आयुक्त का कार्यालय केंद्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,अहमदाबाद उत्तर, कस्टम हॉउस(तल प्रथम) नवरंगपुरा- अहमदाबाद ,380009		Office of the Commissioner of Central Goods & Services Tax & Central Excise, Ahmedabad North, Custom House(1st Floor) Navrangpura, Ahmedabad-380009
फ़ोन नंबर./ PHONE No.: 079-2754 4599 फैक्स/ FAX : 079-2754 4463 E-mail:- oaahmedabad2@gmail.com		

निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. F.NO. STC/15-50/O&A/Denovo/2022 DIN : 20230664WT000041464C

आदेश की तारीख़ / Date of Order : 13.06.2023

जारी करने की तारीख़ / Date of Issue : 13.06.2023

द्वारा पारित/Passed by -

उपेन्द्र सिंह यादव / UPENDRA SINGH YADAV

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR– 01 /2023-24

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

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

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 , द्वितीय तल, बाहुमली भवन असरवा, गिरधर नगर पुल के पास, गिरधर नगर, अहमदाबाद, गुजरात 380004 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 संलग्न की जाएँ)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 हैंचार प्रतियों में दाखिल , उसकी भी उतनी ही ,की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उनमें से कम से क) प्रतियाँ संलगन की जाएंगीम 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 माँग ड्राफ्ट के जरिए अदा की जाएगी तथा यह माँग 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 1.00रूपया 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:

Subject- Denovo Proceedings initiated vide CESTAT, Ahmedabad's Final Order No. A/11123/2022 dated 13.09.2022, arising out of Order In Original No. STC/55/COMMR/AHD/2011 dated 15.12.2011 passed by the Commissioner, Service Tax, Ahmedabad (SCN No. STC/4-95/O&A/10-11 dated 18.10.2010) against M/s Karnavati Club Limited, Sarkhej-Gandhinagar Highway, Ahmedabad-380058.

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR– 01 /2023-24

M/s Karnavati Club Limited, Sarkhej-Gandhinagar Highway, Ahmedabad-380058 (hereinafter referred to as the 'Assessee' for the sake of brevity), were issued SCN F. No. STC/4-95/O&A/10-11 dated 18.10.2010 by the then Commissioner, Service Tax, Ahmedabad. The said SCN was adjudicated by the then Commissioner of Service Tax vide Order In Original No. STC/55/COMMR/AHD/2011 dated 15.12.2011. The demand of Service Tax of Rs. 83,05,307/- was confirmed on merit by classifying the services rendered to be "Club or Association Service" and "Business Auxiliary Service". The rest of the demand of service tax of Rs. 10,17,943/- was dropped by the Commissioner vide the aforementioned order in original. The subject OIO issued by the Commissioner as adjudicating authority was accepted by the department on 23.05.2011. However, aggrieved by the Order In Original confirming the demand of Rs. 83,05,307/- passed by the Commissioner, the assessee had preferred an appeal against the same in CESTAT. The Hon'ble Tribunal vide its Order No. A/11123/2022 dated 13.09.2022 has remanded the matter for passing a denovo order in light of the Hon'ble Supreme Court's Order in the case of M/s. Calcutta Club Ltd.

BRIEF FACTS OF THE CASE PERTAINING TO THE SCN ISSUED TO M/S KARNAVATI CLUB LIMITED, ARE AS FOLLOWS:

M/s. Karnavati Club Limited, Sarkhej-Gandhinagar Highway, Ahmedabad- 380058 (hereinafter referred to as "the assessee") were engaged in providing taxable service and were having Service Tax Registration No. AAACK7865QST001. It also appeared that they were providing Membership of Club or Association (MCA) services.

2. Definition of taxable service provided by Club or Association was given under sub-clause (zzze) of clause (105) of Section-65 of the Finance Act. 1994, accordingly, "taxable service means any service provided or to be provided to their members, by any club or association in relation to provision of services, facilities or advantages for a subscription or any other amount." This service had been brought under levy of service tax with effect from 16.6.2005.

3. It was further observed that clause (25a) of Section 65 of Finance Act. 1994 defined "club or association" as follows:

(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] any body established or constituted by or under any law for the time being in force; or

[ii] any person or body of persons engaged in any 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 services and are of a charitable, religious or political nature; or

[iv] any person or body of persons associated with press or media.

4. The term "advantage" was found to be defined in Oxford Advanced Learners Dictionary as "a thing that helps you to be better or more successful than other people". Therefore, it appeared that the term would cover certain special facilities (like Billiards Room, Squash Court, Swimming Pool. Tennis Court, Gym etc.) provided by clubs for the benefit of its members. Even providing of the residential facilities to the guest of members (non members) appeared to be falling under the purview of advantage.

5. The term "facility" was also found to be defined under Oxford Advanced Learners Dictionary as "buildings, services, equipment's. etc. that are provided for a particular purpose like sports, leisure, etc." Thus, it appeared that it would cover reading room, library, cafeteria, bar, etc. which were generally provided by the club or association for the benefit of its members.

6. Hence, the amount received by the Club from its members and their guests for using the facility or advantage appeared to be covered by the definition of taxable service under the category of "Membership of Club or Association Service", and the assessee appeared liable to pay Service Tax on this income. However, they had not paid any Service Tax on this income under the category of "Membership of Club or Association Service".

7. During the course of audit for the period from 2005-06 to 2008-09, the records maintained by the service provider were verified and it was noticed that the service provider was providing facilities like Entertainment activities, Games and also providing Residential Rooms, Lawn & Hall etc. to the guest of members (i.e. Non Members). but had not paid service tax on the amount received by them on the above activities. As per Para 10 of Board's Circular No. B1/6/2005-TRU Dated 27-7-2005, all these activities of the assessee appeared to be covered under the definition of Club Activities, therefore, these activities appeared to be

falling under Section 65(105)(zzze) of the Finance Act, 1994. The said assessee vide letter No. 4502/KCL/2010-11 dated 13-07-2010 had submitted that all these activities were non taxable. Therefore, it appeared that the service provider had contravened the provisions of Rule 6 of the Service Tax Rules 2004 by way of non payment of service tax. The details of the activity and taxable amount received year wise appeared as under:

Sr. No.	Description Activity	Year	Taxable Amount (Rs.)	Service Tax Payable	Remarks
1	Club Activity	2005-06	1,56,12,092	15,92,433/- @10.20%	Assessee's view is that activities fall under Non Taxable activities
2	---- do---	2006-07	2,73,51,426	33,47,815/- @12.24%	
3	---- do---	2007-08	1,34,94,483	1667918/- @12.36%	
4	---- do---	2008-09	1,28,41,368	1587193/- @12.36%	
		Total	**6,92,99,369**	**81,95,359/-**	

8. letter No.SD-01/4-28/SCN/Karnavati (Audit)/AR-III/10-11 dated 20.09.2010 followed by reminder dated 30.09.2010 was written to the assessee to provide income received for the year 2009-10 on providing facilities like Entertainment activities, Games, Residential Rooms, Lawn & Hall etc to the members and their Guests(i.e. Non members) on which they had not paid service tax. The assessee vide their letter dated 08-10-2010 and 15-10-2010 provided the requisite figures of income received on the above mentioned club services for the year 2009-10. The details regarding the income on which the assessee appeared liable to pay service tax is as under:

Sr. No	Name of the Service	Income in Rs.
1	Entertainment	5,51,284
2	Annual Subscription (Penalty from members)	15,91,241
3	Lawn & Hall Charges	65,37,500
4	Residential Room Charges	1,30,290
5	Library Income	1,60,337
	Total	89,70,652

It appeared that the assessee had not paid Service tax on the above income of Rs.89,70,652/- for the year 2009-10.

9. In view of the above, it appeared that the assessee was providing facilities like Entertainment activities, Games and also providing Residential Rooms. Lawn & Hall etc. to the guests of members (Non Members) and had realized total income amounting to Rs. 7,82,70,021/- (Rs. 6,92,99,369/- +Rs. 89,70,652/-) for the services rendered by them to the members and their guests on which no

Service Tax had been paid. The assessee was required to pay Service Tax of Rs. 91,19,336/- (Rs. 81,95,359/- +RS. 9,23,977/-) under Section 68 of the Finance Act, 1994. However, the assessee had failed to deposit this Service Tax amounting to Rs. 91,19,336/- in the Government Treasury by way of suppressing their income shown in their ST-3 Returns. Hence, the same appeared recoverable from them under the proviso to Section 73(1) of the Finance Act, 1994.

10. From the above facts, it appeared that the said assessee had 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 had failed to determine and pay the service tax and education cess within the stipulated time period on the income received for the residential charges; (ii) Section 70 of the finance Act. 1994 read with Rule 7 of the Service Tax Rules, 1994 in as much as they had failed to include the taxable value in their relevant ST-3 returns with the Service Tax department.

11. Further, since the assessee had failed to credit the tax or any part thereof to the account of the Central Government within the period prescribed, they were 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.

12. The assessee also appeared to have rendered themselves liable for penalty under Section 76 of the Finance Act, 1994 for their failure to pay Service Tax as discussed hereinabove, thus rendering them liable to penalty under Section 76 of the Finance Act, 1994. They also appeared to have rendered themselves liable for penal action under Section 77 of the Finance Act, 1994 for their failure to include the taxable value in the relevant ST-3 returns filed 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.

13. Moreover, in addition to the contravention, omission and commission on the part of the assessee as stated in the foregoing paras, it appeared, that, they had wilfully suppressed the facts, nature and value of service and they had failed to include the taxable value in their relevant ST-3 returns filed with the Service Tax Department. Thus, the contravention, omission

and commissions on the part or the assessee appeared to have rendered them liable for penalty under Section 78 of the Finance Act, 1994.

14. The assessee appeared 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 appeared invokable in this case. The said service tax not paid by them appeared to be demandable and recoverable from them under the proviso to Section 73(1) read with Section 68 of the Act by invoking extended period of five years in as much as the said assessee had suppressed the facts from the department by not declaring the value of taxable services and material facts before the department. The assessee appeared to have failed in paying the service tax and hence they appeared liable to pay the interest on the above amount of service tax under Section 75 of the Finance Act, 1994. All these acts of contraventions 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 on the part of the assessee appeared to be punishable under the provisions of Section 76, 77 and 78 of the Finance Act, 1994 as discussed supra.

15. Therefore a Show Cause Notice bearing F.No. STC/4-95/O&A/10-11 dated 18.10.2010 was issued by the Commissioner of Service Tax, Ahmedabad to M/s. Karnavati Club Limited, Sarkhej-Gandhinagar Highway, Ahmedabacl-380058 asking them to show cause as to why-

(i) The income received by them for the services provided to their members and guests of members (i.e. non members) as discussed above should not be classified under the category of "Club and Association Service" as defined under sub-clause (zzze) of clause (105) of Section-65 of the Finance Act, 1994 and why gross amount collected for providing this service amounting to Rs. 7,82,70,021/- should not be considered as taxable value under the same category.

(ii) The Service Tax amounting to 91,19,336/- [Rupees Ninety One Lakhs Nineteen Thousand Three Hundred Thirty Six Only] on the above value not paid by them should not be recovered from them under the proviso to Section 73(1) of the Finance Act, 1994 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 Section 76 of the Finance Act, 1994 for their failure to make the payment of the Service Tax payable by them;

(v) Penalty should not be imposed upon them under section 77 of the Finance Act, 1994 for their 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, which resulted into non-payment of Service Tax and Education Cess.

Defence Reply and Personal Hearing (at the time of adjudication proceedings held before the then adjudicating authority) :

16. M/s. Karnavati Club Ltd vide their letter dated 28.06.2011 had submitted reply to the show cause notice wherein they had denied the charges levelled against them.

16.1 They had submitted that the SCN was issued in sheer disregard of facts on record which clearly show that they had rendered services as "Club Service", "Mandap Keeper service", "renting of immovable properties service", "Business Auxiliary Service, "Health club service". Their activities cannot be classifiable as a "Club Service" only by any stretch of imagination and accordingly the demand under the SCN was not sustainable on merit. Further, there was no fraud, or collusion or wilful misstatement or suppression of facts or contravention of any of the provisions of the Act, or the rules made there under with intent to evade payment of service tax on their part and hence the demand was not sustainable on the ground of limitation also as the SCN was issued after a limitation period of one year from the relevant date. SCN was issued to them on 18.10.2010 covering period from 1.4.2005 to 31.03.2010 which clearly showed that the same was issued beyond a period of one year from the relevant date.

16.2 They had further submitted that the SCN was vague in its contents as it straight away had alleged suppression at para 14 without in any manner stating or substantiating any positive act of fraud, collusion, wilful misstatement, suppression or intent to evade payment of service tax on their part.

16.3 They had submitted that they were registered with the Service Tax department under "Club Service", "Mandap Keeper service", "renting of immovable properties service", "Business auxiliary service", "Health club service". They had also filed ST-3 returns regularly with the department. These facts were clearly in the knowledge of the department since 1998 onwards, therefore issuing a SCN in the year 2010 alleging suppression of the fact clearly suggests that the SCN was illegal unfair uncalled for and capricious. In the light of above they requested to drop the proceedings under SCN.

16.4 SCN was proposed to levy service tax on the following income.

Nature of service	2005-06	2006-07	2007-08	2008-09	2009-10
Receipt from non-Member	2717895	4307914	2042350	1168580	551284
Penalty income from Member	---	3070046	2023955	1845547	1591241
Game Income	2437065	4462499	4161106	1539599	---
Coaching Income	83440	105387	70942	87349	160337
Residential Room Charges	7011610	10159780	139530	132960	130290
Exclusive right Income Lawn & Hall Charges	3362082	5245800	5056600	8067333	6537500

16.5 On the above service incomes service tax has been demanded under the category of "Club Service" without going into the nature of service & without classifying them in proper category.

They submitted that the salient issues to be addressed here were as under:-

(i) Whether Receipt from non member, penalty from member, game of chance income, coaching income, and Residential room renting income is classifiable as "club service" or not.

(ii) Whether receipt from non member of club was taxable prior to applicability of Finance Act, 1994 as amended vide finance Act, 2011 w.e.f. 01.05.2011 or not.

(iii) Whether penalty recovered from member of club for delayed payment or dues to club was in nature of service income or not.

(iv) Whether income from game of chance was taxable prior to 16.05.2008 or not.

(v) Whether Renting of room income was taxable under "club service" or not.

(vi) Whether income by giving exclusive rights to the decorators was taxable or not.

(vii) Whether coaching income (recreation coaching) was exempt from service tax levy or not.

(viii) Whether demand for the extended period u/s. 73(1) (a) invokable or not.

(ix) Whether demand can be made on 'KCL', when it self levy on 'RCL' has been challenged & matter has been pending with the Hon'ble Gujarat High court.

17. They reproduced the basic provision of the classification of service as under:

"SECTION 65A Classification of taxable services –

(1) For the purposes of this Chapter, classification of taxable services shall be determined according to the terms of the sub-clauses of clause (105) of section 65;

(2) When for any reason, a taxable service is, prima facie, classifo1ble under two or more sub-clauses of clause (105) of section 65, classification shall be effected as follows :-

(a) The sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description:

(b) composite services consisting of a combination of different services which can not be classified in the manner specified in clause (a). shall be classified as if they consisted of a service which gives them their essential character, in so for as this criterion is applicable;

(c) When a service cannot be classified in the manner specified in clause (u) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration.]'

They submitted that as per the terms of the sub-clauses of clause (1 05) of section 65; their various service incomes are classifiable as under:

Nature of Service	Service classable under	basic provision of section
Game of chance	Business Auxiliary service	Sec. 65 (19)
Renting of room income	Renting of immovable Pro. Ser.	Sec. 65 (90a)
Exclusive right income	mandap keeper service	Sec. 65 (105) (M)
Coaching income	Commercial training & Coa. Ser.	Sec. 65(105)(22C).

17.1 In view of the above, they had submitted that demand on the income from game of chance, coaching income, residential room charges income & exclusive right income under the category of the "club service" was not sustainable and requested to drop the proceeding in the interest of justice.

17.2 They had further submitted that the Definition of club/ Association service stated that receipt from members only is the taxable activity and receipts other than members were not covered under the service tax net. They reproduced the definition of "club or association" service as below: .

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) Any body 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:"

They had also reproduced the relevant extracts of Budget 2011-12 as under:

"Budget 2011-12 - Changes and Clarifications on Service tax F.No. No. 334/3/2011-TRU, dated 28-2-2011 (Extracts)"

3.4 Club or Association Service [section 65(105)(zzze)]: The scope of the service is proposed to be expanded to include service provided to non-members as well".

They had submitted that in view of the above it was clear that prior to 01.05.2011 income from non member was not taxable So they requested to drop the proceeding in the interest of justice.

17.3 Regarding taxability on the penalty income from the member for the late payment of dues towards club membership & facilities they had submitted that Penalty income was not a service income, but the compensation for the delayed payment due to the club. As such income was not in lieu of providing of any service, demand of service tax on such income had to be dropped

17.4 Receipt from Housie (game activity):- which was relating to activities & game organization Income which came in to the purview of service tax under the head business auxiliary service w.e.f. 16-05-2008 & onwards. They had reproduced the provisions as under:-

"Budget 2008-2009 - Changes and clarifications on Service tax M.F. (D.R.) Letter D.O.F. No. 334/1/2008-TRU, dated 29-2-2008 (Extracts) Government of India Ministry of Finance (Department of Revenue) Central Board of Excise & Customs, New Delhi

The Finance Minister had introduced Finance Bill, 2008 in the Lok Sabha on 29th February, 2008. Changes relating to service tax are in, -

(i) Clause 85 of the Finance Bill, 2008, and

(ii) Notification Nos. 4/2008-Service Tax to 15/2008-Service Tax, all dated 1st March, 2008.

Changes were being proposed in the provisions of the Finance Act, I 994,

"5.4 Business Auxiliary Service:

5.4.1 Services provided in relation to promotion or marketing of service provided by the client is leviable to service tax under business auxiliary service. Organization and selling of lotteries are globally treated as supply of service. Lotteries (Regulation) Act, 1998 enables State Governments to organize, conduct or promote lotteries. Lottery tickets are printed by the State governments and are sold through agents or distributors. Tickets art: delivered by the State Government to the distributors at a discounted price as compared to the face value of the tickets. Services are provided by the distributors or agents in relation to promotion or marketing of lottery tickets are leviable to service tax under the existing business auxiliary service.

5.4.2 Lotteries fall under the category of games of chance. Games of chance are known under various names like lottery, lotto, bingo etc. and are also conducted through internet or other electronic networks.

5.4.3 To clarify and removal of doubts, an explanation is added under business auxiliary service stating that services provided in relation to promotion or marketing of games of chance organized, conducted or promoted by the client are covered under the existing definition of business auxiliary service. Amendment is only for removal of doubts and field formations are therefore, requested to ensure that service tax is collected on such services".

They submitted that income prior to 16-05-2008 was not liable to service tax. They had discharged duty on game activity after the Finance Act, 2008 amendments".

17.5 "Receipt for renting of residential rooms:-They were in receipt of Residential Properties (Room) rent income for renting of residential properties which was not covered under service tax net up to date. Only Renting of commercial properties had been covered under renting of immovable properties. They reiterated basic definition of renting as under.

"Renting of immovable property service : Renting of immovable property for use in the course or furtherance of business or commerce [section 65(105)(zzzz)] is the taxable service. Renting includes letting. leasing, licensing or other similar arrangement. The contract is for right-to- use an immovable property for a consideration. Immovable properties excluded from the scope of this service are:

- Residential properties
- Residential accommodation such as hotels, hostels, boarding houses. holiday accommodation, tents, camping facilities
- Vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes.
- Vacant land, whether or not having facilities clearly incidental to the use of such vacant land

- Land used for educational, sports, circus, entertainment and parking purposes"

Similarly, renting of immovable property in the following cases were also excluded from the scope of this taxable service, namely:-

(i) Renting of immovable property by a religious body
(ii) Renting of immovable property to a religious body,
(iii) Renting of immovable property to an educational body. other than commercial training or coaching centre. Commercial coaching or training centre is defined under section 65(27).

Where renting of immovable property is a single composite contract involving part of property for use in commerce or business and part of it for residential/accommodation purposes, for the purpose of levy of service tax under this sub-clause, entire property under the contract is treated as property for use in commerce or business and accordingly the total value of the contract shall be the taxable value".

In their case value of renting for the commercial purpose & residential purpose were separate one. They were claiming the deduction from the service tax for the renting of residential room.

17.6 Regarding exclusive rights Income, they submitted that they were not liable to pay service tax as per the case law of CKP Mandal decided by the Hon'ble High Court of Bombay reported at 2006 (4) S.T.R. 183 (Bom.)

On the above basis, it was well settled that exclusive rights were not covered under the service tax net up to that date.

17.7 Regarding coaching income, which was related to the sports coaching the same was exempt from service tax levy.

"Service tax exemption to commercial training or coaching services provided by vocational/recreational training institute

(b) a recreational training institute,
to any person, from the whole of the service tax leviable thereon under section 66 of the said Act.
Explanation. - For the purposes of this notification, -

(i) "recreational training institute" means a commercial training or coaching centre which provides training or coaching relating to recreational activities such as dance, singing, martial arts or hobbies.
[Notification No. 24/2004-S.T., dated 10-9-2004]"

In view of the above, they had claimed exemption from the levy of the service tax. They had earned recreational coaching income, which was not taxable and therefore had requested to drop the demand of service tax on the coaching income.

17.8 With regard to invoking the extended period and issuing SCN on 18.10.2010 for the period 01.04.2005 to 31.03.2010 they had relied on the judgment of Pushpam Pharmaceutical Company v/s Collector of Central Excise Bombay [1995 Supp (3)SCC 462]. They had submitted that in view of above and the fact that there was no deliberate intention on their part, not to disclose the correct information or to evade payment of duty, they had filed service tax return regularly.

17.8.1 They had stated that Section 73 & 78 were not invokable against them. They had submitted that it would be clear from their submission that there was a reasonable cause for not discharging their statutory liability due to interpretation of law and general trade practice. They had deposited the amount of service tax with interest even though they were not liable for service tax. In view of the above, they had requested to take a lenient view and drop the proceedings in the interest of justice.

17.9 They had also submitted that they had already challenged the levy in the Hon 'ble High court of Gujarat vide writ petition no.17102 of 2005 and requested to drop the proceedings in the interest of justice up to & until their appeal is decided by tile Hon'ble Gujarat High Court.

17.10. They had requested to give relief as per Section 80 of the Finance Act, 1994. They had relied on such Judgment in support of their case:

1. CCE, Bhopal V. Thyrocare Services [2006(4) STR 200 (Tri.-Del.)]
2. CCE, Jaipur V. Sikar Ex-Serviceman Welfare Co-Op. Soc Ltd. [2006(4) STR 213 (Tri.-Del.)];
3. Suri Colour Labs (P) Ltd. CCE, Meerut [2006(4) STR 96 (Tri.- Del.)];
4. Surat Municipal Corpn. V. CCE, Surat [2006(4) STR 44 (Tri.-Del.)]
5. BST Ltd. V. CCE, Cochin [2006(4) STR 40 (Tri.-Bang.)]
6. Cosmic Dye Chemical V. CCE, Bombay [1995(75) ELT 721(SC)]
7. CCE, Ludhiana V. Silver Oak Gardens Resort [2008(9) STR 481 (Tri.-Del.)]
8. Arvind Motors V. CCE, Raipur [2008(9) STR 464 (Tri.-Del.)],
9. ETA Engineering Ltd. V. Chennai [2003(3) STR 429 (Tri.-LB)]
10. Smitha Shetty V, CCE, Bangalore [2003(156) ELT 84 (Tri.-Bang.)]
11. Cement Marketing Co. - 1980 (6) ELT 295 (SC):

12. CCE, Mumbai-IV V. Damnet Chemicals P. Ltd. [2007 (216) ELT 3(SC)], Hon. Supreme Court
13. CCV. Seth Enterprises [1990(49) ELT 619 (Tri.-Del.)]

18. A personal hearing was held on 15.11.2011 before the then Commissioner, Service Tax, Ahmedabad, which was attended by Shri Vipul Kandhar, Chartered Accountants on behalf of the assessee. He had explained the case in brief and reiterated the submissions already made in reply to the show cause notice. He had also given a bunch of papers including Bills raised to the club members. party wise ledger and copy of Property tax bills of Ahmedabad Municipal Corporation in support of the reply. He was asked to furnish Chartered Accountant's certificate in support of the bifurcation of figures given by him in his written submission. He had submitted a certificate dated 13.12.2011 issued by DGSM & Co. Chartered Accountants giving bifurcation of figures under different heads.

19. The then adjudicating authority vide OIO NO. STC/55 /COMMR/ AHD/2011 dated 15.12.2011 had decided the SCN F. No. STC/4-95/O&A/10-11 dated 18.10.2010. The adjudicating authority had ordered as under:

(i) Ordered to consider amount of Rs. 1,24,17,381/- (Rupees One crore twenty four lakh seventeen thousand three hundred and eighty one only) received by the said assessee under the head 'receipts from non members' during the years from 2005-06 to 2009-10 as taxable value under the category of "Membership of Club or Association Service";

(ii) Confirmed the demand of service tax of Rs. 14,34,366/- (Rupees Fourteen lakh thirty four thousand three hundred and sixty six only) on the above value and ordered to recover the same from the said assessee under proviso to Section 73(1) of the Finance Act,1994;

(iii) Ordered to consider amount of Rs. 1,25,35,219/- (Rupees One crore twenty five lakh thirty five thousand two hundred and nineteen only) received by the said assessee under the head "Game of chance income" during the years from 2005-06 to 2009-10 as taxable value under the category of "Membership or Club or Association Service";

(iv) Confirmed the demand of service tax of Rs. 14,92,763/- (Rupees Fourteen lakh ninety two thousand seven hundred and sixty three only) on the above value and ordered to recover the same from the said assessee under proviso to Section 73(1) of the Finance Act,1994;

(v) Ordered to consider amount of Rs. 5,07,455/- (Rupees Five lakh seven thousand four hundred and fifty five only) received by the said assessee under the head 'coaching income' during the ;-ears from 2005-06 to 2009-10 as taxable value under the category of "Membership of Club or Association Service";

(vi) Confirmed the demand of service tax of Rs. 57,489/- (Rupees Fifty seven thousand four hundred and eighty nine only) on the above value and ordered to recover the same from the said assessee under proviso to Section 73(1) of the Finance Act,1994:

(vii) Ordered to consider amount of Rs. 1,75,74,170/- (Rupees One crore seventy five lakh seventy four thousand one hundred and seventy only) received by the said assessee under the head 'Residential Room charges' during the years from 2005-06 to 2009-10 as taxable value under the category of "Membership of Club or Association Service";

(viii) Confirmed the demand of service tax of Rs.10,05,841/- (Rupees Twenty lakh five thousand eight hundred and forty one only) on the above value and ordered to recover the same from the said assessee under proviso to Section 73(1) of the Finance ActJ994;

(ix) Ordered to consider amount of Rs. 2,85,47,216/- (Rupees Two crore eighty five lakh forty seven thousand two hundred and sixteen only) received by the said assessee under the head "Exclusive Right Income Lawn & Hall Charges" during the years from 2005-06 to 2009-10 as taxable value under the category of 'Business Auxiliary Service';

(x) Confirmed the demand of service tax of Rs. 33,14,848/- (Rupees Thirty three lakh fourteen thousand eight hundred and forty eight only) on the above value and ordered to recover the same from the said assessee under proviso to Section 73(1) or the Finance Act,1994;

(xi) Ordered to recover interest on the above confirmed demand of Rs. 83,05,307/-(Rupees Eighty three lakh five thousand three hundred and seven only) [Rs. 14,34,366/- + Rs. 14,92,763/- + Rs. 57,489/- + Rs.20,05,841/- + Rs. 33,14,148/-] from the said assessee at the prescribed rate under Section 75 of the Finance Act, 1994;

(xii) Imposed penalty of Rs.200/- (Rupees Two hundred only) per day for the period during which failure to pay the tax continued, upon the said assessee under Section 76 of the Finance Act,1994 for the period from upto 17.4.2006;

Imposed penalty of Rs.200/- (Rupees Two hundred only) per day for the period during which failure to pay the tax continued. or at the rate of 2% of such tax, per month, whichever is higher, from 18.4.2006 till the date of actual payment of the outstanding amount of service tax upon the said assessee under Section 76 of the Finance Act, 1994, for the period upto 9.5.2008; provided further that the amount of penalty payable in terms of this section shall not exceed the service tax payable by the said assessee for the period upto 9.5.2008.

(xiii) Imposed penalty of Rs. 83,05,307/-(Rupees Eighty three lakh five thousand three hundred and seven only) on the said assessee under section 78 of the Finance Act,1994. In the event or the said assessee opting to pay the amount of service tax along with all other dues as confirmed and ordered to be

recovered within thirty days from the date of communication of this order, the amount of penalty liable to be paid by them under Section 78 of the Finance Act, 1994 shall be 25% of the said amount. However, the benefit of reduced penalty shall be available only if the amount of penalty is also paid within the period of thirty days from the communication of this order, otherwise full penalty shall be paid as imposed in the above order.

(xiv) Dropped the demand of service tax of Rs. 10,17,943/- (Rupees Ten lakh seventeen thousand nine hundred and forty three only) on the amount of Rs.85,30,789/- collected as "Penalty from Members" raised under the service category "Membership of Club or Association".

19.1. The Order in Original No. STC/55 /COMMR/ AHD/2011 dated 15.12.2011 (herein after referred to as "the said OIO") was accepted by the department on 23.05.2011. However, the assessee being aggrieved with the above OIO, had filed an appeal before Tribunal and Tribunal vide its Final Order No. A/11123/2022 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. 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]. He had also argued that the assessee was 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.

DEFENCE:

The assessee vide their letter dated 30.01.2023 have tendered their written submission, where they have interalia stated that:

- Audit had observed that during FY 2005-06 to 2009-10, they had not paid service tax on providing facilities like Entertainment Activities, Games and also providing Residential Rooms, Lawn & Hall etc to their member (including their guests).
- The guests of the members have no independent existence in the eyes of the assessee club management and one can neither use any facility of the club or even can not let the invoice be raised on their name unless they are associated with the members. In other words, the general public can

not have access to the facilities provided by the assessee club until they are associated with the members.

- As far as the activities carried out by them during FY 2005-06 to 2009-10 are concerned, the service tax was not leviable as pronounced in their own case by Larger bench of the Apex Court in Civil Appeal No. 7773/2019.
- The Apex Court has held that companies and cooperative societies which are registered under the respective Acts, are not included in the service tax net. They being registered under Companies Act, 1956, they were not required to discharge any service tax on the subject income received during the concerned period.
- In their own case, the demand of service tax for the period FY 2007-08 to 2011-12 has been set aside by the Commissioner(Appeals) on the sole ground that "the activities performed by the assessee have been held to be outside the purview of Service tax hence demand raised by way of output tax as well as disallowing Cenvat Credit become outside its purview". The matter was decided by the Commissioner(Appeals) vide OIA No. AHM-EXCUS-002-APP-1536-137/2019-20 dated 05.06.2020 in respect of OIO No. 46-47/STC/AHD/ADC(JSN)/2012-13 dated 21.02.2013 demanding service tax for the year 2010-11 & 2011-12.
- Further, the demand raised under the category of Club or Association Service for the period 2004-05 to 2008-09 has been set aside by the Commissioner(Appeals) vide OIA AHM-EXCUS-002-APP-138-2019-20 dt. 28.02.2020, where it is held that from the judgment of the Hon'ble Supreme Court that the clubs or body of persons providing services to its members is out of purview of the service tax prior to 1st July 2012 and also the same is in the negative list regime.
- The demand of service tax on Income earned under the head Exclusive Right Income & Hall charges can not be taxed under Business Auxiliary Service as pronounce by the Tribunal in case of M/s. Royal Western India Turf Club Ltd Vs. Commr. Service Tax, Mumbai [2012(11)TMI526-CESTAT], where the Tribunal has held that the activity of renting of premises to the Caterer /Book maker is not liable to be classified as "Business Support Service".
- They have also relied on the decision of Commissioner(Appeals) in their own case vide OIA No. AHM-EXCUS-002-APP-133-135/2019-20 dated 05.06.2020, where the Commissioner(Appeals) has held that "the Cenvat Credit can not be availed or utilised. In the present case, the club can not

be said to be a service provider to its members with any taxable output service. Hence, the Cenvat Credit Rules 2004 can not be made applicable".

The assessee vide their letter dated 02.03.2023 submitted the additional submission, wherein they have sated that:

- They were having objective to provide facilities to its members. For the same they had made arrangement with decorators. Members of the club whenever wish to use the premises of the club, they need services from the decorators and hence for the said service they were to pay certain amount to the decorators.
- The decorators had paid agreed amount to the assessee club. As per the principle of the Mutuality, club and members both are same. Hence, there is no third party involved as the amount paid by the members to the decorators at one hand and the decorator had given it to the club on the other hand meaning thereby the assessee club had never promoted any service of decorators, but facilities were provided to oneself and members in the particular.
- The Show cause notice was issued proposing to levy service tax under the category of "Club & Association Service" on income received by the assessee, whereas the demand has been confirmed under the head of Business Auxiliary Services. Thus evidently the adjudicating authority has travelled beyond the scope of the SCN. They have relied on the decision of the Apex Court in the case of M/s. Brindavan Beverages (P) Ltd [2007(213) ELT 487(SC)], wherein the Apex Court has held that the SCN is foundation of any demand and diverting from the allegation made in the SCN and confirming is totally incorrect. They have also relied on the following decisions:
    - CCE & Cus, Surat vs. Sun Pharmaceuticals Inds Ltd [2015(326) ELT 3(SC)]
    - Caprihans India Ltd Vs. CCE [2015 (325) ELT 632(SC)]
    - CC Mumbai Vs. Toyo Engineering India Ltd [2006(201)ELT 513(SC)]
- They have further stated that the demand is time barred.
- The assessee received the said amount not against rendering any service but as a sharing of receipt of the contractor for using their premises for providing decorative services to the clients. On the receipt on sharing basis no Service Tax can be charged as there is lack of Service Provider and Service recipient relationship. They have placed reliance on judgement pronounced in case of INOX LEISURE LTD. [2021 (10) TMI 893] by

CESTAT Hyderabad as affirmed by The Apex Court vide [2022 (3) TMI 1206].

PERSONAL HEARING:

20. The personal hearing was granted to the assessee on 30.01.2023 and 13.02.2023, but the same was not attended by the assessee. However, as per the oral request by the authorised representative of assessee, the personal hearing was held on 23.02.2023, which was attended by Shri Bishan Shah, CA on behalf of the assessee. During the personal hearing, he has referred to the defence reply dated 30.01.2023 and submitted that this being the remand matter and the matter already being decided by the Hon'ble Supreme Court, the current SCN needs to be dropped in the interest of justice. He has also submitted that the Commissioner(Appeals) has dropped two SCNs for different period on same grounds. Shri Bishan Shah, CA has also submitted the copy of judgement of the Tribunal [2012(11)TMI -CESTAT MUMBAI.

DISCUSSION AND FINDINGS:

21. 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/4-95/O&A/10-11 dated 18.10.2010 & Order-in-Original No. STC/55/COMMR/AHD/2011 dated 15.12.2011, which has been remanded back to the adjudicating authority vide CESTAT order No. A/11123/2022, dated 13.09.2022.

22. As per the SCN No. STC/4-95/O&A/10-11 dated 18.10.2010, the brief issue involved in the matter was that the audit had observed that the assessee was providing facilities like entertainment activities, Games, Residential Rooms, Lawn and Hall to their members and guests of their members, for which they had earned income of Rs. 7,82,70,021/- during FY 2005-06 to 2009-10. The said activities appeared to be falling under the category of service "Club & Association Service" under Section 65(105)(zzze) read with Section 65(25a) of the Finance Act, 1994 (the Act). Therefore, the assessee was issued the aforementioned SCN dated 18.10.2010 for demanding service tax of Rs. 91,19,336/- on the income Rs. 7,82,70,021/-received by them during FY 2005-06 to 2009-10 by way of classifying the service provided to their members and guests of members (i.e. non member) under the Category of "Club & Association Service".

23. The said SCN was adjudicated by the then Commissioner of Service Tax vide Order In Original No. STC/55/COMMR/AHD/2011 dated 15.12.2011.

The demand of Service Tax of Rs. 83,05,307/- was confirmed by classifying the services rendered to be "Club or Association Service" and "Business Auxiliary Service". The rest of the demand of service tax of Rs. 10,17,943/- was dropped by the Commissioner vide the aforementioned order in original. It is also observed that the adjudicating authority had relied on the certificate dated 13.12.2011 for quantification of demand of service. The said certificate was issued by DGSM & Co., Chartered Accountants giving the bifurcation of figures under different heads, on which the assessee had not paid service tax. Since, the data contained in the said certificate was based on trial balance of the assessee, the same was accepted by the then adjudicating authority for purpose of adjudication proceedings. The head wise details of income considered in the said OIO were as under:

TABLE-A

Head of Income	2005-06	2006-07	2007-08	2008-09	2009-10	Total
Receipt from non-Member	2730770	4307914	2430184	1187914	1760599	12417381
Penalty income from Member	0	3070046	2023955	1845547	1591241	8530789
Game of chance Income	2372015	4462499	4161106	1539599	0	12535219
Coaching Income	83440	105387	70942	87349	160337	507455
Residential Room Charges	7011610	10159780	139530	132960	130290	17574170
Exclusive right Income Lawn & Hall Charges	3362082	5245800	5056600	8345234	6537500	28547216
Total	15559917	27351426	13882317	13138603	10179967	80112230

The details of demand confirmed vis-à-vis classification ordered under the subject OIO were as under:

TABLE-B

Sr. No.	Heads Of Income	Taxable value	Demand confirmed (service tax Rs.)	Classification ordered	Remarks
1,	Receipt from non-Member	12417381	1434366	Club or Association service	---
2.	Penalty income from Member	8530789	0	Penalty not service	Demand of ST Dropped Rs.1017943/-
3.	Game of chance Income	12535219	1492763	Club or Association service	---
4.	Coaching Income	507455	57489	Club or Association service	---
5.	Residential Room Charges	17574170	2005841	Club or Association service	---
6.	Exclusive right Income Lawn & Hall Charges	28547216	3314848	Business Auxiliary service	
	Total	80112230	8305307		---
	Summary				
(a)	Total demand confirmed under Club & Association Service		4990459		
(b)	Total demand confirmed under Business Auxiliary service		3314848		

24. However, the assessee being aggrieved with the above OIO, had filed an appeal before Tribunal and Tribunal vide its Final Order No. A/11123/2022 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. 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."*

24.1 Thus, I find that as per the direction of the Tribunal, the facts of the present case have 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.

25. 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 46th 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.

***

224. Clubs, etc. - Members' clubs are an example of a mutual undertaking; but, where a club extends facilities to non members, 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....

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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.

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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 Dwarkadas Khetan and Co. v. CIT [(1956) 29 ITR 903, 907], was right in holding that the section could not be restricted in its application only to a firm which had been created by an instrument of partnership, and that it could reasonably and in conformity with commercial practice, be held to apply to a firm which may have come into existence earlier by an oral agreement, but the terms and conditions of the partnership have subsequently been reduced to the form of a document. If we construe the word "constitute" in the larger sense, as indicated above, the difficulty in which the Learned Chief Justice of the Calcutta High Court found himself, would be obviated inasmuch as the section would take in cases both of firms coming into existence by virtue of written documents as also those which may have initially come into existence by oral agreements, but which had subsequently been constituted under written deeds."*

73. *It is, thus, clear that companies and cooperative societies which are registered under the respective Acts, can certainly be said to be constituted under those Acts. This being the case, we accept the argument on behalf of the respondents that incorporated clubs or associations or prior to 1st July, 2012 were not included in the Service Tax net.*

76. *What has been stated in the present judgment so far as Sales Tax is concerned applies on all fours to Service Tax; as, if the doctrine of agency, trust and mutuality is to be applied qua members' clubs, there has to be an activity carried out by one person for another for consideration. We have seen how in the judgment relating to Sales Tax,* ***the fact is that in members' clubs there is no sale by one person to another for consideration, as one cannot sell something to oneself. This would apply on all fours when we are to construe the definition of "service" under Section 65B(44) as well.***

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.***

25.1 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.

26. It is an undisputed fact 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.

26.1 It is pertinent to mention here that, in respect of services/ facilities availed by the guest of the members of the club, the assessee vide their written submission dated 30.01.2023, 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 with 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. I find that the plea of the assessee were also found to be correct by the then adjudicating authority, as can be seen from para 26.2 of the said OIO, where in the then adjudicating authority on the basis of certain bills produced by the assessee, had observed that the bills were being issued in the name of the members even in case of services being utilised by the guest of member, thus it was observed by the adjudicating authority that the guest of members had no independent existence in the eyes of the club management and guest could neither use the facilities of the club without being associated with a member nor a bill could be raised in the name of guests. In view of this factual matrix, provision of services by the assessee club to the guest of the members were held to be services to members by the then adjudicating authority. Accordingly, the then adjudicating authority had confirmed the demand of service tax of Rs. 49,90,459/- (As per TABLE-B -Summary (a) above) under the category of service of "Club & Association Service" on the income received under the head of "Receipt From Non-Members", "Game of Chance Income", "Coaching Income" and "Residential Room Charges". From the above factual matrix, since the bill were being issued in the name of members in case of services being utilised by the guest of members and the there was no scope of getting services of club by general public without being associated with the member of the club, I am of the considered view that the services provided to the guest of member is amounting to services to the concerned member of the club. Since the Hon'ble Apex Court has ruled that the transaction between incorporated member's club and their members are out of purview of service tax, I find that assessee is not liable to pay service tax on income received under the head of "Receipt From Non-Members", "Game of Chance Income", "Coaching Income" and "Residential Room Charges". Thus, I hold that the demand of service tax of Rs. 49,90,459/- (Table B -summary (a) above), which was confirmed under the category of "Club & Association Service" vide earlier OIO No. STC/55/COMMR/AHD/2011 dtd. 15.12.2011, needs to be dropped.

26.2 As regards the demand of service tax of Rs. 33,14,848/- confirmed under "Business Auxiliary Service" on income of Rs. 2,85,47,216/- booked under the head of "Exclusive Right Income Lawn & Hall", the assessee vide their letter dated has contested that their objective is to provide the facilities to their member, accordingly they had made agreement with decorators and whenever, members wish to use the premises of club, they need services from the decorators and members were to pay to the decorators. The decorators 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.

26.2.1 In respect of the income from Exclusive Rights of Lawn & Hall Charges, the then adjudicating authority had also observed that the assessee, by giving the exclusive right to the decorators, had closed the door for other decorators of hirer's choice. Therefore, it was held that the assessee had rendered the service by promoting and marketing the business of decorators, and therefore amount received from the decorators was held to be the "commission", and the said amount also held to be liable to service tax. Accordingly, the demand of service tax of Rs. 33,14,848/- was confirmed under the category of "Business Auxiliary Service".

26.2.2 Looking to the facts of the case, a reference to the definition of "Business Auxiliary Service" under Section 65(19) of the Finance Act, 1994 is required to be considered. It reads as under:

> (19) *"business auxiliary service" means any service in relation to, —*
> *(i) promotion or marketing or sale of goods produced or provided by or belonging to the **client;** or*
> *(ii) promotion or marketing of service provided by **the client;** or*
> *[* * * *]*
> *(iii) any customer care service provided on behalf of **the client;** or*
> *(iv) procurement of goods or services, which are inputs for **the client;** or*
> *[**Explanation.** — For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]*
> *[(v) production or processing of goods for, or on behalf of, **the client;**]*
> *(vi) provision of service on behalf of **the client;** or*
> *(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision,*
>
> *and includes services as **a commission agent,** [but does not include any activity that amounts to manufacture of excisable goods].*
>
> *[**Explanation.** — For the removal of doubts, it is hereby declared that for the purposes of this clause, —*
> *(a) **"commission agent"** means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person —*

(i) deals with goods or services or documents of title to such goods or services; or
(ii) collects payment of sale price of such goods or services; or
(iii) guarantees for collection or payment for such goods or services; or
(iv) undertakes any activities relating to such sale or purchase of such goods or services;

26.2.3 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.

26.2.4. 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 decorators 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 decorators and user of services of decorators (members) are same person. Thus, it can be said that engaging of Decorators by the club (assessee) is for providing services to self. Accordingly, receiving the money from decorators by the assessee club, is like receiving some part of money back from the payment made to the decorators. Hence, on the basis of above factual matrix, I am of the view that the transaction between the decorators and the assessee can not be said for marketing or promoting the services of decorators or assessee can not be said to be agent of the decorators. 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 Auxiliary Service". I therefore hold that no service tax is leviable under the category of Business Auxiliary Service, on the amount received by the assessee from decorators.

26.2.5. I also find that the assessee has contended that the adjudicating authority has travelled beyond the scope of notice. In this regard, they have placed reliance on decision of the Hon'ble Supreme Court in the case of M/s. M/s. Brindavan Beverages (P) Ltd [2007(213) ELT 487(SC)], wherein the Apex Court has held that the SCN is foundation of any demand and diverting from the

allegation made in the SCN and confirming the same is totally incorrect. They have also relied on the following decisions:

- CCE & Cus, Surat vs. Sun Pharmaceuticals Inds Ltd [2015(326) ELT 3(SC)]
- Caprihans India Ltd Vs. CCE [2015 (325) ELT 632(SC)]
- CC Mumbai Vs. Toyo Engineering India Ltd [2006(201)ELT 513(SC)]

26.2.6. In this regard, I find that the subject SCN has sought demand of service tax of 91,19,336/- on the gross amount collected by the assessee for providing service amounting to 7,82,70,021/- under the category of "Club and Association Service" as defined under sub-clause (zzze) of clause (105) of Section-65 of the Finance Act, 1994. Therefore, the SCN had sought to classify all the activities under the category of "Club and Association Service" and there was no proposal at all to classify the service under "Business Auxiliary Service". Honouring 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 confirming of the demand by the then adjudicating authority under "Business Auxiliary Service", is not sustainable in law as the same is legally not correct. Therefore, I find that the demand of service tax amounting to Rs. 33,14,848/- deserves to be dropped on this count also.

26.2.7. 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. 33,14,848/- on income from "Exclusive Right Income Lawn & Hall Charges", under category of "Club & Association 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 of the purview of levy of service tax under category of "Club & Association Service" as defined under Section 65(105)(zzze) read with Section 65(25a).

27. 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 of the purview of levy of service tax under category of "Club & Association Service" as defined under Section 65(105)(zzze) read with Section 65(25a). Accordingly, I hold that assessee is not liable to pay service tax as demanded and confirmed

under Order in Original No. STC/55/COMMR/AHD/2011 dated 15.12.2011 by the then Adjudicating Authority in the subject SCN No. STC/4-95/O&A/10-11 dated 18.10.2010. 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/OIO, accordingly no penalty is imposable under Section 76 &78 as proposed/imposed in the impugned SCN/OIO. Similarly, no interest is leviable from the assessee under Section 75.

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

ORDER

I hereby drop the demand of service tax of Rs. 83,05,307/- as confirmed against M/s Karnavati Club Limited, Sarkhej-Gandhinagar Highway, Ahmedabad-380058 vide Order In Original No. STC/55/COMMR/AHD/2011 dated 15.12.2011(in SCN No. STC/4-95/O&A/10-11 dated 18.10.2010) passed by the then Commissioner of Service Tax, Ahmedabad, which was remanded back by the CESTAT, Ahmedabad Vide Final Order No. A/11123/2022 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.

(Upendra Singh Yadav)
Commissioner,
Central Excise & CGST,
Ahmedabad North.

By Regd. Post AD./Hand Delivery
F.No. STC/15-50/O&A/Denovo/2022 Date: .06.2023.

To

M/s Karnavati Club Limited,
Sarkhej-Gandhinagar Highway,
Ahmedabad-380058

Copy to:

1 The Principal Chief Commissioner of CGST & C. Ex., Ahmedabad Zone.
2 The Deputy/Assistant Commissioner, CGST & C.Ex., Division- VI, Ahmedabad North.
3 The Superintendent, Range-II, Division-VI, Ahmedabad North.
4 The Superintendent (System), CGST, Ahmedabad North for uploading on website.
5. Guard File.