

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.01.2020

CORAM

THE HONOURABLE MR. JUSTICE C.SARAVANAN

W.P.No.15960 of 2016

Railway Officers Club,
No.136A, Sterling Road,
Nungambakkam,
Chennai - 600 034.

... Petitioner

Vs.

The Additional Commissioner of Service Tax,
Service Tax II Commissionerate,
Newry Towers,
No.2054-I, 2nd Avenue,
Anna Nagar,
Chennai - 600 040.

... Respondent

Prayer: Writ petition is filed under Article 226 of the Constitution of India to issue Writ of Certiorari calling for records and quashing the impugned IN original no.73-75/2015-16-ST-II/C.No.IV/9/455/2014-STC Adj, dated 27.02.2016, passed by the respondent.

For Petitioner : Mr.T.Ramesh

For Respondent : Mr.V.Sundareswaran

ORDER

The respondent submits that the issues is no longer res interga. It is squarely covered by the decisions of the Hon'ble Supreme Court in ''2019 SCC Online SC 1291'' State of West Bengal and Others Vs. Calcutta Club Limited.

The Hon 'ble Supreme Court decision held as under:

79. 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.

80. With this background, it is important now to examine the Finance Act as it obtained, firstly from 16th June, 2005 upto 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 1 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.

In view of the same, the Writ Petition stands allowed.

-s/d-

Assistant Registrar (CS-I)

True Copy

Sub-Assistant Registrar

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To

The Additional Commissioner of Service Tax,
Service Tax II Commissionerate,
Newry Towers,
No.2054-I, 2nd Avenue,
Anna Nagar,
Chennai - 600 040.

+1 CC to Mr.V.Sundareswaran, Advocate sr 184
+1 CC to Mr.T.Ramesh, Advocate sr 215.

W.P.No.15960 of 2016

BP (CO)
SP (20/02/2020)