IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.75246 of 2015

(Arising out of Order-in-Appeal No.19/SH/CE(A)/GHY/2014 dated 25.09.2014 passed by Commissioner(Appeals), Customs, Central Excise & Service Tax, Guwahati.)

M/s. Shillong Club Limited
(Mahatma Gandhi Road, East Khasi Hills, District, Shillong-793001, Meghalaya.)
...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Shillong
.....Respondent
(Morellow Compound, M.G. Road, Shillong-793001.)

APPEARANCE

Shri Nihar Dasgupta, Advocate for the Appellant (s)
Shri H.S.Abedin, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K. CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI RAJU, MEMBER(TECHNICAL)

FINAL ORDER NO. 75658/2021

DATE OF HEARING : 23 August 2021
DATE OF DECISION : 23 August 2021

P.K. CHOUDHARY :

The present appeal has been filed by the Appellant being aggrieved with the Order-in-Appeal dated 25th September 2014 passed by the learned Commissioner (Appeals), Guwahati whereby the demand of Service Tax of Rs.23,19,837/- (including Cess) has been confirmed for the period from 2006-07 to 2010-11, along with interest and penalty as proposed in the Show Cause Notices (SCN) dated 20th October 2011 for the period from 2006-07 to 2008-09 and dated 27th February 2012 for the period from 2009-10 to 2010-11.

2. Briefly stated, the facts of the case are that the Appellant is a member only club incorporated under the provisions of the Indian Companies Act 1913. The Appellant functions on a no profit no loss

basis and the events organized are only open to the members of the club. The Appellant club is established on mutuality concept and therefore any transaction between the club and the members cannot be construed to be between two different parties and hence no Service Tax can be levied on the said transactions.

3. The Appellant states that an investigation proceeding was conducted by the officers of the Anti-Evasion wing of the Service Tax Department as regards alleged nonpayment of Service Tax on the 'club or association services' being provided by the Appellant to its members. Accordingly, two Show Cause Notices for the period from 2006-07 to 2008-09 and from 2009-10 to 2010-11 were issued to the Appellant demanding the Service Tax on the income as reflected in the audited financial statements submitted by the Appellant to the Department. The Appellant contested the same on the grounds of mutuality as well as decisions of various High Courts regarding non applicability of Service Tax on members only club. However, the demand was confirmed by the Adjudicating authority along with interest and penalty for the period covered in the SCN's by a common adjudication order (Order-in-Original) dated 19/09/2012. The Appellant filed an appeal before the Commissioner (Appeals) against the said Order-in-Original dated 19/09/2012 which was confirmed by the learned Commissioner(Appeals) vide order dated 25/09/2014. Hence the present appeal before the Tribunal.

4. Heard both sides through video conferencing and perused the appeal records and the compilation filed on behalf of the Appellant.

5. We find that the short issue to be decided in the instant case is whether the Appellant is liable to Service Tax on the services provided to its members during the alleged period. We find that the issue is no

longer *res integra* in view of the Judgement of Hon'ble Supreme Court in the case of STATE OF WEST BENGAL Versus CALCUTTA CLUB LIMITED [2019 (29) G.S.T.L. 545 (S.C.)], whereby it was held that there cannot be any levy of Service Tax between the members of the club and the club and the history of taxation of Service Tax was also traced by the Hon'ble Supreme Court from para 58 onwards of the judgment. The relevant portion of the judgement is reproduced hereinunder:

> ***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 :*
>
>> *"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 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."*

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.

xxx xxx xxx

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.*

69. *In an interesting judgment of this Court, Union of India and Ors. v. Margadarshi Chit Funds Private Limited and Ors., (2017) 13 SCC 806 = 2017 (3) G.S.T.L. 3 (S.C.), this Court outlined the history of Service Tax as follows :*

"19. The amendment was carried out w.e.f. 1-6-2007 whereby the words "but does not include cash management" were deleted. This provision remained on statute book up to 30-6-2012. By the Finance Act, 2012, entire scheme of service tax was completely changed and overhauled with the introduction of altogether new system of Service Tax. There was a paradigm shift in the Service Tax regime. Initially, Service Tax was levied only on three services by the Finance Act, 1994. The Finance Act, 1996 extended the levy to three more services. Twelve more services were brought under the Service Tax net by the Finance Act, 1997 and its scope was further enlarged by the

Finance Act, 1998 when twelve more services were brought under the Service Tax net. Three services were exempted from the Service Tax by the Finance Act, 1998 and one more service by the Finance Act, 2000. Its scope was further widened by the Finance Act, 2001 when Service Tax was extended to include fifteen more services. The Finance Act, 2002 further levied Service Tax on ten more services. The Finance Act, 2003 brought 8 new services within the ambit of Service Tax. Further, the Finance (No. 2) Act, 2004 brought 13 new services under Service Tax which included reintroduction of Service Tax on 3 services and also made applicable Service Tax on risk cover in life insurance under the life insurance service, whereas this service was introduced in the year 2002. The Finance Act, 2005 brought 9 new services under the Service Tax net. The Finance Act, 2006 brought 15 new services under the Service Tax net. The Finance Act, 2007 brought 7 new services under the Service Tax net and six telecom related services were omitted and merged into one new category of taxable service. Further, the Finance Act, 2008 w.e.f. 16-5-2008, introduced 6 new services. Further, the Finance (No. 2) Act, 2009 w.e.f. 1-9-2009 introduced 3 new services. Likewise, the Finance Act, 2010 w.e.f. 1-7-2010 vide Notification No. 24/2010-S.T., dated 22-6-2010 introduced 8 new services. By the Finance Act, 2011 w.e.f. 1-5-2011 vide Notification No. 29/2011-S.T., dated 25-4-2011, 2 new services were brought within its net and at the same time, health service was exempted w.e.f. 1-5-2011 by Notification No. 30/2011-S.T., dated 25-4-2011. Thus, the Service Tax was on a total of 115 services.

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 66D 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."*

70. *In All-India Federation of Tax Practitioners and Ors. v. Union of India and Ors., (2007) 7 SCC 527 = 2007 (7) S.T.R. 625 (S.C.), this Court upheld the constitutional validity of the levy of Service Tax, also stating :*

> *"8. As stated above, Service Tax is VAT. Just as excise duty is a tax on value addition on goods, Service Tax is on value addition by rendition of services. Therefore, for our understanding, broadly "services" fall into two categories, namely, property based services and performance based services. Property based services cover service providers such as architects, interior designers, real estate agents, construction services, mandapwalas, etc. Performance based services are services provided by service providers like stockbrokers, practising chartered accountants, practising cost accountants, security agencies, tour operators, event managers, travel agents, etc."*

> *After exhaustively reviewing a number of judgments, the Court stated that Parliament has legislative competence to levy Service Tax under Entry 97, List I of the Constitution of India.*

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. 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 :*

> *"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."*

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 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.*

> ***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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> ***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."*

6. We find that the above judgment of the Supreme Court was also referred to in the case of COMMISSIONER OF SERVICE TAX, KOLKATA & ORS. Versus THE BENGAL ROWING CLUB & ANR in APO 86 of 2019 With Writ Petition 534 of 2006 ,OCOT 2 of 2019, wherein the Hon'ble Calcutta High Court has also dismissed the appeal filed by the Revenue in a similar matter concerning taxability between the members of the club and the club itself.

7. By respectfully following the judgement of Hon'ble Supreme Court in the case of Calcutta Club Ltd (supra), we allow the Appeal with consequential relief, if any, to the Appellants. The Appeal is thus disposed of in the above terms.

(Operative part of the order was pronounced in the open Court.)

Sd/
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/

(RAJU)
MEMBER (TECHNICAL)

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