TAXABILITY OF SERVICE OF CLUB-ASSOCIATION UNDER GST LAW ?.

By
Pradeep K Mittal*
B.Com,LLB,FCS

In this Article, an attempt has been made to deal with the vexed issue of levy of GST on various transactions entered into between the Club or Association on the one hand and its constituent members on the other hand. The Hon'ble High Courts of Jharkhand and Gujarat in two cases have authoritatively held that various receipt by the Clubs from their members are not subject to the payment of Service Tax. the amounts collected by clubs. The issue reached the Hon'ble Supreme Court and the Hon'ble Supreme Court have now pronounced its verdict and dismissed the appeal of Government by way of very detailed and exhaustive judgment. I will deal with the position stage-wise.

---

*Advocate – Past Central Council Member, the ICSI
pkmittal171@gmail.com

POSITION PRIOR TO 1.7.2012

2: Let me first deal with the period prior to 1.7.2012, there were two landmark judgment one Jharkhand High Court in Ranchi Club Ltd. vs. Commissioner of Customs [MANU/JH/0270/2012 and another Gujarat High Court in Sports Club Gujarat Ltd. vs. UOI [MANU/GJ/0387/2013 were followed by various benches of Customs Excise & Service Tax Tribunal (hereinafter called CESTAT) holding that the amounts collected by clubs from their own members are not liable to service tax as there is no service provider and no service recipient relationship. For any transaction to be subject to Service Tax, obviously, therefore, there has to be service provider and service recipient.

POSITION SUBSEQUENT TO 1.7.2012

3: After 1.7.2012, negative service tax regime came into being, there is a judgment of Madras High Court in Ootacamund Club Ltd Vs. CST MANU/TN/9586/2019 (Date of judgment dt.17.12.2019), while dealing with the case of petitioner company which is incorporated under Section 25 Companies

Act, 1956, in relation to SCN covering the period 1.10.2008 to 31.1.2014 has quashed the demand of Service Tax confirmed on account of (i) subscription and (ii) usage charges from its members following judgment of the Hon'ble Supreme Court in State of West Bengal and Others vs Calcutta Club Ltd (supra).

3.1: Post 1.7.2012, the definition of "person" under Section 65B(37) of the Finance Act, 1994, was changed to include any association of persons or body of individuals whether incorporated or not. However, the definition of "services" under Section 65B(44) of the Finance Act, 1994 requires the provision of services by one person to another, and the doctrine of mutuality, which is applicable to club qua sales tax for supplies to members, was equally applicable "on all fours to services". Consequently, services by members club to its members amounts to services to self and would not qualify as a service that attract tax. This position was validated for both the pre and post negative list.

4: I may now deal with judgment landmark judgment of the Hon'ble Supreme Court in State of West Bengal and Ors. vs. Calcutta Club Limited : MANU/SC/1367/2019 on the issue of levy of Service Tax, has observed as under:-

> 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 1st 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 cooperative 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, MANU/SC/0181/1960MANU/SC/0181/1960 : (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, 1994 does not purport to levy service tax on member's 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.

5: In para 82 of the above-said judgment, the Hon'ble Supreme Court held that club incorporated under Companies Act, 1956/2013 and also as unincorporated body, would be covered under prior to negative regime i.e. prior to 1.7.2-12 and no Service Tax shall be payable in respect of any transaction between club and its members.

POSITION DURING GST REGIME.

6: If we see para 87 of the above judgment of Supreme Court, reproducing therein - explanation to Section 65, the language (though it talks of levy service tax as a service) is absolutely identically worded with that of Clause 7 of Schedule II attached to CGST Act – though Clause 7 talk of supply of goods. In my view, if it is taxable in former case as a "service", it would be also taxable as "goods" in latter case. The Clause 7 is restricted to goods only and does not cover "service".

7: It appears that the ratio of laid down by the Hon'ble Supreme Court in State of West Bengal Vs. Calcutta Club Ltd, in para 93, as aforesaid, shall equally apply in the GST Regime in view of the fact that provisions of Clause 7 of Schedule II to GST and wording in Explanation given below Section 65B(44) are in identical words, which are reproduced below:-

7.1: The provisions are reproduced below:-

The Section 65B(44) of Finance Act are reproduced below:-

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 person
(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 establishment of distinct persons;

7.2: The position of law after promulgation of GST regime w.e.f.1.7.2017.

Clause No.7 of Schedule II attached to CGST Act, 2017 reads as under:-

7: Supply of Goods: The following shall be treated as supply of goods namely:-
Supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration.

Section 7(1) For the purposes of this Act, the expression "supply" includes

a): all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for consideration by a person in the course or furtherance of business;
b):import of services for a consideration whether or not in the course or furtherance of business; and
c):the activities specified in Schedule-I, made or agreed to be made without consideration;
d): ....
(1A):..

(2):Notwithstanding anything contained in sub-section (1)

(a): activities or transactions specified in Schedule III; or

(b)such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council,

shall be treated neither as a supply of goods nor a supply of services

(3)..

8: Further, it may be noted that above Clause 7 in Sch.II is analogous to and draws strength and sustenance from the provisions in Article 366(29A)(e) of the Constitution "according to which a tax on the sale or purchase of goods include a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration." It does not enable to tax supply of service as a deemed service. Therefore, in my view, there is no deeming fiction to tax the services in the form of (i) admission to the club and (ii) yearly subscription (which definitely is service) by club/association qua its members, in the current regime i.e. Clause 7 of Schedule II.

8.1: If we compare the definition of services and supply under Service Tax and GST, it manifestly emerge that there are no difference in the said definition. In fact, under service tax law, there was a deeming clause i.e. "An unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as a distinct person". The said clause is missing under GST. The intent in GST was never to treat club and members as a separate persons.

9: It may be kept in view that there must be two different persons to tax a transaction under said provision. Merely because an association of persons has been included as person U/s 2(84) does not imply that members of such association are different persons. It is extremely important to note that unless provision similar to that of deemed sale is made, either in the Constitution or

Act, services provided by an association to its members cannot be taxed. The Hon'ble Jharkhand High Court in the case of Ranchi Club Ltd Vs. Chief Commissioner (2012)26 STR 401 (Jhr) examined the concept of mutuality. The main contention before the court was that considering the concept of mutuality, a club/association cannot provide services to itself. Only service provided to another person is taxable. In the absence of deeming fiction, treating club/association and its members as distinct person, servicee tax shall not be payable. Therefore, the High Court accepted the contention of petitioner and held that the levy is ultra-vires to the extent of money collected from members. Subsequently, Gujarat High court in Sports Club of Gujarat Ltd Vs. UOI 2013(40) STT 486 (Guj) concurred with the view taken by the Jharkhand High Court and held that the club and members are not distinct persons, levy of service tax on such club/associations is ultra-vires.

10: With a view to nullify the effect of above judgment w.e.f 1.7.2012, Clause (a) to Explanation 3 to Secton 65B(44) was inserted to provide that an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as a distinct persons.

11: As per definition of "person" provided U/s 2(84) of the CGST Act, 2017, there is no deeming fiction to treat association and members as different persons. The "Principle of Mutuality" has its relevance in all taxation laws i.e. Income Tax, Service Tax, Vat Laws, etc. The association or club and its members cannot be treated as different persons. Hence, key condition to tax a transaction U/s 7(1)(a) that the supplier and recipient must be different, is not satisfied. As per Section 2(84) define "person" as " an association of persons or a body of invividuals, whether incorporaed or not, in India or otherwise. However, as per the said definition, there is no deeming fiction to treat association and its members as different persons. Hence, the key condition to tax a transaction U/ S 7(1)(a) and to treat it as a "Supply", the supplier and recipient, must be different, is not satisfied. Hence, the transaction of providing services by an association to its members cannot be taxed under Sec. 7(1)(a). It is apt to refer to a Circular No.35.9.2018 dt.5.3.2018 issued by Board which says that " GST is levied on intra-state and inter-state supply of goods and services. Accordingly to Section 7 of CGST Act, 2017, the expression include all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person by a person in the course of or furtherance of business and includes activities in Schedule II to CGST Act. It is a big question mark, as to how a Board Circular can tax either supply of goods or services. Furthermore, fiction has been created under Clause 7 to Schedule II of the CGST provides that goods supplied by unincorporated associations or body of persons to a maember there of for cash, deferred payment or other valuable consideration shall be classified as goods under the GST Law. No such deeming fiction has been created under Schedule II with respect to supply of services. However, the Hon'ble Supreme Court in the case of Union of India Vs. Intercontiental MANU/SC/7413/2008 as held that circular impose tax or conditions onerous which is not provided under the law.

12: If we analyze the latest judgment of the Appellate Authority of AAA Maharashtra in Rotay Club of Mumbai Queens Necklace, Order No.MAH/AAAR/SS-RJ/15/2019-20 dt.6.11.2019 (released on 3.2.2020), the following significant and important points emerge:-

a):The appellant is not doing any business in terms of Section 2(17) of CGST Act, 2017, it can be deduced that activities carried out by the appellant would not come under the scope of supply as envisaged under Section 7(1) of the CGST Act, 2017.

b):The appellant is not providing any specific facility or benefits to its members against the membership subscription charged by it, as the entire subscription is spent towards meetings and administrative expenditure only. Thus, we conclude that the appellant is not doing any business as envisaged under Section 2(17) of the CGST Act, 2017.

c): The Department argued that Rotary Club charges fees to admit a person as their member which is not used for any cause. The same seen from Balance Sheet submitted by Rotary Club of Mumbai Queens Necklace. There are no funds used for any social cause. On the contrary, from tax invoice, it is evident club has arranged "spouse events", which amounts to recreation activity. It is also evident it arranged gathering of professional and experts locally and globally to enhance their contracts for furtherance of their business.

d): As per definition of "person" provided U/S 2(84) of CGST Act, 2017, there is no deeming fiction to treat association and members as different persons.

13: Furthermore, if we carefully and critically analyze the definition of services and supply under Service Tax & GST, it is discernible that there are no difference in the said definition. In fact, under Service Tax, there is a deeming clause i.e. "An unincorporated association or a body of person, as the case may be, and a member thereof shall be treated as distinct person". The said clause is missing under GST. The intent in GST was never to treat club and members are separate persons.

14: In view of the fact that the transactions between the club and its members do not result in supply U/s 7 of the CGST Act, 2017 and, therefore, GST is not leviable on (i) Admission Fee (ii) Annual Subscription Charges collected by the Club from its members. At the same time, other services like supply of foods, drinks and other eatables served in Restaurant, Rooms or Dinning Hall will also not be taxable as these are treated as "Service" as per Clause 6(b) attached to Schedule II to CGST Act and not supply of goods for which Department may take a plea that same is taxable by virtue of Clause 7 of Schedule II as this Clause talks of supply of goods. Without prejudice to the above and in the alternative, to avoid any issue with the Department, the club may consider paying GST with GST Rate of 5% on supply of foods, drinks and other eatables supplied in Restaurant, Rooms or Dinning Hall – as the Appellate Authority of AAA Maharashtra in Rotary Club of Mumbai Queens Necklace, in its judgment dt. dt.6.11.2019 (released on 3.2.2020) clearly holds that no GST is payable on (i) admission fee and (ii) on annual subscription fees. It is, however, emphasized once again that, in my view, no taxable is payable by invocation of concept of mutuality and other legal issues discussed in preceding paras.
