IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.12.2019

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.8246 of 2016
and
W.M.P.No.7351 of 2016

M/s Ootacamund Club,
Represented by its Secretary,
Mr.Jimmy Kamdin,
Post Box No.19,
Ooty 643 001. ... Petitioner

Vs.

The Additional Commissioner,
O/o. The Commissioner,
Central Excise, Customs & Service Tax,
6/7. ATD Street,
Race Course Road, Coimbatore 18. ... Respondent

Prayer: Writ Petition filed under Article 226 of Constitution of India, to issue Writ of Certiorarified Mandamus calling for the records of the respondent contained in its order bearing C.No.V/CAS/15/112/2014 dated 07.01.2016 and to quash the same and to consequently direct the respondent to forbear from assessing the petitioner to service tax under the provisions of the Finance Act of 1994.

For Petitioner : Mr.Suhrith Parthasarathy

For Respondent : Mr.A.N.R.Jaya Prathap
Senior Standing Counsel

O R D E R

Heard learned counsel for the petitioner and the respondent.

2.The petitioner was issued with the following two Show Cause Notices:-

Sl.No	Date	SCN No	Period	Amount (Rs)
1	21.04.2014	SL.No.33/2014-ST (JC)	01.10.2008 - 31.01.2014	30,86,565
2	16.10.2015	SL.No.88/2015-ADC	01.02.2014 - 31.03.2015	17,04,205
Total				47,90,770

3.The demand in the respective both Show Cause Notices were confirmed by the impugned Order-in-Original No.4/2016 dated 07.01.2016 bearing reference C.No.V/CAS/15/112/2014 and C.No.V/CAS/15/132/2015.

4.The petitioner has however confined the present writ petition against Order-in-Original No.4/2016 dated 07.01.2016 qua the first Show Cause Notice SL.No.33/2014-ST(JC) dated 21.04.2014 bearing reference C.No.V/CAS/15/112/2014 alone for the period from 01.10.2008 to 31.01.2014, as it is evident from the prayer in the present writ petition.

5.Therefore, this order is confined to the demand confirmed in the impugned order qua first mentioned Show Cause Notice alone.

6.As far as the first first mentioned Show Cause Notice is concerned, the respondent has confirmed a demand of Rs.30,86,565/- as service tax for the period between 01.10.2008 and 31.01.2014. The respondent has also imposed penalty equivalent to the aforesaid service tax under Section 78 of the Finance Act, 1994 and has further imposed a token penalty Rs.10,000/- under Section 77 of the Act while dropping the penalty under Section 76 of the said Act in view of imposition of penalty under Section 78 of the said Act.

7.Facts relevant to the present writ petition are briefly narrated. The petitioner is a registered company under Section 25 of the Indian Companies Act, 1956. It collects subscription and usage charges from its members. Since, levy of service tax on service provided by club/association was introduced in the Finance Act, 1994, it was the view of the Service Tax Department that clubs/associations in the country were liable to pay the service tax for the services rendered by them to their members.

8.On the other hand, the clubs contented that there was no provision of service by applying principle of mutuality. Since the department kept insisting on payment of service tax, the petitioner obtained service of registration and started to collect the service of tax for the use of its rooms alone from July 2005 and continued until 31.03.2014 and paid service tax.

9. Since no service tax was paid for the services provided to its members, the petitioner was issued the aforementioned two Show Cause Notices. These Show Cause Notice culminated in the impugned order.

10.Instead of filing an appeal before the Appellate Commissioner, the petitioner has filed the present writ petition in view of the decision of the Gujarat High Court in Sports Club of Gujarat Ltd vs Union of India, 2013 (31) STR 645 and the Jharkhand High Court in Ranchi Club Ltd vs Chief CCE and ST, 2012 (26) STR 401.

11.These decisions had held that no service tax was payable for the services rendered by the "clubs or association" to its members applying the principle of mutuality.

12.In Sports Club of Gujarat Ltd vs Union of India, 2013 (31) STR 645, the Gujarat High Court declared Section 65 (25a) and Section 65(105)(zzzze) of the Finance Act, 1994 as incorporated/amended by Finance Act, 2005 ultra virus to the extent that it seeks to levy service tax in respect of services purportedly provided by the clubs/associations to its members.

13.The present writ petition came for admission on 07.03.2016 when notice was ordered. Thereafter, an interim order was passed by this Court on 15.04.2016 pending filing of counter affidavit by the respondent. The Respondent has also now filed its counter dated 14.03.2017 today i.e on 17.12.2019.

14.The learned counsel for the petitioner has filed a copy of the decision of the Hon'ble Supreme Court recently rendered in State of West Bengal and Others vs Calcutta Club Ltd and in Chief Commissioner of Central Excise and Service Tax and Another vs Ranchi Club Ltd, 2019 SCC OnLine SC 1291 and submits that the Hon'ble Supreme Court has answered the issue in favour of the petitioner and prays for quashing of the impugned order.

15.The learned counsel for the respondent on the other hand submits that the case can be remitted back to the respondent to pass a speaking order in terms of the decision of this Court.

16.Though a detailed counter has been filed by the petitioner, I am of the view that the present writ petition can be disposed in the light of the latest decision of the Hon'ble Supreme Court rendered in State of West Bengal and Others vs Calcutta Club Ltd and in Chief Commissioner of Central Excise and Service Tax and Another vs Ranchi Club Ltd, 2019 SCC OnLine SC 1291.

17.At the time when said counter was prepared by the respondent, the final order of the Hon'ble Supreme Court in the above cited case had not been pronounced. The Supreme Court has pronounced the above judgment only on 03.10.2019. It is therefore not necessary to deal with the counter filed by the respondent.

18.The Hon'ble Supreme Court has considered the provisions of the Finance Act, 1994, as it stood prior to and after passing of the Finance Act, 2005 and after 2012 after the advent of negative list with the introduction of the definition of “service” in section 65B (44) of the Finance Act, 1994 vide Finance Act, 2012 w.e.f. 01.07.2012.

19.Relevant portion from the decision of the Hon'ble Supreme Court is reproduced below for reference:-

> 80.With this background, it is important now to examine the Finance Act as it obtained, firstly from 16th June, 2005 uptil 1st July, 2012.
> 81.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, (2010) 4 SCC 378 (in particular paragraphs 10, 14 and 32 thereof) and CIT, Kanpur 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.”

82.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.

83.The next question that arises is - was any difference made to this position post 1st July, 2012?

84.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.

85.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.

86.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.

87.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:”

88.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.

89.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.

90.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”.

91.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.

92.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.

93.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.

94.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.

20.Respectfully following the above decision of the Hon'ble Supreme Court in the above case, the present Writ Petition deserves to be allowed.

21.Accordingly the impugned order is quashed qua demand confirmed against the Show Cause Notice SL.No.33/2014-ST(JC) dated 21.04.2014 bearing reference C.No.V/CAS/15/112/2014.

22.Since no remedy has been sought against the demand confirmed against the 2nd mentioned Show Cause Notice SL.No.88/2015-ADC dated 16.10.2015 bearing reference C.No.V/CAS/15/132/2015 in this writ petition, liberty is given to the petitioner to work out the remedy against the said demand confirmed in impugned order in accordance with law.

23.The present Writ Petition is allowed with the above observations. No cost. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-VI)

//True copy//

Sub Assistant Registrar

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To
The Additional Commissioner,
O/o. The Commissioner,
Central Excise, Customs & Service Tax,
6/7. ATD Street,
Race Course Road, Coimbatore 18.

+1cc to Mr.AP.Srinivas, Advocate SR.No.104977

+1cc to Mr.Arun Karthik, Advocate SR.No.105216

W.P.No.8246 of 2016
and W.M.P.No.7351 of 2016

VD(CO)
GMY(21/02/2020)