(2012) 03 JH CK 0028

Jharkhand High Court

Case No: Writ Petition (T) No. 2388 of 2007

Ranchi Club Ltd.	APPELLANT
Vs	
Chief Commissioner of Central Excise and Service Tax, Ranchi Zone and Others	RESPONDENT

Date of Decision: March 15, 2012

Acts Referred:

- Bihar Finance Act, 1994 - Section 65, 65(105), 65(25), 65(67), 66

Citation: (2012) 3 JCR 123 : (2012) 3 JLJR 1 : (2012) 26 STR 401 : (2012) 36 STT 194 : (2012) 51 VST 369

Hon'ble Judges: Aparesh Kumar Singh, J

Bench: Single Bench

Final Decision: Allowed

Judgement

1. This writ petition has been preferred by Ranchi Club Limited for declaration that the Ranchi Club Limited is not covered under the Chapter V of the Bihar Finance Act, 1994 and, therefore, is not liable to pay service tax under "Mandap Keeper''s Services" or under the ''Club or Association Services" categories. The petitioner also prayed for order of prohibition against respondents, Central Excise Division, Ranchi from enforcing any of the provisions of the Service Tax Act i.e. chapter V of the Finance Act, 1994. This writ petition was heard and decided on 13.08.2007 by the Division Bench and, on the basis of the admissions of the learned counsel for both the parties, it has been held in the order dated 13.08.2007 that the petitioner is not liable to pay service tax under the provisions of Section 65(66)(67) of the Finance Act, 1994 when the services are utilized by the members of the club. However, it has also been held that the service provided by the petitioner-club to anyone other than the members, is liable for service tax. This order dated 13.08.2007 was challenged before the Hon''ble Supreme Court as well as by filing the review petition before this Court. During the pendency of Special Leave to Appeal (Civil) CC 4926 of 2008 before

the Hon''ble Supreme Court, the Review Petition No. 51 of 2008, preferred by the Revenue, was allowed by the Division Bench of this Court (in which one of us Justice Prakash Tatia was member) vide order dated 21.04.2011 and the order dated 13.08.2007 was set aside. In view of setting aside of the order dated 13.08.2007 by this Court itself, the Hon''ble Supreme Court disposed of the Revenue''s Special Leave to Appeal (Civil) CC 4926 of 2008, as nothing remained before the Supreme Court to be decided after setting aside of the order referred above. Now the matter has come up before this Court for hearing again the same issue.

2. As we have noticed that petitioner''s contention is that petitioner is a club and also registered company under the Companies Act, 1956. The petitioner is giving service to its members but the club is formed on the principle of mutuality and, therefore, any transaction by the club with its member is not a transaction between two parties. However, being a company, it may enter into a transaction with anybody, a 3rd person, not a member, then in that situation, this club becomes a legal entity and can certainly enter into any transaction and such transaction are not on the principle of mutuality and, therefore, may be liable to any tax as a transaction between two parties. However, when the club is dealing with its members, it is not a separate and distinct individual. It is submitted that in identical facts and circumstances, however, in the matter of imposition of sales tax, when the club was expressly included in the statutory definition of ''dealer'' under Madras General Sales Tax Act, 1959, so as to bring the club within the purview of taxing statute of the Madras Sales Tax, the Hon''ble Supreme Court, in the case of the Joint Commercial Tax Officer v. The Young Mens'' Indian Association, considered the definition of the ''dealer'' by which the club was declared "dealer" and after considering the definition of "sale" as given in the Act of 1959 and explanation-I appended to Section 2(n), specifically declaring the "sale" or "supply or distribution of goods by a club" to its members whether or not in the course of business was declared deemed to be a "sale" for the purpose of the said Act. In that situation, Hon''ble Supreme Court considered the issue that the club is rendering service or selling any commodity to its members for a consideration then whether that amounts to sale or not. Hon''ble Supreme Court held that it is a mutuality which constitutes the club and, therefore, sale by a club to its member and its services rendered to the members, is not a sale by club to the members. In sum and substance, the ratio is that for a transaction of sale, there must be two persons in view of this judgement as well as in view of the Full Bench Judgement of this Court delivered in the petitioner''s own case i.e., Commissioner of Income Tax v. Ranchi Club Limited reported in 1992(1)PLJR 252 (Pat) (Fb). The Full Bench of this Court while considering the identical issue in the matter of imposition of income tax, observed that no one can earn profit out of himself on the basis of principle of mutuality and held that income tax cannot be imposed on the transaction of the club with its members.

3. With the help of these two judgements, learned counsel for the writ petitioner submitted that the petitioner is a club and is rendering services to its members and the same principle of mutuality applies to the facts of the case in view of the reason that the language in the provisions of the Madras General Sales Tax Act, 1959 and the provisions under the Income Tax Act are para materia with the provisions which are sought to be applied against writ petitioner for levy of service tax.

4. Learned counsel for the respondents submitted that sale has its own meaning and service is entirely different transaction which cannot be equated with the sale in any manner. Learned counsel for the Revenue also relied upon the book "Principles of Statutory Interpretation" by Hon''ble G.P. Singh, the then Chief Justice, M.P. High Court (3rd Edition), wherein there is reference of a case wherein Hon''ble Bhagwati J. observed that, for construction of fiscal statute and determination of liability of the subject to tax, one must have referred to the strict letters of law. Learned counsel submitted that the statutory provisions are very clear which are Section 65 (25a), 65(105) (zzze) as well as explanation appended to Section 65. it is submitted that when the language of Section is absolutely clear then meaning of the statute in fiscal matter should be given according to the language and words used in the section and cannot be interpreted on the basis of some ideology or some impressions or with the help of some other enactments. Each of the taxing statute may have its own definition and meaning and they are required to be given effect to irrespective of the fact that meaning of the same word in different statute has been given differently. It is submitted that the Hon''ble Supreme Court in that fact situation of imposition of Sales Tax may have held that there cannot be sale by oneself to oneself and himself to himself but the club can certainly render the service to its members and tax is on service and the members are paying for the service to the club and, therefore, it is a service for consideration rendered by the club and is liable for the tax.

5. We have considered the submission of the learned counsel for both the parties and perused the facts of the case and the relevant provisions of law and the judgements which have been relied upon by the learned counsels for the parties.

6. Section 65 gives the definition for the purpose of the Chapter under the Finance Act, 1994 and for our purpose, relevant is Section 65(25a) which is 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) any body established or constituted by or under any law for the time being in force; or

(ii) any person or body or persons engaged in the activities of trade unions, promotions of agriculture, horticulture of animal husbandry; or

(iii) any person or body or 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;

7. The Sub Section (67) of Section 65 is as under :-

mandap keeper" means a person who allows temporary occupation of mandap for a consideration for organising any official, social or business function;

8. Another provision relevant for our purpose is Section 65(105)(zzze) which is as under :-

Section 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;

9. The explanation appended to Section 65 is as under :-

For the purposes of this section, taxable service includes any taxable service provided or to be provided by any unincorporated association or body or persons to a member thereof, for cash, deferred payment or any other valuable consideration.

10. As per Section 66 of the Finance Act, 1994, service tax is leviable at the rate specified in Section 66 itself and at the relevant time it was 12% of the value of the taxable service. Therefore, the service tax is leviable on the consideration charged for the services.

11. Since it is a plea of the writ petitioner, that the provisions of Madras General Sales Tax Act, 1959, particularly Section 2(g) and 2(n) as also the definition clauses of the said Act of 1959 which have been interpreted by the Hon''ble Supreme Court and the Hon''ble Supreme Court also has considered the explanation-I appended to Section 2(g), therefore, they are required to be considered. Section 2(b) of the Madras General Sales Tax Act, 1959 is as under :-

Section 2(b). a co-operative society, a club, a firm or any association which sells goods to its members is a dealer within the meaning of this clause

12. The definition of dealer as given in Section 2(g) of the Madras General Sales Tax Act, 1959 is as under :-

Section 2(g)." ''dealer'' means any person who carried on the business of buying, selling, supplying or distributes goods from or to its members for cash or for deferred payment or for commission, remuneration or other valuable consideration, shall be deemed to be a dealer for the purpose of this Act;

13. The definition of sale as given in Section 2(n) of the Madras General Sales Tax Act, 1959 is as under :-

Section 2(n). " ''sale'' with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of business for cash or for deferred payment or other valuable consideration.

14. The question which was considered by the Hon''ble Supreme Court in the case of The Joint Commercial Tax Officer, Harbour Division, II-Madras Vs. The Young Men''s Indian Association (Regd.), Madras and Others, was that whether the supply of various preparations by each club to its members involve a transaction of sale within the meaning of Sales of Goods Act, 1930. Hon''ble Supreme Court held that -

Thus in spite of the definition contained in Section 2(n) read with Explanation I of the Act if there is no transfer of property from one to another there is no sale which would be exigible to tax. If the club even though a distinct legal entity is only acting as an agent for its members in matter of supply of various preparations to them no sale would be involved as the element of transfer would be completely absent. This position has been rightly accepted even in the previous decision of this Court.

15. The Hon''ble Supreme Court held so after considering the English Law also and observed that the law in England has always been that members'' clubs to which category the clubs in the present case belong cannot be made subject to the provisions of the Licensing Acts concerning sale because the members are joint owners of all the club property including the excisable liquor. The supply of liquor to a member at a fixed price by the club cannot be regarded to be a sale. If, however, liquor is supplied to and paid for by a person who is not a bona fide member of the club or his duly authorised agent, there would be a sale. With regard to incorporated clubs a distinction has been drawn. Where such a club has all the characteristics of a members'' club consistent with its incorporation, that is to say, where every member is a shareholder and every shareholder is a member, no licence need to be taken out if liquor is supplied only to the members. If some of the shareholders are not members or some of the members are not shareholders, that would be the case of a proprietary club and would involve sale. Proprietary clubs stand on a different footing. The members are not owners of or interested in the property of the club and then the Hon''ble Supreme Court observed that above view was accepted by the various High Courts in India. The Hon''ble Supreme Court, relying upon other judgements held that members'' club is only structurally a company and it did not carry on trade or business so as to attract the corporation profit tax. Therefore, in spite of specific inclusion of the club in the definition of the dealer in the Madras General Sales Tax Act, 1959 by providing an explanation to include the clubs which are selling or distributing the goods to its members for cash have been included in the definition of dealer and by explanation I to Section 2(n) defining the sale the statutory provision was made to include any transfer of property by club to its members to be a sale for the purpose of the said Act, Hon''ble Supreme Court categorically held that in absence of two, there cannot be transaction of transfer of property.

16. The Full Bench of Patna High Court in the case of writ petitioner itself i.e., in the case of Commissioner of Income Tax Vs. Ranchi Club Limited (Supra), after finding that Ranchi Club is a limited company incorporated under the Indian Companies Act, considered the various clauses of the main objects of the club and relying upon various judgements, in paragraph 12 observed as under :-

12. Therefore, by applying the principle of mutuality Members" Clubs always claim exemption in respect of surplus accruing to them out of the contributions received by the clubs from their members. But this principle cannot have any application in respect of the surplus received from non-members. It is not difficult to conceive of cased where one and the same concern may indulge in activities which are partly mutual and partly non-mutual. True, keeping in view the principle of mutuality, the surplus accruing to a Members'' Club from the subscription charges received from its members cannot be said to be income within the meaning of the Act. But, if such receipts are from sources other than the members, then still can it be s aid that such receipts are not taxable in the hands of the club? The answer is obvious. No exemption can be claimed in respect of such receipts on the plea of mutuality. To illustrate, a Members'' Club may have income by way of interest, security, house property, capital gains and income from other sources. But such income cannot be said to be arising out of the surplus of the receipts from the members of the club.and answered the question in affirmative and questions referred were as under :-

(I)Whether, on the facts and in the circumstances of the case, the Tribunal has rightly held that the assessee-club is a ''mutual concern''?

(II) Whether, on the facts and circumstances of the case, the Tribunal has rightly held that the income derived by the assessee-club from its house property let to its members and their guests is not chargeable to tax?

(III) Whether, on the facts and in the circumstances of the case, the Tribunal has rightly held that the income derived by the assessee-club from sale of liquor, etc., to its members and their guests is not taxable in its hands?

17. However, learned counsel for the petitioner submits that sale and service are different. It is true that sale and service are two different and distinct transaction. The sale entails transfer of property whereas in service, there is no transfer of property. However, the basic feature common in both transaction requires existence of the two parties; in the matter of sale, the seller and buyer, and in the matter of service, service provider and service receiver. Since the issue whether there are two persons or two legal entity in the activities of the members'' club has been already considered and decided by the Hon''ble Supreme Court as well as by the Full Bench of this Court in the cases referred above, therefore, this issue is no more res integra and issue is to be answered in favour of the writ petitioner and it can be held that in view of the mutuality and in view of the activities of the club, if club provides any

service to its members may be in any form including as mandap keeper, then it is not a service by one to another in the light of the decisions referred above as foundational facts of existence of two legal entities in such transaction is missing. However, so far as services by the club to other than members, learned counsel for the petitioner submitted that they are paying the tax. Therefore, this writ petition deserves to be allowed and it is held that rendering of service by the petitioner-club to its members is not taxable service under the Finance Act, 1994 and the writ petition of the petitioner is allowed accordingly.