

(2022) 01 CESTAT CK 0022

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 52849 Of 2016

M/s. Bharat Swabhiman (Nyas) Vs Commissioner Customs, Central Excise And Service Tax, Dehradun??

Date of Decision : 27-01-2022

Acts Referred:

Income Tax Act, 1961 — Section 12A, 12AA
Finance Act, 1994 — Section 65(26), 65B(44), 66B, 66B(44), 73(1A), 83
Service Tax Rules, 1994 — Rule 2(1)(d)(i)(B)
Central Excise Act, 1944 — Section 11C

Citation : (2022) 01 CESTAT CK 0022

Hon'ble Judges : Delip Gupta, J;P. Venkata Subba Rao, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

1. M/s. Bharat Swabhiman (Nyas), the appellant has filed this appeal to assail the order dated 13.07.2016 passed by the Commissioner, Customs, Central Excise & Service Tax, Commissionerate, Dehradun, the Commissioner confirming the demand of service tax with interest and penalty.
2. The appellant is a trust registered under the Registration Act, 1908. It was constituted on 05.01.2009 with an aim to carry out charitable objects, which amongst others included yoga education and training for achieving a disease-free and healthy India.
3. The appellant is also registered under section 12AA read with section 12A of the Income Tax Act, 1961, the Income Tax Act. The appellant claims that in order to fulfill its objectives, it engaged itself in organizing residential as well as non-residential yoga camps to propagate yoga training and vedic knowledge for which it received donations from its members.
4. An enquiry was, however, conducted in connection with non-payment of service tax on such membership donations, on freight charges paid by the appellant, and on the amount by the appellant for hiring motor vehicles. Ultimately, a show cause notice dated 06.04.2014 was issued to the appellant for

the period January 2009 to March 2013 proposing demand of service tax with interest and penalty under the category of 'club or association service', 'goods and transport agency service' and 'rent-a-cab operator service'. This show cause notice is pending adjudication.

5. Two more show cause notices dated 31.03.2015 and 05.01.2016 were issued to the appellant for the subsequent periods 2013-14 and 2014-15, based on the allegations made in the first and the second show cause notice, respectively. The appellant filed detailed replies to the second and the third show cause notices. These two show cause notices were adjudicated upon by the Commissioner by a common order dated 13.07.2016. The demand of service tax of Rs. 4,83,52,583/- was confirmed with respect to the membership donations and freight charges paid by the appellant but the demand of service tax of Rs. 61,66,706/- was dropped. The gist of the findings of the Commissioner are as follows:

(i) The second and third show cause notice have been correctly issued under the provisions of section 73(1A) of the Finance Act, 1994, the Finance Act as the allegations made by the Department against the appellant were made known to the appellant in the first show cause notice, which had invoked the provisions of the Finance Act as applicable during the pre and post-negative list period;

(ii) The amount of contribution (membership donations) received from the members is directly relatable to various privileges assured to the members and thus, the said amount of contribution is liable to service tax. The decision of Gujarat High Court in Sports Club of Gujarat Limited vs. Union of India, 2013 (31) STR 645 (Guj.) is not applicable to the present case in as much as the same dealt with the provisions of the Finance Act prior to 30.06.2012;

(iii) Explanation 3 to section 65B(44) of the Finance Act treats an unincorporated association or body of persons and its members as distinct persons. Further, the appellant is obliged to provide stated facilities to members in lieu of donations and thus, is liable to pay service tax on the same;

(iv) Only specific charitable activities are exempted under Notification dated 20.06.2012 and the activities of the appellant are not covered under the scope of the said exemption;

(v) The appellant, by virtue of payment of freight charges, is a person liable to pay service tax and the freight amount is liable to Service Tax under "transport of goods by road service"; and

(vi) The categories of persons liable to pay service tax under reverse charges in terms of rule 2(1)(d)(i)(B) of the Service Tax Rules, 1994, 1994 Rules includes an association of persons. A trust qualifies to be an association of persons and thus, the Appellant is liable to pay service tax under 'goods and transport agency' service.

6. Shri B.L. Narasimhan, learned counsel appearing for the appellant assisted by

Ms. Poorvi Asati, made the following submissions:

- (i) The show cause notices have failed to invoke the applicable provisions of law. The Department can issue a statement of demand or show cause notice for a subsequent period provided the grounds relied upon for the subsequent period are the same as mentioned in the earlier show cause notice. In the present case, the second show cause notice has not mentioned any grounds on which the demand has been proposed and, therefore, the pre-requisite condition of grounds being same cannot be verified;
- (ii) The second and third show cause notices, while proposing the demand of service tax on the amount received post 01.07.2012, neither invoke nor mention the charging provisions i.e. section 66B and section 66B(44) of the Finance Act;
- (iii) The demand of service tax on membership donations is not sustainable as the activities of the appellant are exempt under Notification dated 26.09.2016 from 01.07.2012 to 20.10.2015;
- (iv) The activities of the appellant are exempt under Notification dated 20.06.2012 w.e.f. 21.10.2015;
- (v) The doctrine of principle of mutuality is also applicable in the present case;
- (vi) The appellant is not liable to pay service tax on the freight amount paid by it; and
- (vii) Interest is not recoverable and penalty is not imposable.

7. Shri Anup K. Thapliyal, learned authorized representative appearing for the Department has, however, justified the impugned order and in this connection placed various paragraphs of the order.

8. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the Department have been considered.

9. The issue that arises for consideration is regarding the demand of service tax on the donations received by the appellant from its members and on freight charges paid by the appellant under the reverse charge mechanism.

10. Learned counsel for the appellant submitted that the demand of service tax on membership donation is not sustainable as the activities of the appellant are exempt under Notification dated 26.09.2016 from 01.07.2012 to 20.10.2015 and under Notification dated 20.06.2012 w.e.f. 21.10.2015.

11. It would, therefore, be appropriate to first reproduce the Notification dated 26.09.2016 and it is as follows:

"Notification No. 42/2016-S.T. dated 26-Sep-2016

Whereas, the Central Government is satisfied that in the period commencing on

and from the first day of July, 2012 and ending with the 20th day of October, 2015 (hereinafter referred to as the said period) according to a practice that was generally prevalent, there was non-levy of service tax on the services by way of advancement of Yoga provided by entities registered under section 12AA of Income-tax Act, 1961 (43 of 1961) and this service was liable to service tax, in the said period, which was not being paid according to the said practice.

Now, therefore, in exercise of the powers conferred by section 11C of the Central Excise Act, 1944 (1 of 1944), read with section 83 of the Finance Act, 1994 (32 of 1994), the Central Government hereby directs that the service tax payable under section 66B of the Finance Act, 1994, on the service by way of advancement of Yoga provided by entities registered under section 12AA of Income-tax Act, 1961 (43 of 1961) in the said period, but for the said practice, shall not be required to be paid.”

12. The appellant is registered under section 12AA of the Income Tax Act and the education and training in yoga provided by the appellant is towards the activity of advancement of yoga. Thus, as both the conditions are satisfied by the appellant, the membership donations collected by the appellant would be exempt from payment of service tax for the period from 01.07.2012 to 20.10.2015.

13. The appellant is also entitled to exemption from payment of service tax under the Notification dated 20.06.2012 w.e.f. 21.10.2015. The relevant extract of the said Notification is reproduced below:

“Notification No. 25/2012-S.T. dated 20-June-2012

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) and in supersession of notification number 12/2012-Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 210(E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the following taxable services from the whole of the service tax leviable thereon under section 66B of the said Act, namely :

.....

4. Services by an entity registered under section 12AA of the Income tax Act, 1961 (43 of 1961) by way of charitable activities;

.....

2. Definitions.

For the purpose of this Notification, unless the context otherwise requires,-

(k) "charitable activities" means activities relating to-

(i) public health by way of -

(a) care or counseling of (i) terminally ill persons or persons with severe physical or mental disability, (ii) persons afflicted with HIV or AIDS, or (iii) persons addicted to a dependence-forming substance such as narcotics drugs or alcohol, or

(b) public awareness of preventive health, family planning or prevention of HIV infection;

(ii) advancement of religion or spirituality;

(iii) advancement of educational programmes or skill development relating to,-

(a) abandoned, orphaned or homeless children;

(b) physically or mentally abused and traumatized persons;

(c) prisoners; or

(d) persons over the age of 65 years residing in a rural area;

(iv) preservation of environment including watershed, forests and wildlife; or

(v) advancement of any other object of general public utility up to a value of, -

(a) eighteen lakh and seventy five thousand rupees for the year 2012-13 subject to the condition that total value of such activities had not exceeded twenty five lakhs rupees during 2011-12;

(b) twenty five lakh rupees in any other financial year subject to the condition that total value of such activities had not exceeded twenty five lakhs rupees during the preceding financial year;"

(emphasis supplied)

14. An amendment was made in the aforesaid Notification dated 20.06.2012 by Notification dated 21.10.2015 in paragraph 2 (ii) and is as follows:

"(ii) in paragraph 2,

.....

(b) in clause (k), in sub-clause (ii), for the words religion or spirituality, the words religion, spirituality or yoga shall be substituted."

(emphasis supplied)

15. The definition of 'charitable activity' in the Notification dated 20.06.2012 was amended to include activities relating advancement of yoga.

16. It is, therefore, clear that the twin conditions that the entity must be registered under section 12AA of the Income Tax Act and activities must be carried out by way of charitable activities stand satisfied.

17. The next issue that remains to be decided is whether the appellant is liable to

pay service tax on the freight amount paid by it on a reverse charge mechanism.

18. 'Goods transport agency' service has been defined in section 65(26) of the Finance Act to mean any person who provides service in relation to transport of goods by road and issues consignment notes, by whatever name called. In the present case, consignment notes have not been issued and so the activities cannot be said to be covered under 'goods transport agency' services.

19. In this connection it would be useful to refer to the decision of the Tribunal in *Bhoramdeo Sahakari Shakhar Utpadam Karkhana vs. Commissioner of Customs, Central Excise & Service Tax, Raipur*, 2019 (10) TMI 1416 – CESTAT, New Delhi, wherein it has been held that service tax can be levied only if consignment notes are issued.

20. Thus, service tax liability could not have been fastened on the appellant under the reserve charge mechanism.

21. It would, therefore, not be necessary to examine the other contentions raised by the learned counsel on behalf of the appellant.

22. The order dated 13.07.2016 passed by the Commissioner, therefore, cannot be sustained. It is, accordingly, set aside and the appeal is allowed.

(Order Pronounced on 27.01.2022)