# IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

**Service Tax Appeal No. 76665 of 2016**

(Arising out of Order-in-Original No. 27/COMMR/ST-II/KOL/2016-17 dated 24/06/2016 passed by Commissioner of Service Tax-II, Kolkata)

**M/s. Calcutta Club Ltd.**
(241, A. J. C. Bose Road, Kolkata-700 020)

**Appellant**

*VERSUS*

**Commr. of Service Tax-II, Kolkata**
(180, Shanti Pally, Rajdanga Main Road, Kolkata-700107)

**Respondent**

**APPEARANCE :**

Shri Pulak Kumar Saha & Shri J. Bhattacharya, both CA for the Appellant
Shri S. Dey, Authorized Representative for the Respondent

**CORAM:**
**HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)**
**HON'BLE MR. K. ANPAZHAKAN, MEMBER (TECHNICAL)**

**FINAL ORDER NO.76489/2025**

Date of Hearing : 7th May 2025
Date of Pronouncement : 10.06.2025

**PER R. MURALIDHAR**

The appellant is a members-only club, registered as a Public Limited Company under the Companies Act, 1956. Proceedings were initiated demanding Service Tax in respect of various services being provided by them. After due process, the Adjudicating authority confirmed the demands along with interest and penalty. Being aggrieved the appellant is before the Tribunal.

2. The Ld Consultant appearing on behalf of the appellant, submits the details of the confirmed demand under various categories which is as under:

i. Service Tax Liability of Rs. 57,24,877 under Restaurant Service

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ii. Service Tax liability of Rs. 8,87,249 on Rent Hoarding and Royalty Income for the FY 2008-09 to 2012-13 under Renting of Immovable Property Service provided to M/s. Calcutta Street Advertising Pvt. Ltd. and M/s. Ganesh Departmental Stores. In this regard, the Appellant has paid the Service Tax Liability of Rs. 2,40,900 in respect of M/s. Ganesh Departmental Stores which was ordered to be appropriated.

iii. Service Tax liability of Rs. 2,49,342 was confirmed in respect of Advertising Agency Service provided by the Appellant by way of display of advertisements/banners.

3. In respect of the confirmed demand on account of Restaurant Service, the arguments of the Ld Consultant is as under :

3.1 The Appellant submits that the primary objective of the club is to provide its members with privileges, advantages, conveniences, and accommodations of a club. The facilities of the club are exclusively for its members, their spouses, and guests accompanied by members. No outsider is permitted to use the club's facilities. No person other than a member or guest accompanied by a member or his/herspouse can use the facilities of the club. No outsider is permitted to use the facilities of the club.

3.2 The Appellant submits that their dining rooms belong to its members and it is only the Appellant's members and their accompanying spouses and guests who visit such dining rooms. The Appellant submits that the dining rooms are used by the club members according to the bye-laws of the club made by the members themselves. The Appellant submits that the club dining rooms cannot under any circumstances be treated as public eating place nor can the members of the club, to whom the dining rooms belong, be treated as members of the public in relation to such

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dining rooms. The Appellant states that the club dining rooms cannot be treated as restaurants and no service tax can be imposed.

3.3 The restaurant service under clause (zzzzv) of Section 65(105) of the Finance Act, 1994 was introduced under taxable service category with effect from 01.05.2011. As per the definition of Taxable service provided in the said clause is reproduced below for reference:

> ***"taxable service means any service provided or to be provided to any person, by a restaurant, by whatever name called , having the facility of air-conditioning in any part of the establishment, at any time during the financial year, which has license to serve alcoholic beverages, in relation to serving of food or beverage, including alcoholic beverages or both, in its premises."***

3.4 Therefore, the basic contention of introduction of taxable service by the exchequer is to levy service tax on restaurants. In common parlance restaurant is a place where food or beverages are normally served to the customers. The word restaurant has been defined in

- Webster's Ninth New Collegiate Dictionary as " a public eating place"
- The chambers dictionary as " a place where food or meals are prepared and served or are available to customers."
- Macmillan Dictionery as " a building or room where meals and drinks are sold to customers sitting at tables".

3.5 From the above definitions, it is clear that restaurant is a public place where food and beverages are served. As it is a public place, anybody can enter into it. However, in case of the Appellant only the members and the guests accompanied by the member can only enter and are allowed to have food inside the club premises. Places

mentioned in the impugned order such as "Coffee Room", "Chinese Kitchen", "Tandoor Corner", "Bakery" and "Ice Cream Parlour" are not separate places but are situated with the same area of the club premises where only the members can enter and no outsider is permitted to enter in those places. Therefore, the Appellant club cannot be taxed under the category of Restaurant Service.

3.6 The Appellant submits that service tax levy applies only to proprietary restaurants where food and/or beverages are provided by the proprietor carrying on business to customers at his public eating place for consideration, intending to make a profit. The proprietor of a restaurant deals with the customers as a principal contracting party and the proprietor is an entity separate and distinct from the customers.

3.7 The Appellant submits that the Appellant is not a "club or association" or "restaurant" within the meaning of the Act and was and is not liable to obtain registration thereunder or pay any tax or file any return or comply with any other formality. The Appellant is a members' club and is outside the purview of the Act.

3.8 The Appellant submits that each member of the club is a member of the company and each member of the company is a member of the club and there is complete identity between the members of the club and the members of the company. For the guests, the members alone can pay. The guests do not have any independent right to use or pay for the club facilities. No part of the surplus, if any, arising from the dealings between the club and its members is distributed to any member by way of dividend or otherwise. The Appellant is being used by the members for the purpose of obtaining goods and services as their agent.

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3.9 The Appellant submits that by virtue of the Hon'ble Supreme Court's judgement in the case of **State of West Bengal vs Calcutta Club Limited**, the Hon'ble apex court has held that the concept of mutuality applies on a members' club and members and the club are inseparable persons.

3.10 In view of the above submissions, the Ld Consultant prays that the confirmed demand of Rs.57,24,877 on account of Restaurant Service.

4 In respect of confirmed demand of Rs.3,21,147 under Renting of Immovable Service on account of Astor transactions, his submissions are as under :

4.1 The Appellant states that for supply of cooked food and food products to its members, it has entered into an agreement on 18th July, 2006 with M/s. Astor. In terms of the said agreement, club will allot a space along with various facilities like deep fridges, water cooler, dining tables, chairs, curtains, etc. to cook food and service to the club members as per the approved menu and price as shall be duly approved by the Appellant. M/s. Astor will arrange for fuel for cooking, pay for actual consumption of electricity, arrange at its cost and expenses for all cooking implements, crockery & cutlery, lilen, etc., provide service staff to handle KOTs/Vouchers for supply of food to the members. The Appellant will bill for the food so consumed by the club members to the respective club members on monthly basis based on the rate and menu approved by the club. For providing the supply of food and other related services to the members of the club, M/s. Astor will charge the club at 80% of the rate agreed upon plus taxes and duties, as applicable. For consumption of the food by the members, the Appellant shall raise and M/s. Astor shall not raise any invoice whatsoever.

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4.2 M/s Astor shall not get any tenancy right within the club premises and they are authorised to use the club premises only for a limited purpose of cooking and serving food to the members of the Appellant Club as per the approved menu and rate duly approved by the club. Therefore, it is amply clear that the Appellant was not engaged in any commercial activity with the objective of earning profit within the club premises by taking the place on rent and by selling of food to any outsider as claimed by the department. Instead, M/s. Asotor is cooking and supplying the cooked food to the club members onlyas per the approved menu and rate duly approved by the club.

4.3 The Appellant further submits that for renting there must be a fixed sum of rental to be given by the tenant to the landlord. In the instant case, the Appellant is not at all acting as a landlord, but taken the services of M/s. Astor for preparation, supply and service of cooked food to its members only. The 20% margin the Appellant earns, is for meeting its other expense and the corresponding direct expense for cost of food at 80% paid to M/s. Astor is for supply of cooked food to its members. In effect, the Appellant is supplying cooked food to its members by using M/s. Astor and paid M/s. Astor 80% of the value of the food so charged to the members.

4.4 The Appellant, in this regard, has relied upon the judgment of the Hon'ble Ahmedabad CESTAT in the case of **Rajpath Club Ltd vs Service Tax[Service Tax Appeal No. 11688 of 2018 – DB**] wherein the Hon'ble Tribunal, in a similar kind of situation, has categorially decided that no service tax under Renting of Immovable property shall be levied upon Appellant club.

4.5 Accordingly, it is prayed that the confirmed demand of Rs.3,21,147 may be set aside.

5. In respect of the confirmed demand of Rs.8,87,249 under Renting of Immovable Property Service, the demand is in respect two parties :

| | | |
|---|---|---|
| (a) | Calcutta Street Advertising | Rs.5,29,008 |
| (b) | Ganesh Departmental Stores | Rs.3,58,241 |

5.1. It submitted that in respect of Ganesh, the appellant has already paid Rs.2,40,900 and the same has been appropriated by the Adjudicating authority. The balance amount of Rs.1,17,342 along with the demand in respect of Calcutta Street Rs.5,29,008 , totalling Rs.6,46,350 already stands paid along with interest of Rs.5,37,008 along with penalty of Rs.1,61,588 being 25% of Rs.6,46,350 already stands paid by the appellant.

5.2 On the ground that the appellant has not collected the Service Tax in respect of the above rents, the appellant pleads that they may be allowed cum-tax benefit and consequently they should get the refund of Rs.66,046.

5.3 The appellant relies on the Hon'ble Supreme Court in the case of ***Commissioner of Central Excise, Delhi Vs. Maruti Udyog Ltd. [(2002) 141 ELT 3]***

6. In respect of the confirmed demand of Rs.2,49,342 on account of Advertising Agency Service, the Ld Consultant makes the following submissions :

6.1. During the period 2008-09 to 2012-13, the Appellant has earned 'Advertisement Income' for display of advertisements/banners at club events or in the club souvenir. During the relevant period the Appellant had collected/raised bill amounting to Rs. 22,80,337/- on

which total service tax amount demanded is Rs. 2,49,342/-. In the impugned OIO, the Ld. Commissioner has confirmed the demand under Advertising Agency Service as prescribed in 65(105)(e) of the Finance Act,1994.

6.2 In this regard, the Appellant submits that The definition of advertising agency service is defined in Section 65(105)( e) which reads as below:

***"Taxable Service" means any service provided or to be provided to any person by an advertising agency in relation to advertisement, in any manner."***

6.3 So, to become taxable, the service must be provided by an advertising agency. Further, the definition of advertising agency is provided in Section 65(3) of the Finance Act, 1994 which reads as below:

***""Advertising agency" means any person engaged in providing any service connected with the making, preparation, display or exhibition of advertisement and includes an advertising consultant."***

6.4 Further in Section 65(2) of the Finance Act, 1994 the definition of advertisement is given as below:

***"advertisement" includes any notice, circular, label, wrapper, document, hoarding or any other audio or visual representation made by means of light, sound, smoke or gas;"***

6.5 In this regard, the Appellant submits that they are not engaged in the business of providing services as defined in Section 65(3) of the Finance Act,1994. The core activity of the Appellant club is to provide usual club facilities to its members. In order to provide amusement facilities to members, the Appellant used to arrange different events/functions where only members and guests

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accompanied by members can participate and enjoy. In the said events, different business entities can display their advertisements/ banners against which the Appellant usually collects a charge/commission. The Appellant did not have any role in making, preparation, display or exhibition of the advertisements which are essential key attributes of an advertising agency. The activities performed by the Appellant was limited to canvassing the content of advertisements prepared by the advertiser and nothing else.

6.6 In this regard, the Appellant refers the TRU Circular No. 96/7/2007-ST dated 23rd August,2007 wherein it is clearly stated that merely canvassing of advertisements should not be classified under Advertising Agency Service. The relevant portion from the said circular is reproduced below for reference:

> ***"Merely canvassing advertisements for publishing, on commission basis, is not classifiable under the taxable service falling under section 65(105)(e).Such services are liable to service tax under business auxiliary service [section 65(105)(zzb)]"***

7. Submissions on Extended Period of Limitation :

7.1 The Appellant submits that the show cause notice covering the period from April, 2008 to March,2012 was issued on 22.04.2014 by invoking the extended period in terms of the proviso to Section 73(1) of the Finance Act, 1994. Therefore, the entire demand proposed in the impugned show cause notice is barred by limitation in terms of Section 73(1) of the Act.

7.2 The Appellant submits that the proviso to Section 73(1) can be invoked only in situations where any Service Tax has not been levied or paid or has been short levied or short paid or erroneously refunded by reasons of fraud, collusion, willful misstatement, suppression of facts or contravention of any of the

provisions of the Act or of the Rules made thereunder with an intention to evade payment of Service Tax.

7.3 The Appellant further submits that the extended period of limitation under the proviso to Section 73(1) of the Finance Act, 1994 can be invoked only if suppression, willful misstatement occurs due to deliberate evasion of tax on part of the assessee, It is clear that such act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to avoid payment of duty.

7.4 The concept of suppression has been dealt with at length in the case of ***Lakshmi Engg. Works Vs. CCE [1989 (44) ELT 353]*** by the Apex Court wherein it has been held that the concept of suppression amounts to that which one is legally to state but one intentionally or deliberately or consciously does not state. In other words, the term 'suppression' includes a mental element to deliberately omit to state certain thing. It was therefore, held that the extended period of limitation is inapplicable in absence of suppression of facts and hence, absence of an intent to evade payment of duty. The same principle was also upheld by the Hon'ble Supreme Court in the case of ***Pushpam Pharmaceuticals Company Vs. CCE [1995 (78) ELT 401 (S.C.)]***

8. In view of the above submissions, the Ld Consultant prays that the appeal may be allowed as per their prayer both on merits as well as on account of limitation.

9. The Ld A R appearing for the Respondent Revenue, reiterates the detailed findings of the Adjudicating authority wherein after proper verification of the documentary evidence placed before him and the statutory provisions, he has dropped a portion of the demand and has confirmed the demands discussed above. He submits that it is on record that the appellants were running various Restaurants within the Calcutta Club premises with all the facilities given by any

Restaurant including the food and beverage service, airconditioning, proper ambience for dining etc. Further, they have provided space to Astor, who are paying the rent in the form remitting 20% of the billed amount to the appellants. This is nothing but rent being received in the form of sharing of the total consideration. In respect of the Hoarding and Rental facilities given to two parties, the appellants are not opposing the Service Tax thereon. In respect of the Advt being provided to their clients, the appellant is required to pay the Service Tax under the classification of Advertising Agency Services. Further, though the appellant was required to register themselves and pay the Service Tax properly, they failed to do so in respect of these services. The contravention came to light only on account of the detailed verification and investigation taken up by the Revenue. Hence, he justifies the invocation of the extended period. In view of these submissions, it is prayed that the appeal may be dismissed.

10. Heard both the sides. Perused the appeal papers and other submissions made by both the sides.

11. One of the main arguments of the appellant is to the effect that there is no 'service provider' 'service receiver' relationship between the Members and the Club. This was a contentious issue which was going on for many years. There were clubs which were in the form of Society, wherein the members form the entire organization. There were some clubs which were Public Limited Companies, wherein the Members were given Membership based on the Membership fee. In these cases, there arose a question as to whether any Service Tax is payable when the service is rendered to its own Members. After several decisions on both the sides, the matter reached the Hon'ble Supreme Court. In the case of STATE OF WEST BENGAL *Versus* CALCUTTA CLUB LIMITED as reported in 2019 (29) GSTL 545(SC), i.e in the case of the present appellant, the Hon'ble Supreme Court held as under :

> **76.** *What has been stated in the present judgment so far as Sales Tax*

*is concerned applies on all fours to Service Tax*; as, if the doctrine of agency, trust and mutuality is to be applied *qua* members' clubs, there has to be an activity carried out by one person for another for consideration. We have seen how in the judgment relating to Sales Tax, *the fact is that in members' clubs there is no sale by one person to another for consideration, as one cannot sell something to oneself. This would apply on all fours when we are to construe the definition of "service" under Section 65B(44) as well*.

**77.** However, Explanation 3 has now been incorporated, under sub-clause (a) of which unincorporated associations or body of persons and their members are statutorily to be treated as distinct persons.

**78.** The Explanation to Section 65, which was inserted by the Finance Act of 2006, reads as follows :

> "*Explanation.* - For the purposes of this section, taxable service includes any taxable service provided or to be provided by any unincorporated association or body of persons to a member thereof, for cash, deferred payment or any other valuable consideration."

**79.** It will be noticed that the aforesaid explanation is in substantially the same terms as Article 366(29A)(e) of the Constitution of India. *Earlier in this judgment qua Sales Tax, we have already held that the expression "body of persons" will not include an incorporated company, nor will it include any other form of incorporation including an incorporated cooperative society*.

**80.** It will be noticed that "club or association" was earlier defined under Sections 65(25a) and 65(25aa) to mean "any person" or "body of persons" providing service. In these definitions, the expression "body of persons" cannot possibly include persons who are incorporated entities, as such entities have been expressly excluded under Sections 65(25a)(i) and 65(25aa)(i) as "anybody established or

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constituted by or under any law for the time being in force". *"Body of persons", therefore, would not, within these definitions, include a body constituted under any law for the time being in force.*

**81.** When the scheme of Service Tax changed so as to introduce a negative list for the first time post-2012, services were now taxable if they were carried out by "one person" for "another person" for consideration. "Person" is very widely defined by Section 65B(37) as including individuals as well as all associations of persons or bodies of individuals, whether incorporated or not. Explanation 3 to Section 65B(44), instead of using the expression "person" or the expression "an association of persons or bodies of individuals, whether incorporated or not", uses the expression "a body of persons" when juxtaposed with "an unincorporated association".

**82.** *We have already seen how the expression "body of persons" occurring in the explanation to Section 65 and occurring in Sections 65(25a) and (25aa) does not refer to an incorporated company or an incorporated cooperative society. As the same expression has been used in Explanation 3 post-2012 [as opposed to the wide definition of "person" contained in Section 65B(37)], it may be assumed that the Legislature has continued with the pre-2012 scheme of not taxing members' clubs when they are in the incorporated form*. *The expression "body of persons" may subsume within it persons who come together for a common purpose, but cannot possibly include a company or a registered cooperative society*. Thus, Explanation 3(a) to Section 65B(44) does not apply to members' clubs which are incorporated.

**83.** The expression "unincorporated associations" would include persons who join together in some common purpose or common action - see *CIT, Bombay North, Kutch and Saurashtra, Ahmedabad* v. *Indira Balkrishna,* (1960) 3 SCR 513 at pages 519-520. The expression "as the case may be" would refer to different groups of individuals either bunched together in the form of an association also, or otherwise as a group of persons who come together with some

common object in mind. *Whichever way it is looked at, what is important is that the expression "body of persons" cannot possibly include within it bodies corporate.*

12. In the present case, there is no dispute that the appellant is an incorporated Public Limited Company. The factual details clarify that the facilities are meant purely for the usage of its members. In the Restaurants run within the Club, only the Members get access to the facilities of food, beverages. They may bring in their own guests as per the rules of the club. But the Bills are raised only the Members who are liable to pay the amount in question. Thus it is clear the facilities are not open to general public and cannot be used any person other than a person who is the Member of the club.

13. The Hon'ble Supreme Court has considered in detail the amendments brought in with effect from 1.7.2012 and has come to a conclusion that even after this date, in case of services provided by an incorporated body to their members, the same would not be liable for any Service Tax for the services provided. Therefore, even without getting into the argument as to whether the services provided are that of Restaurant, as has been canvassed by the Revenue, or not , as has been vehemently argued by the appellant, on the sole ground that the service rendered to the members cannot be made liable to Service Tax, we set aside the confirmed demand of Rs.57,24,877/- on account of Restaurant Service.

14. Coming to the issue of premises given to Astor for running the restaurant, it is seen from the factual matrix and the Agreement that the Club is not only providing the space but also several infrastructure facilities to Astor. But there is no Lease Agreement wherein the Lessee would be required to pay a fixed rent per month. The clause 2(xiv) of the Agreement states :

***" THE ASTOR shall not claim any right of tenancy, licence or any other right in***

***respect of the said service area or in respect of any part of the club premises under any circumstances whatsoever and shall be bound to remove its men and material from the said service area upon expiry or termination of this agreement without any objection of whatsoever nature."***

15. Astor is given the menu of various items to be prepared and supplied to the Members, who pay the amount to the Club. The Club retains 20% of the amount and gives back 80% to Astor. The overall structure of the transaction is not that of lessor and lessee between the appellant and Astor. Therefore, we set aside the confirmed demand of Rs.3,21,147/-

16. Coming to the confirmed demand of Rs.2,49,342, it is seen that the demand has been made under the Advertising Agency Service. The definition of Advertisement Agency and Taxable Service under this classification is as under :

> ***""Advertising agency" means any person engaged in providing any service connected with the making, preparation, display or exhibition of advertisement and includes an advertising consultant."***
>
> ***"Taxable Service" means any service provided or to be provided to any person by an advertising agency in relation to advertisement, in any manner."***

17. Therefore, in order to fall under this classification, the person providing service should be an 'Advertising Agency' and in the present case, the Club is not an Advertising Agency taking various works associated with the Advertising. Further, CBIC vide Circular No.. 96/7/2007-ST dated 23rd August,2007 has clarified as under :

> ***"Merely canvassing advertisements for publishing, on commission basis, is not classifiable under the taxable service falling under section 65(105)(e).Such services are liable to service tax under business auxiliary service [section 65(105)(zzb)]"***

18. In the present case, if any Adverisement is published in the souvenir, or any display is carried out in the Club premises, that in

itself cannot make the appellant liable for payment of Service Tax. Therefore, we set aside the confirmed demand of Rs.2,49,342

19. Coming to the confirmed demand on account of the rental services rendered by the appellant, it is seen that the appellant is not contesting the same. They have paid the same along with interest and requisite penalty. They seek partial refund of the same on the ground that they have not charged the Service Tax on the lessee and hence they should be given the cum-tax benefit in terms of Section 67(2) of the Finance Act 1994. We find that in case of one party, they have admitted that they have charged the Service Tax and hence paid the Service Tax on 2,40,000 before Adjudication. Hence, if they have charged the Service Tax on the Rental Value, it has to be presumed that even on the second part, they have to pay the Service Tax on the Rent value only. In respect of the second party, the same will have to be verified with the Agreement and the monthly payments to ascertain as to whether the rent can be treated as inclusive of Service Tax. Since issue pertains to period 2008-09 to 2012-13, which is more than one decade old, the time and effort towards the same, does not justify the amount in question. Further, the appellant has paid the same in 2016. If they had paid excess Service Tax, it was for them to file a refund claim within one year from that date so as to meet the requirement of Section 11B of the CEA 1944. Considering these aspects, we reject their submissions to consider their request to grant the refund.

20. The appellants have also contested the confirmed demand on account of time bar. The confirmed demand is for the period April 2008 to March 2013. The Show Cause Notice was issued on 22.04.2014 by invoking the extended period provisions. We see force in the arguments of the appellant that all the details were properly reflected in their records. They also would be carrying Bonafide belief that there is no requirement to pay the Service Tax when the Restaurant service is being provided to their Members. Several decisions of the High Courts favoured their belief. Even in

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respect of Astor transactions, decisions were in favour of the appellant. Therefore, we hold that the Revenue has not made out any case of suppression against the appellant. We find that part of the confirmed demand pertains to the normal period of 18 months. We hold that the confirmed demand for the extended period is hit by limitation.

21. The appeal is allowed on merits. On limitation, the demand confirmed for the extended period is held as time barred.

22. The appellant would be eligible for consequential relief, if any, as per law.

(Pronounced in the open court on 10.06.2025)

Sd/-
**(R. Muralidhar)**
**Member (Judicial)**

**Sd/-**
**(K. Anpazhakan)**
**Member (Technical)**

Pooja