persons or bodies of individuals, whether incorporated or not", uses the expression "a body of persons" when juxtaposed with "an unincorporated association".

82. We have already seen how the expression "body of persons" occurring in the explanation to Section 65 and occurring in Section 65(25a) and (25aa) *does not refer to an incorporated company or an incorporated cooperative society. As the same expression has been used in Explanation 3 post-2012 (as opposed to the wide definition of "person" contained in Section 65B(37)), it may be assumed that the legislature has continued with the pre-2012 scheme of not taxing members' clubs when they are in the incorporated form. The expression "body of persons" may subsume within it persons who come together for a common purpose, but cannot possibly include a company or a registered cooperative society. Thus, Explanation 3(a) to Section 658(44) does not apply to members' clubs which are incorporated.*

83. The expression "unincorporated associations" would include persons who join together in some common purpose or common action see ICT, Bombay North, Kutch and Saurashtra, Ahmedabad v. Indira Balkrishna (1960) 3 SCR 513 at page 519-520. The expression "as the case may be" would refer to different groups of individuals either bunched together in the form of an association also, or otherwise as a group of persons who come together with some common object in mind. Whichever way it is looked at, what is important is that the expression "body of persons" cannot possibly include within it bodies corporate

84. We are therefore of the view that the Jharkhand High Court and the Gujarat High Court are correct in their view of the law in following Young Men's Indian Association (supra). We are also of the view that from 2005 onwards, the Finance Act of 1994 does not purport to levy service tax on members' clubs in the incorporated form.

85. The appeals of the Revenue are, therefore dismissed. Writ Petition (Civil) No.321 of 2017 is allowed in terms of prayer (i) therein, Consequently, show-cause notices, demand notices and other action taken to levy and collect service tax from incorporated members' clubs are declared to be void and of no effect in law."

In view of above and following the above decision. We are of the view that we do not find any legal infirmity in the impugned Commissioner (Appeals) order and we uphold the same.

5. The department's appeal is accordingly dismissed.

(Order pronounced in the open court on 28.06.2024)

(SOMESH ARORA)
MEMBER (JUDICIAL)

(C. L. MAHAR)
MEMBER (TECHNICAL)

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