IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 04.12.2019
CORAM:

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.26398 of 2011

M/s.Perundurai Common Effluent Treatment Plant,
Rep by its Director - N.Chandrasekaran,
Plot No.H-14, 4th Cross C.C.Road,
Sipcot Industrial Growth Centre,
Perundurai - 638 052. ... Petitioner

Vs.

1.The Commissioner of Customs & Central Excise,
No.1, Foulk's Compound, Annai Medu,
Salem - 636 001,
Salem District.

2.The Additional Commissioner,
Office of the Commissioner of Customs,
& Central Excise,
No.1, Foulk's Compound, Annai Medu,
Salem - 636 001, Salem District ... Respondents

Prayer: Writ Petition is filed under article 226 of the Constitution of India, writ of Certiorarified Mandamus, calling for the records of the impugned proceedings of the 2nd respondent in C.No.V/MCA/15/110/2011-ST.Adj./Show Cause Notice SI.No.86/2011(ST-ADC) dated 03.10.2011 quash the same as illegal and contrary to law and further forbear the respondent from subjecting the petitioner to levy of Service Tax in respect of the activity of effluent treatment carried out for the benefit of its members.

For Petitioner : M/s.Abarna
For Respondents : Mrs.Hema Muralikrishnan
Senior Standing Counsel for R1 & R2

O R D E R

In this writ petition, the petitioner has challenged the impugned Show Cause Notice No.86/2011 (ST-ADC) dated 03.10.2011 bearing reference C.No.V/MCA/15/110/2011-ST.Adj issued by the 2nd respondent.

2.By the impugned show cause notice, the petitioner has been called upon to show cause as to why service tax should not be demanded from the petitioner for taxable services rendered by the petitioner under Section 65 (105) (zzze) of the Finance Act 1994 between the period May 2005 and May 2010.

3.In the impugned show cause notice, it has been alleged that the petitioner was rendering services that of a "clubs or association" as defined in Section 65 (25a) of the Finance Act, 1994. It has been alleged that since the petitioner was an incorporated company and therefore, the services rendered by it cannot be said to be excluded from the definition of "club or association" in view of specific exclusion sub-clause (iii) to the above definition.

4.Under these circumstances, the impugned Show Cause Notice justifies invocation of extended period of limitation and has called upon the petitioner to pay sum of Rs.3,08,58,519/- as service tax, primary education cess of Rs.6,00,659/- and secondary higher education cess of Rs.2,24,896/- for the aforesaid period. The Show Cause Notice also calls upon the petitioner to show cause as to why interest under Section 75 of the said Act should not be imposed and why penalty under Section 76 read with Sections 78 and 77 should not be imposed on the petitioner.

5.Both the counsel fairly submit that the issue is no longer res integra in light of the latest decision of the Honourable Supreme Court in State of West Bengal Vs. Calcutta Club Ltd., 2019 (29) GSTL 545 (S.C). However, the learned counsel for the respondents submits that petitioner should be relegated show cause proceedings and in case the petitioner has a favourable case in terms of the above decision of the Honourable Supreme Court, appropriate order would be passed. She further submits that Writ Petition against the Show Cause Notice is not maintainable in the light of the decision of the Honourable Supreme Court in Commissioner of Central Excise, Haldia Vs. Krishna Wax (P) Ltd., 2019 SCC OnLine SC 1470.

6.I have considered the arguments of the learned counsel for the petitioner and respondents.

7.Normally, writ against show cause notices ought not to have been entertained in the 1st place. The petitioner ought to have been directed to reply to the said show-cause notice.

8.However, in the present writ petition an interim injunction was ordered on 16.11.2011 in M.P.No.2 of 2011 and therefore the impugned Show Cause Notice has not been adjudicated till date. Meanwhile, the Honourable Supreme Court has now given its verdict on 03.10.2019 in the above case. The question of law has been settled. In paragraph 72, 73, 82, 83 and 84, the Honourable Supreme Court has observed as under:-

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 Actcan 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."

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 member's club when they are in incorporated form. The expression "body of persons" may subsumed within it person who come together for a common purpose, but cannot possibly include company or a registered cooperative society. Thus, Explanation 3 (a) to Section 65B does not apply to members club which are incorporated.

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.
> 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.

9.Thus, it is evident that the proposed demand in the impugned show cause notice can no longer be sustained in the light of the above decision of the Hon'ble Supreme Court. Therefore, this Writ petition is allowed. No cost.

Sd/-
Assistant Registrar

// True Copy//

Sub Assistant Registrar

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To

1.The Commissioner of Customs &
Central Excise,
No.1, Foulk's Compound, Annai Medu,
Salem - 636 001, Salem District.

2.The Additional Commissioner,
Office of the Commissioner of Customs,
& Central Excise,
No.1, Foulk's Compound, Annai Medu,
Salem - 636 001, Salem District.

+1cc to Ms.V.Abarna, Advocate, SR.No.101417.

W.P.No.26398 of 2011

MR(CO)
CSR:19.02.2020