

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH-COURT NO. 3

Service Tax Appeal No. 11288 of 2016 - DB

(Arising out of OIA-AHM-SVTAX-000-COM-31-15-16 dated 30/03/2016 passed by Commissioner of Service Tax-SERVICE TAX - AHMEDABAD)

The Sumel Business Park 3

Co Operative Service Society Ltd

The Sumel Business Park 3, Opp New Cloth Market,
Behind Kagdapith Police Station, Raipur,
Ahmedabad, Gujarat

.....Appellant

VERSUS

C.S.T.-Service Tax - Ahmedabad

7 th Floor, Central Excise Bhawan, Nr. Polytechnic
Central Excise Bhavan, Ambawadi,
Ahmedabad,, Gujarat- 380015

.....Respondent

APPEARANCE:

Shri Rahul Patel, Chartered Accountant for the Appellant

Shri R K Agarwal, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR

HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. 12274/2023

DATE OF HEARING: 25.09.2023

DATE OF DECISION: 11.10.2023

RAMESH NAIR

The brief facts of the case are that appellant is a members' society incorporated under the Gujarat Corporative Societies Act, 1961 for the purpose of management and maintenance of Sumel Business Park-3 of commercial scheme comprising various commercial units owned by the member of the appellant society. In order to maintain the property, the following types of amount were collected by the appellant from its members:

- a) maintenance charges
- b) maintenance deposits
- c) parking deposits and other amounts.

1.2 The appellant under a bonafide belief that the appellant and its members are no distinct person and following doctrine of mutuality the Service Tax was not discharged by the appellant on the amounts collected by it from the Members. The case of the department is that the appellant in terms of definition of Club or association service as provided in the sub clause (zzze) of clause 105 of Section 65 of the Finance Act, 1994 are liable to pay the service tax. Accordingly a show cause notice dated 20.06.2014 was issued proposing demand of Service Tax for the period 01.07.2012 to 31.03.2014. Though the show cause notice was issued referring to the statutory provision prevailing prior to 01.07.2012 but in the adjudication order the demand of service tax was confirmed considering the provisions for taxability of the service prevailing with effect from 01.07.2012. the Adjudicating Authority vide Order-In-Original dated 30.03.2016 confirmed the demand, appropriated a apart of the demand already paid, demanded interest on the Service Tax confirmed and also imposed penalty under Section 77 and 78. Being aggrieved by the said impugned order-in-original, the appellant filed the present appeal.

2. Shri Rahul Patel, Learned Chartered Accountant, appearing on behalf of the appellant submits that the demand of Service Tax, whether on the statutory provision prevailing prior to 01.07.2012 or post 01.07.2012 is not sustainable. He submits that as per the show cause notice, the demand was raised considering the definition of club or association service as provided under sub clause (zzze) of clause 105 of Section 65 of the Finance Act, 1994. Whereas that said provision was not prevailing from 01.07.2012. The Adjudicating Authority completely going out of the scope of show cause notice confirmed the demand, relying on the statutory provision which is effective from 01.07.2012. Therefore, the adjudication order travelled

beyond the scope of show cause notice, on this ground itself the entire demand is liable to be set aside.

2.1 Without prejudice to the above, he further submits that as per definition of club or association service provided under sub clause (zzze) of clause (105) of Section 65 of the Finance Act, 1994 under the definition as per sub clause (i) anybody established or constituted by or under any law for the time being in force was excluded from the definition of club or association. In the present case there is no dispute that the appellant being a corporative society is registered with registrar of corporative societies under Gujarat Corporative Societies Act, 1961. Therefore, in view of the clause (i) of definition of club or association provided under sub clause (zzze) of clause (105) of section 65 of the finance Act, 1994, the appellant is clearly out of the purview of the definition of club or association. Therefore no service exists, which can be chargeable to Service Tax.

2.2 He further submits that this issue has been considered by the Hon'ble Supreme Court's larger bench in the case of *State of West Bengal Vs. Culcutta club Ltd. -2019 (29) GSTL 545 (SC)* wherein, it was held that between the club or association and its members which are incorporated there is a principle of doctrine of mutuality. Accordingly there is no provision of service by an association to its members. He submits that the Hon'ble Supreme court also considered the position of the changed law with effect from 01.07.2012 and even for the period post 01.07.2012 also it was held that the principle of doctrine of mutuality applies and accordingly no service Tax is chargeable in case of incorporated body.

2.3 He further submits that in a particular case of Cooperative body the Hon'ble Supreme Court in the case of *CCE Vs. Rajasthan Co-Operative Dairy Federation Ltd - 2022 (65) GSTL 257 (SC)* also reiterates the view

taken in case of Kolkata Club Ltd. and held that no service tax is payable, by dismissing the Revenue's appeal.

2.4 Without prejudice to the above submissions, he further submits that the appellant have also strongly raised the issue with regard to the maintenance deposits that such deposit which is refundable cannot treated as consideration towards any service. He submits that the Adjudicating Authority did not consider it as deposit for the reason that the appellant are enjoying the interest on such deposit.

2.5 It is his submission that merely because some interest is accrued the nature of the deposit will not change and the same cannot be considered towards the consideration of service. In support of this submission, he placed reliance on the following Judgments:

- Commissioner of Central Excise Vs. Gas Authority of India Ltd- 2008 (232) ELT 7 (SC)
- Precision Rubber Industries (P) Ltd. Vs. Commissioner of Central Excise, Mumbai- 2016 (334) ELT 577 (SC)
- Commissioner Vs. Reliance Ports and Terminals Ltd.- 2016 (334) ELT 630 (Guj.)

2.6 In the grounds of appeal, the appellant also raised the issue of limitation. The submission of the appellant in this regard is as under:-

"20. Taking into account the above-mentioned case laws, it is apparent that there has been a violation of the principle of natural justice in the appellant's case. Even if it is assumed without being admitted that as far as the personal hearing is concerned, there has been an honest mistake on the part of the appellant, still taking into account the fact that almost the entire amount of service tax has already been

deposited by the appellant, the rationale behind the above-mentioned case laws is squarely applicable to the appellant.

21. It is humbly submitted that due to the above-mentioned reasons, the appellant was under a bonafide belief that the amount collected from the members was exempt from service tax and it was not that the appellant wanted to keep clandestine the fact of such activity being done by it from the department. In view of this, if there is no suppression of facts, demand beyond one year/ eighteen months is not sustainable. Therefore, the H'ble Principal Commissioner of Service Tax, Ahmedabad has wrongly invoked the extended period under Section 73(1) of the Act. The appellant places reliance on the following judicial pronouncements:

- a) MP Water & Power Management Institute v. CCE[2009] 20 STT 79 (New Delhi - CESTAT)*
- b) Sapphire Security & Intelligence Regiment (P.) Ltd. v. CCE [2010] 24 STT 277 (Chennai - CESTAT)*
- c) Vishal Traders v. CCE [2010] 24 STT 260 (New Delhi - CESTAT).*
- d) Secretary, Town hall Committee, Mysore City Corpn. v. CCE (2007) 10 STT 434 (Bang. CESTAT)*
- e) Singh Brothers v. CCE (2009) 20 STT 357-27 VST 406 (New Delhi - CESTAT)*
- f) Toyota Kirloskar Motor (P.) Ltd. v. CCE (2009) 21 STT 378 (Bang. CESTAT)*
- g) Padam Chand Mutha & Co. v. CCE (2009) 21 STT 296 (New Delhi - CESTAT)*
- h) CCE v. Asian Cranes & Engg. Services (2009) 22 STT 510 (New Delhi - CESTAT)*

3. On the other hand Shri Rajesh K Agarwal, Learned Superintendent (AR) appearing on behalf of the revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both the sides and perused the records. We find that in the present case the demand of service tax was confirmed under the head of club or association service as specified in Sub clause (zzze) of clause (105) of section 65 of the finance

Act, 1994 and also considering the provision of service in terms of section 65B (44) of Finance Act, 1994 effective from 01.07.2012. We find that in the entire show cause notice the proposal of service tax demand was only on the basis of the definition of club or association service as specified in sub clause (zzze) of clause (105) of section 65 of the Finance Act, 1994. Whereas in the adjudication order, the demand was confirmed on the basis of the statutory provision prevailing with effect from 01.07.2012 where under the concept of definition of service was given away and negative list was introduced, according to which irrespective of any service provided by one person to another person except the services prescribed under the negative list are chargeable to Service Tax.

4.1 We find that the allegation made in the show cause notice is on the completely different provision and the grounds than the statutory provision applied while confirming the demand of Service Tax in the adjudication order. Therefore, the adjudication order has travelled absolutely beyond the scope of show cause notice. The demand of Service Tax is liable to be set aside on this ground itself that the adjudication order cannot travel beyond the show cause notice. This issue has been considered time and again in various judgments. Some of the judgments which are relied upon by the appellant are reproduce below:

a) In the case of Commissioner of Central Excise Vs. Gas Authority of India Ltd (Supra) the Hon'ble Supreme Court of India has passed the following order:

"7. As repeatedly held by this Court, show cause notice is the foundation of the Demand under Central Excise Act and if the show cause notice in the present case itself proceeds on the basis that the product in question is a by-product and not a final product, then, in that event, we need not answer the larger question of law framed hereinabove. On this short point, we are in agreement with the view expressed by the

Tribunal that nowhere in the show cause notice it has been alleged by the Department that Lean Gas is a final product. Ultimately, an assessee is required to reply to the show cause notice and if the allegation proceeds on the basis that Lean Gas is a by-product, then there is no question of the assessee disputing that statement made in the show cause notice.

8. We express no opinion on the merits of the question framed hereinabove. We are dismissing these appeals only on the facts of the present case and only on the ground that there is no allegation made in the show cause notice that Lean Gas is the final product.”

b) In the case of Precision Rubber Industries (P) Ltd. Vs. Commissioner of Central Excise (Supra) the Hon'ble Supreme Court of India has passed the following order:

“11. In so far as the present appeal is concerned, it is the case of the Revenue in the show cause notices that the goods are classifiable under Chapter Heading 4016.99. Therefore, no new case could have been set up or decided contrary to the show cause notices that the goods fall under Chapter Heading 8448.00 without issuing a fresh show cause notice to the assessee in this regard.

12. In these circumstances, and following the decisions of this Court, we would have ordinarily permitted the Revenue to issue a fresh show cause notice to the assessee seeking to classify the goods under Chapter Heading 8448.00. However, due to the passage of time, we are of the opinion that it would not be advisable (or permissible under the provisions of the Central Excise Tariff Act) to permit the Revenue to reopen the entire proceedings and classify the goods under Chapter Heading 8448.00.

13. Accordingly, while setting aside the impugned order passed by the Tribunal, we remand the matter to the Tribunal to take a decision on whether the goods manufactured by the assessee are classifiable under Chapter Heading 4009.99 as claimed by the assessee or 4016.99 as claimed by the Revenue. The order of remand is limited only to this issue.”

c) In the case of Commissioner Vs. Reliance Ports and Terminals Ltd (supra) the Hon'ble Gujarat High Court has passed the following decision:

“8. This court has considered the submissions advanced by the learned counsel for the respective parties and has perused the impugned orders passed by the Tribunal as well as by the Commissioner as well as the decisions cited by the learned counsel for the respondent.

9. On a conjoint reading of the show cause notice issued to the assessee and the questions proposed in this appeal, it is evident that the issues raised in the questions proposed do not find place in the show cause notice. From the averments made in the memorandum of appeal and the grounds raised therein as well as on a perusal of the impugned order passed by the Tribunal, it appears that the appellant does not dispute the validity of the order of the Tribunal on the grounds decided by the Commissioner, but on grounds, which were not subject matter of the show cause notice. In the show cause notice, the assessee was not called upon to state as to whether the services of “Consulting Engineers” and “Banking and other Financial Services” are “input services” of the respondent or as to whether the capital goods were used for providing “output services” provided by the respondent viz. “Port Services”, etc. Evidently therefore, in the present appeal, the appellant seeks to challenge the impugned order passed by the Tribunal on grounds which were never subject matter of the show cause notice. Under the circumstances, in the light of the settled legal position as emerging from the above referred decisions of the Supreme Court, that the show cause notice is the foundation of the demand under the Central Excise Act and that the order-in-original and the subsequent orders passed by the appellate authorities under the statute would be confined to the show cause notice, the question of examining the validity of the impugned order on grounds which were not subject matter of the show cause notice would not arise.

10. In the aforesaid premises, in the absence of any infirmity in the findings recorded by the Commissioner or the Tribunal, there is no warrant for interference. The questions proposed by the appellant which were not subject matter of the show cause notice, do not arise out of the impugned order passed by the Tribunal. The appeal being devoid of any merit, is, accordingly, dismissed.”

From the above consistent view of the Apex Court and following the same by the Hon'ble Gujarat High Court, it is settled that the show cause notice is foundation of a case and any proceeding whether adjudication or appellate proceeding cannot travel beyond the show cause notice. Therefore, following the settled legal position as cited above, the demand in

the present case is not sustainable on the ground that the adjudication order has travelled beyond show cause notice.

4.2 Without prejudice to the above finding, we find that the appellant is a registered corporative society under the Gujarat Corporative societies Act, 1961 therefore, it clearly falls under the category of a members society which is incorporated. The definition of club or association provided under the sub clause (zzze) of clause (105) of Section 65 of the Finance Act, 1994 is reproduced below:

Definition and scope of service:

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) Any body 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 objection 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:

(section 65(25a) of the finance Act,1994)

“Taxable Service” means any service provided or to be provided to its members, by any club or association in relation to provision of services, facilities or advantages for a subscription or any other amount.

(Section 65 (105) (zzze) of the Finance Act, 1994)”

From the above definition itself, it is unambiguous that if any body is established or constituted by or under any law for the time being in force is clearly excluded from meaning of club or association.

4.3 In the present case, the appellant's society is incorporated under the Gujarat corporative Societies act, 1961 therefore it clearly falls under the four corners of the clause (i) of definition of club or association provided under sub clause (zzze) of clause (105) of section 65 of finance Act 1994. Therefore the appellant's activity does not fit into the club or association services. Even if considers that whether the appellant is liable to pay service tax under the new service tax provision effective from 01.07.2012, first we have to see the definition of service under 65B(44) which reads as under :

"(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.

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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."

From the above definition, it can be seen that the service will exist only when an activity is carried out by a person for another for consideration.

4.4 In the present case since there is a doctrine of mutuality between the appellant's corporative society and its members, it cannot be said that a person had provided service to another person. There is no difference between the corporative society and its members that means both are one. Accordingly, there is no service provision by one person to another person. Therefore even as per the definition of service provided under section 65B(44) with effect from 01.07.2012, the activity between the appellant and its members does not fall under the definition of service. Though we have discussed above on the issue in length but the issue is no longer res-integra as the Hon'ble Supreme Court in the land mark judgment of the larger bench in the case *State of West Bengal Vs. Calcutta club Ltd.* (supra) considered this very issue and not only for the period prior to 01.07.2012 but also for the period post 01.07.2012 and came to the conclusion that since there is a doctrine of mutuality between the club or association and its members, no provision of service exists, particularly in a case where a body/club/ association is incorporated.

4.5 In the present case, as discussed above the appellant being admittedly an incorporated society under the Gujarat corporative Society Act, 1961 the ruling of the Apex court in the case of *State of West Bengal Vs. Calcutta club Ltd.* clearly applies, accordingly the Service Tax demand does not sustain. The Hon'ble Supreme Court particularly for the period post 01.07.2012 gave a specific finding, the same are reproduced below:

"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.

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.”

From the above specific finding for the period post 01.07.2012 also the demand of Service Tax under club or association does not sustain. The identical issue was considered by Hon’ble Supreme Court also in the case of *CCE Vs. Rajasthan Co-Operative Dairy Federation Ltd* (Supra) wherein following their Lordships earlier judgment in the case of the *State of West*

Bengal Vs. Culcutta club Ltd. (supra). The revenue's appeal was dismissed. This further reinforces that appellant being identically placed Co-Operative body of the appellant in the case of *CCE Vs. Rajasthan Co-Operative Dairy Federation Ltd (Supra)* the judgment of Hon'ble Apex Court in the case of *State of West Bengal Vs. Culcutta club Ltd.* directly applies in the facts of the present case.

4.6 Without prejudice to the above, we find that the appellant have raised one of the issue that in case of maintenance deposit, the same is not liable to Service Tax as it is not on account of consideration towards the service but the same is refundable deposit. In this regard Learned Counsel has submitted ledger, wherein such maintenance deposit was accounted for. From the perusal of such account we find that the maintenance deposit was received as a refundable deposit and the same was shown as refundable in the ledger. Therefore, such amount cannot be considered as a consideration towards any service. Hence, the same is not chargeable to Service Tax on this ground also. This issue has been considered in various judgments, wherein the refundable deposit was held to be not consideration towards the service. Some of the judgments are referred below:

- Ashiana Maintenance Services LLP - 2019 (24) GSTL 47 (Tri- Del.)
- Murli Realtors Pvt. Ltd. Vs. CCE Pune-III 2015 (37) STR 619 (Tri.- Mumbai)
- Commissioner Of Central Excise, Mumbai-III Vs. I.S.P.L. Industries Ltd. 2003 (154) ELT 3 (SC)

4.7 As regard the ground on the issue of limitation made in the appeal by the appellant, we find that the issue of taxability on club or association under club or association service was under dispute right from the

beginning and various Tribunals and High Courts have passed the order, mostly in the favour of the assessee, on the ground that due to doctrine of mutuality there is no provision of service by one person to another person and later on the matter was taken up by the Apex Court and Larger Bench of the Apex court finally decided the matter in the case of *State of West Bengal Vs. Calcutta club Ltd.* (supra) in favour of the assessee. In this legal position we are of the view that no suppression of facts or mis-declaration or any *mala fide* intention can be attributed to the appellant for non-payment of service tax. Therefore the extended period is not invocable in the present case. Accordingly, the demand for the extended period is not sustainable on limitation also.

5. As per our above discussion and findings, the Service Tax demand is not sustainable on multiple grounds as discussed above. Accordingly, we set aside the impugned order and allow the appeal with consequential relief.

(Pronounced in the open court on 11.10.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)