
(2014) 12 GUJ CK 0058

In the Gujarat High Court

Case No : Special Civil Application No. 30148 of 2007

Green Environment Services Cooperative Society Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 15-12-2014

Acts Referred:

Finance Act, 1994 — Section 65(105)(zzze), 65(19), 65(25a), 65(2Sa)

Citation : (2015) 37 STR 961 : (2015) 83 VST 519

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

Bench : Division Bench

Advocate : Mitul K. Shelat, Advocate for the Appellant; Y.N. Ravani, Advocate for the Respondent

Judgement

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Akil Abdul Hamid Kureshi, J.—Petitioners have challenged the vires of Section 65(25a) and also 65(105)(zzze) of the Finance Act, 1994 as amended by Finance Act, 2005 to the extent that said provisions pertain to levy of service tax in respect of the services provided by the petitioner society to its members. The petitioners have also challenged an order dated 9.10.2007 passed by the adjudicating authority confirming the service tax demand of Rs. 71,43,582/with interest and penalty at the rate of 200% of the tax demanded. He also imposed a separate penalty of Rs. 200/per day or 2% of the tax not paid, whichever is higher.

2. The petitioner No. 1 is a society registered under the Gujarat Cooperative Societies Act and is engaged in the activity of maintaining a common effluent treatment plant at Vatva Industrial Estate, Ahmedabad. The petitioner No. 1 provides the facility of common effluent treatment to its members through the medium of cooperative society. The case of the petitioners is that such society was created solely with a purpose of providing effluent treatment facility commonly to its members who were the industrial establishments located at Vatva. Any service provided by them, therefore, could not be made taxable since

it was merely a service provided by the members to themselves. There was no element of any commercial service provided by the service provider to its consumers. Inter alia on such basis the petitioners challenged the constitutionality of Section 65(25a), which authorizes collection of such service tax from the agencies such as the petitioner No. 1. Pending this petition, the adjudicating authority confirmed the duty demand with penalty and interest as mentioned above. The petitioners have, therefore, separately challenged such order-in-original.

3. Learned counsel, Shri Shelat for the petitioners pointed out that initially the show cause notice was issued basing the recoveries on Section 65(19) of the Finance Act, 1994, however, realizing that such demand would not be maintainable under said provision, separate show cause notice was issued why the services provided by the petitioner No. 1 society to its members be not classified as one under "Club or Association" and accordingly chargeable under Section 65(25a) of the Finance Act, 1994. It was on this basis that the Commissioner of Service Tax in the impugned order confirmed the service tax demand. It was held as under:

"37. Since it was found that the service provided does not fall under the category of business auxiliary service as alleged in the show cause notice dated 28.02.07, but it appeared to fall under the category of "club or association services" as defined under section 65(25a) of the Finance Act, 1994 from 16.06.05 onwards, a notice was issued to M/s. GES on 07.08.07 asking them to show cause as to why the service provided by them should not be categorized accordingly and service tax recovered thereon. In their written reply as well as during personal hearing, M/s. GES have made only two counter submissions viz.

1) The society does not have any independent existence or identity of its own. The members have come together for the purpose of discharging their legal obligation to eliminate pollutants. There is no other party rendering any service to the members. As such, it cannot be said that M/s. GES is rendering any service to its members.

2) Clubs or associations are essentially for recreational or social purposes. This can be inferred from the clauses (i), (ii), (iii) & (iv) of Section 65(25a) of the Finance Act, 1994.

38. I do not find any merit in either of these submissions. The very existence of the service "club or association service" in the Finance Act, 1994 implies that a distinction is made between a club or association and its members. For legal purposes they are two separate entities. As far as their submission that clubs or associations as defined under the Finance Act, 1994 cover only recreational or social associations, I find no such restriction. I, therefore, hold that the service provided by M/s. GES is actually a "club or association service" which is taxable from 16.06.2005. The service tax liability for the services rendered by M/s. Green Environment Services Cooperative Society Ltd. from 16-06-2005 to

31-03-2006 comes to Rs. 71,43,582/- (Rs. 70,03,512/service tax plus Rs. 1,40,070/Education Cess)."

4. Learned counsel, Shri Shelat pointed out that the provision of Section 65(25a), insofar as it pertains to the service provided by a society to its members, came to be declared as unconstitutional by a Division Bench of this Court in the case of Sports Club of Gujarat Ltd. Vs. Union of India, . The Court held as under:

"The learned advocate Mr. Ravani appearing for the Authorities i.e. Union of India, Commissioner of Central Excise, and Deputy Commissioner/Assistant Commissioner, Service Tax Cell, vehemently opposed the petitions and submitted that the Department has not accepted the aforesaid judgment. Learned advocate submitted that the Department has filed SLP before the Hon"ble Apex Court and the judgment is under challenge. Merely because the judgment is not accepted by the Department, its persuasive value is not lost and it can always be considered by this Court for its persuasive value, more particularly when the said judgment has relied upon a decision of the Full Bench of Patna High Court in the matter of Commissioner of Income Tax Vs. Ranchi Club Ltd. , which is referred to by the Division Bench.

The learned advocate for the Department also submitted that there is no question of mutuality because the club is a legal entity as it is incorporated under the Companies Act. This Court is unable to accept the submissions made by learned advocate for the Department because they were the very facts before the Division Bench for consideration and learned advocate for the Department could not set out any convincing grounds on which this Court should not follow the decision of the Division Bench of Jharkhand High Court.

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. The issue being covered by the said decision and the ratio laid down therein and such provision having been declared unconstitutional to the extent noted above, impugned order dated 9.10.2007 passed by the Commissioner of Service Tax is required to be set aside.

6. Before closing learned counsel for the revenue pointed out that by notification giving retrospective effect such services have been exempted from payment of service tax. In our opinion, this would be one of the additional ground for setting aside the impugned order of adjudication.

7. Accordingly, impugned order dated 9.10.2007 passed by the Commissioner of Service Tax is set aside. Rule made absolute. No costs.