CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH- COURT NO. I

SERVICE TAX APPEAL NO. 51711 OF 2018

[Arising out of Order-in-Original No. 124(CKJ)ST/UDR/2018 dated 15.03.2018 passed by the Commissioner (Appeals), Central Excise & CGST, Udaipur]

M/s. Umed Club **....Appellant**
Near Gaushala Maidan,
Circuit House Road,
Jodhpur-342003

versus

Commissioner (Appeals), Central Excise & Central Goods & Service Tax, **....Respondent**
142-B, Hiran Magri, Sector-11,
Udaipur (Rajasthan)

APPEARANCE:

Shri Pradeep Jain, Chartered Accountant for the Appellant
Shri Manoj Kumar, Authorized Representative for the Department

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: 16.01.2025
Date of Decision: 03.06.2025

FINAL ORDER NO. 50816/2025

JUSTICE DILIP GUPTA:

M/s. Umed Club[1] has filed this appeal to assail the order dated 15.03.2018 passed by the Commissioner (Appeals) dismissing the appeal filed by the appellant for setting aside the order dated 17.07.2015 passed by the Assistant Commissioner. The Assistant Commissioner, by said order, rejected the refund claim of Rs. 21,04,836/- filed by the appellant under section 11B of the Central Excise Act, 1944[2] read with section 83 of the Finance Act, 1944[3].

2. The appellant is a club engaged in providing services of restaurant and accommodation to its members. It claims that it mistakenly paid an

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1. **the appellant**
2. **the Central Excise Act**
3. **the Finance Act**

amount as service tax under 'club or association' services as defined under section 65(25aa) of the Finance Act, which tax was not payable on the basis of principle of mutuality of interest. Accordingly, a refund claim of Rs. 21,04,836/- was filed by the appellant. This refund claim was rejected by the Assistant Commissioner by order dated 17.07.2015 on merits and it was also held that the appellant would not be entitled to refund on the ground of unjust enrichment.

3. An appeal was filed by the appellant against this order before the Commissioner (Appeals), which appeal was rejected by the order dated 21.03.2018 as the refund claim was found to be not admissible on merits. The relevant portions of the order passed by the Commissioner (Appeals) are reproduced below:

> "6.1. Now, I examine the case of refund on merit. **I find that the appellant has contended that the services rendered by a club to its members is covered by the principle of mutuality and so the same cannot be considered as provision of service from one legal entity to another, hence services rendered by a club to its members are not leviable to service tax.** The appellant also relied on various decisions in this regard.
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> 6.1.1. **I find that in this case, the refund pertains to the period after introduction of negative list regime. Therefore, the case is required to be examined in view of new provisions effective from 01.07.2012.** I find that as per definition of service defined under Section 65B (44), service means any activity carried out by a person for another for consideration, and includes a declared service. Further, as per explanation 3(a) to the said section, 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. Moreover, the definition given under Section 65B(37) defines the person which includes an individual, a Hindu

Undivided Family, a company, a society, a limited liability partnership, a firm, an association of persons or body of individuals, whether incorporated or not, Government, a local authority, or every artificial juridical person, not falling within any of the preceding sub-clauses. **From the perusal of the aforesaid legal position, any activity carried out by one person for another person for consideration is a service and the company and its member are distinct person. In this case, the club is incorporated under Company Act and the services provided by the club to its members for consideration such as service of restaurant, providing of rooms and mandap keeping services are definitely covered under the definition of the service as defined with effect from 01.07.2012. Furthermore, as per provisions and explanation 3(a) given under Section 65B(44) and the definition of person defined under Section 65B(37) with effect from 01.07.2012, the club and its member are distinct person and therefore, the services provided by the club to it's members are covered in the definition of service and these services are not covered in the negative list as well as under exemption notification and therefore, these were liable to service tax during the period involved in this case in terms of the provisions of Section 66B of the Act ibid.**

6.2 I further find that the appellant has contended that the principles of mutuality applies in their case as the club and members both are same person and therefore, no service tax is leviable. In this regard, it has already been established that company and members are two distinct person in terms of provisions of "service" and definition of "person" as defined under Section 65B(44) and 65B(37) as discussed above. Therefore, the principles of mutuality are not applicable to the present issue."

(emphasis supplied)

4. To support the aforesaid view, the Commissioner (Appeals) placed reliance upon the decision of Authority for Advanced Ruling in **Emerald Leisures Ltd.**[4] and **Avadh Infratech Ltd**[5].

5. The Commissioner (Appeals) also distinguished the decisions relied upon by the appellant for the following reasons:

> "6.4 **With regard to Tribunal's decisions passed in favour of appellant, I find that these are related to the activities undertaken by the appellant prior to period 30.06.2012 or before, whereas the definition of "service" and "person" as defined under Seciton 65B(44) and 65B(37) effective from 01.07.2012, it has substantially changed the scenario of service tax** as discussed above and accordingly to new provisions, the company and member are different person and the activities undertaken in between them falls under the category of service."
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> **(emphasis supplied)**

6. It needs to be noted that the Assistant Commissioner, while rejecting the refund claim filed by the appellant by order dated 17.07.2015, made the following observations:

> "**15. In view of above the case laws cited by claimant are clearly distinguishable from the facts of the case since as per Section 65B(7) ibid as the members are separate persons from the club; fact of which i.e. Section 65B (37) was not available before Hon'ble Courts delivering in the case laws which have been cited by the claimant in support of their case. Furthermore, it is a settled position of law that benefit of a judicial pronounce is not available to a person until it is not pronounced in his own case. Therefore, also the claim of the assessee is liable to be rejected.**

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4. 2016 (41) S.T.R. 321 (A.A.R.)
5. 2016 (45) S.T.R. 580 (A.A.R.)

> **16.** in view of above the claim of the assessee does not prove the test of merits as well as unjust enrichments therefore; the same is liable to be rejected."
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> **(emphasis supplied)**

7. It would be seen from the aforesaid order that though some reasons have been given by the Assistant Commissioner for rejecting the refund claim on merits, but no reason whatsoever has been given by the Assistant Commissioner for holding that refund could not be granted to the appellant on the ground of unjust enrichment. The Assistant Commissioner even observed that benefit of a decision will not be available to a person unless it is pronounced in his own case. As noticed above, the Commissioner (Appeals) dismissed the appeal filed by the appellant only for the reason that on merits, refund could not be granted to the appellant.

8. Shri Pradeep Jain, learned chartered accountant appearing for the appellant submitted that:

- **(i)** The judgment of the Supreme Court in **State of West Bengal** vs. **Calcutta Club Limited**[6] covers the legal position as it existed prior to 01.07.2012 and w.e.f. 01.07.2012. The Commissioner (Appeals) was, therefore, not justified in holding that w.e.f. 01.07.2012 the service provided by a club to its members would be subject to service tax; and
- **(ii)** The refund application filed by the appellant was, therefore, liable to be allowed.

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6. 2019 (29) G.S.T.L. 545 (S.C.)

9. Shri Manoj Kumar, learned authorized representative appearing for the department, however, suumitted that in view of the judgment of the Supreme Court in **ITC Ltd.** vs. **Commissioner of Central Excise, Kolkata-IV**[7], the refund application could not have been entertained without the appellant having challenged the self-assessment order in appeal.

10. The submissions advanced by the learned chartered accountant appearing for the appellant and the learned authorized representative appearing for the department have been considered.

11. The only reason assigned by the Commissioner (Appeals) for holding that the appellant was not entitled to refund of service tax already paid by it is that the appellant was required to pay service tax with effect from 01.07.2012 in view of the provisions of the Finance Act.

12. It would, therefore, be necessary to examine the judgment of the Supreme Court in **Calcutta Club** wherein the Supreme Court examined whether service tax would be leviable on a club for the services rendered by it to its members both prior to 07.01.2012 and w.e.f. 01.07.2012. The relevant portions of the order passed by the Supreme Court in respect of the period prior to 01.07.2012 are reproduced below:

> "**58. As was stated hereinabove, Service Tax was introduced for the first time by the Finance Act, 1994. Under Section 64(3), Chapter V of the Finance Act applied to taxable services as defined, with effect from 16th June, 2005. Under Section 65(25a), "club or association" was defined as follows:**
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> "club or association" means any person or body of persons providing services, facilities or advantages, for

7. 2019 (368) E.L.T. 216 (S.C.)

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 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.

59. Under Section 65(105)(zze), "taxable service" was defined as follows:

"Taxable service" means any service provided -
(zze) to its members by any club or association in relation to provision of services, facilities or advantages for a subscription or any other amount."

60. With effect from 1st May, 2011, "club or association" was defined by Section 65(25aa) as follows:

"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-

(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 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.

61. Likewise, in Section 65(105)(zzze), the expression "or any other person" was added after the expression "to its members", thus making it clear that the tax net had now been widened so as to include non-members of clubs or associations as well.

62. Under Section 66, it was stated that there shall be levied the tax (referred to as "the Service Tax") at the rate of 12% of the value of taxable services referred to in sub-clauses...(zzze) of clause (105) of Section 65, and collected in such manner as may be prescribed.

63. Under Section 67, where Service Tax is chargeable on any taxable service with reference to its value, it was stated:

"**67. Valuation of taxable services for charging Service Tax. -** (1) Subject to the provisions of this Chapter, where Service Tax is chargeable on any taxable service with reference to its value, then such value shall,-

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of Service Tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for consideration which is not ascertainable. Be the amount as may be determined in the prescribed manner."

64. Likewise, under Section 68, it was stated:

"**68. Payment of Service Tax.-** (1) Every person providing taxable service to any person shall pay Service Tax at the rate specified in section 66 in such manner and within such period as may be prescribed."

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71. With this background, it is important now to examine the Finance Act as it obtained, firstly from 16th June, 2005 uptil 1st July, 2012.

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.

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."

(emphasis supplied)

13. The Supreme Court, thereafter, examined the position w.e.f. 01.07.2012 and observed as follows:

"**65. With effect from 1st July, 2012, Sections 65 and 65A were made inapplicable, and a new Section 65B introduced, in which under Section 65B(37), the term "person" was defined as follows:**

"(37) "person" includes, -

(i) an individual,

(ii) a Hindu undivided family,

(iii) a company,

(iv) a society,

(v) a limited liability partnership,

(vi) a firm,

(vii) an association of persons or body of individuals, whether incorporated or not,

(viii) Government,

(ix) a local authority, or

(x) every artificial juridical person, not falling within any of the preceding sub-clauses;

66. Under Section 65B(44), "service" was defined as follows:

"(44) "service" means any activity carried out by a person for another for consideration and includes a declared service but shall not include-

(a) an activity which constitutes merely, -

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods, which is deemed to be sale within the meaning of clause (29A) of Article 366 of the Constitution; or

(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or Tribunal established under any law for the time being in force.

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Explanation 3. - For the purposes of this Chapter,-

(a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;

> (b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons."

67. A new Section 66B was then introduced, which states as follows:

> "**66B. Charge of Service Tax on and after Finance Act, 2012. -** There shall be levied a tax (hereinafter referred to as the Service Tax) at the rate of fourteen per cent. on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed."

68. As was stated hereinabove, Service Tax was thus leviable on all services as defined, short of a negative list of services which was then set out in Section 66D of the Act.

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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 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.

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(29A)(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 cooperative society.

80. It will be noticed that "club or association" was earlier defined under Sections 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 Sections 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 Sections 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.**

83. The expression "unincorporated associations" would include persons who join together in some common purpose or common action - see CIT, Bombay North, Kutch and Saurashtra, Ahmedabad v. Indira Balkrishna, (1960) 3 SCR 513 at pages 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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> **(emphasis supplied)**

14. The Supreme Court ultimately held:

> **"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."**
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> **(emphasis supplied)**

15. It is not in dispute that the appellant was established under the provisions of the Rajasthan Societies Registration Act 1958.

16. In view of the aforesaid Judgment of the Supreme Court in **Calcutta Club** that deals with the legal position as it existed prior to 01.07.2012 and as it exists w.e.f. 01.07.2012, the finding recorded by the Commissioner (Appeals) that the appellant would be liable to pay service tax on the services rendered by a club to its members w.e.f. 01.07.2012 is not correct. Similarly, reliance placed by the Commissioner (Appeals) on the decisions rendered by the Authority for Advanced Ruling in **Emerald Leisures Ltd.** and **Avadh Infratech Ltd.** is mis-placed.

17. Though the Commissioner (Appeals) has not dealt with issue of unjust enrichment, but the Assistant Commissioner also introduced the theory of unjust enrichment, though without recording reasons.

18. In **Karnavati Club Ltd.** vs. **Commissioner of Service Tax, Ahmedabad**[8], the Tribunal examined whether the claim of unjust enrichment can be raised against a club when it provide services to its members. It was held that the principle of unjust enrichment would not be applicable. The relevant paragraphs of the decision are reproduced below:

> "**11.** It can be seen from the above reproduced paragraphs that their Lordships have come to a categorical conclusion that the members of the club cannot be seen separately as a client or customer and the mandap or the club is one and the same. Since the Service Tax is sought from the club and it has been set aside at the show cause notice stage, by the Hon'ble High Court, it cannot be said that said club has passed on the incidence of Service Tax liability to its members, as the members are not separate from the club, is the ratio of their Lordships. **If that be so, it cannot be said that by claiming the refund from self, the club itself will be unjustly enriched. Services rendered to self cannot be equated with the services rendered to a client or customer.**
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> **12.** In my view, the appellant has passed the hurdle of unjust enrichment and I hold that the provisions of Section 12B will not be applicable in this case as the club and the members are not separate and are one as held in this case by Hon'ble High Court, the question of producing any other evidence in support of non-passing of Service Tax liability does not arise."
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> **(emphasis supplied)**

19. Learned authorized representative appearing for the department has, however, placed reliance upon the judgment of the Supreme Court in **ITC** to contend that in the absence of any appeal having been filed by the appellant to assail the self-assessment order, the appellant could not have directly asked for refund.

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8. 2013 (31) S.T.R. 445 (Tri.-Ahmd.)

20. It needs to be noticed that neither the show cause notice has raised this plea nor the orders passed by the Assistant Commissioner or the Commissioner (Appeals) have examined this plea. The department has also not filed any cross appeal in this appeal to raise this issue. In such circumstance, it is not open to the department to raise this plea in this appeal filed by the appellant.

21. The impugned order dated 15.03.2018 passed by the Commissioner (Appeals) is, accordingly, set aside and the appeal is allowed with consequential relief(s).

(Order pronounced on **03.06.2025**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

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