(2004) 06 CAL CK 0049

Calcutta High Court

Case No: G.A. No. 1938 of 2001 and W.P. No. 642 of 1999

Dalhousie Institute		APPELLANT
	Vs	
Assistant Commissioner, Service Tax Cell		RESPONDENT

Date of Decision: June 30, 2004

Acts Referred:

- Transfer of Property Act, 1882 - Section 19, 2, 22, 3, 65

Citation: (2005) 125 ECR 23 : (2005) 180 ELT 18 : (2006) 3 STR 311

Hon'ble Judges: Kalyan Jyoti Sengupta, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Kalyan Jyoti Sengupta, J.

In this case the applicant initially having accepted the applicability of the Finance Act, 1994 as amended by Finance Act, 1997 (hereinafter referred to as the aforesaid Act) to it, the club/petitioner has asked for a declaration that the said Act does not apply. So, they prayed for quashing and rescinding of the communications letters dated 21st October, 1997, 12th october, 1998 and November 26, 1998 and also the Registration Certificate dated 19th November, 1997. The short fact of the case is that the petitioner No. 1 is a body, formed under the West Bengal Societies Registration Act, 1961 by its members and with an object to achieve various purposes as mentioned in the object Clause of its bye-laws. It is stated that the petitioner No. 1 is non-profit making body and extended amenities and facilities to its members only and/or their guests. In the bye-laws there is no provision for allowing the outsider to participate in the club function and affairs except in case of guest(s) of a member, who is solely responsible for making payment on behalf of the guests. In other words, the income of the club derived from the members and/or members of their family and the surplus of the receipts is being invested and/or reserved for the benefit of the members exclusively, no amount of excess is distributed among its

members. In legal parlance the element of mutuality in the affairs and dealing of the club exists. The Club provides for various facilities and amenities including space as a venue for holding social, commercial and business functions, meetings and gatherings.

2. In 1994 by the aforesaid Act various services rendered by the traders and/or organizations were subjected to tax at a particular rate. In 1997 by way of amendment of the aforesaid Act the services rendered by "mandap keeper" providing mandap to the clients were brought under eligibility to the Service Taxes. Pursuant to the aforesaid Act the petitioner got itself registered and filed returns. It is claimed that obtaining of registration followed by filing of returns under the aforesaid Act were my mistake. On discovery of legal position the present application has been taken out for the relief as quoted hereinabove.

3. The learned Senior Counsel Mr. J.P. Khaitan appearing for the petitioner contends going by the definition of section 65 (Clause 4(i) of the said Act that the petitioner"s Club cannot be brought within the purview of the same. The said definition of taxable service is quoted below :

"65. 4 (i) "taxable service" means any service provided .....(p) to a client by a mandap keeper in relation to the 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".

4. Mr. Khaitan says that it is clear from the aforesaid definition in order to charge tax under the aforesaid Act following four pre-conditions must be satisfied.

(i) "There must be letting out of immovable property which may include any furniture, fixtures, light fittings, floor coverings therein;

(ii) Such letting out must be for consideration;

(iii) Such letting out and provision of related facilities and catering services must be to a client;

(iv) Such letting out must be for organizing any official, social or business function."

5. According to him if there is mutuality in the affairs and business of any establishment, whether it is a body corporate or collective individuals or otherwise, the same cannot be brought within the purview of chargeability of service taxes. He has developed his argument by drawing analogy with decided cases of Income Tax and sales tax. In connection with the Income Tax he has relied on decisions of Supreme Court and this Court rendered in case of Commissioner of Income Tax, Bihar Vs. M/s. Bankipur Club Ltd., , CHELMSFORD CLUB Vs. COMMISSIONER OF INCOME TAX, , Commissioner of Income Tax v. Darjeeling Club Ltd. 52 ITR 676. He has also relied on decision of the Supreme Court in connection with Sales Tax rendered in case of The Joint Commercial Tax Officer, Harbour Division, II-Madras

Vs. The Young Men''s Indian Association (Regd.), Madras and Others, .

6. None appears on behalf of the respondents. However, I find affidavit-in-opposition has been filed. In the affidavit-in-opposition the point has been taken firstly the petitioner is estopped from challenging the action of the respondent after having obtained Registration Certificate and submitted returns. It is further stated in the affidavit that the petitioner/club is offering its immovable property other assets and facilities for use and enjoyment of the outsider in the name of the guests for consideration. The members who are bringing the invitees could not be termed as guests within the meaning as defined in the bye-laws and rules of the petitioner. It is further stated in the affidavit that when a member of the petitioner holds any social gathering in the club premises and invite large number of people to attend such gathering, no individual guest charges is paid and further register is maintained, recording each and every invitee in name of guests.

7. Therefore, going by the definition of ''client'' as mentioned in the said Act and having regard to the meaning of the word ''client'' as mentioned in Webster''s Encyclopaedic unabridged dictionary of English Language the Members and their guests who are using the club premises as an invitee for social function and gatherings can be treated to be client.

8. Having considered contention of the petitioner as well as the respondent the point in this case is whether going by the definition of ''Mandap'' and ''Mandap keeper'' of the said Act the petitioner/club can be made liable to pay service taxes or not. Before I decide this issue the preliminary point taken by the respondent is to be addressed. It is contended the petitioner is estopped from making this application after having obtained registration certificate under the said Act and submitted returns for one year. It has now become elementary principle of law that question of estoppel cannot arise nor the principle thereof can be applied as against the provisions of law. If it is found that the particular statute is not applicable to any person or persons, the action taken by mistake cannot operate as an estopped or acquiescence. So, this preliminary issue is decided against the respondent.

9. Mr. Khaitan persists in the doctrine of mutuality, which has already been accepted by the Supreme Court and this Court without any exception and consistently in several cases of Income Tax as well as Sales Tax. He submits that there is no basic difference in the object and purpose of exigibilityy of the service taxes. Whether the principle of mutuality can be applied in this case or not, has to be gathered from the definitions of mandap keeper and the taxable service. Therefore the aforesaid three definitions are set out hereunder.

"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 covering therein let out for consideration for organizing any official social or business function;

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

"taxable service" means any service provided to a client, by a mandap keeper in relation to the 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.

10. The words ''let out for consideration'' employed in the definition of ''mandap'' clearly intend the element of use of any person including the third party given by the landlord, of the immovable property as well as the furniture, fixture and light fittings on consideration. Therefore, the meaning and definition of letting out inheres transaction of commercial character, rather trading. Similarly, from the definition of ''mandap keeper'' it is clear that a person allows temporary occupation of a mandap for consideration, meaning thereby temporary parting with possession to third party for consideration. Therefore, it is obvious that legislature intended this transaction must be for commercial purposes. again words ''provided to a client'' used in the definition of taxable service in the said Act necessarily presupposes that the mandap keeper must be letting out to any person on consideration. Now it has to be examined in the context of the aforesaid reading and meaning of the three definitions, whether the petitioner/club does come within the purview of the same or not.

11. Undeniably and undisputedly the petitioner club has been formed by a number of individuals and for the purpose of attaching apparently independent legal entity this body individuals have got this club registered under the West Bengal Societies Registration Act, 1961. Under the said Act this club cannot have any juristic entity rather the office-bearer of the same as provided u/s 19 of the said Act. Therefore all the members jointly own all the immovable properties as per definition of the mandap. In the bye-laws, rules and regulations of the Club I do not find there is any provision that the properties and the facilities those are being made available by the members for themselves, are extended to the third parties for any consideration whatsoever. The members of the club are allowed exclusively to participate in the services rendered by the club and the club fund, no third party is allowed to participate in the same. Even the facilities and amenities of the club are not extended to any third party who, of course, may come as a guest and/or invitee of the members. Therefore, it is clear from the activities of the club as stipulated in the bye-laws, rules and regulation, the ''mandap keeper'' in this case is the members collectively in the name of petitioner No.1 and the mandap belonged to them in the name of the petitioner No. 1 again. The allegations in the affidavit-in-opposition for which the action is sought to be taken do not make any difference of the afore said user. I am of the view that the understanding of respondent about petitioners'' dealing is fallacious, for they mean the word ''client'', relying on the dictionary expression instead of reading and understanding correct meaning and purport of the aforesaid three definitions. In my view service taxes is recoverable from the

''mandap keeper'' who is having different and separate legal and physical entity and, let out mandap with commercial and trading object. Here the members have formed the petitioner No.1 to serve themselves mutually and for this purpose members are paying for such user and any amount of receipt and expenditure of the club is enjoyed and/or participated and/or incurred by the members alone, not by third party.

12. The suggestion of Mr. Khaitan for application of the principle of mutuality which has been accepted in Income Tax and Sales Tax cases in this case as well, appears to have much relevance because of the definition as mentioned above. In the Income Tax cases our Court Additional Commissioner of Income Tax Vs. Rahmat Khan Faizukhan, while applying the principle of mutuality has held that:

"The club was not the landlord and the members, during their stay, were not the tenants of the club. The members by virtue of their membership were entitled to avail of the facilities of the club as of right according to the rules of the club. They wee entitled to accommodation also as of right. what is paid by the members for their accommodation cannot be treated as rent and that income cannot be regarded as income from house property under the I.T. Act."

13. In the decision of Supreme Court Commissioner of Income Tax, Bihar Vs. M/s. Bankipur Club Ltd., it has been observed considering the large number of Indian and English decisions at page 110 that -

".... the receipts for the various facilities extended by the clubs to their members, as stated hereinabove, as part of the usual privileges, advantages and conveniences, attached to the membership of the club, cannot be said to be "a trading activity". The surplus-excess or receipts over the expenditure - as a result of mutual arrangement, cannot be said to be "income" for the purpose of the Act."

14. In the case of CHELMSFORD CLUB Vs. COMMISSIONER OF INCOME TAX, the Supreme Court wile following the Bankipur Club case that it is not only the surplus from the activities of the business of the club that is excluded from the levy of Income Tax even the annual value of the clubhouse as contemplated in Section 22 of the Act will be out side the purview of levy of income tax".

15. The Supreme Court in the case of the Joint Commercial Tax Officer, Harbour Division v. Young Men''s Indian Association Madras and Ors. while dealing with the problem of levy of sales tax in connection with a club after considering the various decisions of the Courts of this country as well as the English decision was pleased to observe as follows:

"The essential question, in the present case, is whether the supply of the various preparations by each club to its members involved a transaction of sale within the meaning of the Sale of Goods Act, 1930. The State Legislature being competent to legislate only under entry 54, List II of the Seventh Schedule of the Constitution the

expression sale of goods'' bears the same meaning, which it has in the aforesaid Act. 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 the matter of supply of various preparations t 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.

The final conclusion of the High Court in the judgment under appeal was that the case each club was analogous to that of an agent or mandatory investing his own moneys for preparing things for consumption of the principal and later recouping himself for the expenses incurred. Once this conclusion on the facts relating to each club was reached it was unnecessary for the High Court to have expressed any view with regard to the vires of the Explanations to section 2(g) and (n) of the Act. As no transaction of sale was involved there could be no levy of tax under the provisions of the Act on the supply of refreshments and preparations by each one of the clubs to its members."

16. The principle of mutuality in this case is also squarely applicable, as going by the definitions of mandap, mandap keeper and the taxable service, in this case the facility of use of the premises to the members by its club cannot be termed to be a letting out nor the members of the club using the facility of any portion of the premises for any function can be termed to be a client. The services rendered by any person to his client presupposes the element of commerciality and obviously this transaction must be involved with the third parties, as opposed to the members of the club.

17. Thus, I allow the writ petition consequently I set aside and quash the notices and the registration certificate.

18. However, there will be no order as to costs.