CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

SERVICE TAX APPEAL NO. 53009 OF 2016

[Arising out of Order-in-Original No. JAI-EXCUS-000-COM-06-16-17 dated 22.08.2016 passed by the Commissioner, Central Excise, Jaipur]

M/s Rajasthan Co-operative Dairy Federation Limited **Appellant**
Saras Sankul, 1-JLN Marg, Jaipur

Versus

The Commissioner, Central Excise, Jaipur **....Respondent**
Central Excise Commissionerate,
Jaipur NCR Building, Statue circle,
C-Scheme, Jaipur (Rajasthan) 302005

APPEARANCE:

Shri Narendra Singhvi, Advocate - for the Appellant

Shri Ravi Kapoor, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 07.04.2022
DATE OF DECISION: 09.05.2022

FINAL ORDER NO. 50402/2022

P. V. Subba Rao

M/s Rajasthan Cooperative Dairy Federation Limited [1] is registered as an Apex Society under the Rajasthan Co-operative Societies Act, 2001 for implementation of 'Operation Milk Flood' in the State. The District Milk Cooperative Societies and the milk unions formed under the same Act are members of the appellant

1 appellant

Apex Society. The appellant is responsible for planning policies, financial resource mobilization and management, liaison with agencies of the State and Central Government, financing institutions, imparting training and orientation to daily cooperative members, advising and assisting milk unions, etc. It charges an amount @ 1.25% of the annual turnover of milk unions to manage their finances and other services and this amount is called by the appellant as Rajasthan Cooperative Dairy Federation Cess (RCDF Cess).

2. The appellant's records were audited and an audit report No. 862/2014 dated 23.03.2015 was issued to it stating that it had started paying service tax on RCDF cess from July 2012 but had not paid service tax before and that it was liable to pay service tax on the RCDF cess before June 2012 under the category of 'business support services' under Section 65(104c) of the Finance Act, 1994. At this stage, it would be pertinent to mention that Chapter V of the Finance Act, 1994 under which service tax is levied, had undergone a substantial change with effect from July 2012. Prior to this date, service tax could be levied only on specific taxable services indicated in the Act. From July 2012, service tax became payable on all the services except those which have been mentioned in the negative list. The appellant had paid service tax from July 2012 but had not paid service tax on the RCDF cess for the period prior to this date.

3. A show cause notice dated 20.04.2015 was issued to the appellant covering the period March 2010 to June 2012 demanding service tax along with interest and proposing to impose penalties

upon the appellant. Adjudicating upon the show cause notice, the Commissioner passed the impugned order confirming service tax demand of Rs. 6,55,25,588/- along with interest under Section 75 of the Finance Act, 1994. He also imposed penalties under Section 78 and 77 upon the appellant.

4. Aggrieved, the appellant filed the present appeal on the following grounds:

(i) No service tax is leviable on services as the appellant is an association of its members and the principle of mutuality applies. Although the appellant is registered as a separate entity under the Rajasthan Cooperative Societies Act, 2001, its members are district cooperative societies and milk unions. Thus, it is akin to club or association which renders service to its own members. It has been held in various case laws that no service tax can be levied on a club or association for the services which it renders to its own members as there is no service provider - service recipient relationship between a club and its members. Reliance was placed on the following decisions:

a) State of West Bengal Vs. Calcutta Club Ltd.[2] ;

b) Commissioner of Service Tax, Bangalore Vs. Sobha Developers Ltd.[3];

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2 **2019 (29) GSTL 545 (SC)**

3 **2020-TIOL-904-HC-KAR-ST**

c) Ootacamund Club, Ootty Vs. Additional Commissioner, Coimbatore[4];

d) Commissioner of Service Tax, Delhi-III Vs. Manufacturers Association for Information Technology[5] ;

e) Gujarat Eco Textile Park Ltd. Vs. Commissioner of Central Excise & Service Tax[6];

f) Hyderabad Boat Club Vs. Commissioner of Customs, Central Excise & Service Tax, Hyderabad[7];

g) Film Nagar Cultural Center Vs. Principal Commissioner of Central Tax[8]

(ii) The services provided by the appellants are not 'business support services' but are in the nature of services provided by club or association which also are not taxable.

(iii) The demand is barred by limitation.

(iv) The allegation of willful suppression with intent to evade payment of tax cannot sustain in the case of a public sector undertaking.

(v) The appellant has no *mens rea* as it is a government organized body and hence penalties under Section 77 and 78 cannot be levied.

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4 2020-TIOL-50-HC-MAD-ST
5 2020-TIOL-1421-CESTAT-DEL
6 2021-TIOL-147-CESTAT-AHM
7 2020-TIOL-504-CESTAT-HYD
8 2020-TIOL-344-CESTAT-HYD

(vi) If service tax is held to be liable, the receipts by the appellant must be taken as cum-tax values.

(vii) Service Tax on the disputed taxable value was already deposited by the appellant prior to the issue of the show cause notice and, therefore, no show cause notice should have been issued as per Section 73(3) of Chapter V of the Finance Act.

5. Learned Counsel for the appellant submits that an identical case came up before the Bangalore Bench of the Tribunal in which service tax was held to be not liable to be paid by the **Karnataka Co-operative Milk Producers Federation Limited Vs. CCE, Bangalore-II**[9] relying on the judgment of a Constitution Bench of the Supreme Court in **Calcutta Club Ltd**.

6. Learned Departmental Representative made the following submissions:

(i) He reiterated the discussions and findings given in the impugned order;

(ii) Section 65 (104c) of the Finance Act as it existed during the relevant period reads as follows:

> "services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, Operational assistance for marketing formulation of customer service and pricing policies, infrastructural support services and other transaction processing.

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9 **2022-VIL-184-CESTAT-BLR-ST**

> Explanation.—For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security"

(iii) As per minutes of meeting of Board of Directors of the RCDF, it was decided to levy service charge to 1.25% on the annual turnover of unions, to provide the following services:

(i) Marketing support as per requirement.

(ii) Coordination with the state/central government and financial institutions for various schemes;

(iii) Finalizing rate contracts for purchase of raw material for cattle feed plants, packing material for milk and milk products and cattle feed etc.;

(iv) Assist to plant management, engineering and integrated business planning and related financial analysis

(v) Use of 'SARAS' brand;

(vi) Development and launching of new products;

(vii) MIS system support."

(iv) The district milk unions purchase milk and sell milk and milk products and the appellant provides marketing support to the milk unions. Thus, it is squarely covered in the definition of 'business support services' under

Section 65 (104c) of the Finance Act. The appellant also provides service in the form of customer service, pricing policies, MIS system support and for these services the appellant is charging 1.25% service charges, which it refers to as RCDF cess.

(v) Clearly, the taxability of a transaction is linked with the nature of activities carried out for a consideration and not on the basis of objectives for which any organization is established or created. The appellant was not created for operation of agricultural or animal husbandry but was providing various services in the form of marketing support assistance and plant management business planning and financial services analysis MIS support etc., to the milk unions who are engaged in the business of procuring milk and selling milk and milk products. The appellant's service is a support service to such business and, therefore, it is squarely covered by the definition of 'business support services' as per Section 65 (104c). Therefore, service tax needs to be paid.

(vi) The submissions of the appellant that it falls under the head of club or association service is not correct as the appellant is not acting as a club but is providing business support service to its members in return for a consideration. Therefore, the judgment of the Supreme Court in **Calcutta Club Ltd.** and other judgments do not come to the aid of the appellant.

(vii) The benefit of cum tax computation cannot be given in the facts of this case;

(viii) So far as the suppression of facts which enabled invoking extended period of limitation and imposition of penalty is concerned, it is quite clear that the appellant had written a letter dated 21.6.2013 seeking an exemption from payment of service tax. However, it never sought any clarification regarding applicability or otherwise of service tax on the activities carried out by them. Further, these letters were issued in 2013 whereas the relevant period in this case is from March 2010 to June 2012. The fact that the appellant was carrying out taxable activity only came to the notice of the Department during audit of the records of the appellant. Thus, there is an element of suppression which renders the appellant liable to pay service tax invoking extended period of limitation and it also renders it liable to penalty.

(ix) Penalty under Section 78 is mandatory and there is no provision in law for giving preferential treatment to assessees who are public sector undertakings.

7. We have gone through the records of the case and considered the submissions made by both sides.

8. It is undisputed that the appellant is registered as a cooperative society under the Rajasthan State Cooperative Act, 2001 and the district cooperatives and milk unions are its

members. As an apex cooperative society, the appellant is a legal entity by itself. The milk unions are also legal entities by themselves. The milk unions are engaged in purchasing milk, processing it and selling milk and milk products. The appellant is providing various services to support the milk unions in this endeavour and is charging a fee which is called RCDF cess at the rate of 1.25% on the turnover of the milk unions. The question which falls consideration is whether in this factual matrix the services provided by the appellant to its own members (who are also separate legal entities) can be considered as service provided by one entity to another.

9. We find that the Constitution Bench of the Supreme Court has in **State of West Bengal Vs. Calcutta Club Ltd.** discussed at length the doctrine of mutuality under Article 366 (29A) (e) of the Constitution and held that doctrine of mutuality continues to be applicable to incorporated and unincorporated members' clubs after the 46th Amendment to the Constitution and, therefore, no sales tax is payable to the State by the Calcutta Club. It was further held that the same logic applies to service tax levied on members' clubs. Paragraphs 49, 50, 54, 55, 72, 73, 76, 77, 77, 78, 79, 80 and 85 of this judgment are reproduced below:

> **"49.** In light of the view that we have taken, it is unnecessary to advert to Shri Dwivedi's arguments that the explanation (1) to Section 2(10) of the West Bengal Sales Tax Act is a stand-alone provision and not an explanation in the classical sense. We, therefore, answer the three questions posed by the Division Bench in *State of West Bengal* v. *Calcutta Club Limited* (supra) as follows :
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> (1) The doctrine of mutuality continues to be applicable to incorporated and unincorporated members' clubs after the 46th Amendment adding Article 366(29A) to the Constitution of India.

(2) *Young Men's Indian Association* (supra) and other judgments which applied this doctrine continue to hold the field even after the 46th Amendment.

(3) Sub-clause (f) of Article 366(29A) has no application to members' clubs.

50. Having gone through the judgment and order of the West Bengal Taxation Tribunal dated 3rd July, 2006 and the impugned Calcutta High Court judgment dated 1st February, 2008, and in view of the answers to the three questions referred to the present Three Judge Bench (as listed hereinabove), we are of the view that no interference is called for in the findings of fact or declaration of law in this case. Accordingly, C.A. No. 4184 of 2009 stands dismissed.

C.A. No. 7497 of 2012 and other connected matters:

54. Likewise, the Gujarat High Court by the judgment dated 25th March, 2013, followed the judgment of the High Court of Jharkhand and declared the following :

"8. In the result, these petitions are allowed and it is hereby declared that Section 65(25a), Section 65(105)(zzze) and Section 66 of the Finance (No. 2) Act, 1994 as incorporated/amended by the Finance Act, 2005 to the extent that the said provisions purport to levy Service Tax in respect of services purportedly provided by the petitioner club to its members, to be *ultra vires.* Rule is made absolute with no order as to costs."

55. The appeals that are listed before us concern impugned judgments that have in essence followed these two judgments, insofar as Service Tax that is levied on members' clubs is concerned. **The vast majority of cases before us concerns members' clubs that have been registered as Companies under Section 25 of the Companies Act, or registered cooperative societies under various State Acts, such societies being bodies corporate under the aforesaid Acts**.

72. The definition of "club or association" contained in Section 65(25a) makes it plain that any person or body of persons providing services for a subscription or any other amount to its members would be within the tax net. However, what is of importance is that anybody "established or constituted" by or under any law for the time being in force, is not included. Shri Dhruv Agarwal laid great emphasis on the judgments in *DALCO Engineering Private Limited* v. *Satish Prabhakar Padhye and Ors. Etc.,* (2010) 4 SCC 378 (in particular paragraphs 10, 14 and 32 thereof) and *CIT, Kanpur and Anr.* v. *Canara Bank,* (2018) 9 SCC 322 (in particular paragraphs 12 and 17 therein), to the effect that a company incorporated under the Companies Act cannot be said to be "established" by that Act. What is missed, however, is the fact that a Company incorporated under the Companies Act or a cooperative society registered as a cooperative society under a State Act can certainly be said to be "constituted" under any law for the time being in force. In *R.C. Mitter & Sons, Calcutta* v. *CIT, West Bengal, Calcutta,* (1959) Supp. 2 SCR 641, this Court had occasion to construe what is meant by "constituted" under an instrument of partnership, which words occurred in Section 26A of the Income Tax Act, 1922. The Court held :

"The word "constituted" does not necessarily mean "created" or "set up", though it may mean that also. It also includes the idea of

> clothing the agreement in a legal form. In the *Oxford English Dictionary*, Vol. II, at pp. 875 & 876, the word "constitute" is said to mean, *inter alia*, "to set up, establish, found (an institution, etc.)" and also "to give legal or official form or shape to (an assembly, etc.)". Thus the word in its wider significance would include both, the idea of creating or establishing, and the idea of giving a legal form to, a partnership. The Bench of the Calcutta High Court in the case of *R.C. Mitter and Sons* v. *CIT* [(1955) 28 ITR 698, 704, 705] under examination now, was not, therefore, right in restricting the word "constitute" to mean only "to create", when clearly it could also mean putting a thing in a legal shape. The Bombay High Court, therefore, in the case of *Dwarkadas Khetan and Co.* v. *CIT* [(1956) 29 ITR 903, 907], was right in holding that the section could not be restricted in its application only to a firm which had been created by an instrument of partnership, and that it could reasonably and in conformity with commercial practice, be held to apply to a firm which may have come into existence earlier by an oral agreement, but the terms and conditions of the partnership have subsequently been reduced to the form of a document. If we construe the word "constitute" in the larger sense, as indicated above, the difficulty in which the Learned Chief Justice of the Calcutta High Court found himself, would be obviated inasmuch as the section would take in cases both of firms coming into existence by virtue of written documents as also those which may have initially come into existence by oral agreements, but which had subsequently been constituted under written deeds."

73. 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.

76. 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.

77. 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.

78. 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."

79. It will be noticed that the aforesaid explanation is in substantially the same terms as Article 366(29A)(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.

> **80.** It will be noticed that "club or association" was earlier defined under Sections 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 Sections 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.
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> **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."

10. We further find that following **Calcutta Club Ltd.** the Bangalore Bench of this Tribunal held in **Karnataka Co-operative** held that no service tax is payable on the services rendered by the member's federation to its members.

11. The law laid down in **Calcutta Club** is that a club and its members are one and the same and the club is formed for the purpose for mutual benefit of its members. Therefore, any amount paid by the members to the club and the services rendered by the club to its members are self service and cannot be taxed. The fact that the club is incorporated as a separate legal entity makes no difference. We find no good reason not to apply the same principle to the appellant, which is also a cooperative federation of milk unions who are its members. Although the milk unions (district cooperative societies) and the appellant (apex society) are registered under the Cooperative Societies Act of the State and are, therefore, distinct legal entities, the nature of relationship between the appellant and the milk unions continues to that of club to its members. Therefore, no service tax is payable on the services rendered by the appellant to the milk unions.

12. Thus, in view of the judgment of the Constitution Bench of the Supreme Court in **Calcutta Club**, and the decision of the Tribunal in **Karnataka Co-operative Milk Producers Federation Limited** it has to be held that no service tax was payable by the appellant for the services rendered to its members.

13. Accordingly, the demand confirmed by the impugned order cannot be sustained. The interest on the demand and the penalties imposed also need to be set aside and are set aside. The appeal is, accordingly, allowed and impugned order is set aside with consequential benefits to the appellant, if any.

(Order pronounced in open Court on 09.05.2022)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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