IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.03.2020

CORAM:

THE HON'BLE MR.JUSTICE R.MAHADEVAN

Writ Petition No.25820 of 2010
&
M.P.Nos.2 of 2010 & 1 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, Erode District ...Petitioner

Vs.

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

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 respondent in C.No.V/MCA/15/92/2010-ST.Adj, dated 08.09.2010, 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. M.Abinaya

For Respondent : Mrs.Hema Muralikrishnan
Senior Standing Counsel.

O R D E R

In this writ petition, the petitioner has challenged the show cause notice of the respondent in C.No.V/MCA/15/92/2010-ST.Adj, dated 08.09.2010.

2. In the show cause notice, it has been alleged that the petitioner was rendering services that of “clubs or association” as defined in Section 65 (25a) of the Finance Act, 1994. It has also been alleged that the petitioner, being an incorporated company, 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. Hence, the impugned Show Cause Notice came to be issued calling upon the petitioner to pay a sum of Rs.3,08,58,591/- as service tax, Rs.6,00,659/- as primary education cess and Rs.2,24,896/- as secondary higher education cess, for the period from 2005 and May 2010, recoverable under Section 73-A (1) of the Finance Act, 1994, along with interest under Section 75 of the said Act and penalty under Sections 76, 77 and 78 of the siad Act.

3. The learned counsel for both sides fairly submitted that the issue is no longer res integra, in light of the latest decision of the Hon'ble Supreme Court in the case of State of West Bengal Vs. Calcutta Club Ltd., reported in 2019 (29) GSTL 545 (S.C).

4. However, the learned Senior Standing Counsel for the respondent submitted that the petitioner should be relegated show cause proceedings and in case the petitioner has a favourable case in terms of the above decision of the Hon'ble Supreme Court, appropriate orders would be passed. She further submitted that the 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.

5. This Court has considered the arguments of the learned counsel for both sides and perused the materials available on record.

6. Normally, a writ against show cause notice ought not to have been entertained at the first instance and the petitioner ought to have been directed to reply to the said show-cause notice.

7. However, in the present writ petition, an interim injunction was ordered on 16.11.2010 and therefore the impugned Show Cause Notice has not been adjudicated till date. Meanwhile, the Supreme Court has given its verdict on 03.10.2019 in the case of State of West Bengal Vs. Calcutta Club Ltd, supra and the question of law has now been settled. In paragraphs 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."

8. In the light of the above proposition by the Supreme Court, it is evident that the proposed demand in the impugned show cause notice can no longer be sustained. Therefore, this Writ petition is allowed by setting aside the order impugned herein. No costs. Consequently, the connected MPs are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

srk

To

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

+1cc to M/s.R.Hemalatha, Advocate, S.R.No.20807

+1cc to M/s.Hema Murali Krishnan, Advocate, S.R.No.20700

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&
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KJ(CO)
RN(09/06/2020)