2020-TIOL-1005-CESTAT-KOL

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL**
**REGIONAL BENCH, KOLKATA**
**COURT NO. II**

**Service Tax Appeal No.119 of 2011**

Arising out of Order-in-Appeal No.14/ST/Kol/2011, Dated: 17.01.2011
Passed by Commissioner of Central Excise (Appeals), Kolkata

**Date of Hearing: 25.07.2019**
**Date of Decision: 25.07.2019**

**M/s THE SATURDAY CLUB LTD**
**7, WOOD STREE, KOLKATA-700016**

**Vs**

**COMMISSIONER SERVICE TAX**
**KOLKATA, 180, SHANTIPALLY, RAJDANGA MAIN ROAD**
**KOLKATA-700107**

**Appellant Rep by:** Shri Ankit Kanodia, CA
**Respondent Rep by:** Shri S Mukhopadhyay, AR

**CORAM:** P K Choudhary, Member (J)
P Venkata Subba Rao, Member (T)

**ST -** The assessee is engaged in providing club services and other related services and is registered with the service tax department since the introduction of Club and Association services in the Finance Act from 16/06/2005 by inserting the taxable service under section 65(105)(zzze) of FA, 1994 - A SCN was issued to assessee in 2008 alleging non-payment of service tax on corporate membership fees received by assessee prior to 16/06/2005 but for which services are to be provided after 16/06/2005 also proportionately based on the Explanation 3 inserted in Section 67 of FA, 1994 w.e.f. 13/05/2005 for the period 2005-06 including cess and also for non payment of service tax on Junior membership and NRI membership billed in July 2005 and Oct 2005 respectively - Thus the total demand being Rs.41,54,045/- - The major issue to be decided is whether the amounts received by assessee prior to the introduction of levy of service tax under Club and Association services w.e.f. 16/06/2005 can be made exigible to service tax or not - Issue involved is no more res-integra in view of the decision of High Court of Rajasthan in case of ***CARRIER POINT -***
It is not in dispute that the department has sought to tax the amounts received as corporate membership prior to 16/06/2005 on proportionate basis after the introduction of levy of service tax on club and association services - Hence, by respectfully following the said decision, the levy on such amounts cannot be sustained and hence the demand to that extent is set aside - However, since the assessee has already collected and paid the service tax, Tribunal refrain from commenting on the aspect of refund of said amount to the assessee - Further, as regards the demand of service tax on Junior and NRI Membership as also on account of Corporate membership from Greaves Cotton Limited, assessee have already paid the service tax on said amounts, however interest on the same has not been paid by them - Thus, interest on the said amount is payable by assessee for delayed payment of service tax - As regards imposition of penalty, the levy was itself introduced w.e.f. 16/06/2005 and the major demand itself not being sustainable, the question of invoking suppression cannot be upheld in the current case - Thus, penalty under section 78 cannot be imposed on assessee - Thus, the impugned order is modified accordingly by setting aside the demand of service tax along with penalty: CESTAT

**Appeal partly allowed**

**Case laws cited:**

***CARRIER POINT Versus COMMISSIONER OF CENTRAL EXCISE, JAIPUR 2018 (10) G.S.T.L. 213 (Raj.)... Para 2***

***M/s ENCHANTED WOODS CLUB LTD Vs COMMISSIONER OF CENTRAL EXCISE, LUDHIANA- 2014-TIOL-849-CESTAT-DEL... Para 2***

***BANGALORE CLUB Vs COMMISSIONER OF CENTRAL EXCISE BANGALORE-I - 2019-TIOL-138-CESTAT-BANG... Para 2***

***NOBLE INSTITUTE (EDUCATION) PVT. LTD. Versus COMMR. OF S.T., AHMEDABAD - 2008-TIOL-506-CESTAT-AHM ... Para 2***

**FINAL ORDER NO. 76607/2019**

**Per: P K Choudhary:**

The facts of the case in brief are that the appellant is engaged in providing club services and other related services and is thus registered with the service tax department since the introduction of Club and Association services in the Finance Act from 16/06/2005 by inserting the taxable service under section 65(105)(zzze) of the Finance Act, 1994. A SCN was issued to the Appellant in 2008 alleging non-payment of service tax on corporate membership fees received by the Appellant prior to 16/06/2005 but for which services are to be provided after 16/06/2005 also proportionately based on the Explanation 3 inserted in the Section 67 of the Finance Act, 1994 w.e.f. 13/05/2005 for the period 2005-06 (up to Dec 2005) amounting to Rs.41,15,076/- including cess and also for non payment of service tax on Junior membership and NRI membership billed in July 2005 and Oct 2005 respectively amounting to Rs.38,969/-. Thus the total demand being Rs.41,54,045/-. The Appellant had submitted its reply before the Ld. Adjudicating Authority with proof of payments made under protest for the entire amount of demand of service tax. The Ld. Adjudicating authority, however, proceeded to confirm the demand of entire service tax along with interest and imposed a penalty of Rs. 83,00,000/- under section 78 on the Appellant. On appeal before the the Ld. Commissioner (Appeals), the Ld. Commissioner (Appeals) upheld the adjudication order. Thus the present appeal of the Appellant before this Tribunal wherein the Appellant is challenging the demand of service tax to the extent of Rs.41,15,076/- along with interest and imposition of penalty of Rs.83,00,000/- on the Appellant.

2. The Ld. Chartered Accountant, Ankit Kanodia, appearing on behalf of the appellant, submits that the demand of service tax on the amount received for corporate membership to the extent of Rs.40,53,468/- before the levy of service tax on Club and Association services cannot be sustained as the service perse was not taxable on receipt of the consideration and hence the demand to that extent is liable to be quashed. However, since the Appellant has collected the said amount from the corporate members and deposited under protest, the Ld. CA did not pressed for refund of the said amount. Further on the amount received as Corporate membership in Aug 2005 from M/s. Greaves Cotton Ltd. having an impact of Rs.61,608/-, the Appellant states that it has already discharged the said tax vide challan dated 04/03/2006. On the issue of non payment of service tax on the amount received for Junior membership and NRI membership, the Ld. CA submitted that the said amount of Rs. 39,002/- has also been deposited vide challan dated 05/05/2006 as is evident from the chart of payment in page 5 of the SCN itself. He further submitted that since the entire demand was paid under protest before the issuance of SCN, the question of penalty does not arise and the levy itself on the corporate membership fees received prior to 16/06/2005 cannot sustain. In this regard he relied on the following decisions :-

***a. CARRIER POINT Versus COMMISSIONER OF CENTRAL EXCISE, JAIPUR 2018 (10) G.S.T.L. 213 (Raj.)***

***b. M/s ENCHANTED WOODS CLUB LTD Vs COMMISSIONER OF CENTRAL EXCISE, LUDHIANA- 2014-TIOL-849-CESTAT-DEL***

***c. BANGALORE CLUB Vs COMMISSIONER OF CENTRAL EXCISE BANGALORE-I - 2019-TIOL-138-CESTAT-BANG***

***d. NOBLE INSTITUTE (EDUCATION) PVT. LTD. Versus COMMR. OF S.T., AHMEDABAD 2008 (10) S.T.R. 374 (Tri. - Ahmd.) = 2008-TIOL-506-CESTAT-AHM***

Further, the Ld. CA also stressed upon the invocation of extended period of limitation in the captioned case and provided a table showing the summary of events since the inception of the issue at hand and the issuance of SCN invoking suppression on the part of the Appellant.

3. The Ld. DR reiterated the findings of the Order-in-Original and pressed upon the fact that the Appellant is liable to pay interest on the amount of Junior and NRI membership paid belatedly by the Appellant.

4. Heard both sides and perused the appeal records.

5. We find that the major issue to be decided in the captioned matter is whether the amounts received by the Appellant prior to the introduction of the levy of service tax under Club and Association services w.e.f. 16/06/2005 can be made exigible to service tax or not. In this regard, we find that the issue involved in this appeal is no more res-integra in view of the decision of the Hon'ble High Court of Rajasthan in the case of ***CARRIER POINT Versus COMMISSIONER OF CENTRAL EXCISE, JAIPUR 2018 (10) G.S.T.L. 213 (Raj.)***
wherein it was held by the Hon'ble High Court as under :

> ***"30. The assessee herein has entered into a concluded Contract much prior to coming into force of Service Tax law and in view of the clarification which has been issued in 2005 which clearly made out the case for the appellant inasmuch as the legislation has now used the language after 2005 which clearly states as under; "Taxable service means any service provided or to be provided to any person by a Commercial training or coaching classes in relation to the Coaching.***
>
> ***31. In that view of the mater, it is very clear that prior thereto, there is authority interpretation of the provision as services which are referred to be provided in future was not covered. Even otherwise in view of the law Concluded Contract cannot be revived in view of subsequent development which will lead to a very odd situation with the assessee and he has to suffer in his business and has to face the breach of contract.***
>
> ***32. In that view of the matter when we have to interpret the taxing statute, we have to interpret Article 265 and the possibility of interpretation should not be avoided to be very impracticable for either of the side.***
>
> ***33. In that view of the matter, we make it clear that any payment of contract which are entered after 1-7-2003 will invite Service Tax and any contract which is concluded prior to 1-7-2003 will not invite imposition of Service Tax.***
>
> ***34. In that view of the matter, the issue is required to be answered in favour of the assessee."***

6. In the present case also, it is not in dispute that the department has sought to tax the amounts received as corporate membership prior to 16/06/2005 on proportionate basis after the introduction of the levy of service tax on club and association services. Hence, by respectfully following the decision of the Hon'ble High Court of Rajasthan in the case of Carrier Point (supra), we hold that the levy on such amounts cannot be sustained and hence the demand to that extent is set aside. However, since the Appellant has already collected and paid the service tax, we refrain from commenting on the aspect of refund of the said amount to the Appellant.

7. Further, as regards the demand of service tax on Junior and NRI Membership as also on account of Corporate membership from Greaves Cotton Limited, we find that the Appellants have already paid the service tax on the said amounts, however interest on the same has not been paid by the Appellant. Thus, interest on the said amount is payable by the Appellant for delayed payment of service tax.

8. Further, as regards imposition of penalty of Rs.83,00,000/- on the Appellant, we find that the levy was itself introduced w.e.f. 16/06/2005 and the major demand itself not being sustainable, the question of invoking suppression cannot be upheld in the current case. We rely on the decision of the Tribunal in
***NOBLE INSTITUTE (EDUCATION) PVT. LTD. Versus COMMR. OF S.T., AHMEDABAD 2008 (10) S.T.R. 374 (Tri. - Ahmd.) = 2008-TIOL-506-CESTAT-AHM*** wherein in a similar issue as to taxability of amounts received prior to levy of tax, it was held that –

> ***"3……In any case, no question was ever raised by the appellant's jurisdictional Central Excise authorities questioning t disclosure of the fees amount collected prior to 1-7-2003, when it is a common knowledge that such fees are collected at the start of the financial year. The said services were made leviable to tax only w.e.f. 1-7-2003 and such collection of fees amount at the start of the year, when the services were not taxable, cannot reflect upon any mala fide on the part of the appellant. As such, I agree with the appellant that the demand notice having been issued after a period of about 2 years of issuance of clarification by the Board is barred by limitation. The impugned order is, accordingly, set aside and appeal is allowed with consequential relief."***

9. Thus, penalty under section 78 cannot be imposed on the Appellant.

10. Thus, we modify the impugned order accordingly by setting aside the demand of service tax of Rs.40,53,468/- along with penalty of Rs.83,00,000/-. Interest on the amount of Rs.1,00,577/- on amount received for Junior and NRI membership and corporate membership of Greaves Cotton limited is to be paid by the Appellant. We thus order accordingly.

11. In view of the above, the impugned orders are set aside and the appeal filed by the appellant is partly allowed with consequential benefit, if any.

(Operative part of the order was pronounced in the open court)