CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
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REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No.4174 Of 2012

[Arising out of OIO No.20/Commr/PKL/2012 dated 05.10.2012 passed by the Commissioner of Central Excise, Panchkula]

M/s Indian Machine Tools Manufacturers Association : Appellant (s)
Plot No.249-F, Phase-IV, Udyog Vihar,
Sector-18, Gurgaon, Haryana-122015

Vs

The Commissioner of Central Excise, Panchkula : Respondent (s)
SCO 407-408, Sector-8, Panchkula-134119

APPEARANCE:
Shri B.G. ChidanandUrs, Advocate for the Appellant
Shri Siddharth Jaiswal and Shri Nikhil Kumar Singh, Authorised Representatives for the Respondent

CORAM :
HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No.60403/2023

Date of Hearing:12.09.2023

Date of Decision:18.09.2023

Per:P. ANJANI KUMAR

The appellants, M/s Indian Machine Tools Manufacturers Association (IMTMA), are a society registered under Societies Registration Act, 1946 and Indian Companies Act, 1956; the appellants are registered as a service tax assessee under the category of "Business Exhibition Services", "Sponsorship Services", "Renting of Immovable Property Service" and "Scientific and Technical Consultancy Services". On scrutiny of the documents and financial
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statements of the appellants, Department issued a show-cause notice dated 23.03.2010 to the appellants demanding service tax of Rs.10,73,258/- under the Head "Club or Association Service" on the membership collected; Rs.1,32,89,297/- under the Head "Club or Association Service" for charging fees from members for attending the functions; Rs.76,57,325/- under the Head "Business Exhibition Service" on the basis of difference between ST-3 Returns and balance sheet; Rs.2,82,54,686/- on the basis of difference between ST-3 Returns and balance sheet under the Head "Renting of Immovable Property Service". The demand raised in the show-cause notice was confirmed, along with interest and penalties, vide OIO dated 05.10.2012, which is impugned in the present appeal.

2. Shri B.G. Chidananda Urs, learned Counsel for the appellant, submits that the membership fees is not liable to service tax as there are no two persons recognizable under law to tax such transaction. He relies on the following:

- State of West Bengal Vs Calcutta Club Limited- 2019 (29) GSTL 545 (SC).
- Karnataka Co-operative Milk Producers Federation Ltd.- 2022 (61) GSTL 39 (Tri. Bang.)
- Rajasthan Co-operative Dairy Federation Ltd.- 2022 (65) GSTL 350 (Tri. Del.) upheld by the Hon'ble Supreme Court- 2022 (65) GSTL 257 (SC).

3. Coming to the demand of service tax on the income received in organising seminar, workshops and conferences, the confirmation was

on a wrong classification, the activity cannot be classified under "Club or Association Service"; the services rendered to their own members are not chargeable in view of the judgment in the case of Calcutta Club Limited (supra); coming to the services rendered to non-members, the same falls under "Convention Service"; as the demand is raised under "Club or Association Service", the same is not maintainable; Hon'ble Supreme Court in the case of M/s 3i Infotech Ltd.- 2023-TIOL-125-SC-ST held that adjudication on the basis of show-cause notice should be made only on the basis of classification stated in the show-cause notice.

4. Adverting to the demand confirmed under "Business Exhibition Service", learned Counsel submits that the income was inclusive of various Heads like sale of goods during seminar, workshop and conferences, advertising income and sponsorship income; such income cannot form income for any service; the said income also included income from advertisement which cannot be taxed under the Head "Business Exhibition Service". He submits that sponsorship collected is not liable to service tax under forward charge mechanism as the service tax is to be paid by these sponsors under Reverse Charge Mechanism as explained in Board's Letter No.334/4/2006 -TRU dated 28.02.2006.

5. Learned Counsel submits on the demand pertaining to notional income on Exhibition that the demand is based on hypothetical computation; the ledger extracts clearly show that notional income

was recorded as income from exhibition hall; he submits that as held in Indian Oil Sky Tanking Ltd. – 2015 (38) STR 221 (T) service tax cannot be levied when the cost of services is not recovered. He also relies on Forward Resources Pvt. Ltd.- 2023 (69) GSTL 76 (Tri. Ahmd.) and submits that Income Tax and Service Tax are two different/ separate and independent Acts and the provisions will operate under different field.

6. Learned Counsel further submits that no demand can be raised on account of difference between the figures reflected in ST-3 Returns and balance sheet. He also submits that extended period is not invokable in the case as all the facts are available in the financial records of the company and as such, there was no positive act of suppression, mis-statement, mis-representation etc. on the part of the appellants with an intent to evade payment of service tax.

7. Shri Siddharth Jaiswal, assisted by Shri Nikhil Kumar Singh, Authorized Representatives for the Department, reiterates the findings of the OIO and submits that the Adjudicating Authority has considered all the issues raised by the appellants and has given findings on each of the points; thus, the Adjudicating Authority has come to a considered opinion on the issues raised.

8. Heard both sides and perused the records of the case. Brief issues that demands our consideration are (i) whether the membership fee collected by the appellants is exigible to service tax

under "Club or Association Service" (ii) whether a demand raised under the wrong Head can be confirmed for the reason that it is taxable to duty under one Head or the other and (iii) whether a demand confirmed on the basis of difference in the figures between ST-3 Returns and balance sheets.

9. Coming to the first issue, we find that the issue is no longer *res integra* having been decided by a number of judgments. Hon'ble Apex Court laid down the principle in the case of Calcutta Club (supra) and re-affirmed the same in the case of Rajasthan Co-operative Dairy Federation Ltd.(supra). It was held in the Calcutta Club (supra) that:

> **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.
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> **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.
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> **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.

10. Coming to the second issue, as to whether demand raised under one Head can be confirmed under a different Head, we find that learned Commissioner finds that "even otherwise, a change in classification, when a previous classification and the proposed classification are both taxable services, such a change would not effect the taxability of service. The noticee has failed to establish that the impugned services covered under the instant show-cause notice are not taxable under the Finance Act, 1994. Hence, the submissions by the noticee are not tenable." We find that such an argument is spurious. It has been held in a number of judgments that the show-cause notice is the foundation of the case and it is not open for the Adjudicating Authority to confirm a demand under some Heading whereas it was proposed to confirm the same under some other Heading. We find that Hon'ble Apex Court in the case of M/s 3i Infotech Ltd. (supra) held that:

> 10. "It is pertinent to note here that the first show cause notice dated 19th October 2009 contained a demand for service tax under the taxable service of "Management, Maintenance and Repair" and the rest of the three notices contain a demand under

> classifiable service "Information Technology Software". In the facts of the case, the demand was made on account of services provided by the assessee in respect of the supply of third-party software, software developed in house or customised software/ The assessee had temporarily transferred the right to use the said software to their clients. Thus, prior to 16th May 2008, such service was classifiable under the category of "Intellectual Property Service" and with effect from 16th May, 2008, it was classifiable under the category of "Information Technology Software". In fact, the management, maintenance and repair services of computer hardware as well as software under the annual maintenance contract was covered by the category of "Management, Maintenance or Repair" services which was defined under Section 65(64) of the Finance Act. Thus, the classification mentioned in the first show cause notice was completely erroneous. Therefore, CESTAT was right in holding that the first show cause notice was illegal. Elementary principles of natural justice required that the adjudication on the basis of show cause notice should be made only on the basis of classification stated in the show cause notice. Assessee cannot be subjected to a penalty on the basis of a show cause notice containing a completely erroneous category of service. Therefore, the demand made on the basis of the first show cause notice was illegal. Therefore, we find that there is no merit in the appeal preferred by Revenue.

11. Coming to third and final issue as to whether any demand can be sustained on the basis of difference between the figures of ST-3 Returns and the balance sheets, we find that it is a settled principle of law that service tax can be levied only when there is a clear identification of service provider, service recipient and consideration paid for the same. In the absence of any such evidence of the service recipient and the service provided, service tax cannot be demanded and confirmed. For this reason, we are of the considered opinion that

it is not open for the Department to raise demands on the basis of other statutory returns like Income Tax Returns or balance sheets without proving that such service has been rendered by the assessee and consideration thereof has been received. Similarly, no service tax demand can be raised and confirmed on the basis of notional income. We find that Tribunal in the case of Synergy Audio Visual Workshop (P) Ltd.- 2008 (10) STR 578 (Tri. Bang.) held that:

> **5.1** The other ground is for confirming demands is that the appellants had shown certain amounts due from the parties in their Income Tax returns and Revenue has proceeded to demand Service Tax on this amount shown in the Balance Sheet. The appellants have relied on large number of judgments which has settled the issue that amounts shown in the Income Tax returns or Balance Sheet are not liable for Service Tax. In view of these judgments, the appellant succeeds on this ground also. The impugned order is set aside and the appeal is allowed.

12. We also find that Tribunal in the case of Indian Oil Corporation- 2020 (32) GSTL 350 (Tri. Kolkata) held that:

> 8. Having heard both the sides, we are of the view that the entire operation of transportation of the crude from Haldia port to BRPL is covered by a single contract. The terminal facilities are only intermediate operation of the transportation of the goods through pipeline. Since, the requisite amount of the service tax has already been paid on the service of transportation through pipeline provided by the respective parties, we feel that the terminal facilities being the integral part of the entire pipeline facilitating the transportation of the liquid crude, it will not be legally correct to consider the terminal facilities as independent facilities for which no real transaction of service charges have actually taken place and therefore demanding a service tax on the notional value taken by the appellant only for the purpose of accounting of the cost of the different units working under the appellants, will be not in the interest of the service tax law. Since, service tax has already been paid on the entire amounts which have been charged for

> transportation of the crude through pipeline, we think that charging service tax separately for the terminal facilities is legally not sustainable.

13. In view of the above, we find that the impugned order cannot be sustained and is liable to be set aside. We do so and allow the appeal.

(Pronounced on 18/09/2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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