CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 54143 OF 2015

(Arising out of Order-in-Original No. 22/ST/SVS/DL-III/2015 dated 10/07/2015 passed by Principal Commissioner of Service Tax, Delhi-III)

Commissioner of Service Tax Delhi-II ….. Appellant
(5th Floor, 14-15 Farm Bhawan, Nehru Place,
New Delhi-110019)

VERSUS

M/s Manufacturers Association For Information Technology ….. Respondent
(4th Floor, PHD House, Opp. Asian Games Village
Hauz Khas, New Delhi-110016)

APPEARANCE:

Shri Vivek Pandey, Authorized Representative of the Department
Shri B.L. Narasimhan and Ms. Shagun Arora, Advocate for the Respondent

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 50764 /2020

DATE OF HEARING/DECISION: August 31, 2020

JUSTICE DILIP GUPTA

This Appeal is directed against the order dated July 10, 2015 passed by the Principal Commissioner, Service Tax, Delhi Commissionerate[1] by which the demand of Rs. 2,73,358/- towards

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1 The Principal Commissioner

service tax in regard to the show cause notice dated April 22, 2013 has been confirmed. The order also confirms the demand of Rs. 1,06,296/- towards service tax in regard to the show cause notice dated May 15, 2014. The aforesaid two demands have been confirmed with interest at an appropriate rate.

2. The Manufacturers Association for Information Technology, which is the respondent in the Appeal, is a society registered under the provisions of the Societies Registration Act, 1860. It was incorporated to represent the Information and Communication Technology sector and professes to offer a wide range of programs and services to its members across the country such as organizing conferences, seminars, training sessions, events and workshop; policy representation; domestic and international marketing support; technology initiatives; publishing industry related information in targeted publications; networking opportunities; and many other industry- directed services. It is also registered as a charitable institution under section 12A of the Income Tax Act, 1961.

3. Two show cause notices dated April 22, 2013 and May 15, 2014 were issued to the respondent covering the period April 2007 to March 2012 and April 2013 to March 2013 respectively proposing to demand service tax under the category of 'club or association services' and 'business exhibition service' on various heads of income broadly categorized under sponsorship from members for seminars and workshops, sale of publications, grants received from Government and European Commission and miscellaneous receipts. The aforesaid two cause notices were

adjudicated upon by a common order dated July 10, 2015. The demand of service tax was confirmed only in relation to the income from the members on account of compilation, updating and printing of the directory under the head 'business auxiliary service'. The demand on other receipts were dropped holding that the receipts from government and non- government grants were not in the nature of a consideration for providing any service to the grantors; the receipt from sale of publications was considered to be a sale transaction and so not susceptible to service tax and service tax could be levied on the receipt from sponsorship fee on a reverse charge mechanism from the sponsors.

4. The Department has filed this Appeal against that part of the order of the Principal Commissioner that drops the demand.

5. Shri Vivek Pandey, learned Authorized Representative of the Department made the following submissions:

i. The Adjudicating Authority went beyond the show cause notice in confirming a portion of the demand under 'business auxiliary service' instead of 'membership of club or association service';

ii. The Adjudicating Authority has not given reasons for accepting the claim of the noticee that income from 'AGM Sponsorship', Sponsorship from Members and Workshop' and 'Sponsorship from Members for Hiring Consultants' would fall under 'sponsorship service' and not under 'membership of club or association' service.

iii. The Adjudicating Authority has not given reasons for dropping the demand on account of "study of manpower skill in IT hardware" and 'recovery of cost from European Commission' for establishing e-waste to enhance environment friendly recycling; and

iv. The Adjudicating Authority has not given reasons for dropping the demand on 'grants received from Government'.

6. Shri B. L. Narasimhan, learned Counsel appearing for the Respondent has, however, made the following submissions:-

i. No service tax is leviable on services rendered by clubs or association incorporated under any law for the time being in force. To support this contention, reliance has been placed on the decision of the Supreme Court in **State of West Bengal & others** vs **Calcutta Club Limited**[2]**;**

ii. The activities of the respondent are excluded from the purview of the definition of 'club or association services';

iii. No service can be said to be provided by the Respondent to its members due to the principle of neutrality; and

iv. Service tax cannot be levied on every income reflecting in the financial statements of an assessee without satisfaction of the conditions mentioned in section 65B(44) of the Finance Act, 1994[3].

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2 2019 (10) TMI 160-Supreme Court
3 The Act

7. The submissions advanced by the learned Authorized Representative of the Department and the learned Counsel for the Respondent have been considered.

8. As noticed hereinabove, the periods involved in the two show cause notices are from April, 2007 to March, 2012 and April 2012 to March, 2013.

9. Section 65(25a) of the Act that was inserted w.e.f. June 16, 2005 defines 'club or association' and is as follows:-

> "**65 (25a)** '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) any body 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 activities 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."

10. The taxable service under section 65(105)(zzze) of the Act means :

> "**65(105) (zzze)** 'taxable service' means any service provided or to be provided to its member, by any club or association in relation to provision of services, facilities or advantages for a subscription or any other amount."

11. The definition of 'club or association' contained in section 65(25a) of the Act was amended w.e.f. May 1, 2011 and the amended definition is reproduced below:-

> **65(25aa)** 'club or association' means any person or body of persons providing services, facilities or advantages, primarily to its members, for a subscription or any other amount, but does not include-
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> (i) any body 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 activities 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.

12. The taxable service under section 65(105) (zzze) of the Act has also been amended by adding the expression 'or any other person' after the expression 'to its members' thus widening the tax net to include non-members of club or association as well.

13. With effect from July 1, 2012, 'service' has been defined under section 65B (44) of the Act and service tax is leviable on all services as defined except the negative list of services set out in section 66D of the Act.

14. This amendment was explained by the Supreme Court in **Union of India and others** vs **Margadarshi Chit Funds Pvt. Ltd. and others**[4] as follows:-

> 20. Thus, right from 1994 till 2011, the mode adopted was to specify those services on which it was intended to levy service tax. However, Parliament by the Finance Act, 2012 w.e.f. 1-7-2012 has introduced altogether new system of taxation of services by making a paradigm shift. Now, the scheme of taxation of services is based on negative list of services. Therefore, earlier list of taxable services is no longer applicable. Instead two things have happened. First, the term "service" is defined whereas there was no definition of "service" in the Finance Act, 1994 which position remained till 2012. Earlier, each individual service on which tax was levied (known as taxable service) was defined. Secondly, the definition of "service" given now contains a negative list which is contained in Section 66-D of the Act. In other words, it specifically excludes certain transactions from the ambit of service. Thus, those transactions which are specifically excluded are not liable for service tax. Any other kind of service which qualifies the definition of "service" contained in the Act would be exigible to service tax."

15. The Supreme Court in **Calcutta Club Ltd**. examined the definition of 'club or association' as contained in section 65(25a) of

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4 (2017) 13 SCC 806

the Act from June 16, 2005 up to July 1, 2012 and the relevant portion is reproduced 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."

16. The Supreme Court in the aforesaid decision in **Calcutta Club Ltd** also examined the definition of 'club or association' after July 1, 2012 and the relevant portion is reproduced.

> "75. It can be seen that the definition of "service" contained in section 65B(44) is very wide, as meaning any activity carried out by a person for another for consideration. "Person" is defined in section 65B(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.
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> 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.
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> 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.
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> 78. The explanation to section 65, which was inserted by the Finance Act of 2006, reads as follows:
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>> "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:"
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> 79. It will be noticed that the aforesaid explanation is in substantially the same terms as Article 366(29-A)(e) 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.
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> 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.
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> 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".
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> 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 65B(44) does not apply to members' clubs which are incorporated.
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> 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.
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> 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.

17. It would be seen from the aforesaid that 'club or association' was earlier defined under section 65(25a) and 65(25aa) to mean 'any person' or 'body or persons' providing service. The expression 'body of persons' cannot be possibly include persons who are incorporated entities, as such entities have been expressly excluded under sections 65(25a)(i) and 65(25aa)(i) as 'any body established or constituted by or under any law for the time being in force'. 'Body of persons', therefore, would not include a body constituted under any law for the time being in force. Thus, companies and cooperative societies, prior to July 1, 2012, which

were registered under respective Acts, would be constituted under those Acts. Incorporated clubs or associations, therefore, prior to July 1, 2012 which were registered under Acts, would be constituted under those Acts. Incorporated clubs or associations, therefore, prior to July 1, 2012 were not included in the service tax net. After July 1, 2012, also the situation does not change for the reason that Explanation 3 uses the same expression. The Supreme Court held that 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 and the Explanation 3(a) to section 65B (44) would not apply to members clubs which are incorporated. In this view of the matter, the Supreme Court categorically held that from 2005 onwards, the Finance Act does not purport to levy service tax on members club in the incorporated form.

18. The aforesaid decision of the Supreme Court was followed by this Bench in **Indian Beverage Association** vs **Commissioner of Service Tax**[5]**.**

19. It is not in dispute that in the present case the respondent has been incorporated under the provisions of the Societies Registration Act. Thus, in view of the aforesaid decision of the Supreme Court, even if the receipts under 'club or association' services rendered by the Respondent are counted as income of the Respondent, even then the same cannot be taxed and the Appeal is liable to be dismissed on this ground alone.

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5. Service Tax Appeal No. 51738 of 2016 decided on January 28, 2020

20. Thus, the submissions advanced by the learned Authorized Representative of the Department cannot be accepted and nor is it necessary to deal with the other submissions advanced by the learned Counsel for the respondent.

21. Thus, for all the reasons stated above, the Appeal filed by the Department deserves to be dismissed and is, accordingly, dismissed.

(Order pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.L. MAHAR)
MEMBER (TECHNICAL)

Rekha