T017_आयुक्त का कार्यालय,
केंद्रीय जी. एस. टी. एवं
केंद्रीय उत्पाद शुल्क ,अहमदाबाद -- उत्तर,
कस्टम हॉउस, प्रथम तल,
नवरंगपुरा ,अहमदाबाद- 380009

ONE NATION..ONE TAX..ONE MARKET

OFFICE OF COMMISSIONER
CENTRAL GST & CENTRAL EXCISE,
AHMEDABAD- NORTH
CUSTOM HOUSE, 1ST FLOOR,
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निबन्धित पावती डाक द्वरा/By R.P.A.D

DIN- 20230564WT000000B090

फा.सं./F.No. STC/15-51/OA/Denovo/2022

आदेश की तारीख़/Date of Order :- 31.05.2023

जारी करने की तारीख़/Date of Issue :- 31.05.2023

द्वारा पारित/Passed by:- मुकेश राठौर / Mukesh Rathore
अपर आयुक्त / *Additional Commissioner*

मूल आदेश संख्या / Order-In-Original No. 05/ADC/MR/2023-24

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसके/उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरूद्ध अपील ,इसकी प्राप्ति से 60 (साठ) दिन के अन्दर आयुक्त (अपील), केन्द्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,केन्द्रीय उत्पाद शुल्क भवन, अंबावाड़ी ,अहमदाबाद 380015-को प्रारूप संख्या एस टी -४ (ST-4) में दाखिल कर सकता है। इस अपील पर रू. 5.00 (पांच रुपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this order may appeal against this order in form EA-1 to the Commissioner(Appeals), Central GST & Central Excise, Central Excise Building, Ambawadi, Ahmedabad-380015 within sixty days from the date of its communication. The appeal should bear a court fee stamp of Rs. 5.00 only.

इस आदेश के विरुद्ध अपील करने के लिए आयुक्त (अपील) के समक्ष नियमानुसार पूर्व जमा के धनराशी का प्रमाण देना आवश्यक है ।

An appeal against this order shall lie before the Commissioner (Appeal) on giving proof of payment of pre deposit as per rules.

उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या एस टी -४ (ST-4) में दो प्रतियों में दाखिल की जानी चाहिए। उस पर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 के नियम 3 के प्रावधानों के अनुसार हस्ताक्षर किए जाने चाहिए। उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

(3) उक्त अपील की प्रति।

(4) निर्णय की प्रतियाँ अथवा जिस आदेश के विरूद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिसपर रू .5) 00. पांच रूपये (का न्यायालय शुल्क़ टिकट लगा होना चाहिए।

The appeal should be filed in form एस टी -४ (ST-4) in duplicate. It should be signed by the appellant in accordance with the provisions of Rule 3 of Central Excise (Appeals) Rules, 2001. It should be accompanied with the following:

(3) Copy of accompanied Appeal.

(4) Copies of the decision or, one of which at least shall be certified copy, the order Appealed against OR the other order which must bear a court fee stamp of Rs.5.00.

विषय:- कारण बताओ सूचना/ Proceeding initiated against Show Cause Notice F.No. STC/4-10/O&A/10-11 dated 20.04.2010 issued to M/s Rajpath Club, S.G. Highway, Ahmedabad, Gujarat.

BRIEF FACTS OF THE CASE

M/s. Rajpath Club Limited, Sarkhej-Gandhinagar Highway, Ahmedabad – 380058 is a service provider hereinafter referred as "the assessee having Service Tax Registration No. AAACR7379AST001 and engaged in providing the services in respect of Membership of Club or Association (MCA) services to its members.

2. During the course of Audit, it was also observed that the assessee entered into a catering contract with M/s. Ahura Restaurants Pvt. Ltd. since 2003 and with M/s. Bhagwati Banquets & Hotels Ltd since 13.02.2007 to run canteens inside the club premises on contract basis. As per these contracts, for running the business of canteen, the caterers are allowed to use the fully equipped kitchen alongwith all the machines and equipments, the Cascade restaurant, Splash coffee shop, food court, new glass restaurant, the banquet hall, the fountain lawn party area, the Portico, Children park party etc. along with all the facilities like to air-conditioning, electrical installations, music systems, fans, lights and other fittings. The club also provides the caterer with crockery, cutlery, service ware, linen and kitchen utensils and banqueting materials. The club retained 10% of the basic food and beverage bill amount and additional 4% when the sale exceeded Rs. One crore per annum, of the caterer (M/s. Ahura Restaurants Pvt. Ltd.) and retained 13% in the first year and thereafter 14% for the remaining period of the basic food and beverage bill of M/s. Bhagwati banquets & Hotels Ltd. towards the use of premises, electricity, water and maintenance. Since the club provided infrastructural support services to the said two caterers for running their catering business inside the club premise, they are liable to pay Service Tax on the income they earned from the services provided this caterer.

3. The definition of the Business support service is given under Section 65(104c) of the Finance Act, 1994 which is as under:

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

5. From the above definition, it appeared that the income retained by the assessee falls under the Business Support Service and the Service Tax is required to be paid by the assessee on this income. During the Audit, it was noticed that the assessee earned income from the said two caterers by way of retaining certain percentage of catering income with the assessee against the business support services to them and amount of Service Tax required to be paid as under:

Sl.No.	Period	Amt. earned for providing business support service to caterers (Rs.)	Service Tax (Rs.)
1.	01.05.2006 to 31.03.2007	1281231	156822
2	2006-07 to 2007-08	3198216	395299
	Total	4479447	552121

6. Further, the assessee was asked to furnish amount received by them by retaining certain amount from caterers for the period 2008-09 vide letter No. SD-01/4-49/Audit/2009-10 dated 17.08.2009 followed by reminders dated 06.10.2009, 30.11.2009, 16.12.2009 and 02.02.2009. The assessee has furnished the information vide letter FL/2010 dated 04.02.2010. As per the information, the income received by them by retaining certain amount from caterers for the year 2008-09 is Rs. 35,73,437/-. The assessee is required to pay service tax on this amount under category of Business Support Service. Service Tax (inclusive of Education Cess) on the amount of Rs. 35,73,437/- comes to Rs. 4,41,677/-. Thus the total Service tax required to be paid by the assessee comes to Rs. 9,93,798/- (Rs. 5,52,121/- for 01.05.2006 to 2007-08 + Rs. 4,41,677/- for the year 2008-09).

7. In view of the aforesaid discussion, it appeared that the assessee has realized income from caterers amounting to Rs. 80,52,884/- from the period 16.06.2005 to 31.03.2009 for the services rendered by them under Section 68 of the Finance Act, 1994. However, the assessee has failed to deposit this Service Tax amounting to Rs. 9,93,798/- in the Government Treasury, hence the same is required to be recovered from them under Section 73(1) of the Finance Act, 1994.

8. From the above facts, it appeared that the assessee has contravened the provisions of (i) Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994 in as much as they have failed to determine and pay the service tax and education cess within the stipulated time period on the income received from the caterer; (ii) Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 in as much as they have failed to include the taxable value in their relevant ST-3 returns with the Service Tax department.

9. Further, since the assessee failed to credit the tax or any part thereof to the account of the Central Government within the period prescribed, they are liable to pay simple interest under Section 75 of the Finance Act, 1994 at such rate not below ten per cent and not exceeding thirty-six per cent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette for the period for which such credit of the tax or any part thereof is delayed.

10. Also the failure on the part of the assessee to pay Service Tax as discussed hereinabove renders them liable to pay penalty under Section 78 of the Finance Act, 1994. Whereas, the failure on their part to include the taxable value in the relevant ST-3 returns with the Service Tax department as provided under Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 renders them liable for penal action under Section 77 of the Finance Act, 1994.

11. Moreover, in addition to the contravention, omission and commissions on the part of the assessee as stated in the foregoing paras, it was noticed that, they have willfully suppressed the facts, nature and value of service and they have failed to include the taxable value in their relevant ST-3 returns with the Service Tax Department. Further, it is a prevalent knowledge that in the time of self assessment burden of proof regarding payment of Service Tax lies upon the provider of Output Services. Therefore, as discussed

above, the assessee has rendered themselves liable for penalty under Section 78 of the Finance Act, 1994.

12. The assessee is guilty of wilful suppression of the actual liability of service tax with a view to evade payment of service tax, therefore, extended period of five years is applicable in this case. The said service tax not paid by them is required to be demanded and recovered from them with interest under the proviso to Section 73(1) read with Section 75 of the Finance Act, 1994 by invoking extended period of five years in as much as the said service provider has suppressed the facts from the department by not declaring value of taxable services and material facts from the department. All these acts of contravention of the provisions of Section 68, and 70 of the Finance Act, 1994 read with Rules 6 and 7 of the Service Tax Rules, 1994 appear to be punishable under the provisions of Section 76, 77 and 78 of the Finance Act, 1994.

13. Therefore Show Cause Notice F.No.STC/410/O&A/10-11 dated 20.04.2010 was issued to M/s. Rajpath Club Limited called upon to show cause as to why-

i. The income received by the assessee for the room residential charges should not be classified under the category of "Business Support Service" as defined under sub-clause (zzzq) of clause (105) of Section 65 of the Finance Act, 1994 and why gross amount collected for providing this service amounting to Rs. 80,52,884/- should not be considered as taxable value under the same category.

ii. The Service Tax amounting to Rs. 9,93,798/- [Rupees Nine Lacs Ninety Three Thousand Seven Hundred Ninety Eight Only] not paid by them should not be recovered from them under the provisions of Section 73(1) of the Finance Act, 1994 read with Section 68 of the Finance Act, 2004 as amended.

iii. Interest at the appropriate rates as prescribed under Section 75 of the Finance Act, 1994 should not be recovered from them from the due date on which the Service Tax was liable to be paid till the date on which the said Service Tax is paid;

iv. Penalty should not be imposed upon them under Sections 76 of the Finance Act, 1994 for the failure to make the payment of the Service Tax payable by them;

v. Penalty should not be imposed upon them under section 77of the Finance Act, 19994 for the failure to include the taxable value in their relevant ST-3 returns with the Service Tax department within the stipulated time.

vi. Penalty under Section 78 of the Finance Act, 1994, as amended, should not be imposed on them for suppressing the value of taxable services and material facts before the department resulting into non-payment of Service Tax and Education Cess.

DEFENCE REPLY

14. The assessee filed their defense reply vide their letter dated 25th August 2010 wherein they submitted that during audit, the department had observed, that the assessee entered into a contract with M/s. Ahura Restaurants Pvt. Ltd. and M/s. Bhagwati Banquets & Hotels Limited to run

restaurant inside the club premises. As per contract the caterers were allowed to use the fully equipped kitchen alongwith all the machines and equipments the "cascade" restaurant, "splash" coffee shop, "food court", "new glass restaurant" and the banquet hall, the fountain lawn, party area, the portico, children park party etc. alongwith all the facilities like the air-conditioning, electrical installations, music systems, fans, lights and other fittings; that the club also provides the restaurant owner with crockery, cutlery, service ware, linen and kitchen utensils and banqueting materials; that as per contract the assessee retained an amount of Rs. 80,52,884/- for the period 16.06.2005 to 31.03.2009 from two canteen caterers; that the department considered this income falling under Business Support Service and considered the assessee liable to pay service tax of Rs. 9,93,798/-. They further submitted as per para No. 13 mentioning reasons to issue SCN, it is stated that "income received by the assessee for room residential charges should not be classified under the category of business support service"; that the adjudicating authority issued show cause notice in April 2010, without mentioning date of issue of SCN, demanding service tax of Rs. 9,93,798/-, interest under section 75 and penalties under sections 76, 77 and 78 of the Finance Act, 1994.

15. They further submitted that they are providing clubs or association service and registered with service tax department having service tax registration No. AAACR 7379 A ST001; that Club or Association means any person or body of persons providing services, facilities or advantages, for a subscription or any other amount, to its members

16. They further stated that taxable service means any service provided or to be provided to its members, by any club or association in relation to provision of services, facilities or advantages for a subscription or any other amount. They entered into contract to run restaurant is having their menu card and raised their invoices to the members of the club. As per contract the restaurant operator shall be allowed to use furnished restaurant, new coffee shop, the banquet hall, the lawn cafeteria, the verandah cafeteria alongwith all the facilities like the A/C's electrical installations, music system, fans, light and other fittings for the use of several members, jointly called club. The cost of electricity shall be borne by the club. The club shall provide the caterer with fresh crockery, cutlery, service ware, kitchen utensils, banqueting materials. The restaurant operator will serve food and beverage as per the time, items, quantity and rate fixed by the club to the members of the club. The caterer shall employ its own staff and use material to server food items to the persons visiting the restaurant; That the restaurant operator shall prepare food bills as per the menu for the consumption of food and beverages consumed by the members and same is required to be issued to individual member; that the restaurant operator had charged VAT on the said invoices to the member; that payment for the said bill can be made through cash or credit. All payments received shall be deposited with club on the next working day. If the members desire to enjoy credit facility the same can be extended on presentation of the members' smart card. Such bill alongwith a summary statement shall be submitted to the club by the restaurant operator. The caterer shall submit the consolidated summarized bills and sales statement, every 15 days stating the amount to be retained by the club and the amount to be reimbursed to the restaurant operator from the total amount of sales registered for the period. The same shall be made good by the club within 3 days of receipt of such summarized statement; that the club shall retain certain percent of the basic

food and beverage sold by the restaurant operator towards the use of electricity, water, maintenance and premises. The percentage retained by the assessee is variable and not a fixed amount; That during audit it was observed by the department that assessee retained Rs. 44,79,447/- for the period 16.06.2005 to 31.06.2008. The department further obtained information from the assessee and observed that during 2008-2009 an amount of Rs. 35,73,437/- was retained by the assessee; that in all the assessee retained Rs. 80,52,884/- for the period 16.06.2005 to 31.03.2009. According to the department this service falls under category of Business Support Service and the assessee was liable to pay service tax of Rs. 9,93,798/-.

17. They further submitted that the assessee is a club and their financial statements had been filed to ROC, Income Tax authorities annually. The said amounts were reflected in the books of accounts from time to time. The annual report along with financial statements were distributed to members; They further submitted service tax audit of the assessee had been conducted during the year 2009-10 for the period 16.06.2005 to 31.03.2009. Copy of the said report is attached; The department issued show cause notice in April 2010 demanding service tax of Rs. 9,93,798/-, interest under section 75 and penalty under section 76, 77 and 78 of the Finance Act, 1994.

18. The assessee further submitted that they have not rendered Business Support Service according to Section 65(104c) of the Finance Act, 1994, *"SUPPORT SERVICE OF BUSINESS OR COMMERCE means services provided in relation to business or commerce and includes evaluation of prospective customers, tele-marketing, processing of purchase order 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.*

Explanation: for the purpose 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."

19. They further submitted that the assessee had not provided any purchase order, information and tracking of delivery schedules, managing distribution and logistic, customer relationship management service, accounting and processing of transaction, operational assistance for marketing, formulation of customer service and pricing policies etc. Therefore the assessee is not covered under providing business support service; that assessee had not provided any infrastructural support service including providing office lounge with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security. Therefore the assessee had not rendered any service relating to business support service.

20. The assessee is registered as club service and paying service tax accordingly. The purpose of club is to serve their members and not to provide any service relating to business or commerce; the objective of the club to have restaurant in the premises is for the benefit of the members and not for the

benefit of the restaurant operator. Club never had object to support business of the restaurant operator.

21. They further submitted that amount retained is for meeting common expenses incurred by the club for restaurants on the basis of concept of mutuality; that they had retained certain amount towards meeting the expenses to be incurred by club towards electricity expenses, expenses on crockery, cutlery, kitchen utensils etc. supply of machines and equipments required in kitchen, maintenance of area allotted to the caterer for providing catering service in restaurant, new coffee shop, banquet hall, lawn cafeteria, verandah cafeteria, and expenses incurred for air-conditioners, fans, lights, music systems, electric installations etc. The retention of amount is not value of any service rendered by the assessee under business support service; that SCN issued without proper application of law and understanding the amount retained by the assessee.

22. The assessee retained amount from the restaurant operator from retaining certain percentage of food items sold by the restaurant operator. Where assessee had not received any amount, but on the basis of doctrine of mutuality; that in the SCN it is mentioned that the income received by the assessee is for room residential charges. This indicates that SCN issued either with prejudicial mind without understanding the transaction or without application of law.

23. They further submitted that amount retained by the assess is not suppression; that as per proviso to section 73(1) of the Finance Act, 1994 extended period can be invoked only by a reason of suppression of facts. The assessee is a company incorporated under section 25 of the Companies Act, 1956 as non-profit making company whose annual accounts were filed with Registrar of Companies, Department of Company Affairs, Government of India, Income Tax department, Department of Revenue, Government of India. The same amounts had reflected in these financial statements, there is no change in the facts which were submitted to the Service Tax audit parties. The intention of the assessee was not to suppress any facts, and hence proviso to section 73(1) of the Finance Act, 1994 is not applicable.

24. They further submitted that simultaneous imposition of penalty under both sections 76 and section 78 of the Finance Act, 1994 and not permissible. Section 78 was amended under Finance Act, 2008 with effect from 10.05.2008 give legal form of above said judgements ad proviso added to section 78 as provided also that if the penalty is payable under this section, the provisions of section 76 shall not apply; in case of Assistant Commissioner of Central Excise v. Krishna Poduval (2006) 3 ST3 96 (Kerala High Court), justifying penalty under both sections 76 and 78 nullified. The honourable CESTAT Delhi in the case of Opus Media & Entertainment v. CCE (2007) 10 STJ 259 (CESTAT – Del) held that where in the cases penalty under section 78 has been imposed, no penalty under section 76 was imposable. Therefore imposition of penalty under both sections is not correct.

25. They further submitted that they are not liable to pay interest and penalties. The SCN is required to be quashed on this basis itself that the assessee is not covered under category of business support services and not liable to pay service tax. Therefore, te assessee is not liable to pay interest and various penalties imposed on them.

26. They also submitted vide their letter dt. 10.03.2011 that the Assessee is a non-profit company registered under section 25 of the Companies Act, 1956. The Assessee is a member club without any shareholders recoup expenses. The assessee is therefore a mutual undertaking which does not earn profit as understood in commercial parlance and does not carry on any trade or business. Hence, members and club both are same entity; that the Assessee club had also obtained registration of operating restaurant for their members from Government of Gujarat, copy of the said registration is enclosed; that as per the concept of mutuality club and members are the same and by giving their own kitchen, furniture to prepare and serve food is not to support business of the other but for one's own consumption; that the SCN failed to establish how the assessee had supported to caterers in their business and provide service. The SCN had been issued without providing under which limb of support service of business or commerce the assessee falls and just because the assessee had retained certain amount, it is not enough to establish charges framed in the SCN. The assessee had not supported in any way to the caterer but had made an arrangement of running full fledge restaurant for their own use; that the service being treated as support service of business or commerce there must be three parties i.e. service provider, service receiver and service supported.

27. They submitted that there is/was no service provider – but the assessee club had established restaurant in their own premises for their personal use. Hence, for amounts retained by the club from collective payment to be made by members to the restaurant operator is not support service as members and club is not different. Further they requested todrop the proceedings sought to be initiated by the SCN No. F.No. STC/4-10/O&A/10-11/989 dated 20.04.2010. The adjudicating authority decided the Show Cause Notice under OIO dated 21.03.2011 and dropped the proceedings initiated under show cause notice on merits. Department filed appeal before the Com(A) which was decided by the Com(A) found that principal activity i.e.running of restaurant has been undertaken by two parties while support was provided by the club in the form of providing all support service. Hence the activity is covered under Business Support service and accordingly confirmed the demand of Rs.9,93,798/- vide OIA dated 17.10.2011. The assessee filed appeal before the Hon"ble CESTAT remanded back the matter to the adjudicating authority vide order dated 13.09.2022.

28. In this connection, the assessee further submitted that a certain portion of revenue has been retained by the assessee from the caterers gets got covered under the taxable service provided in relation to support service of business or commerce. On going through the definition of Business Support Service, any transaction between two parties to be made liable to service tax, it has to be ensured that the taxable service should be covered withinthe meaning of the definition. Thus, for any transaction between the two parties to be made liable to service tax, It has to be ensured that the taxable service should be covered within the meaning of the definition as contained above. It follows from the above definition that the following essentials also needs to be satisfied:

a. The Transaction entered between the two parties should be a Service.

And

b. The Service Should be in relation to the support of the business Or commerce as defined vide Section 65(104c).

29. They further stated that on careful reading of the definition of support service of business and commerce, it can be seen that the words *"services provided in relation to the business or commerce"*are used. However, the Assessee is not into any business, the Assessee is club. Activities by the club for its member are excluded from the scope of service tax on the basis of principle of mutuality. Therefore, when the service is not in respect of business or commerce the same cannot be treated as support service and hence the same is outside the purview of Levy of Service tax .Moreover,Hon'ble Mumbai Tribunal in the case of M/s Royal Western India Turf Club Ltd Vs CST Mumbai [2012 (11) TMI 526 - CESTAT, MUMBAI] held that the activities of the Appellants to make available space within the premises of the club by way of stall for a consideration cannot be taxed under Business Support Service.(Copy of Judgment is enclosed as Annexure-F).Accordingly, the amount shared by the Restaurant Operator(s) cannot be taxed as not covered under the scope of taxable services in relation to Support of the business or commerce.

30. The Assessee submits that the same issue in the Assessee's own case for the subsequent period has been decided in their favour by the Hon'ble Commissioner (Appeals) Ahmedabad. The Assessee is retaining some amount from the gross amount collected from its members to meet the expenses occurred for water, electricity and maintenance for given assets. All payment received from members in respect of food are deposited with club. In case a member to desire to enjoy credit facility the same can be extended on presentation of member's smart card by the club. That the Assessee is not involved in to provide services pertaining to evaluation of prospective customers, telemarketing, processing of purchase order, information and tracking of delivery schedules, managing distribution and logistic, customer relationship management set-vice, accounting and processing of transaction, operational assistance for marketing, formulation of customer service and pricing policies etc. That the presence of the assesse ehas not been seen in rendering service such as infrastructural support service including providing office lounge with office utilities; lounge, and reception with competent personal to handle messages, secretarial services, internet and telecom facilities, penalty and security to their caterers. Hence, they cannot be covered under the business support service. That the facilities of food and beverage by Assessee through the said caterers were meant for their members and their guest only not for independent third party. In other words, whatsoever services provided by the Assessee through the said caterers were to their members only. That the Hon'ble High Courts and Hon'ble Tribunals in several decisions have held that. Member and club both are same entity. Principally there should be existence of two sides/entities for having transaction as against consideration. In a member's club, there is no question of two sides. Members and club both are same entity. One may be called as principal when the other may be called as agent, therefore, such transaction in between themselves cannot be recorded as Income, sale or service as per applicability of the revenue tax of the country. Hence, members club not liable to pay service tax in allowing its

members to use its space as mandap. That any service rendered by a club to its members is in the nature of self service in as much as there can be no club without its members. That the intention of the Assessee for carrying out any activity is needed to be seen while deciding the tax implications on the same the activity carried out by the Assessee club is not of commercial nature as it is carried out only for the benefits of its members. Therefore, the Assessee made agreement with restaurant operators to provide food and beverages to the members of the club only hence, this cannot be covered under the definition of "Business Support Service."

31. The Assessee is member's club and make available facilities exclusively for its members. The Assessee does not carry a business or trade, it is therefore, a mutual undertaking which does not earn profit. The club and members are same entity. The larger bench of the Hon'ble Supreme Court in Our own case of State of West Bengal v. Rajpath Club LtdCivil Appeal No. 7773 of 2019 arising out of SLP (C). No. 26883 of 2013 where it has held that any transactions between members of incorporated club is out of the purview of Taxes i.e. it is neither supply of goods nor supply of services. The club has also obtained restaurant licence for their members from government of Gujarat. As per concept of mutuality "Club" and "member" are same and by giving their own kitchen, furniture, fixtures to prepare and serve food is not to support business of other but for once own consumption. The objective of club to have restaurant in the premises is for the benefit of the members and not for the benefit for the caterers. On careful reading of the definition of support service of business and commerce, it can be seen that the words *"services provided in relation to the business or commerce"* are used. However, the Assessee is not into any business, the Assessee is club. Activities by the club for its member are exempt on the basis of principle of mutuality. Therefore, the first few words are very important in order to tax the transaction under support service. Thus, when the service is not in respect of business or commerce the same cannot be treated as support service and hence the same is outside the purview of Levy of Service tax .The assesee has retained certain amount towards meeting the expenses to be incurred by the club towards Gas expense, electricity expense, crockery, cutlery, kitchen utensils, supply of machines and equipment etc.The retention amount is not the value of service rendered by the assesee under business support service and therefore not liable to service tax.

32. Here, in the given case SCN is issued extending the prescribed limitation period by invoking the proviso to Section 73(1) of The Finance Act, 1994 on 26th April, 2010 for the period May, 2006 to March, 2009.Intention to evade the payment of service tax is one of the basic ingredients which need to be established before the department can invoke the larger period of limitation for enforcing the demand of service tax. It is something more than mere non-payment of service tax. (Span Commercial Co. v. CCE Ahmedabad-I.Final Order No. A/10185/2020 Dt. 14.01.2020)The SCN is issued solely based on the information reported in the Annual Accounts and hence allegation that there is Suppression of the Facts cannot be sustained.(Rolex Logistic Private Limited - CESTAT Banglore - (2009-2013-STR-1470))SCN fails to prove malafide intention/ Suppression of facts at the hand of the appellant. Burden of proving the same lies on the one who alleges the same. (Uniworth Textiles Ltd. - 2013 (288) E.L.T.161 (S.C.)SCN has not shown any positive act done by the Appellant which proves the intention of Non-payment of service tax. (Tata

Consultancy Services Limited – Supreme Court)The SCN has failed to appreciate the fact that tax paid under reverse charge is available as Cenvat credit and therefore, the taxpayer is not going to benefit from not paying such tax. The extended period of limitation is not invocable. This is for the simple reason that throughout the audit proceedings, the appellant has diligently submitted the information sought by the Team. Accordingly, we hereby request you to kindly go through the entire submission and grant us personal hearing before passing the Order.

PERSONAL HEARING:

33. The personal hearing was granted to the assessee on 26.05.2023 which was attended by Shri Bishan R Shah, CA on behalf of the assessee. During the personal hearing, they has submitted his written submission on dated 30.01.2023 re-iterated the same at the time of personal hearing. Further he requested to drop the Show Cause Notice.

DISCUSSION AND FINDINGS:

34. The proceedings under the provisions of the Finance Act, 1994 and Service Tax Rules, 1994 framed there under are saved by Section 174(2) of the Central Goods & Service Tax Act, 2017 and accordingly I am proceeding to adjudicate the SCN.

35. I have carefully gone through the facts of the case, material on record and the submissions made by the assessee. I have also gone through the SCN No.STC/4-10/O & A/10-11 dated 18.10.2010, Order-in-Original No. 22/STC-AHD/ADC(MKR)/2010-11 dated 21.03.2011 & OIA No.269/2011(STC) K.ANPAZHAKAN/COMMR(A)/AHD dated 14.10.2011& CESTAT order No. A/11124/2022 dated 13.09.2022.

36. The brief issue involved in the matter was that the during the course of audit, it was observed that the assessee is members club and for providing food and beverages facilities to its members in the club, they entered into contract with M/s. Ahura Restaurants Pvt. Ltd. since 2003 and with M/s. Bhagwati Banquets & Hotels Ltd since 13.02.2007 to run canteens inside the club premises on contract basis. As per these contracts, for running the business of canteen, the caterers are allowed to use the fully equipped kitchen along with all the machines and equipments, the Cascade restaurant, Splash coffee shop, food court, new glass restaurant, the banquet hall, the fountain lawn party area, the Portico, Children park party etc. along with all the facilities like to air-conditioning, electrical installations, music systems, fans, lights and other fittings. The club also provides the caterer with crockery, cutlery, service ware, linen and kitchen utensils and banqueting materials. The club retained 10% of the basic food and beverage bill amount and additional 4% when the sale exceeded Rs. one crore per annum, of the caterer (M/s. Ahura Restaurants Pvt. Ltd.) and retained 13% in the first year and thereafter 14% for the remaining period of the basic food and beverage bill of M/s. Bhagwati banquets & Hotels Ltd. towards the use of premises, electricity, water and maintenance.

37. Since the club provided facilities to the said two caterers for running their catering business inside the club premises, the department was of the view that the assessee is liable to pay service on the portion retained by the club and accordingly SCN No.STC/4-10/O & A/10-11 dated 18.10.2010 was issued to the assessee which was adjudicated vide Order-in-Original No. 22/STC-AHD/ADC(MKR)/2010-11 dated 21.03.2011 wherein the case was decided in favour of the assessee by observing that it is affair between club and its members and the club is providing restaurants services to its members, and in such situation allegation of providing business support service does not sustain merits. Aggrieved with the OIO, the department filed appeal with Com(A) and Com(A) vide OIA No.269/2011(STC) K.ANPAZHAKAN/COMMR(A)/AHD dated 14.10.2011 confirmed the SCN by classifying the services under Business Support Service. However, the assessee had filed an appeal before the Hon"ble CESTAT and the CESTAT vide its Final Order No. No. A/11124/2022 dated 13.09.2022 has remanded back the matter to the adjudicating authority for reconsidering the matter by applying judgment of the Hon'ble Supreme Court in the case of Calcutta Club Ltd vis-à-vis the facts of the case.

38. Primarily, the grounds on which the matter has been remanded back is that the representative of the assessee had argued before the Tribunal that the issue on taxability of membership of Club or Association Service has been settled by the Larger bench of Hon'ble Supreme Court in the case of State of West Bengal vs. Calcutta Club Ltd [2019-TIOL-449-SC-SC-ST-LB], wherein they were one of the litigant before the Hon'ble Supreme Court. Thus, the Tribunal observed that the said judgment was not available at the time of adjudication, therefore, the same needs to be re-considered on the basis of the law laid down by the Hon'ble Supreme Court. Relevant paras of the Tribunal's order dated 13.09.2022 are reproduced for better comprehension.

> *"02. Shri Bishan Shah, learned chartered accountant appearing on behalf of the appellant at the outset submits that on the issue of taxability of Membership of Club or Association Service, the same is settled by the larger bench of Hon'ble Supreme Court in the case of State of West Bengal Vs. Calcutta Club Ltd.- 2019-TIOL-449-SC-ST-LB. He submits that the appellant was also one of the litigant before the Hon'ble Supreme Court. He submits that as per the Hon'ble Supreme Court judgment the present liability of service tax is not sustainable.*
>
> *04. We have carefully considered the submissions made by both the sides and perused the records. We find that the issue related to taxability of Club Membership was under litigation before various forums. Finally, the hon'ble Supreme court in the case of Calcutta Club Ltd (supra) the larger bench has decided the issue. We are of the view that though the issue is settled as per the Hon'ble Supreme Court judgment, each case has to be re-considered applying the judgment of the hon'ble Supreme Court viz-a-viz the facts of each case.*
>
> *4.1 Therefore, in our considered view the present issue needs to be reconsidered by the adjudicating authority on the basis of the law laid down by the Hon'ble Supreme Court vis-à-vis facts of each case therefore, we set aside the impugned order and remand the matter to the adjudicating authority for passing a fresh order. All the issues are kept*

open. Since the appeal pertain to the period 2012 and the period involved is 2005-06 to 2008-09, the adjudicating authority is expected to pass a denovo order within a period of two months from the date of this order."

39. Thus, I find that as per the direction of the Tribunal, the facts of the present case has to be examined under the law laid down by the Hon'ble Supreme Court, accordingly, the issue regarding the applicability of service tax on services rendered by the Club or Association of person or body of person to their members. The Show Cause Notices alleges that the club is providing infrastructural services to the two caterers engaged by them for the services of their members are falls under the category of Business Support Service and therefore they are liable to be taxed. In this connection I would like to go through the definition of Business Support service

(105) "taxable service" means any [service provided or to be provided], -

(zzzq) to any person, by any other person, in relation to support services of business or commerce, in any manner;

Definition of Business Support Service:

[(104c) "support services of business or commerce" means 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, E26[operational or administrative assistance in any manner], formulation of customer service and pricing policies, infrastructural support services and other transaction processing.

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;]

40. In this connection, the assessee contended that on careful reading of the definition of support service of business and commerce, it can be seen that the words service provided in relation to business or commerce are used. However the assessee is no into any business, the assessee is club. Activities by the club for its members areexcluded from the scope of service tax on the basis of mutuality. Therefore when the service is not in respect of business or commerce the same cannot be treated as support service and hence the same is outside the purview of levy of service tax.

41. In this connection, on perusal of the records, I find that the assessee is a member club. They are providing food and beverage facilities to their members in the club for which they entered into contracts with two caterers M/s.Aura Restaurant P.Ltd and M/s.Bhagwati banquets & Hotels Ltd to run the restaurant in the said club premises. They have provided allfacilities such as kitchen alongwith all the machines and equipments, the Cascade restaurant, Splash coffee shop, food court, new glass restaurant, the banquet hall, the fountain lawn party area, the Portico, Children park party etc. along with all the facilities like to air-conditioning, electrical installations,

music systems, fans, lights and other fittings. The club also provides the caterer with crockery, cutlery, service ware, linen and kitchen utensils and banqueting materials. The assessee have retained some money toward water, electricity and maintenance which was mutually between them and the restaurant as per the agreement. I further the find that the food and beverages by the assessee through the said caterers were meant for their members and their guest only and not for any outsider. Hence it can be concluded the service are provided by the club and received by its members.

42. On going through the judgement of the Hon'ble Supreme Court in the case of State of West Bengal Vs. Calcutta Club Ltd.- 2019-TIOL-449-SC-ST-LB, it is seen that the Apex court has, after deliberating its own decisions delivered earlier, decisions of various High Courts and 46 amendment to Constitution of India, decided the issue regarding levy of service tax on Club/Association as defined under Section 65(25a) (w.e.f. 16.06.2002) of Finance Act, 1994. Under Section 65(25a), **"club or association"** was defined as under:

> ***Section 65(25a): "club or association"*** *means any person or body of persons providing services, facilities or advantages, for a subscription or any other amount, to its members,* ***but does not include*** *–*
>
> *(i)* ***anybody established or constituted by or under any law for the time being in force,*** *or*
> *(ii) any person or body of persons engaged in the activities of trade unions, promotion of agriculture, horticulture or animal husbandry, or*
> *(iii) any person or body of persons engaged in any activity having objectives which are in the nature of public service and are of a charitable, religious or political nature, or*
> *(iv) any person or body of persons associated with press or media.*

And under Section 65(105)(zzze), the "taxable service" was defined as follows:

> *"Taxable Service", means any services provide-*
>
> *65(105) (zzze)- to its members by any club or association in relation to provision of services, facilities or advantages for a subscription or any other amount."*

Further, the paras of decision of the Apex Court, which I find relevant to the present matter, are reproduced for ready reference.

> ***29.*** *Given the differences pointed out in Cricket Club of India (supra) between clubs registered as Companies under Section 25 of the Companies Act and other companies, it is clear that the ratio decidendi in the judgment in Bacha F. Guzdar (supra) would not apply to such clubs - there being no shareholders, no dividends declared, and no distribution of profits taking place. Such clubs, therefore, cannot be treated as separate in law from their members.*
>
> ***30.*** *The doctrine of mutuality as applied to clubs is elaborately discussed in Bangalore Club v. Commissioner of Income Tax and Anr., (2013) 5 SCC 509. In discussing the fact that in members' clubs there is a complete identity between contributors and participators, this Court held :*

"16. On this aspect of the doctrine, especially with regard to the non-members, Halsbury's Laws of England, 4th Edn., Reissue, Vol. 23, Paras 222 and 224 (pp. 152 and 154) states :

"222. General features of mutual trading. - ... Where the trade or activity is mutual, the fact that as regards certain activities, certain members only of the association take advantage of the facilities which it offers does not affect the mutuality of the enterprise.

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224. Clubs, etc. - Members' clubs are an example of a mutual undertaking; but, where a club extends facilities to nonmembers, to that extent the element of mutuality is wanting."

17. Simon's Taxes, Vol. B, 3rd Edn., Paras B1.218 and B1.222 (pp. 159 and 167) formulate the law on the point, thus :

"... it is settled law that if the persons carrying on a trade do so in such a way that they and the customers are the same persons, no profits or gains are yielded by the trade for tax purposes and therefore no assessment in respect of the trade can be made. Any surplus resulting from this form of trading represents only the extent to which the contributions of the participators have proved to be in excess of requirements. Such a surplus is regarded as their own money and returnable to them. In order that this exempting element of mutuality should exist it is essential that the profits should be capable of coming back at some time and in some form to the persons to whom the goods were sold or the services rendered....

***

It has been held that a company conducting a members' (and not a proprietary) club, the members of the company and of the club being identical, was not carrying on a trade or business or undertaking of a similar character for purposes of the former corporation profits tax.

***

A members' club is assessable, however, in respect of profits derived from affording its facilities to non-members. Thus, in Carlisle and Silloth Golf Club v. Smith (Surveyor of Taxes), [(1913) 3 KB 75 (CA)], where a members' golf club admitted nonmembers to play on payment of green fees it was held that it was carrying on a business which could be isolated and defined, and the profit of which was assessable to income-tax. But there is no liability in respect of profits made from members who avail themselves of the facilities provided for members."

18. In short, there has to be a complete identity between the class of participators and class of contributors; the particular label or form by which the mutual association is known is of no consequence. Kanga and Palkhivala explain this concept in The Law and Practice of Income Tax (8th Edn., Vol. I, 1990) at p. 113 as follows :

"1. Complete identity between contributors and participators. - '... The contributors to the common fund and the participators in the surplus must be an identical body. That does not mean that each member should contribute to the common fund or that each member should participate in the surplus or get back from the surplus precisely what he has paid.' The Madras, Andhra Pradesh and

Kerala High Courts have held that the test of mutuality does not require that the contributors to the common fund should willy-nilly distribute the surplus amongst themselves : it is enough if they have 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 similar association or used for some charitable objects."

Rowlatt, J.'s observations in Thomas (Inspector of Taxes) v. Richard Evans & Co. Ltd., (1927) 1 K.B. 33 were then referred to as follows :

> *"... But a company can make a profit out of its members as customers, although its range of customers is limited to its shareholders. If a railway company makes a profit by carrying its shareholders, or if a trading company, by trading with the shareholders even if it is limited to trading with them, makes a profit, that profit belongs to the shareholders in a sense, but it belongs to them qua shareholders. It does not come back to them as purchasers or customers; it comes back to them as shareholders upon their shares. Where all that a company does is to collect money from a certain number of people — it [does not matter] whether they are called members of the company or participating policyholders - and apply it for the benefit of those same people, not as shareholders in the company, but as the people who subscribed it, then, as I understand Styles case [New York Life Insurance Co. v. Styles (Surveyor of Taxes), (1889) LR 14 AC 381 : (1886-90) All ER Rep. Ext. 1362 : (1889) 2 TC 460 (HL)], there is no profit. If the people were to do the thing for themselves, there would be no profit, and the fact that they incorporate a legal entity to do it for them makes no difference; there is still no profit. This is not because the entity of the company is to be disregarded; it is because there is no profit, the money being simply collected from those people and handed back to them, not in the character of shareholders, but in the character of those who have paid it. That, as I understand [it], is the effect of the decision in Styles case [New York Life Insurance Co. v. Styles (Surveyor of Taxes), (1889) LR 14 AC 381 : (1886- 90) All ER Rep. Ext. 1362 : (1889) 2 TC 460 (HL)]."*

Given these observations, it is clear that if persons carry on a 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. This judgment was also followed by this Court in Income Tax Officer, Mumbai v. Venkatesh Premises Cooperative Society Limited, (2018) 15 SCC 37. 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.

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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 DwarkadasKhetan 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.***

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.*

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.***

43. The Hon'ble Apex Court has discussed the definition of "Club or Associations" as defined under Section 65(25a) in para 58 under its judgement. Then under Para-80, the Apex Court has held that the expression "body of persons" appearing in the definition and which are incorporated entities, have been expressly excluded under Section 65(25a)(i) of the Finance Act, 1994. The Apex Court has also held that in case of service to its member, there is an absence of existence of another person and one can not provide service to self. The apex court has also discussed the term "established" and "Constituted" in detail in its judgment at para -72. From the decision of the Apex Court, it is apparent that the clubs or an incorporated body of person providing services to its members is out of the purview of service tax prior to 1st July 2012 and also in negative list regime.

44. As can be seen from the decision of Hon'ble Apex Court that the member's club and its members are identical entities or same persons. Hence, it can be safely construed that club is also recipient of services of the caterers and in the same way, allowing the use of fully equipped kitchen alongwith all the machines and equipments and other infrastructures to caterers by the club is for providing services to self only. In the instant case, the intention of assessee for carrying out any activity is to be considered. In this case the activity i.e. providing food and beverages to its members is not commercial in

nature as it is carried out only for the benefit for its members. Therefore the assessee made the agreement with restaurant operators to provide the food and beverages to members and their guests of the club only and therefore the activity cannot be considered under the definition of business support service. In view of the definition of the Business Support Service, I do not find that the assessee are involved in providing services pertaining to 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 etc. Further the assessee is also not involved rendering any infrastructural support services including providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security to their caterers. From the above, it is clear that the service is rendered by the club to its members only and therefore will not fall under the definition Business support service.

45. I further find that the Business support service is the service in relation to commerce or business. In this connection, the assessee contended that they are not into any business, they are club, the activities carried out by the club for its members are not in the nature of business or commerce. As the members and club are of single entity there are no two sides involved in this case also i.e the service receiver and service provider. The club is providing foods and beverages to its members. Since the club and its members are same entity the question of service tax does not arise. Therefore the activities in dispute are also not attracting any service tax as these are not covered under the definition of business support service as alleged in the Show Cause Notice. Since the club and members are same entity the question of providing service does not arise.

46. It is the undisputed facts that the assessee is member's club and they are incorporated under Companies Act, 1956 (under Section 25 as observed by the Apex Court in para 55); therefore in view of the aforementioned decision of Hon'ble Supreme Court, the services provided by the assessee being incorporated Members' club to their members do not fall under the purview of the service tax.

47. It is pertinent to mention here that, in respect of services/ facilities availed by the guest of the members of the club, the assessee has stated that the services of the clubs were not meant for general public, it was for members and guests of the member only. They have also stated the general public has no access to the club unless they are associated the members.In this regard, I find from the SCN that it mentions about receiving of income from member and guest of their members and not from the general public.

48. As regards the demand of service tax of Rs. 9,93,798/- confirmed under "Business Support Service" the assessee has contested that their objective is to provide the facilities to their member, accordingly they had made agreement with restaurants and whenever, members wish to use the premises of club, they need services from the restaurants and members were to pay to the restaurants. The restaurants had paid agreed amount to the assessee club. They have further argued that as per the principle of mutuality, club and

members are same. Hence engaging the decorators is providing facilities to oneself.

49. The Apex Court, in para 76 of the its decision, after deliberating various judgement of the Apex Court/High Court on doctrine of mutuality, has observed that *"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"*. Therefore, it is seen that Members of the club and Members' club are identical.

50. As contested by the assessee and discussed earlier, non-member was not having any access to the club without being associated with members and in case of the guest of the members, invoices were being issued in the name of the members. Further, nothing contrary to the arguments advanced by the assessee, is available on records. Accordingly, I am of the considered view that the services of the restaurant operators were to be utilised by the members or guests of the members only. In view of the judgement of the Apex Court, it can be said that the person (club) who have granted the exclusive rights to the restaurants and user of services of restaurant are same person. Accordingly, receiving the money from restaurant by the assessee club, is like receiving some part of money back from the payment made to the restaurants. Hence, on the basis of above factual matrix, I am of the view that thetransaction between the restaurants and the assessee can not be said for business support services to the restaurants or assessee can not be said to be agent of the restaurants. Merely receipt of income in financial records does not make it taxable under service tax. Thus, I find that the activity of the assessee can not be classified to be "Business Support Service". I therefore hold that no service tax is leviable under the category of Business Support Service, on the amount received by the assessee from restaurants.

51. In this regard, I find that the subject has sought demanding of service tax of 9,93,798/- on the gross amount collected by the assessee for providing service under the category of "Business Support Service" as defined under sub-clause (zzzq) of clause (105) of Section-65 of the Finance Act, 1994. Honoring the above mentioned decisions of the Hon'ble Supreme Court, I find that SCN is foundation of any departmental proceedings and the department has to build up the case on it. Accordingly, I find that the conforming of the demand under "Business Support Service", is not sustainable in law as the same being legally not correct. Therefore, I find that the demand of service tax amounting to Rs. 9,93,798/- deserves to be dropped on this count also.

52. Therefore applying the ratio of the decision of the Hon'ble Apex Court in the matter of Calcutta Club, I find, in the instant case also, that the demand of service tax of Rs. 9,93,798/- on income from under category of " Business Support Service" as proposed under the said SCN, is liable to be dropped as the assessee being incorporated members' club, services provided to their members is out the purview of levy of service tax under category of "Business Support Service" as defined under Section 65(105)(zzzq) read with Section 65(25a).

53. From the above factual matrix, legal provision in force at the material time and documentary evidences produced by the assessee and matter

as settled by the Hon'ble Supreme Court, I find that that the assessee is not liable to pay service tax on services provided to their members as they being incorporated members' club, services provided to their members is out the purview of levy of service tax under category of "Business Support Service" as defined under Section 65(105)(zzzq) read with Section 65(25a). Accordingly, I hold that assessee is not liable to pay service tax as confirmed under Order in Appeal No. 22/STC-AHD/ADC/MKR/2010-11 dated 21.03.2011 by the Appellate Authority in the subject SCN No. STC/4-10/O&A/10-11 dated 20.04.2010. Thus, the subject demand is liable to be dropped on merits being incorrect and legally not sustainable. Further, since there is no short payment of tax by the assessee, as alleged in the SCN/OIA, accordingly no penalty is imposable under Section 76,77, 78 as proposed/imposed in the impugned SCN/OIA. Similarly, no interest is leviable from the assessee under Section 75.

54. In view of the above discussion and findings, I pass the following order:

ORDER

55. I hereby drop the demand of service tax of Rs. 9,93,798/- (Rupees Nine Lakh Ninety Three Thousand Seven Hundred Ninty Eight only) confirmed against M/s.Rajpath Club Ltd, Sarkhej-Gandhinagar Highway, Ahmedabad-380058 vide Order In AppealNo.269/2011(STC)/K.ANPAZHAKAN /COM(A).AHD DATED 14.10.2010passed by the Com (A),Central Excise, Ahmedabad, which was remanded back by the CESTAT, Ahmedabad Vide Final Order No. A/11124/2022 dated 13.09.2022 for re-consideration of the said demand in light of the decision of the Hon'ble Supreme Court in the matter of M/s. Calcutta Club Ltd. vs. State of West Bengal.

56. Accordingly Show Cause Notice No.STC/4-10/O & A/10-11 dated 20.04.2010 is disposed off.

(MUKESH RATHORE)
Additional Commissioner
Central Excise & CGST,
Ahmedabad North.

F.No. STC/15-51/DENOVO/2022 Dated-31.05.2023

By Regd. Post AD./Hand Delivery

To
M/s. Rajpath Club Limited,
Sarkhej Gandhinagar Highway,
Ahmedabad.

Copy for information to:

1. The Commissioner, CGST & CX, Ahmedabad North.
2.. The Dy./Asstt.Com., DIV-VI, CGST & CX, Ahmedabad North.
3. The Supdt. Range-I, Division-VI, CGST & CX, Ahmedabad North
4. The Superintendent, Systems, CGST & CX, Ahmedabad North
5. The Guard File