(2014) 11 GUJ CK 0071

In the Gujarat High Court

Case No : Tax Appeal Nos. 1194 to 1201 of 2014

Commissioner of Central Excise & Customs — APPELLANT

Vs

Surat Tennis Club — RESPONDENT

Date of Decision : 12-11-2014

Acts Referred:

Finance Act, 1994 — Section 65(105)(zzze), 65(25a), 66, 73(1)

Citation : (2015) 50 GST 25

Hon'ble Judges : V.M. Pancholi, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : R.J. Oza, Advocates for the Appellant

Judgement

Akil Abdul Hamid Kureshi, J.—These appeals arise out of a similar background. Question is of leviability of service tax on the service provided by the club to its members. If we briefly refer to the facts from 1194/2014, it would appear that a show cause notice was issued on 27.11.2009 under section 73(1) of the Finance Act 1994 conveying to the noticee respondent Surat Tennis Club that the club was providing taxable services in the category of Club or Association. The terms ''Club or Association'' as defined under section 65(25a) of the Finance Act 1994 and the services provided by the club to its members is taxable service with effect from 16.6.2005 as per section 65(105)(zzze) of the Finance Act as amended. The club has not registered itself as a service provider and on the total value of taxable service of Rs. 99,25,000/-, the club was required to pay service tax of Rs. 12,26,000/- (rounded off) with interest and penalties. The issue ultimately reached the Customs, Excise & Service Tax Appellate Tribunal ("the Tribunal" for short). By a brief judgment dated 10.4.2014, the Tribunal allowed the appeal relying on decision of this Court in case of Sports Club of Gujarat Ltd. v. Union of India [Special Civil Application Nos. 13654, 13655 & 13656 of 2005, dated 25-3-2013]. Against this judgment, the department has filed the present appeal.

2. Following questions of law are presented for our consideration:

"(a) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law in allowing appeal of the respondent with consequential relief by placing sole reliance on decision rendered by this Hon''ble Court in the case of Sports Club of Gujarat Ltd. Vs. Union of India, without recording comparative jurisdictional facts of both the cases and giving its finding thereon?

(b) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law by not recording reasons for disagreement with the findings recorded by the appellate commissioner in the matter of confirming liability of respondent to pay service tax, interest and penalty under provisions of the Finance Act, 1944 in terms of order passed by the adjudicating authority?"

3. Counsel for the department vehemently contended that the Tribunal committed an error in applying the decision of this Court in case of Sports Club of Gujarat Ltd. (supra) without comparing the facts of the present case. He further submitted that the High Court in case of Sports Club of Gujarat Ltd. (supra) declared only portion of section 65(25a) and section 65(105)(zzze) of the Finance Act ultra vires qua the petitioners before the Court alone. He lastly contended that the said decision has been challenged before the Supreme Court and the SLP is pending.

4. In our opinion, no substantial question of law arises. It is true that the decision of the Tribunal is somewhat brief and it would have been desirable if the Tribunal had given more elaborate facts in order to apply the ratio of the decision of this Court in case of Sports Club of Gujarat Ltd. (supra). However, that by itself would not permit or at-least in facts of this case, to overturn the decision of the Tribunal when undisputably the facts are similar. As noted above, even in case of the present assessees, the notice issued was for levy of service tax on the service provided by a club to its members. The question of taxability of service was at issue before this court in case of Sports Club of Gujarat Ltd. (supra). The Court concluded as under:

"8. In the result, these petitions are allowed and it is hereby declared that Section 65(25a), Section 65(105)(zzze) and Section 66 of the Finance (No. 2) Act, 1994 as incorporated/amended by the Finance Act, 2005 to the extent that the said provisions purport to levy service tax in respect of services purportedly provided by the petitioner club to its members, to be ultra vires. Rule is made absolute with no order as to costs."

5. In view of this ratio, the Tribunal was perfectly justified in setting aside the orders of the department authorities confirming the demand of service tax.

6. The contention that the decision of Sports Club of Gujarat Ltd. (supra), declares the statutory provision ultra vires qua the petitioners before the Court alone, is a rather curious contention and needs to be recorded only for summary rejection. We are not conscious of any concept where a Court would declare a

provision unconstitutional and make its application in personam. When a declaration of unconstitutionality is made by the Court, it operates in rem. Even in case of Sports Club of Gujarat Ltd. (supra), there was no intention of the Court ever to declare the provision ultra vires and apply the same only to the petitioners before the Court. What was sought to be conveyed in the reproduced paragraph 8 of the judgment was that to the extent such provisions seek to levy service tax in respect of services provided by the club to its members, is impermissible and, therefore, ultra vires.

7. We are bound by the ratio of the decision of this Court. Mere pendency of further appeal by the department would not prevent us from disposing of these appeals. All the appeals are therefore, dismissed.