

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

Service Tax Appeal No. 85130 of 2019

(Arising out of Order-in-Appeal No. NA/GST & CX/A-III/MUM/83/17-18 dated 28.05.2018 passed by the Commissioner (Appeals), GST & CEX (Appeals III), Mumbai)

Prabhadevi Himgiri CHSL
Himgiri Apartments, Plot no. 1217
Eknath Hatikar Marg,
Prabhadevi, Mumbai

.....Appellant

VERSUS

The Commissioner of CGST & Central
Excise, Mumbai Central
115, New Central Ex. Bldg
MK Road, Churchgate
Mumbai

.....Respondent

APPEARANCE:

Shri N.S. Patel, Advocate for the appellant
Shri Prabhakar Sharma, Supdt(AR) for the respondent

CORAM: HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: A/86112 / 2022

DATE OF HEARING : 09.11.2022
DATE OF DECISION : 28.11.2022

Per: AJAY SHARMA

This appeal has been filed by the appellant against the order dated 28.5.2018 passed by the Commissioner (Appeals), GST & CX.(Appeals-III) Mumbai in an appeal filed by the Revenue, by which the learned Commissioner enhanced the late

fee/penalty on the appellant herein from Rs. 16,100/- to Rs.83,100/-.

2. Proceedings have been initiated against the appellants i.e. M/s. Prabhadevi Himgiri Co-operative Housing Society Ltd., for not filing the Service Tax Returns in the prescribed form ST-3 as required under Section 70 ibid r/w. Rule 7 electronically through ACES within the period prescribed therein. A show cause notice dated 19.02.2013 was issued for imposing penalty under Section 70 ibid r/w Rule 7C ibid for delayed filing of ST-3 Returns for the period from April, 2009 to March, 2011 and October, 2011 to March, 2012. The Adjudicating Authority vide Order-in-Original dated 12.6.2014 imposed the penalty of Rs.16,100/- u/s. 70 ibid r/w. Rule 7C ibid. On appeal filed by Revenue, the learned Commissioner (Appeals) vide impugned order dated 28.5.2018 enhanced the penalty to Rs.83,100/-.

3. Section 70 ibid provides that *"every person liable to pay service tax shall himself assess the tax due on the services provided by him and shall furnish to the superintendent of central excise a return in such form and in such manner and at such frequency and with such late fee not exceeding twenty thousand rupees, for delayed furnishing of return, as may be prescribed."*

4. There is no dispute that prior to 1st July, 2012 clubs or associations were not included in the Service Tax net. Through various decisions of the Hon'ble Supreme Court as well of the Hon'ble High Court and of course of the Tribunal, it is settled legal position that a club incorporated and formed on *principle of mutuality*, is not liable to pay Service Tax on services provided to its members inasmuch as it is not a service by one legal entity to another and though the club had distinct legal entity, it was acting merely as an agent for its members. The Hon'ble Larger Bench of the Supreme Court in the matters of *State of West Bengal & Ors. vs. Calcutta Club Limited*; reported in

2019(29)G.S.T.L. 545 (SC) while following its own decision in the matter of *C.T.O. vs. Young Men's Indian Association*; (1970) 1 SCC 462 has laid down that from 2005 onwards, the Finance Act of 1994 does not purport to levy service tax on members' clubs in the incorporated form and while dismissing the Appeals of Revenue held that show cause notices, demand notices and other action taken to levy and collect service tax from incorporated members' club are declared to be void and of no effect.

5. The issue whether the services provided by the Housing Society to its members falls within the taxable net, came up for consideration before this Tribunal in the matter of *Tahnee Heights Co-operative Housing Society Ltd. vs. Commr. of CGST, Mumbai South*; 2019(21) GSTL 440 (Tri.-Mumbai) and while discussing the principle of mutuality it has been held by the Tribunal that the activities undertaken by the appellant therein should not fall within the scope and ambit of taxable service, for payment of service tax. The relevant paragraphs of the said decision is reproduced as under:-

" xxx

xxx

xxx

7. *On reading of the above statutory provisions, it transpires that there is no much of difference for recognition of the taxable service in dispute, for levy of service tax, under both the un-amended and amended provisions of the service tax statute. In order to be categorized as a "taxable service", there must be existence of two parties, i.e. the service provider and the service receiver. As far as the relationship between an incorporated society or club and its members is concerned, it is an undisputed fact that such incorporated association is a distinct legal entity. However, since the association was formed or constituted and existed for the exclusive purpose of catering/meeting to the requirements of its members, as per the laid down policy in the bye law, it cannot be said that there is involvement of two persons, one to be termed as the service provider and the other as the service receiver. Thus,*

the incorporated association and its member being one and the same, the activities undertaken or the services provided by the former will not be considered as a service, eligible to service tax under the principle of mutuality.

8. *Considering various judgments delivered by Hon'ble Supreme Court and the Hon'ble High Courts on the issue of principle of mutuality vis-a-vis leviability of tax on the club or association service, this Tribunal in the case of Federation of Indian Chambers of Commerce & Industry (supra) has held that on application of the principle of mutuality, services provided by clubs/associations to their respective members would not fall within the ambit of the taxable "club or association" service. Further, in the case of Matunga Gymkhana (supra), this Tribunal has also taken the similar view. Though the said decisions were rendered under the un-amended definition of taxable service (effective up to 30-6-2012), but the ratio laid down therein is squarely applicable to the post amended definition of "service" contained in the negative list regime (w.e.f. 1-7-2012), inasmuch, in absence of presence of both service provider and service receiver, the transaction cannot be statutorily terms as taxable service and will not be exigible to service tax. Even under the negative list regime, for the period from 1-10-2015 to 31-3-2016, this Tribunal in the case of Rajpath Club Ltd. (supra) has concurred with the earlier referred decisions of the Tribunal.*

9. *Coming to the issue of ascertaining the status of the appellant, whether an incorporated body or otherwise, for the purpose of consideration of applicability of explanation 3(a) appended to Section 65B of the Act, I have examined the relevant provisions of the Act of 1960 and the model bye laws provided therein. Under Section 36 in the Act of 1960, it has been provided that "the registration of a society shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power toand to do such other things as are necessary for the purpose for which it is constituted". Further, clause 67 of Maharashtra Co-*

operative Housing Society Bye Laws, formulated under the Act of 1960 earmarked the charges, in the form of contribution to be collected from the members of the society, which relates inter alia, for payment of property taxes, water charges, common electricity charges, contribution to repair and maintenance fund, contribution to sinking fund, service charges etc. Clause 69 of the said Bye law also provides that the committee shall apportion the share of each member towards the charges of the society on the basis mentioned therein.

10. *On perusal of the above statutory provisions, it reveals that upon registration of the society, the same is legally accepted as a body corporate and thereafter, its function and operation are strictly guided as per the laid down bye laws, provided for the purpose. In this case, it is no doubt, a fact that the appellant is a co-operative society and is duly incorporated under the Act of 1960. The appellant also do not provide any services to its members, who pay the amount towards their share of contribution, for occupation of the units in their respective possession. Further, the fact is also not under dispute that the appellant do not provide any facilities or advantages for subscription or any other amount paid. Thus, under such circumstances, the appellant cannot be termed as an unincorporated association or a body of persons, for the purpose of consideration as a 'distinct person'. Accordingly, the explanation furnished under clause 3(a) in Section 65B of the Act will not designate the appellant as an entity, separate from its members. Furthermore, the purpose for which the appellant's society was incorporated, clearly demonstrate that it is not at all providing any service to its members and the share of contribution is to meet various purposes as stated above. Therefore, I am of the considered view that the case of the appellant is not confirming to the requirement of 'service', as per the definition contained in Section 65B(44) of the Act.*

11. *In view of the foregoing discussion and analysis, it is concluded that the activities undertaken by the appellant should not fall within the scope and ambit of taxable service, for payment*

of service tax. Therefore, service tax amount paid by the appellant should be eligible for refund. Accordingly, the impugned order is set aside and the appeals are allowed in favour of the appellant."

6. Learned Counsel for the Appellant submitted list of cases in which Principle of mutuality has been applied and demand was set aside by the Hon'ble Supreme Court, Hon'ble High Court and by this Tribunal as well and some of them are *Matunga Gymkhana vs. CST, Mumbai; 2015 (38) STR 407 (Tri-Mum)*, *Cricket Club of India vs. CST Mumbai; 2015 (40) STR 973 (Tri-Mum)*, *Commissioner vs. Matunga Gymkhana; 2015 (40) STR J-136(SC)*, *Sports Club of India vs. UOI; 2013 (31) STR 645 (Guj.)*, *Ranchi Club Ltd. Vs. CC of Central Excise & GST, Ranchi Zone; 2012 (20) STR 401 (Jhar.)*. Therefore in view of the *principle of mutuality of interest* as discussed hereinbefore and looking into the fact that the members of the Appellant are providing services to themselves, no Service Tax is leviable on the same.

7. In the case in hand the penalty u/s. 70 ibid is imposed on the appellant for not filing the ST- 3 return on time. Section 70 ibid provides that *"every person liable to pay service tax shall himself assess the tax due on the services provided by him and shall furnish to the superintendent of central excise a return in such form and in such manner and at such frequency and with such late fee not exceeding twenty thousand rupees, for delayed furnishing of return, as may be prescribed."* Therefore only the persons who are liable to pay service tax, have to file the return on time else they are liable to pay penalty. But as discussed in the preceding paragraphs applying the principle of mutuality, the appellants are not liable to pay service tax at all and once it has been held that they are not liable to pay service tax then section 70 ibid itself has no application. Although they have filed return belatedly for whatever reason, but they were not obliged to do

so. This act of theirs cannot put them in any adverse situation as they are not liable to pay any service tax.

8. Although the appellants did not file any appeal before the 1st appellate authority against the imposition of penalty of Rs.16,100/- but now since they are in appeal before the Tribunal against the enhancement of the penalty to Rs.83,100/- [*which also includes the penalty imposed by the adjudicating authority*] and have challenged the entire amount of penalty therefore I am deciding this appeal for the entire amount of penalty imposed on them. As I have already observed that the appellant are not liable to pay any service tax therefore section 70 ibid has no application on the facts of this case and hence a fortiori there is no justification for imposing any penalty.

9. In view of the discussions made hereinabove, the appeal filed by the appellant is allowed with consequential relief, if any, as per law.

(Pronounced in open Court on 28.11.2022)

(Ajay Sharma)
Member (Judicial)

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