CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/726/2008-DB

[Arising out of No. 36/2008 dated 29/08/2008 passed by Commissioner of Service Tax , BANGALORE-I]

Bangalore Club
#10,field Marshal,k.m.cariappa
Road,bangalore
BANGALORE
KARNATAKA
560025

Appellant(s)

Versus

C.C.E.-Bangalore-i
POST BOX NO 5400...CR BUILDINGS,
BANGALORE,
KARNATAKA
560001

Respondent(s)

Appearance:

Shri N. Anand, Advocate
K. S. Ravi Shankar
No. 152(18), Race Cource Road,
Bangalore,
Karnataka
560001

For the Appellant

Dr. J. Harish, Dy. Commissioner(AR)

For the Respondent

Date of Hearing: 26/07/2018
Date of Decision:___________

HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. ____________________

Per : S.S GARG

The present appeal is directed against the impugned order dt. 29/08/2008 passed by the Commissioner of Service Tax, Bangalore whereby the Commissioner has confirmed the demand of Rs.1,58,12,328/- under Section 73(2) of the Finance Act, 1994 and also appropriated an amount of Rs.17,32,720/- already paid by them under TR challan and a sum of Rs.6,34,936/- paid by them utilizing the CENVAT credit. The Commissioner has also confirmed demand of interest as per Section 75 of the Finance Act and also imposed penalty under Section 76 of the Finance Act and a penalty of Rs.1000/- under Section 77 and also imposed equal penalty of Rs.1,58,12,328/- under Section 78 and liberty also granted to the appellant to pay the reduced penalty of 25% if the tax, interest and reduced penalty are paid within 30 days.

2.1. Briefly the facts of the present case are that the appellant is an association of persons engaged in providing club facilities and are registered under the taxable service of health club and fitness center from 25/07/2003. Based on the intelligence gathered by the officers of DGCEI that the appellant is not paying appropriate service tax on club and association membership services rendered by them, documents relevant for further investigation from the appellant were collected under summons proceedings. Statement of Col. K.G. Murthy, Secretary of the appellant was recorded on 08/03/2007. On verification of the records collected, it appeared that the appellant is providing services which are classifiable under the category of Club or Association Membership Services. There are about 7471 members in the appellant Club as per Balance Sheet 2005-06 and the club is providing various facilities and services to its members and their guests and dependents viz. canteen, bar, swimming pool, library, table tennis, gymnasium, tennis, squash, billiards, card-room, chambers (rooms) and banquet facility. Further, members elect a General Committee every year consisting of nine elected members who are responsible for entire activities of Bangalore Club. Members utilize the club facilities by paying subscription fee fixed by the club. Guests of the members can also utilize the facilities of the club. Thus the activities of the appellant fall squarely under the category of "Club or Association Membership Services" which is liable for service tax with effect from 16/06/2005.

2.2. The DGCEI recorded statement of Shri K.G. Murthy, Secretary and authorized person of the appellant and thereafter the appellant was issued a show-cause notice demanding an amount of Rs.1,58,12,328/- being service tax payable for the period from 16/06/2005 to 28/02/2007 on 'Club or Association Membership Services' rendered by them and interest and penalties are also proposed in the show-cause notice. The appellant filed a detailed reply to the show-cause notice taking all the points raised in the show-cause notice. The main contention in the reply to the show-cause notice was that in view of the principle of mutuality, they were not liable to pay service tax under the category of 'Club or Association Membership Services'. After following the due process, the adjudicating authority i.e. Commissioner of Service Tax proceeded to pass the Order-in-Original dt. 29/08/2008 rejecting the contention of the appellant and confirmed the demand.

3. Heard both the parties and perused records.

4.1. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that the entire demand is barred by limitation. The appellant was registered under the category of health and fitness centre which is admitted in the impugned order for which registration was obtained in 2003 and the Department was aware of the fact that appellant is a club rendering services to its members and therefore the charge of suppression cannot be invoked against the appellant. He further referred the definition of club or association as provided in Section 65(25a) of the Finance Act, 1994, as amended from time to time and it provides “club or association” means any person or body of persons providing services, facilities or advantages, for a subscription or any other amount, to its members, but does not include-

(i) Anybody established or constituted by or under any law for the time being in force; or

(ii) Any person or body of persons engaged in the acitivites of trade unions, promotion of agriculture, horticulture or animal husbandry or

(iii) Any person or body of persons engaged in any activity having objectives which are in the nature of public service and are of a charitable, religious or political nature, or

(iv) Any person or body of persons associated with press or media;

4.2. He further submitted that the Secretary of the club in his statement on 08/03/2007 has admitted that they have started paying service tax w.e.f. 01/05/2006 in respect of collection of monthly subscription and subscription towards badminton, billiards, cards, health club, squash, swimming pool, table tennis, tennis and library. But they have not paid service tax on membership entrance fee collected by the club as they are of the opinion that on account of the principle of mutuality of interest, the appellants are not entitled to pay the service tax on the membership entrance fees and other services rendered by the club to its members. Learned counsel further submitted that though appellants have paid the service tax under the category of other services, they are entitled to refund of the same as they are not liable to pay the service tax. He further submitted that the issue is whether the club is liable for payment of service tax on the amounts collected from its own members is well settled now by various High Courts by holding that there is no rendering of service between the club and its own members and the club is not liable for payment of service tax on the amounts collected from its members. In support of this submission, he relied upon the following decisions:-

i. Ranchi Club Ltd. Vs. UOI [2012(26) STR 401 (Jhar.)]
ii. Sports Club of Gujarat Ltd. Vs. UOI [2013(31) STR 645 (Guj.)]
iii. Surat Tennis Club Vs. UOI [2016(42) STR 821 (Guj.)]
iv. Green Environment Services Coop. Society Ltd. Vs. UOI [2015(37) STR 961 (Guj.)]
v. DD Retreat Vs. CCE [2017(52) STR 506 (Tri. Bang)]
vi. Century Club Vs. CCE&CST, Bangalore [Final Order No.21458-21460/2018 dt. 25/09/2018]

5. On the other hand, the learned AR for the Revenue submitted that the Revenue has filed appeals against all the decisions which have

been relied upon by the appellant and the appeals are pending before the Apex Court. He further submitted that with regard to other services except the membership entrance fee, in an identical case of Century Club, the Tribunal rejected the refund claims regarding the taxable service under the category of health and fitness centre and the said decision is reported in 2009(13) STR 68 (Tri. Bang.) and the said decision was affirmed by the Hon'ble High Court of Karnataka which is reported in 2010(17) STR 337. He further submitted that in view of the decision of the Karnataka High Court with regard to Century Club wherein the refund claim filed by the Century Club on identical grounds was rejected by the Tribunal as well as by the High Court should be followed with regard to various services except membership entrance fee.

6. After considering the submissions of both the parties and perusal of the material on record and the various decisions relied upon by the appellant, we find that as far as entrance fees for becoming the members of the club is concerned, the issue is no more res integra and has been settled by various decisions cited supra. Further we find that the appellants were registered under the category of health club and fitness centre as per the statement of the Secretary in 2003 itself and has been paying the service tax on all the facilities viz. monthly subscription towards badminton, cards, billiards, health club, squash, swimming pool, table tennis, tennis and library. Though the appellants are claiming the refund of the said service tax paid on these facilities to its members on the same

principle of mutuality of interest. Further we find that in the case of Century Club, on identical grounds, the club was registered under the category of health club and fitness centre and they paid the service tax on various facilities provided to its members and later on they filed the refund claim on the ground that they are not liable to pay service tax under the club and association service on the basis of mutuality of interest. The Tribunal vide its order reported in 2009(13) STR 68, rejected the refund claim and the said decision of the Tribunal was affirmed by the High Court of Karnataka as reported in 2010(17) STR 337. Though the counsel for the appellant has submitted that the decision of the Hon'ble High Court and the Tribunal is per incurrium because they have not considered all the issues and the decision of the various other High Courts relied upon by the appellant but it is a fact that the Century Club, in that case, has not filed appeal against the decision of the Karnataka High Court and the decision of the Karnataka High Court has become final. For subsequent period, the Century Club also filed refund claims and this Tribunal vide Final order No.21458-21460/2018 dt. 25/09/2018 by relying upon the decision of the Karnataka High Court has dismissed the appeals of the Club. Here it is pertinent to reproduce the relevant findings by this Tribunal in the case of Century Club which is on identical issue.

> *6.1. After considering the submissions of both sides and perusal of material on record, we find that in the present case the appellant is seeking refund of service tax paid by them under mistake under the category of health club and fitness center on the ground that they are*

not liable to pay service tax as the service has been rendered to its own members. Further we find that it is an admitted fact by the appellant that they have collected service tax from its own members and paid the same to the Government under the category of health club and fitness center. Further, we find that this particular service was in dispute for the earlier period and this Tribunal as well as Hon'ble High court of Karnataka have rejected the refund claim of the appellant. Further we find that the Hon'ble High Court has distinguished some of the decisions relied upon by the appellant in the present case. It could be pertinent to reproduce the finding of the Hon'ble High Court, which is reproduced here in below:-

> *It is an undisputed fact that the appellant club is registered under the provisions of Karnataka Societies Registration Act, providing various services to its members. It is also registered with the Service 'Tax Department under the category of 'Health and Fitness Service". It is charging, collecting and paying the service Tax for the period from October 2005 to March 2006. But they have filed a refund claim on the ground that they are registered under the Karnataka Societies Registration Act and providing service to its own members. It is mutually consented between the members and the club. Therefore service tax is not applicable to the appellant club is examined by the Assessing Officer. While examining the said contention, the Assessing Officer has held that the service rendered by the club to its members come under the category of 'Health and fitness service' specified in Section 65(51) of the Finance Act, 1994. The definition of 'Health and fitness service' with reference to the said conclusion is after interpretation of Section 65(51) of the Act.*

6.2. Further we find that since the appellant had *not challenged the decision of the Hon'ble High Court before the Hon'ble Apex court, the said decision is binding on the Tribunal. Further we are of the opinion that the argument of the learned counsel for the appellant that the decision of the Hon'ble High court is per incuriam is not correct because the High Court has given reasons for denial of the refund. Further, we hold that the refund is hit by doctrine of unjust enrichment.*

7. In view of our discussion above, we are of the considered view that as far as service tax on subscription / membership fee is concerned, the issue has been decided in favour of the appellant in view of the various decisions cited supra. But with regard to other services provided by the club where the club is charging the service tax from its members and is paying the same, we are of the view that in view of the Karnataka High Court's decision cited supra, the demand on other services except membership fee service, the appellants are liable to pay service tax. Accordingly, the appeal is partly allowed.

(Order was pronounced
in Open Court on **......................**)

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

Raja...