


<p>आयुक्त का कार्यालय केंद्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,अहमदाबाद उत्तर, कस्टम हाउस(तल प्रथम) नवरंगपुरा- अहमदाबाद ,380009</p>		<p>Office of the Commissioner of Central Goods & Services Tax & Central Excise, Ahmedabad North, Custom House(1st Floor) Navrangpura, Ahmedabad-380009</p>
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निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. F.No.STC/04-12/O&A/2016-17

आदेश की तारीख / Date of Order : 29.06.2020

जारी करने की तारीख / Date of Issue : 29.06.2020

द्वारा पारित/Passed by -

डॉ बलबीर सिंह / Dr. BALBIR SINGH

आयुक्त / COMMISSIONER

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR – 04-05 /2020-21

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसे व्यक्तिगत प्रयोग के लिए निःशुल्क प्रदान की जाती है।

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2. इस आदेश से असंतुष्ट कोई भी व्यक्ति इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार ,सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,O-20, मेघाणीनगर ,न्यु मेन्टल हास्पिटल कम्पाउन्ड , अहमदाबाद -380016 को संबोधित होनी चाहिए।

Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal, 2nd Floor, Bahumali Bhavan Asarwa, Near Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad. Gujarat 380004.

2.1 इस आदेश के विरुद्ध अपील न्यायाधिकरण में अपील करने से पहले मांगे गये शुल्क के 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है।

An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

(as per amendment in Section 35F of Central Excise Act,1944 dated 06.08.2014)

3. उक्त अपील प्रारूप सं. इ.ए 3.में दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 के नियम 3 के उप नियम (2)में विनिर्दिष्ट व्यक्तियों द्वारा हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियाँ में दाखिल किया जाए तथा जिस आदेश के विरुद्ध अपील की गई हो ,उसकी भी उतनी ही प्रतियाँ सलग्न की जाएं)उनमें से कम से कम एक प्रति प्रमाणित होनी चाहिए।(अपील से संबन्धित सभी दस्तावेज भी चार प्रतियाँ में अग्रेषित किए जाने चाहिए।

The Appeal should be filed in Form No. E.A.3. It shall be signed by the persons specified in sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be

filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate.

4. अपील जिसमें तथ्यों का विवरण एवं अपील के आधार शामिल हैं चार प्रतियों में दाखिल उसकी भी उतनी ही की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उनमें से कम से कम प्रतियाँ संलग्न की जाएंगी एक प्रमाणित प्रति होगी।

The Appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy.)

5. अपील का प्रपत्र अंग्रेजी अथवा हिन्दी में होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरण के बिना अपील के कारणों के स्पष्ट शीर्षों के अंतर्गत तैयार करना चाहिए एवं ऐसे कारणों को क्रमानुसार क्रमांकित करना चाहिए।

The form of appeal shall be in English or Hindi and should be set forth concisely and under distinct heads of the grounds of appeals without any argument or narrative and such grounds should be numbered consecutively.

6. अधिनियम की धारा 35बी के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है, वहां के किसी भी राष्ट्रीयकृत बैंक की शाखा से न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के नाम पर रेखांकित मांग ड्राफ्ट के जरिए अदा की जाएगी तथा यह मांग ड्राफ्ट अपील के प्रपत्र के साथ संलग्न किया जाएगा।

The prescribed fee under the provisions of Section 35 B of the Act shall be paid through a crossed demand draft, in favour of the Assistant Registrar of the Bench of the Tribunal, of a branch of any Nationalized Bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

7. न्यायालय शुल्क अधिनियम 1970, की अनुसूची 1-मद 6 के अंतर्गत निर्धारित किए अनुसार संलग्न किए गए आदेश की प्रति पर 1.00रूपैया का न्यायालय शुल्क टिकट लगा होना चाहिए।

The copy of this order attached therein should bear a court fee stamp of Re. 1.00 as prescribed under Schedule 1, Item 6 of the Court Fees Act, 1970.

8. अपील पर भी रु 4.00 का न्यायालय शुल्क टिकट लगा होना चाहिए।

Appeal should also bear a court fee stamp of Rs. 4.00.

विषय: -कारण बताओ सूचना:

Sub: Proceedings initiated vide Show Cause Notice bearing F.No.STC/04-59/O&A/2014-15 dated 23.07.2015 and STC/04-12/O&A/2016-17 dated 12.08.2016 issued to M/s Karnavati Club Ltd., Sarkhej Gandhinagar Road, Ahmedabad-380058.



Brief facts of the case:

The Karnavati Club Limited, Sarkhej Gandhinagar Road, Ahmedabad 380 058 (hereinafter referred to as "Noticee") is registered with the Service Tax Range-II, Div-III, Commissionerate, Ahmedabad holding service tax registration number AAACK7865QST001 under the category of Membership Club or Association Service.

2. The Noticee had filed refund claims totaling to Rs.10,04,51,690/- before the jurisdictional Assistant Commissioner in view of order dated 25.03.2013 passed by the Hon'ble High Court of Gujarat at Ahmedabad in Special Civil Application (SLP) No. 13654 of 2005 filed by the Noticee. The Noticee had filed the said SLP against the department's direction to take registration and pay service tax under the category of 'Membership Club or Association Service'. The Noticee, though got themselves registered and started paying service tax under the said category of service, they challenged the constitutional validity of Section 65(25a), Section 65(105)(zzze) and Section 66 of the Finance Act, 1994. The refund claims had been sanctioned by the jurisdictional Assistant Commissioner as per details given in the Table below:

File Number	Period	Amount (Rs.)	Order-in-Original (OIO) No. & Date
SD-01/4-31/Refund/Karnavati/14-15	2005-06	40,35,629/-	SD- 01/Ref/80/AC/Karnavati/ 14-15,Dated 12.08.2014
SD-01/4-32/Refund/ Karnavati/14-15	2006-07	66,51,899/-	SD-01/Ref/81 /AC/Karnavati/ 14-15,Dated 12.08.2014
SD-01/4-33/Refund/ Karnavati/14-15	2007-08	1,58,00,483/-	SD- 01 /Ref/82/AC/Karnavati/14-15,Dated 12.08.2014
SD-01/4-34/Refund/Karnavati/14-15	2008-09	1,66,01 ,355/-	SD-01/Ref/83/AC/Karnavati/14-15,Dated 12.08.2014
SD-01/4-35/Refund/Karnavati/14-15	2009-10	2,08,06,500/-	SD-01/Ref/84/AC/Karnavati/14-15,Dated 12.08.2014
SD-01/4-1147/Refund/Karnavati/13-14	2010-11	1,08,01,824/	SD-01/Ref/85/AC/Karnavati/ 14-15,Dated 12.08.2014
SD-01 /4-36/Refund/Karnavati/14-15	2011-12	1,90,59,000/-	SD-01/Ref/86/AC/Karnavati/14-15,Dated 12.08.2014
SD-01/4-1149/Refund/karnavati/13-14	4/12-6/12	66,95,000/-	SD-01/Ref/87/AC/Karnavati/14-15 dated 12.08.2014
Total		10,04,51,690/-	

3. Further the said assessee had filed Refund claims as detailed below in view of order dated 25.03.2013 passed by the Hon'ble High Court of Gujarat at Ahmedabad in Special Civil Application No. 13654 of 2005.

Table-B

No.	F.No.	Period	Amount	OIO No.
1	STC/Ref/KCL/200/D-III/15-16	Oct-14-Mar-15	Rs. 45,36,282/-	STC/Ref/ 136/HCV /KCL/D-III/ 15-16 Dated 05.02.16
2	STC /Ref/Karnavati/300/D-III/ 15-16	Apr-15 Sept 15	Rs. 48,26,570/-	STC/Ref/185/HCV /Karnavati/D-III/15-16 Dated 31.03.16
	Total		Rs.93,62,852/-	

4. In its order dated 25.3.2013, Hon'ble High Court of Gujarat, relying on the judgment of the Division Bench of Jharkhand High Court at Ranchi in the matter of Ranchi Club Ltd vs Chief Commissioner of C. Ex. & S.T., Ranchi zone, reported in 2012 (26) STR 401 (Jhar.), had allowed the appeal and 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 to its members to be ultra vires. This order of the Hon'ble High Court had not been accepted by the department and an SLP No. 24977/2013 has been filed in the Supreme Court of India.

5. As the Noticee's claim was based on the Hon'ble High Court of Gujarat's order dated 25.3.2014 and in view of the fact that there was no stay on the said order of the Hon'ble High Court, refunds totaling to Rs.10,04,51,690/- and Rs.93,62,852/- were sanctioned by the jurisdictional Assistant Commissioner under Section 11 B of the Central Excise Act, 1944 vide Orders-in-Originals (OIOs) detailed in Para 2 above.

6. It, however, appeared that the refund of Rs.10,04,51,690/- and Rs.93,62,852/- had been granted to the noticee erroneously as the department has not accepted the aforesaid order of the Hon'ble High Court of Gujarat dated 25.3.2013 and an SLP No. 24977/2013 has been filed in the Supreme Court of India on the following grounds.

- (i) *The Honorable High Court has erred by holding constitutional validity of section 65 (25a), section 65(105) and section 66 of the Finance Act, 1994 as ultra vires and allowing the petition filed by The Karnavati Club Ltd by relying upon the decision of the Jharkhand High Court reported in 2012(26) STR 401 (Jhar) in the case of Ranchi Club Limited Vs. Union of India which has been challenged by the department before the Hon 'ble Apex Court and the matter bearing Diary No. 28241/2012 between Commissioner of Customs and Excise, Ranchi Vs. Ranchi Club& Others is still pending.*
- (ii) *That Section 65(105)(zzze) defines the taxable service provided by clubs and association. Section 65(25a) defines the terms 'clubs and associations' and section 66 is the charging section of service tax.*
- (iii) *That from the legal provisions as above, the taxable service is any service provided by a club or association to its members in relation to provision of services, facilities or advantages for a subscription or any amount.*
- (iv) *Accordingly, the argument of doctrine of mutuality bears no significance in the context of taxable service provided by clubs and associations as the same has been legally overcome by creating a legal fiction treating clubs and associations and its members as two separate persons. This is evident from the definition of clubs and associations.*
- (v) *Notwithstanding the above, in the instant case mutuality is not a valid grounds of challenge in view of the fact that the petitioner club is incorporated under the Companies Act. In law, a company is a legal entity, which has a separate legal identity from its members.*

The petitioner has stated that vide Entry 62 of the State List reads as 'taxes on luxuries, including taxes on entertainments, amusements, betting and gambling' vide this entry; states are competent to legislate on the activity of amusement and entertainment. [(2005) TIOL-10-SC-LT-CB]. However, this has to be distinguished with the levy on the service of providing entertainment or amusement. Service Tax levy is not a levy on the activity of amusement or entertainment per se but on the service of provision of such entertainment or amusement. Thus, the levy of service tax on services provided by clubs and associations to its members is well within the legislative competence of the Parliament.

- (vii) *The exclusion provided in the definition of 'clubs and associations' to 'any body established or constituted by or under any law' is not applicable to a company. A company is not established and constituted by or under the Companies Act but rather is formed and registered under the said Act.*
- (viii) *In view of the above, it is respectfully submitted that section 65(25a), 65 (105) (zzze) and section 66 of the Finance Act, 1994 are not ultra virus as held by the Hon 'ble High Court of Gujarat vide its order dated 25.03.2012 and the said order is not legal and proper.*



7. It also appeared that the Noticee had not established that the refund claims were not hit by the clause of unjust enrichment. In Para 2 of the Refund Sanction OIO's stated above, reliance has been placed on CESTAT Ahmadabad's Final Order No-10306-10309/WZB/AHD/2013, dated 29.01.2013, however it appeared that non-filing of appeal against the said Tribunal order was only on account of low monetary involvement and hence it cannot have any precedent value.

8. In view of above, the refund of Rs.10,04,51,690/- and Rs.93,62,852/- granted to the Noticee under different Orders-in-Original mentioned hereinabove appeared erroneous and therefore, appeared liable to be recovered from the Noticee under Section 73(1) of the Finance Act, 1994.

9. Therefore, M/s. Karnavati Club Limited, Sarkhej Gandhinagar Road, Ahmedabad 380059 was asked to show cause as to why the refund of Rs.10,04,51,690/- and Rs.93,62,852/- sanctioned by the jurisdictional Assistant Commissioner under different Orders-in-Original mentioned hereinbefore should not be treated as erroneous refund and why the same should not be recovered from them under Section 73 (1) of the Finance Act, 1994. The following Show Cause Notices were issued to the assessee in this regard.

Sr. No.	SCN F.No.	SCN Date
01	STC/4-59/O&A/2014-15	23.07.2015
02	STC/4-12/O&A/16-17	12.08.2016

10. Written Submission

10.1 The noticee vide letters dated 26.09.2016 has submitted interalia as-

The salient issues to be addressed here are as under:-

(i) Whether the club service provided to members of the club is taxable prior to 01.07.2012 onwards or not.

(ii) Whether the refund granted by the department has been hit by the principal of unjust enrichment or not.

3.1 Whether the club service provided to members' club is taxable prior to 01.07.2012 onwards or not.

The noticee had been formed to provide facility exclusively for the members. The principal object of the noticee was to encourage and promote the game of cricket and other games and sports in the State of Gujarat and as such other objectives. The noticee is a member's club and is governed under Income Tax Act, 1961 on the principle of mutuality from 1973-74.

The noticee submitted that for being chargeable to tax under the provision of service tax, it is essential that the person concerned should render service to another person. Thus the basic requirement for falling within the ambit of the said provision is that there has to be a service provider and a service receiver. In the present case, the noticee being members' club provide sports activities to its members only which would be in the nature of "self service" and consequently, would not attract service tax. In the absence of there being any service provider and service recipient in relation to the transaction in question, the taxability in the present case is not justifiable.

Further, the noticee submitted that in the impugned case, the noticee is a members' club, so noticee was not liable for the service on the basis of the High Court decisions as under:

- (i) 2013 (31) S.T.R. 645 (Guj.) IN THE HIGH COURT OF GUJARAT AT AHMEDABAD Ravi R. Tripathi and R.D. Kothari, JJ. SPORTS CLUB OF GUJARAT LTD. Versus UNION OF INDIA Special Civil Application Nos. 13654-13656 of 2005, decided on 25-3-2013

Club - Finance Act, 1994 - Sections 65(25a), 65(105)(zzze) and 66 - Service Tax on club rendering service to its members - HELD : It was ultra vires and beyond legislative competence of Parliament - There was no loss of mutuality of club members even if club was incorporated under Companies Act, 1956 - Ranchi Club Ltd. [2012 (26)ST.R.401 (Jhar.)] applied - Department's plea that they have not accepted this judgment, rejected - Persuasive value of this judgment was not lost, more so because it had relied on a Full Bench decision of High Court

Precedent - Judgment of High Court - Relying on decision of a Full Bench of its own High Court - Its persuasive value is not lost for other High Courts merely because it was accepted by Department. [para 7]
Petitions allowed

- (ii) 2012 (26) S.T.R. 401 (Jhar.) IN THE HIGH COURT OF JHARKHAND AT RANCHI Prakash Tatia, CJ. and Aparesh Kumar Singh, J. RANCHI CLUB LTD. Versus CHIEF COMM. OF C. EX. & S.T., RANCHI ZONE W.P. (T) No. 2388 of 2007, decided on 15-3-2012

Club - Incorporated as Company and formed on principle of mutuality - Liability to Service tax for services utilised by members of club, viz. mandap keeper, etc. - HELD :

In view of mutuality, if club provides any service to its members, it is not a service by one legal entity to another, and is not liable to Service tax - Explanation to Section 65 of Finance Act, 1994 that 'taxable service includes any taxable service provided or to be provided by any unincorporated association or body or persons to a member', found to be similar to Explanation-I to Section 2(n) of Madras General Sales Tax Act, 1959 including within definition of sale any transfer of property by club to its members, considering which Apex Court in Young Men's Indian Association [1970 (1) sec 462] had held supply of preparations by club to its members was not a sale as there was no transfer of property from one to another, and even though club had distinct legal entity, it was acting only as an agent for its members - Sections 65(66) and 65(67) of Finance Act, 1994. [para 18]

Sale and service - Nature of - Sale entails transfer of property whereas service does not - However, both transactions requires existence of two parties - Sale requires seller and buyer, and Service requires service provider and service receiver. [para 18]
Petition allowed

- (iii) 2014 (33) S.T.R. 214 (Commr. Appl.) BEFORE THE COMMISSIONER OF CUSTOMS AND CENTRAL EXCISE (APPEALS), NEW DELHI Shri S.R. Baruah, Commissioner (Appeals) IN RE : FEDERATION OF INDIAN MICRO AND SMALL & MEDIUM ENTERPRISES Order-in-Appeal No. 228/S.Tax/D-11/2012, dated 3-12-2012

Club or Association service - Representing members for Trade and Commerce and coordination in participation of members in US fair - HELD : Body of persons representing members and fees collected thereon - Factors for classification under Club and Association service fulfilled - Activity of coordinating participation not covered under exclusion clause of Section 65(25aa) of Finance Act, 1994 - Section 96J of Finance Act, 1994 exempts membership fee collected for representation of members for period between 16-6-2005 to 31-3-2008 - Break-up of amount received toward membership fees for exempted period not available - Assessee to submit relevant data within 15 days and assessee to be intimated of Service Tax liability for period 1-4-2008 onwards

Demand upheld with interest and penalty - Section 73 of Finance Act, 1994. [para 5.1]

Demand - Club or Association service - As per C.B.E. & C. Circular No. 145/14/2011- S.T., dated 19-8-2011 service tendered for facilitating issue of country of origin Certificate classifiable under Technical Inspection and Certification services - Demand by classifying activities under Club or Association service unjustified and is liable to be set aside - Section 73 of Finance Act, 1994. [para 5.2]

Demand - Project income - Amount received from UNCTAD towards project expenses - As per C.B.E. & C. Circular No. 145/14/2011-S.T., dated 19-8-2011 UNCTAD not covered in list of international organisation to whom certain privileges and immunities granted - Assessee to intimated about Service Tax liability for period 1-4-2008 onward -Assessee liable to pay penalty in terms of Section 78 of Finance Act, 1994 - Section 73 of Finance Act, 1994. [para 5.3]

Demand - Limitation under self-assessment regime, tax liability, assessee under obligation to classify service rendered and to discharge Service Tax correctly Assessee neither registered nor discharged Service Tax liability - Act of nonobservance of rules tantamount to contravention of laws with intent to evade payment of Service Tax - Hence extended period of limitation invokable - Impugned order upheld -

Section 73 of Finance Act, 1994. [para 6]

Appeal disposed off

3.1.2 Further, the department want to recover on the basis of explanation 3 of section 658(44) of the Finance Act, 1994 as under:

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 persons:
- (b) an establishment of a person in the taxable territory and any of his other establishment in a nontaxable territory shall be treated as establishments of distinct persons.

Against this the noticee submitted that the above explanation-3 is not at all applicable to the noticee as the noticee was a incorporated company registered under Companies Act, 1956. From the above it is clear that the explanation-3 applies to an unincorporated association or a body of persons and not to the incorporated. Therefore, on this ground also the appeal filed by the department may be quashed and required to be set aside.

Against which noticee submitted that in the impugned case, noticee are member club, so noticee were not liable for the service on the basis of the high court decision in our own case:

- The Hon'ble High Court of Gujarat in the case of *Sports Club of Gujarat Vs. Union of India [2013-TIOL-528-HC-AHM-ST]* has declared Section 65(25a), Section 65(105)(zzze) and Section 66 of the Finance Act as incorporated/ amended by the Finance Act, 2005 to the extent that the said provisions purport to levy Service tax in respect of services provided by club to its members, as ultra vires;

Further on the same basis other high court & tribunal has also stated that:

- The Hon'ble High Court of Jharkhand in the case of *Ranchi Club Vs. Chief Commr. Of C. Exe. & ST, Ranchi [2012 (26) STR 401 (Jhar)]*, has held that in view of the mutuality and the activities of the club, if club provides any service to its members may be in any form including as mandap keeper, then it is not a service by one to another as foundational facts of existence of two legal entities in such transaction is missing;
- The afore stated judgments were also considered by the Principal Bench of the Hon'ble CESTAT, Delhi in the case of *Federation of Indian Chambers of Commerce & Industry Vs. Commissioner of Service Tax, Delhi [2014-T10L-701-CESTAT-DEL]*, wherein it was held that on application of the principle of mutuality, services provided by clubs to their respective members would not fall within the ambit of the taxable 'Club or Association' service nor the consideration whether by way of subscription/ fee or otherwise received therefore be eligible to Service tax.
- The concept of principle of mutuality in respect of clubs and their members needs to be tested legally post facto July 1, 2012 (Negative List Regime of Service tax) whereby the definition of 'Service' provided first time under Section 658 (44) of the Finance Act, which interalia, provides that any activity carried out by a person for another for consideration is a 'Service'.

However, Explanation 3 to Section 658 (44) of the Finance Act has carved out an exceptions to the General Rule that Service tax leviable only when services provided by a person to another. In terms of Explanation 3(a) thereof, an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons.

As noticee is registered body corporate and not an unincorporated association or a body of persons, the said explanation is not applicable to them.

So dept's belief for the demanding of the Service Tax back/SCN demand was not requisite.

3.1.3 Regarding the applicability of the provision after 01.07.2012 & onwards as under:
Guidance Note 2 - What is Service?

'Service' has been defined in clause (44) of the new section 658 and means-

- any activity

- for consideration
- and includes a declared service.

The said definition further provides that 'Service' does not include

- any activity that constitutes only a transfer in title of (i) goods or (ii) immovable property by way of sale, gift or in any other manner
- (iii) a transfer, delivery or supply of goods which is deemed to be a sale of goods within the meaning of clause (29A) of article 366 of the Constitution
- a transaction only in (iv) money or (v) actionable claim
- a service provided by an employee to an employer in the course of the employment.
- fees payable to a court or a tribunal set up under a law for the time being in force

There are four explanations appended to the definition of 'service' which are dealt with in later part of this Guidance Note. Each of the ingredients bulleted above have been explained in the points below.

2.1 Activity

2.1.1 What does the word 'activity' signify?

'Activity' has not been defined in the Act. In terms of the common understanding of the word activity would include an act done, a work done, a deed done, an operation carried out, execution of an act, provision of a facility etc. It is a term With very wide connotation.

Activity could be active or passive and would also include forbearance to act. Agreeing to an obligation to refrain from an act or to tolerate an act or a situation has been specifically listed as a declared service under section 66E of the Act.

2.2 Consideration

2.2.1 The phrase 'consideration' has not been defined in the Act. What is, therefore, the meaning of 'consideration'?

As per Explanation (a) to section 67 of the Act "consideration" includes any amount that is payable for the taxable services provided or to be provided.

Since this definition is inclusive it will not be out of place to refer to the definition of 'consideration' as given in section 2(d) of the Indian Contract Act, 1872 as follows

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise"

In simple terms, 'consideration' means everything received or recoverable in return for a provision of service which includes monetary payment and any consideration of nonmonetary nature or deferred consideration as well as recharges between establishments located in a non-taxable territory on one hand and taxable territory on the other hand.

2.2.2 What are the implications of the condition that activity should be carried out for a 'consideration'?

- To be taxable an activity should be carried out by a person for a 'consideration'
- Activity carried out without any consideration like donations, gifts or free charities are therefore outside the ambit of service 'For example grants given for a research where the researcher is under no obligation to carry out a particular research would not be a consideration for such research.
- An act by a charity for consideration would be a service and taxable unless otherwise exempted. (for exemptions to charities please see Guidance Note 7)

Conditions in a grant stipulating merely proper usage of funds and furnishing of account also will not result in making it a provision of service.

- Donations to a charitable organization are not consideration unless charity is obligated to provide something in return e.g. display or advertise the name of the donor in a specified manner or such that it gives a desired advantage to the donor.

2.2.3 What is the meaning of monetary consideration?

Monetary consideration means any consideration received in the form of money. 'Money' has been defined in section 658 and includes not only cash but also cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveler's cheque, money order, postal or electronic remittance or any such similar instrument.

Source: TRU, C.B.E.& C., Department of Revenue, Ministry of Finance, dated 20-6-2012]

Further noticee drew attention towards the fact that, as there were no service provider & service receiver, both are the same person so it is not a service, so no service tax has been applicable on such receipt.

The noticee relied on the following citations:

- (i) 2013 (31) S.T.R. 445 (Tri. - Ahmd.) IN THE CESTAT, WEST ZONAL BENCH, AHMEDABAD [COURT NO. II] Shri M.V. Ravindran, Member (J) KARNAVATI CLUB LTD. Versus COMMISSIONER OF SERVICE TAX, AHMEDABAD Final Order Nos. A/10306-10309/2013-WZB/AHD, dated 29-1-2013 in Appeal Nos. ST/123, 124,558 and 559/2011

Refund - Unjust Enrichment- Applicability of - Club or Association service - Demand raised for rendering Health and Fitness Service to members - Payment of Service Tax under protest under 'Mandap Keeper' category upon insistence of lower authorities challenged before High Court - HELD : High Court categorical conclusion that members not to be seen separately as clients or customers and mandap or club one and the same - Since demand set aside at SCN stage; incidence of tax liability not passed to members - Services rendered to self cannot be equated with services rendered to client or customer - Assessee passed hurdle of unjust enrichment - Provision of Section 128 of Central Excise Act, 1944 not applicable; therefore question of producing evidence supporting non-passing of Service Tax liability not to arise - Impugned order set aside Sections 11B and 12B of Central Excise Act, 1944 as applicable to Service Tax vide Section 83 of Finance Act, 1994. [paras 9, 10, 11, 12, 13]
Appeal allowed

So on the basis of the supra submission, dept's appeal on the basis of explanation 2 of 65B(44) was required to be quashed. By any stretch of imagination, member club incorporated under company act, 1956 was not covered under the explanation, So dept' has allowed refund rightly to us.

- 3.2 Regarding the refund granted by the department has been hit by the principal of unjust enrichment or not.

On the department question regarding the unjust enrichment, Noticee drew attention towards the fact that their club is member's club, where member & club has same identity.

In the impugned case noticee has been constituted by the members for the creation of the club facility for the members of the club. So noticee society has been working for his member only and that noticee club had been working for the members only, there were no service has been provided to other than members.

The Noticee relied upon the following case laws in support of their contention.

- (i) 2015 (37) S.T.R. 961 (Guj.) IN THE HIGH COURT OF GUJARAT AT AHMEDABAD Akil Kureshi and Vipul M. Pancholi, JJ. GREEN ENVIRONMENT SERVICES CO-OP. SOCIETY LTD. Versus U.O.1. Special Civil Application No. 30148 of 2007, decided on 15-12-2014
- (ii) 2015 (40) S.T.R. 957 (Tri. - Mumbai) IN THE CESTAT, WEST ZONAL BENCH, MUMBAI [COURT NO. I] S/Shri M.V. Ravindran, Member (J) and C.J. Mathew, Member (T) CHIPLUN NAGARI SAHAKARI PATSANSTHA LTD. Versus C.C.E., KOLHAPUR Final Order Nos. A/3392-3394/2015-WZB/STB, dated 30-9-2015 in Appeal Nos. ST/318 & 381/2011 and ST/66/2012
- (iii) 2013 (31) S.T.R. 645 (Guj.) IN THE HIGH COURT OF GUJARAT AT AHMEDABAD Ravi R. Tripathi and R.D. Kothari, JJ. SPORTS CLUB OF GUJARAT LTD. Versus UNION OF INDIA Special Civil Application Nos. 13654-13656 of 2005, decided on 25-3-2013
- (iv) 2015 (38) S.T.R. 529 (Tri. - Del.) IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI [COURT NO. I] Justice G. Raghuram, President and Shri Rakesh Kumar, Member (T) FEDERATION OF INDIAN CHAMBERS OF COMMERCE & INDUSTRY Versus C.S.T., DELHI Final Order Nos. ST/A/51787-51790/2014-CU[DB], dated 28-4-2014 in Application Nos. ST/Stay/58830, 58956, 58954 & 55537/2013 in Appeal Nos. ST/58191, 58306, 58304 & 55424/2013
- 2015 (38) S.T.R. 407 (Tri. - Mumbai) IN THE CESTAT, WEST ZONAL BENCH, MUMBAI S/Shri Anil Choudhary, Member (J) and P.S. Pruthi, Member (T) MATUNGA GYMKHANA Versus COMMISSIONER OF SERVICE TAX, MUMBAI Final Order Nos. A/1800-1803/2014-WZB/C-I(CSTB), dated 18-12-2014 in Appeal Nos. ST/105/2009-Mum, ST/185 & 298-299/2011-Mum
- (vi) 2015 (38) S.T.R. 99 (Tri. - Mumbai) IN THE CESTAT, WEST ZONAL BENCH MUMBAI S/Shri P.R. Chandrasekharan, Member (T) and Anil Choudhary, Member (J) Third Member on Reference : Shri P.K. Jain, Member (T) VIDARBHA CRICKET ASSOCIATION Versus COMMISSIONER OF C. EX., NAGPU . Final Order Nos. A/2303-2304/2013-WZB/C-I(CSTB), dated 4-12-2013, Misc. Order No. M/1726/2013-WZB/C-I(CSTB), dated 20-11-2013 & Misc. Order Nos. M/1015-1016/2013-WZB/C-I(CSTB), dated 14-6-2013 in Appeal Nos. ST/136/2012 & ST/85107 /2013



- (vii) 2014 (36) S.T.R. 110 (Tri. - Del.) IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI [COURT NO. I] Justice G. Raghuram, President and Shri Rakesh Kumar, Member (T) PUNJAB STATE FEDERATION OF CO-OP. SUGAR MILLS LTD. Versus C.C.E., CHANDIGARH Final Order Nos. ST/A/52619-52620/2014-CU(DB), dated 22-5-2014 in Appeal Nos. ST/858-859/2008
- (ix) 2013 (31) S.T.R. 445 (Tri. - Ahmd.) IN THE CESTAT, WEST ZONAL BENCH, AHMEDABAD [COURT NO. II] Shri M.V. Ravindran, Member (J) KARNAVATI CLUB LTD. Versus COMMISSIONER OF SERVICE TAX, AHMEDABAD Final Order Nos. A/10306-10309/2013-WZB/AHD, dated 29-1-2013 in Appeal Nos. ST/123, 124, 558 and 559/2011.

PERSONAL HEARING:

11. Shri Bishan Shah, C.A., appeared on behalf of the assessee before me on 15.06.2020, and reiterated the above fact and requested that the proceedings initiated against the assessee may be dropped in light of the judgment passed by the Hon'ble Supreme Court of India, para 84 & 85 stated as under-

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.*

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.*

DISCUSSION AND FINDINGS:

12. I have gone through the records of the case, the submissions made by the assessee in their reply to the Show Cause Notices and during the course of personal hearing.

13. I find that the issue to be decided is whether the services provided by the assessee to its members in relation to provision of services, facilities or advantages for a subscription or any amount, is a taxable service provided by clubs and associations defined under Section 65(105)(zzze) of the Finance Act, where Section 65(25a) defines the terms 'clubs and associations' under the Finance Act, 1994 and Service Tax is charged under Section 66 of the said Act.

14. The assessee had challenged the validity of Section 65(105)(zzze) Section 65 (25a) and Section 66 of the Finance Act, 1994, as amended to the extent that the said provisions purport to levy Service Tax in respect of services purportedly provided by the assessee to its member before the Hon'ble High Court of Gujarat, as being ultra vires.

15. I find that Hon'ble High Court of Gujarat, relying on the judgment of the Division Bench of Jharkhand High Court at Ranchi in the matter of Ranchi Club Ltd. Versus Chief Commissioner of C. Ex, & S. T., Ranchi zone reported in 2012 (26) STR 401 (Jhar); allowed the appeal and 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 to its members to be *ultra vires*.

16. Attention is drawn to the relevant paragraph from the judgment of the Jharkhand High

Court at Ranchi in the matter of Ranchi Club Ltd. v/s. Chief Commission of C.Ex. & S.Tax., Ranchi Zone reported in 2012 (26) STR 401 (Jhar), wherein they had relied upon the judgment of Hon'ble Supreme Court in the case of Joint Commercial Tax Officer v/s. The Young Men's Indian Association, which held as under:

"In that situation, Hon'ble Supreme Court considered the issue that the club is rendering service or selling any commodity to its members for a consideration then whether that amounts to sale or not. Hon'ble Supreme Court held that it is a mutuality which constitutes the club and therefore, sale by a club to its members and its services rendered to the members, is not a sale by club to the members."

17. CESTAT, Ahmedabad, in the case of M/s. Karnavati Club Ltd., in its decision reported in 2013 (31) S.T.R. 445 (Tri. - Ahmd.), has also relied upon the judgment of the Hon'ble High Court of Gujarat and held as under:

11. *It can be seen from the above reproduced paragraphs that their Lordships have come to a categorical conclusion that the members of the club cannot be seen separately as a client or customer and the mandap or the club is one and the same. Since the Service Tax is sought from the club and it has been set aside at the show cause notice stage, by the Hon'ble High Court, it cannot be said that said club has passed on the incidence of Service Tax liability to its members, as the members are not separate from the club, is the ratio of their Lordships. If that be so, it cannot be said that by claiming the refund from self, the club itself will be unjustly enriched. Services rendered to self cannot be equated with the services rendered to a client or customer.*

12. *In my view, the appellant has passed the hurdle of unjust enrichment and I hold that the provisions of Section 12B will not be applicable in this case as the club and the members are not separate and are one as held in this case by Hon'ble High Court, the question of producing any other evidence in support of non-passing of Service Tax liability does not arise.*

13. *Accordingly, in the facts and circumstances of this case, I set aside the impugned order and allow the appeals with consequential relief.*

18. The Show Cause Notices were issued to the noticee as the department had not accepted the aforesaid order of the Hon'ble High Court of Gujarat dated 25.03.2013 and SLPs had been filed in the Supreme Court of India on the grounds mentioned in Para 5 above.

19. The Hon'ble Supreme Court of India, has decided the above issue, vide their judgment dated 03.10.2019, in the case of Chief Commissioner of Central Excise and Service Tax & Others V/s. M/s. Ranchi Club Ltd. (Civil Appeal No. 7497 of 2012), reported in 2019 (29) GSTL 545(S.C.), wherein it was held as under:

Clubs - Having no shareholders, dividends declaration and distribution of profits -
Such clubs cannot be treated as separate in law from their members. - If persons carry on certain activity in such a way that there is a commonality between contributors of funds and participators in the activity, a complete identity between the two is then established. This identity is not snapped because the surplus that arises from the common fund is not distributed among the members - It is enough that there is a right of disposal over the surplus, and in exercise of that right they may agree that on winding up, the surplus will be transferred to a club or association with similar activities. Most importantly, the surplus that is made does not come back to the members of the club as shareholders of a company in the form of dividends upon their shares. Since the members perform the activities of the club for themselves, the fact that they incorporate a legal entity to do it for them makes no difference. What is of essence, therefore, in applying this doctrine is that there is no sale transaction between two persons, as one person cannot sell goods to itself. [paras 29, 30]

Club or association Service Tax levy thereon - Person providing services for subscription or any other amount to members is within tax net - However, anybody

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.

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.

81. 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”.

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.

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.

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.

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.

20. The list of relevant Civil Appeals decided vide the above judgment are as under:

- (i) Civil Appeal No. 4184 of 2009 (State of West Bengal & Ors. v/s. Calcutta)
- (ii) CA No.7497 of 2012 (Ranchi Club Ltd.)
- (iii) C.A. Nos. 7773 of 2019 arising out of SLP (C) No. 26883 of 2013 (M/s. Karnavati Club Ltd.),

- (iv) C.A. Nos. 7771 of 2019 arising out of SLP (C) No. 22909 of 2013 (M/s.Rajpath Club Ltd.),
- (v) C.A. Nos. 7772 of 2019 arising out of SLP (C) No. 24977 of 2013 (M/s.Sports Club Ltd.),

21. The C.A.no. 7773 of 2019 pertains to M/s. Karnavati Club Ltd. Therefore in light of the aforementioned judgment of the Supreme Court of India, I am left with no alternative but to drop the proceedings against the assessee.

22. In view of the above, I pass the following order:

:: ORDER ::

(i) I drop the proceedings initiated against the assessee vide the following Show Cause Notices.

Sr. No.	SCN F.No.	SCN Date
01	STC/4-59/O&A/2014-15	23.07.2015
02	STC/4-12/O&A/16-17	12.08.2016



(Signature)
 (Dr. Balbir Singh)
 Commissioner,
 C.G.S.T.,
 Ahmedabad North

F.No. STC/4-12/O&A/16-17

Date: 29.06.2020

BY Registered post. A.D/ Hand Delivery/ S.P.A.D

To
 The Karnavati Club Limited,
 Sarkhej Gandhinagar Road,
 Ahmedabad 380 058

Copy to :

1. The Principal Chief Commissioner, C.G.S.T, Ahmedabad Zone, Ahmedabad.
2. The Assistant Commissioner, CGST, Division-VI, Ahmedabad.
3. The Superintendent, AR-I, Division-VI, CGST, Ahmedabad- North.
4. Guard file.