(2004) 06 CAL CK 0048

Calcutta High Court

Case No: Writ Petition No. 1739 of 1998

Saturday Club Ltd.		APPELLANT
	Vs	
Asstt. Commr., Service Tax Cell		RESPONDENT

Date of Decision: June 24, 2004

Acts Referred:

- Constitution of India, 1950 - Article 226
- Finance Act, 1994 - Section 65

Citation: (2005) 1 CALLT 575 : (2005) 123 ECR 91 : (2005) 180 ELT 437 : (2006) 3 STR 305

Hon'ble Judges: Amitava Lala, J

Bench: Single Bench

Advocate: R.N. Bajoria, J.P. Khaitan and Rupa Mitra, for the Appellant;D.K. Shome and B. Samaddar, for the Respondent

Judgement

Amitava Lala, J.

This writ petition has been made by the Saturday Club Limited, a well-known club of the city of Calcutta (Kolkata) by the pen of the then Secretary and authorised representative of the same. Such writ petition was filed in the year, 1998 praying inter alia declaration that the petitioner club is not a mandap keeper within the meaning of Chapter V of the Finance Act 1994 as amended by the Finance Act, 1997 and is not liable to pay any service tax under the Act along with various writs in the nature of mandamus, prohibition, certiorari with the incidental prayers virtually to restrain the authorities from giving effect and/or further effect of all the purported proceedings relating and/or including the communications dated 21st October, 1997, 17th December, 1997, 23rd April, 1998, 8th July, 1998 and 17th/21st July, 1998 and a direction upon the respondents to act in accordance with law. Such writ petition was then formally entertained and interim order was granted by a Bench of this High Court. Directions for affidavits were also given.

2. Mr. R.N. Bajoria, learned Senior Counsel, with the able assistance of Mr. J.P. Khaitan, learned Counsel, contended before this Court that the petitioner club is a members'' club but not a proprietary club. Therefore, it is not supposed to pay service tax for using the space as mandap as per requirement of the members. It is governed by its own Memorandum and Articles of Association as well as rules and bye-laws connected therewith. From the relevant clause under objects being Clause 3(a) of the Memorandum and Articles of Association is quoted hereunder:

"3(a) To afford to its Members all the usual privileges, advantages, conveniences and accommodation of a Club and the promotion of Social Amusement and Entertainments, the Pursuit of Literature and the facilitation of Study in Languages and the Arts".

The question of profit would also govern by Clause 86 of the Articles of Association under Chapter V which deals with financial part of it. Such portion is also quoted hereunder:

"The profits of the Club whencesoever derived, shall be applied solely towards the benefit of the Club or otherwise in the promotion of the objects of the Club as set forth in the Memorandum of Association, and no portion thereof shall be paid by way of dividend or bonus to the Members of the Club".

3. As per bye-laws sales tax would be levied extra in respect of using rooms for the purpose of parties, seminars, meetings, conferences, other club functions, rehearsals, charity sales and also for service of food, beverage etc.

4. According to Mr. Bajoria, whenever and wherever tax is to be levied the club can neither avoid it nor he has any intention to argue on that score. But the question of giving service tax for using the club premises as mandap cannot be held to be a service or different from its usual service to the members so that service tax can be imposed. He called upon the Court to go through the relevant portions of the Finance Act, 1994. Section 65 sub-section (19) gives the meaning of the word "mandap" which means :

"(19) "mandap" means any immovable property as defined in section 3 of the Transfer of Property Act, 1882 (4 of 1882) and includes any furniture, fixtures, light fittings and floor coverings therein let out for consideration for organising any official, social or business function";

5. Sub-section (20) gives the meaning of "mandap keeper" which means:

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

6. Sub-section (34) speaks about "service tax" which means tax chargeable under the provisions of this chapter. Clauses (o) and (p) of sub-section (41) give an indication of "tax service" which means service provided as follows :

"(o) to a client, by a pandal or shamiana contractor in relation to a pandal or shamiana in any manner and also includes the services, if any, rendered as a caterer.

(p) to a client, by a mandap keeper in relation to use of a mandap in any manner including the facilities provided to the client in relation to such use and also the services, if any, rendered as a caterer".

7. Section 64(3) of this Act says that this Chapter shall apply to taxable services provided or after the commencement of this Chapter.

8. I also find from such Act that Section 66 therein is a charging Section made applicable in respect of Clauses (o) and (p) as above. Moreover, Section 67(6) gives an indication how the amount will be charged and recovered. Clause (o) is as follows :

"(o) in relation to service provided by mandap keeper to a client, shall be the gross amount charged by such keeper from the client for the use of mandap including the facilities provided to the client in relation to such use and also the charges for catering, if any".

9. Now it is duty incumbent upon the Court to understand whether service tax as per the Act can be levied upon the club in using the space as mandap or not.

10. He cited various judgments in support of his contentions. From 1970 (XXVI) Sales Tax Cases 241 (Harbour Division-II, Madras v. Young Men''s Indian Association Madras, and Ors.) it has been found that the six Judges Bench of the Supreme Court held that if a members'' club even though a distinct legal entity acts only as an agent for its members in the matter of the supply of various preparations and articles to them no sale would be involved as the element of transfer would be completely absent. Members are joint owners of all the club properties. Proprietary clubs stand on a different footing. The members are not owners of or interested in the property of the club. To show the difference of characteristic between the ''members'' club'' and ''proprietary club'' the Supreme Court held that where every member is a shareholder and every shareholder is a member then the same would be called as ''members'' club''. In the members'' club what is essential that the holding of the property by the agent or trustee must be holding for and on behalf of and not a holding antagonistic to the members of the club. If a club even though a distinct legal entity, is only acting as an agent for its members in the matter of supply of various preparations to them no sale would be involved as the element of transfer would be completely absent. According to Mr. Bajoria a club is an agent when the members of the club are principal. In Commissioner of Income Tax Vs. Darjeeling Club Ltd., a Division Bench of our High Court observed that there is a long line of decisions in which it has been he]d that supplies made by a club to its members or the facilities afforded by a club to its members for a price will not amount to business activity of the club, even though there may be surplus of revenue over

expenditure and the surplus could not be taxed as business profits if the sales were confined to the members of the club only. There cannot be any distinction whether one is temporary member or honorary member. There is no question of reference to individual entity as a class. What is important is the members as a class will be entitled to a benefit. Any surplus contribution will be held for the benefit of the members. The benefit of the surplus fund must go back to the members as a class. The facilities including accommodation is provided by the class as agent of the members but not an owner of a house property. The members have provided for themselves these facilities through the instrumentality or agency of the club. Neither the club is the landlord nor the members, during their stay, are the tenants of the club. The members by virtue of their membership are entitled to avail of the facilities of their club as a right according to the rules of the club. They are entitled to accommodation also as of right. What is paid by the members for their accommodation cannot be treated as rent and the income cannot be regarded as income from the house property under the Income Tax Act. In Commissioner of Income Tax, Bihar Vs. M/s. Bankipur Club Ltd., it was held by the Supreme Court that there must be complete identity between contributors and participators if this requirement is fulfilled. It is immaterial what particular form the association takes. Trading between persons associating together in this way does not give rise to profits which are chargeable to tax. Facilities were offered only as a matter of convenience for the use of the members. It was further held in CHELMSFORD CLUB Vs. COMMISSIONER OF INCOME TAX, that the surplus from the activities of the club is excluded from the levy of the Income Tax.

11. Mr. Dipak Shome, learned Counsel, with able assistance of Mr. Biswanath Samaddar, learned Counsel, contended before this Court that providing ''mandap'' by a club as a ''mandap keeper'' cannot be the usual course of business activities under the objects of the Memorandum of Association of the club. He called upon to show clause 86 of the Articles of Association as above. By showing the relevant part of the bye-laws he said that the club is charging more as against rental and other costs and even thereafter they are levying payable sales tax. Therefore, the club authorities are using the space as against the consideration and thereby making profit out of it which cannot be called as a usual privilege to the members. Many of the clubs accepted the imposition of the service tax. There are very few clubs who are opposing the clause. In fact, an interim order was obtained as far back as on 28th August, 1998 as against the show cause notice issued by the authority without giving any reply in connection thereto. He said that the privileges of the club members are restricted by way of payment of membership amount. The judgments which are cited by Mr. Bajoria on behalf of the petitioner club are not in connection with the service tax but payability of income or sales tax. He cited two judgments reported in Tamilnadu Kalyana Mandapam Owners Association Vs. Union of India and Others, and 2001 (133) E.L.T. 235 (Kol) (Commr. of C.Ex., Jamshedpur v. Tata Iron & Steel Co. (Tube Division) in support of his case.

12. In the first case I find that a Division Bench of Madras High Court held that imposition of service tax upon the persons doing the business of ''mandap keeper'' is intra vires. So far as the next case is concerned it deals with payability of the service tax by the ''outdoor caterer'' and ''mandap keeper''.

13. In any event, I cannot come to any logical conclusion in respect of the applicability of the citations in the present case.

14. I have two questions to Mr. Shome in order to come to a definite conclusion in respect of the subject-matter which are as follows :

(a) If the owner of the house allows any of the family members or friends to carry out a marriage or other ceremony at his house, whether such owner is liable to pay service tax to the authority ?

(b) Is there any difference of principle about applicability of the Income Tax or sales tax or service tax ?

15. His contention is that ''mandap keeper'' when utilises the premises of the owner but allows another to carry out marriage or other functions is liable to pay tax. So far as the second point is concerned his submission is that service tax related to the service which unusually carried out by a club being different from Income Tax and sales tax. However, these two answers become the sheet anchor of the reply of Mr. Bajoria. He immediately got hold all these two points by showing symmetrical stands on both the points. Firstly, he contended that it is nobody''s case that if any outside ''mandap keeper'' is carrying out a business in a premises of another he is supposed to pay service tax and will raise a bill along with the service tax upon the owner. There is no dispute to that extent. But here the case is different. In the instant case, whether there should be collection of service tax by a owner of the property if he voluntarily allows any of his known persons to use his premises for the purpose of carrying out the marriage or other ceremony or not. There cannot be any applicability of service tax in between themselves since there is no question of transfer of property amongst them. So far as the second point is concerned he said there is no difference among all the three types of taxes principally. Thereby the ratio of the judgments cited by him will be applicable in the present case.

16. According to me, I have no much of say as against the petitioner''s cause. The proceedings which was initiated as against the petitioner club is not a simpliciter show cause but imposition of service tax giving an opportunity to show cause as to why the same will not be levied. One of the relevant portions to draw an inference on that score is as follows :

"The club is letting out its premises for organising social or official function for a consideration. Therefore, M/s. The Saturday Club appears to come within the ambit of the definition of a ''mandap keeper'' and was due to get themselves registered with the service tax authorities".

17. It is well known that show cause simpliciter normally should not be normally interfered with by the Writ Court. This is not such a case. Here such notice was followed by a further notice on 17th July, 1998 and ultimately adjudication case was fixed for registration and payment of service tax. The very existence of the proceeding is challenged before this writ Court which cannot be said to be futile attempt. It is a question of jurisdiction of the authority. It is well-known by now particularly in view of the Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. However, the High Court makes a self-imposed restriction when the attentive and/or efficacious remedy is available. But when a dispute like the enforcement of fundamental right or violation of principles of natural justice or an action without jurisdiction or vires under any Act is available before a writ Court, such Court should intervene with the same irrespective of availability of alternative efficacious remedy. Therefore, the petitioner in this case, cannot be said to be remediless before the Writ Court. That apart, at the stage of final hearing after entertaining the writ petition and after passing an interim order as far back as in 1998, the Court cannot refuse to enter upon the merit of the case on the ground of any alternative remedy. It is to be remembered that duty of the Constitutional Court not to allow or persist the litigation to go on and on but nip in the bud. For an example, if the proceedings is allowed to go having all such questions open it will result the same fate. Then again the same will be challenged. In such circumstances, when available cause is apparent immediate step is to be taken by the Writ Court by intervention without waiting for the future. Totality says that the Writ Court was rightly invoked to avoid the perpetuity of the illegality and there is no bar upon the Writ Court in entertaining the same. So far as the merit is concerned, law is well-settled by now that in between the principal and agent when there is no transfer of property available question of imposition of service tax cannot be made available. It is true to say that there is a clear distinction between the ''members'' club'' and ''proprietary club''. No argument has been put forward by the respondents to indicate that the club is a ''proprietary club''. Therefore, if the club space is allowed to be occupied by any member or his family members or by his guest for a function by constructing a ''mandap'' the club cannot be called as ''mandap keeper'' because the club is allowing his own member to do so who is, by virtue of his position, principal of the club. If any outside agency is called upon to do the needful it may raise a bill along with the service tax upon the club and the club as an agent of the members, is supposed to pay the same. The authority cannot impose service tax twice once upon the people carrying out the business of ''mandap keeper'' as well as the members'' club for the purpose of using the space for constructing or using it as ''mandap''. Therefore, apart from any other question possibility of double taxation cannot be ruled out. If I explain my first query as above it will be crystal clear that if a person being an owner of the house allows another to occupy the house for the purpose of carrying out any function in that

house it will not be construed as transfer of property. But if such person calls upon a third party ''mandap keeper'' to construct a ''mandap'' in such house then in that case such ''mandap keeper'' can be able to raise bill upon the user of the premises along with the service tax. Therefore, I cannot hold it good that members'' club is covered by the Finance Act, 1994 for imposition of service tax to use its space as ''mandap''. So far as the other point is concerned whether the ratio of the judgments can be acceptable herein or not I like to say ''yes it is applicable''. Income Tax is applicable if there is an income. Sales tax is applicable if there is a sale. Service tax is applicable if there is a service. All three will be applicable in a case of transaction between, two parties. Therefore, principally there should be existence of two sides /entities for having transaction as against consideration. In a members'' club there is no question of two sides. ''Members'' and ''club'' both are same entity. One may be called as principal when the other may be called as agent, therefore, such transaction in between themselves cannot be recorded as income, sale or service as per applicability of the revenue tax of the country. Hence, I do not find it is prudent to say that members'' club is liable to pay service tax in allowing its members to use its space as ''mandap''.

18. Therefore, the entire proceedings as against the club about the applicability of service tax stands quashed. Interim order, if any, stands confirmed. However, no order is passed as to costs. Thus, the writ petition stands disposed of.