

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I**

APPEAL No. ST/52800/2015-CU[DB]

(Arising out of Order-in-Appeal No.204-ST/APPL-AGRA/LKO/2015 dated 26/05/2015 passed by Commissioner (Appeals), Customs, Central Excise & Service Tax, Lucknow)

M/s Agra Club Ltd.

Appellant

Vs.

**Commissioner of Central Excise &
Service Tax, Agra**

Respondent

Appearance:

Shri Jatin Mahajan (Advocate)
Shri Pawan Kumar Singh (Supdt.) AR

for Appellant
for Respondent

CORAM:

**Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)**

Date of Hearing : 27/06/2018
Date of Decision & Pronouncement : 17/07/2018

FINAL ORDER NO. - 71541/2018

Per: Archana Wadhwa

The appellant is a Non-profit Making Company engaged in providing club services to its members and being controlled by the members themselves.

2. They filed a refund claim dated 13/02/2014 in respect of Service Tax paid by them during the period 01/08/2010 to 31/12/2013 to the extent of Rs.66,20,558/- paid by them during the said period under the category of “Club or Associations Services”. The said refund claim was filed on the ground that as per the law declared by the Hon’ble Gujarat High Court in the case of M/s Karnavati Club Ltd. vs. Commissioner of Service Tax and dismissal of the Revenue’s appeal by the Hon’ble Supreme Court on 26/04/2010, there was no requirement to pay Service Tax in respect of said services being provided by them to their own members of the club.

3. Revenue initiated proceedings against the appellant by way of show cause notice dated 13/06/2014 proposing to deny the refund claim on the ground of limitation as also on account of ‘unjust enrichment’. The notice culminated into an order passed by the Original Adjudicating Authority rejecting refund claim which stands upheld by Commissioner (Appeals).

4. The said order of Commissioner (Appeals) is impugned before us.

5. As regards the limitation, learned advocate appearing for the appellant has drawn our attention to the letter dated 13/07/2010 addressed by the appellant to their Jurisdictional Assistant Commissioner of Service Tax expressing their opinion that no service tax is leviable on club services as per the law declared by various Courts and hence they intend to discontinue the payment of service tax on the services. It was also stated in the said letter that if Revenue does not agree with their contention, they may be afforded an opportunity of personal hearing so that they can personally present their case and thereafter if Revenue does not agree, an appropriate speaking order may be passed. Though Commissioner (Appeals) has taken note of said letter of the appellant, but has observed that the same cannot be treated as a letter of protest inasmuch as the same is more like an intimation to the Department whereby the party has informed the Department that in view of the High Court/CESTAT decisions they are going to discontinue payment of service tax on their services. He further observed that this letter was suitably replied by the Jurisdictional Assistant Commissioner vide his letter dated 03/08/2010 informing the party to continue to follow their earlier practices relating to payment of

service tax on their services. Inasmuch as the appellant has not opted for provisional assessment nor mentioned phrase “Under Protest” on their challans, rather they continued to pay the service tax on their services as per their earlier practice, their letter dated 13/07/2010 stood disposed of at that point itself. Accordingly, he has held that the service tax was not deposited “under protest”.

6. We have gone through the said letter dated 13/07/2010 addressed by the appellant to the Assistant Commissioner of Service Tax, Agra. It stands stated in the said letter that the appellant is a Non-profit Making Company and every member is a shareholders and the club is open to members only. The services are not being provided to non members. They referred to the Tribunal decision in the case of Dehradun Club Ltd. vs. Commissioner of Central Excise, Meerut, Final Order No.545/2007-SM[BR] dated 21/03/2007, vide which it was held that inasmuch as services are being provided to the members, the service tax is not attracted. They also referred to Hon’ble Calcutta High Court decision in the case of Dalhousie Institute vs. Assistant Commissioner 2006 (003) S.T.R. 311 (Calcutta) and Saturday Club Ltd. vs. Assistant Commissioner 2006 (003) S.T.R. 305 wherein the Hon’ble High Court has held that no service

tax is attracted in respect of services rendered to the members of club. They also attached list of the subsequent cases wherein the said decisions of Hon'ble High Court were followed. Accordingly, they requested the Assistant Commissioner to agree with them for discontinuation of the payment of service tax or in the alternative to give them a personal hearing so as to explain their case. It is seen that in reference of said letter the Assistant Commissioner directed the appellant to continue payment of service tax and in these circumstances the appellant continued to pay the tax.

7. The question which arises is as to whether the said letter of the assessee has to be treated as a letter of protest or has to be discarded, as done by Commissioner (Appeals). The Hon'ble Punjab and Haryana High Court in the case of Commissioner of Central Excise Chandigarh vs. IND Swift Lands Ltd. 2017 (6) G.S.T.L. 21 (P & H) has held that if an assessee in their letters to Jurisdictional Authorities contend that it was not liable to pay the taxes and pays the tax on pressure from the Department, the payment of tax is required to be considered as not voluntarily paid. The Hon'ble High Court also observed that it is not necessary that the duty payment should be accompanied by words "Under

Protest” and if the conduct of the assessee indicates that payment was not voluntary but were due to compulsion it has to be treated as having been made ‘under protest’. Similarly the Hon’ble Allahabad High Court in the case of Kisan Cooperative Sugar Factory Ltd. vs. Commissioner of Central Excise 2018 (8) G.S.T.L. 365 (All.) has observed that deposit of tax ‘under protest’ the limitation of Section 11B would not be applicable. In fact the Tribunal in the case of Monnet International Ltd. vs. Commissioner of Central Excise, New Delhi 2017 (3) G.S.T.L. 380 (Tri.-Del.) has allowed the refund of the deposited amount for a period of three years by observing that such duty was not required to be paid and retention of the amount, which was in the nature of deposit, by the Revenue is not permissible.

In any case by going through the said letter of the appellant, we note that a clear protest was lodged by them inasmuch as the appellant intended to discontinue the practice of payment of service tax but had to pay the tax on account of direction of their Jurisdictional Assistant Commissioner. Thus payment of service tax by the appellant was admittedly under pressure from Jurisdictional Central Excise Authorities. As such in the light of various decisions referred supra, it has to be held

that payment were 'under protest', even though the invoices were not individually endorsed with the expression, "Under Protest".

8. Having held that service tax was being paid "Under Protest", we are of the view that limitation prescribed under Section 11B will not apply. Accordingly, the refund claim by the appellant has to be held as having been filed with limitation.

9. As regards 'unjust enrichment' the appellant have taken a categorical stand that the law declared by various High Courts have held that the levy of service tax on the club is *ultravirous* inasmuch as the clubs and its members cannot be held to be two different individuals and by applying the principle of mutuality, club members are not different from club, even if club was incorporated under Companies Act, 1956. In such a scenario, it is the contention of the appellant that club as well as members being one and the same, principle of 'unjust enrichment' would not apply.

10. The Hon'ble Gujarat high court in the case of Sports Club of Gujarat Ltd. vs. Union of India - 2013 (31) S.T.R. 645 (Guj.), while declaring the levy as *ultravirous* and

beyond the competence of parliament has referred to the Full Bench judgment of the Hon'ble Patna High Court in the case of Commissioner of Income Tax vs. Ranchi Club Ltd. reported as 1992 (1) PLJR 252 (Pat.) as also Hon'ble Jharkhand High Court decision in the case of Ranchi Club Ltd. vs. Chief Commissioner 2012 (26) S.T.R. 401 (Jhar.). As Para - 18 of the said decision is relevant for the purpose of deciding the issue of 'unjust enrichment', we reproduce the same for right reference.:-

“18. However, learned counsel for the petitioner submits that sale and service are different. It is true that sale and service are two different and distinct transaction. The sale entails transfer of property whereas in service, there is no transfer of property. However, the basic feature common in both transaction requires existence of the two parties; in the matter of sale, the seller and buyer, and in the matter of service, service provider and service receiver. Since the issue whether there are two persons or two legal entity in the activities of the members' club has been already considered and decided by the Hon'ble Supreme Court as well as by the Full Bench of this Court in the cases referred above, therefore, this issue is no more res integra

and issue is to be answered in favour of the writ petitioner and it can be held that in view of the mutuality and in view of the activities of the club, if club provides any service to its members may be in any form including as mandap keeper, then it is not a service by one to another in the light of the decisions referred above as foundational facts of existence of two legal entities in such transaction is missing. However, so far as services by the club to other than members, learned counsel of the petitioner submitted that they are paying the tax.”

11. As seen from the above, it stand observed by the Hon’ble High Court that the basic feature required in services is presence of two persons or two legal entities i.e. service provider and service receiver and if the club provides any services to its members, in any form, then it is not a service by one to another. This leads us to hold that the club, while providing services to its members, have not provided the same to a second person and such services have been held to have been provided to the club itself or to the member themselves. For invoking the principle of ‘unjust enrichment’, the presence of two different parties, distinct from each other is required and it has to be held that the tax collected by the one, who is

claiming the refund of the same has already been collected by him from the other party and the refund of the same cannot be allowed so as to make first party as unduly enriched. When services stands provided to himself only, and there is no second party, as observed by the Hon'ble High Court, it cannot be said that the club would become unduly enriched by collecting the service tax from its members as well as by claiming the same as refund inasmuch as club and members have been held to be the same by various High Courts.

12. The Tribunal in the case of Karnavati Club Ltd. vs. Commissioner of Service Tax, Ahmedabad - 2013 (31) S.T.R. 445 (Tri.-Ahmd.) has examined an identical issue and has held that High Court has categorically concluded that members are not to be seen separately as client or customers. Services rendered to self cannot be equated with services rendered to client or customers and as such it has to be held that assessee passed hurdle of the principles of 'unjust enrichment'. The said decision of the Karnavati Club Ltd. squarely applies to the facts of the present case.

13. In view of foregoing, we set aside the impugned order and allow the appeal with consequential relief to the appellant.

(Pronounced in Court on 17/07/2018)

Sd/-
(Anil G. Shakkarwar)
Member (Technical)

Sd/-
(Archana Wadhwa)
Member (Judicial)

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