[2016] 68 taxmann.com 240 (Mumbai - CESTAT)

CESTAT, MUMBAI BENCH

Gondwana Club

v.

Commissioner of Customs & Central Excise, Nagpur

M. V. RAVINDRAN, JUDICIAL MEMBER
AND C.J. MATHEW, TECHNICAL MEMBER
ORDER NO. A/86239/2016/STB
APPEAL NO. ST/530/2011
SEPTEMBER 8, 2015

CASE REVIEW

Sports Club of Gujarat v *Union of India* [2013] 35 taxmann.com 557/40 STT 486 (Guj.) (para 8); *Green Environment Services Co-op Society Ltd.* v. *Union of India* [2015] 49 GST 563/53 taxmann.com 324 (Guj.) (para 8); *Matunga Gymkhana* v *CST* [Appeal No. ST/530/2011, dated 8-9-2015] (para 8) and *Jt. CTO* v *Young Men's Indian Association* [1970] 1 SCC 462 (para 8) *relied on.*

CASES REFERRED TO

Sports Club of Gujarat v *Union of India* [2013] 35 taxmann.com 557/40 STT 486 (Guj.) (para 8), *Green Environment Services Co-op Society Ltd.* v. *Union of India* [2015] 49 GST 563/53 taxmann.com 324 (Guj) (para 8), *Matunga Gymkhana* v *CST* [Appeal No. ST/ 530/2011, dated 8-9-2015] (para 8) and *Jt. CTO* v *Young Men's Indian Association* [1970] 1 SCC 462 (para 8).

U.R. Naik, Adv. *for the Appellant.* **P.V. Sekhar**, Dy. Commissioner (AR) *for the Respondent.*

ORDER

C.J. Mathew, Technical Member - M/s Gondwana Club is in appeal before us against order-in-original no. 01/ST/2011-12/C dated 15th June 2011 in which the Commissioner of Central Excise & Customs, Nagpur has confirmed demand of Rs. 60,81,315/- as tax for rendering of 'business support services' and 'club or association service' along with interest on the unpaid portion besides imposition of penalty under sections 76, 77 and 78 of Finance Act, 1994.

2. It appears that the appellant is in receipt of various amounts from its members and other persons for use of sporting, recreational and infrastructural facilities ofthe club in addition to entrance fees and periodical subscription amounting to Rs. 4,88,76,021/- for the period from April 2005 to September

2009. These were sought to be taxed as 'club or association service' as per section 65(105)(zzze) of Finance Act, 1994. Further, the caterers contracted by the appellant for delivery of food and beverages to members were required to pay contract fee, electricity charges and a miscellaneous amount 'all at prefixed rates - amounting to Rs. 30,24,000/- for the period from April 2005 to September 2009 which was sought to be taxed under section 65(105)(zzzq) of Finance Act, 1994 as 'support services of business or commerce'. Yet another demand related to recoveries of Rs. 91,574/- from staff members who were provided with accommodation for the period from April 2005 to September 2009 that Revenue claims was liable to tax under section 65(105)(zzzz) of Finance Act, 1994 for rendering 'renting of immovable property service' Appellant having registered themselves as provider of club or association service paid Rs. 3,93,301/- as tax on the amount received from caterers under that head.

3. The original authority has held that the amount of Rs. 30,49,301/- paid by the catering contractors is liable to tax for providing 'support services of business or commerce' and that tax not having been paid under this head renders the appellant liable to tax thereon. On the tax dues under 'renting of immovable property service' it was held that tax had been paid for 2007-08 but not for the period thereafter on an amount of Rs. 27,787/-.

4. We notice from the record of proceedings that there is a disjointed approach in taxing the appellant. Tax demands should be characterized by a certainty which is found to be lacking in these proceedings; the attempt appears to have been to tax the receipts rather than demand taxes on taxable services. The nature of the transaction that is sought to be taxed does not appear to have been examined with reference to section 65 of Finance Act, 1994. Exacerbating this misapplication are the avoidable visits to the show cause notice for comprehending the discussion in the impugned order; the impugned order has segregated the consideration received from different entities but has not quantified the tax liability under each head. Consequently, there is a demonstrated lack of clarity in the impugned order that casts doubts about its sustainability.

5. The appellant, in its wisdom and by application of common sense, registered itself under the most obvious head as provider of 'club or association service' and, claiming that it was not rendering any taxable service other than that of using the caterers for making food facilities available to its members, paid tax on receipts under the head of 'club or association service.' The adjudicating authority, while determining that the entire receipts of the appellant were liable to tax, discovered that the consideration from different entities were attributable to multiple services. Notwithstanding this finding, the impugned order has not determined the tax liability distinctly for each of the services. Impliedly, the nature of each transaction and its fitment into the various sub-clauses of section 65(105) has not been ascertained. It is, therefore, perplexing that in determining the omnibus demand, the claim of the appellant for acknowledgment of the tax paid on receipts from the catering contractors was disregarded.

6. Requiring them to render tax on the amounts that were already subject to tax is not equitable. Moreover, learned Counsel for appellant has drawn attention to circular no. 58/07/2003-CX(ST) dated 20th May 2003 of the Central Board of Excise & Customs instructing the field formations to be flexible

in the matter of head of tax cited for remitting tax. Accordingly, in the light of this circular, reference to inappropriate accounting code cannot be held to the detriment of the appellant and due discharge of tax on the receipts from the catering contracts must be taken on record. We do so while rejecting all claims of non-taxability of this amount adverted on behalf of the appellant. Having accepted the tax liability, having discharged the same and having claimed that the incorrect accounting code should be treated as a mere technical flaw, there is no merit in pleading before us that the bar of limitation applies. Undoubtedly, the catering contractors who are engaged to provide comestibles to the members, are enabled to do so owing to the various facilities provided by the appellant. The amount of tax that has been paid on these receipts is affirmed as being in accordance with the Finance Act, 1994.

7. Some of the staff employed by the appellant have been subjected to recovery of amounts towards accommodation provided to them. It is on record that appellant rendered tax on the amounts collected by them during 2007-08 and, taking note of this, the impugned order has determined a small amount as taxable for the subsequent period. The contractual privileges of an employer-employee relationship are outside the purview of service tax and this activity of the appellant does not come within the definition of the taxable service of 'renting of immovable property' sought to be saddled on the appellant in the impugned order. Accordingly, the demand under the head 'renting of immovable property service' does not sustain.

8. Learned Counsel for appellant relies on the decisions of the Hon'ble High Court of Gujarat in *Sports Club of Gujarat* v. *Union of India* [2013] 35 taxmann.com 557/40 STT 486 and *Green Environment Services Co-op Society Ltd.* v. *Union of India* [2015] 49 GST 563/53 taxmann.com 324 (Guj) and of the Tribunal in *Matunga Gymkhana* v *CST* [Appeal No. ST/ 530/2011, dated 8-9-2015] to dispute the finding of tax liability on the receipts from its members. Drawing a distinction between members' clubs and proprietary clubs, these decisions have placed reliance on the exclusion from tax arising from 'mutuality' as enunciated by the Hon'ble Supreme Court in *Jt. CTO* v. *Young Men's Indian Association* [1970] 1 SCC 462 to hold that transactions between members' clubs and the individual members are not exigible to tax. The Hon'ble High Court, in re *Sports Club of Gujarat* (*supra*) has held section 65(25a), read with section 65(105)(zzze) and section 66 of Finance Act, 1994 to be ultra vires to the extent that it seeks to levy service tax on the transactions between a member and the club/association of which he is a member.

9. We have heard the learned Counsel for appellant and the learned Authorized Representative. In view of the above cited decisions of the Hon'ble High Court of Gujarat, the demand of tax on receipts from members cannot sustain. We also find that the attempt in the proceedings before the lower authority has been to tax these receipts merely because appellant is a club and because of the existence of section 65(105)(zzze) in Finance Act, 1994 which is as below:—

> "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;
>
> In its wisdom, departmental authorities have considered it fit to tax the subscription or any other

amount paid by a member to the club in which membership has been obtained. Tax under Finance Act, 1994 is not on the entity or on amounts receipts by the entity — it is on specified taxable services and hence taxability can arise only to the extent that each transaction between the member and the club can meet the test of conformity with section 65(105)(zzze) supra.

10. A members' club, by its very composition, is a grouping of individuals who have chosen to be members of a particular club for fulfilment of certain human needs 'social, sporting, recreational etc.' that cannot be fulfilled except in such organized collectives. Mere aggregation is not provisioning of a service. Access to such aggregation is predicated upon, inter alia, payment of a joining or entrance fee. Such fees do not provide assurance of any service but allows the individual to claim affiliation to the aggregate. Gratification of the needs that drive human beings to seek membership are not entirely attributable to services rendered by clubs; payments towards joining fees are, therefore, not necessarily a consideration for service. Such aggregates, during the years of its existence, acquire ownership of valuable assets that, upon the contingency of disaggregation, will devolve on its constituents. The entrance or joining fee represents merely the present value of such assets and not the consideration for service that the member may obtain from the club. The founders of the institution have, assuredly, made financial contributions to bring it into being and those who join subsequently will, in equity, be required to make their contributions too. Pooling of finances in this manner for a common purpose is but participation in aggregate of expenditure and is not an expense incurred for obtaining a service. Therefore, to the extent that the services of a club are contingent upon payments to be made separately for each transaction, contribution to the corpus of a club cannot be construed as consideration for service and, hence, is outside the scope of taxability.

11. The club, as an entity, incurs certain expenses to keep it as a going concern; cost of maintaining the establishment, remuneration to management and staff, recurring expenses are a few of these. Not being a commercial concern, the primary wherewithal for meeting these expenses are the purse strings of the members. Periodical subscription is collected accordingly. Deficits drive the enhancements of subscription. Consequently, contribution to common expenditure cannot be considered to be consideration for services that the club renders to members. All too often, members do not derive any service by mere membership; clubs charge individually for use of facilities that the club has on offer. The subscription is, therefore, not a consideration for a service and, hence, not taxable.

12. Without ascertainment of the receipts as quid pro quo for an identified service, demand of tax on amount transferred from an individual to an entity merely because the individual happens to be a member, on the one hand, and the recipient happens to be club/association on the other, does not meet the test of having rendered taxable service.

13. Accordingly, the impugned order is set aside to the extent that receipts from members and on recoveries from staff is sought to be taxed. The liability already paid is confirmed as due discharge of tax on receipts from catering contractors for rendering 'support service of business or commerce'. Interest, if any, on delayed payment shall be determined and paid. Penalty under section 78 of Finance

Act, 1994 is also modified to the amount of tax that is confirmed. Penalty under section 77 of Finance Act, 1994 is upheld.