

**CUSTOMS EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
NEW DELHI
PRINCIPAL BENCH, COURT NO. 1**

SERVICE TAX APPEAL NO. 53183 OF 2014

[Arising out of Order-in-Original No. 07/COMMR./MRT-I/2014 dated 25.02.2014 passed by the Commissioner of Customs & Central Excise Meerut-I]

M/S DIVYA YOG MANDIR TRUST,
Patanjali Yog Peeth,
Delhi Raod, Bahadarabad,
Haridwar (Uttarakhand).

Appellant

Vs.

**COMMISSIONER OF CENTRAL EXCISE
COMMISSIONERATE, MEERUT-I**

Respondent

WITH

SERVICE TAX APPEAL NO. 53184 OF 2014

[Arising out of Order-in-Original No. 07/COMMR./MRT-I/2014 dated 25.02.2014 passed by the Commissioner of Customs & Central Excise, Meerut-I]

M/S YOG SANDESH,
Patanjali Yogpeeth,
Delhi Road, Bahadarabad,
Haridwar (Uttarakhand)

Appellant

Vs.

**COMMISSIONER OF CENTRAL EXCISE
COMMISSIONERATE, MEERUT-I**

Respondent

WITH

SERVICE TAX APPEAL NO. 53185 OF 2014

[Arising out of Order-in-Original No. 07/COMMR./MRT-I/2014 dated 25.02.2014 passed by the Commissioner of Customs & Central Excise, Meerut-I]

M/S DIVYA YOG SADHNA,
Patanjali Yogpeeth,
Delhi Road, Bahadarabad,
Haridwar (Uttarakhand).

Appellant

Vs.

**COMMISSIONER OF CENTRAL EXCISE
COMMISSIONERATE, MEERUT-I**

Respondent

AND

SERVICE TAX APPEAL NO. 53186 OF 2014

[Arising out of Order-in-Original No. 07/COMMR/MRT-I/2014 dated 25.02.2014 passed by the Commissioner of Customs & Central Excise, Meerut-I]

M/S DIVYA PRAKASHAN,

Appellant

Patanjali Yogpeeth,
Delhi Road, Bahadarabad,
Haridwar (Uttarakhand)

Vs.

**COMMISSIONER OF CENTRAL EXCISE,
COMMISSIONERATE, MEERUT-I**

Respondent

Appearance:

Shri B.L.Narasimhan & Ms. Purvi Asati, Advocate for the Appellant
Shri Harshvardhan, Authorized Representative of the Respondent

CORAM:

**HON'BLE MR JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR P. V SUBBA RAO, MEMBER(TECHNICAL)**

FINAL ORDER NOS. 51213-51216 /2022

**DATE OF HEARING : 07/12/2022
DATE OF DECISION: 23/12/2022**

P V SUBBA RAO:

These four appeals assail the same order in original¹ dated 25.2.2014 passed by the Commissioner of Central Goods and Services Tax, Meerut-I² whereby demands of service tax under six different heads were confirmed against the appellants along with interest

¹ Impugned order

² Commissioner

under section 75 of Chapter V of the Finance Act, 1994³. Penalties were also imposed under sections 76, 77 and 78.

2. Enquiries by the Directorate General of Central Excise Investigation⁴ into the affairs of the four appellants culminated in the DGCEI issuing a Show Cause Notice⁵ dated 19.10.2012 calling upon the appellant to explain why service tax should not be demanded from them along with interest and why penalties should not be imposed. The Commissioner issued the impugned order confirming the demands against the four appellants under various heads as follows:

Appellant/ Head of Service	Club or Association Service	Intellectual Property Rights Service	Renting of Immovable Property Service	Transport of Goods by Road Service	Health Club and Fitness Centre Service	Development and Supply of Contents Service
Divya Yog Mandir Trust	1,41,68,987	81,576	15,21,942	14,601	60,172	16,045
Divya Yog Sadhna	-	30,74,441	-	1,27,846	-	-
Divya Yog Prakashan	-	-	-	3,65,642	-	-
Divya Yog Sandesh	-	3,31,247	-	3670	-	-
Total	1,41,68,987	34,87,264	15,12,942	5,11,119	60,172	16,045

3. We have heard Shri B. L. Narasimhan, learned counsel for the appellant and Dr. Radhe Tallo, learned authorised representative for the Revenue and perused the records.

4. Of the six heads under which service tax was demanded, learned counsel for the appellants submits that they are not contesting the demand under 'Renting of Immovable Property Service' and have paid the entire demand along with interest. He also submits that they are not contesting the demand under 'Health club and

³ the Act

⁴ DGCEI

⁵ SCN

Fitness Centre Service'. We proceed to examine the demands under each of the remaining four heads.

Club or Association Service [Section 65(105) (zzze)]

5. The demand under this head was made only against M/s. Divya Yog Mandir Trust, the appellant in appeal **ST/51383/2014**. The appellant received contributions from its members which are relatable to various privileges which the members enjoy. The case of the Revenue is that such contributions are chargeable to service tax at the hands of this appellant under the head 'Club or Association Service' under Section 65(105)(zzze) read with section 65(25aa). Learned counsel for the appellant submits that the services rendered by a club to its members is self-service and is not chargeable to service tax under Club or Association Service. He relies on the judgment of the Supreme Court in **State of West Bengal vs. Calcutta Club Ltd.**⁶ and asserts that the case of the appellant is squarely covered by the ratio of this judgment. Learned authorised representative reiterates the impugned order.

6. We have considered the submissions of both sides with respect to this service.

7. It is undisputed that the appellant was receiving contributions from its members and that such members enjoy some privileges in lieu of such contributions. What needs to be decided is if this arrangement makes it exigible to service tax under section 65(105)(zzze) read with section 65(25a). These sections read as follows:

⁶ **2019(29)GSTL545(SC)**

Section 65 (105)- "taxable service" means **any service provided or to be provided-**

...

(zzze) **to its members** or any other person, **by any club or association** in relation to provision of services, facilities or advantages for a subscription or any other amount;

Section 65 (25a)- " club or association" means any person or body of persons providing services, facilities or advantages, primarily to its members, for a subscription or any other amount, but does not include-

- (i) Any body **established or constituted by or under any law for the time being in force**; or
- (ii) Any person or body of persons engaged in the activities of trade unions, promotion of agriculture, horticulture or animal husbandry; or
- (iii) Any person or body of persons engaged in any activity having objectives which are in the nature of public service and or of a charitable, religious or political nature; or
- (iv) An person or body of persons associated with press or media;

8. In **Calcutta Club Ltd.**, the Supreme Court held that companies and co-operative societies which are registered under the respective Acts can be said to have been constituted under those laws and therefore, get excluded from the definition of club or association under section 65(25a) and consequently, any service rendered by them will not be exigible to service tax under section 65(105)(zzze).

Paragraphs 71 to 73 of this judgment are reproduced below:

71. With this background, it is important now to examine the Finance Act as it obtained, firstly from 16th June, 2005 upto 1st July, 2012.

72. The definition of "club or association" contained in Section 65(25a) makes it plain that any person or body of persons providing services for a subscription or any other amount to its members would be within the tax net. However, what is of importance is that anybody "established or constituted" by or under any law for the time being in force, is not included. Shri Dhruv Agarwal laid great emphasis on the judgments in *DALCO Engineering Private Limited v. Satish Prabhakar Padhye and Ors. Etc.*, (2010) 4 SCC 378 (in particular paragraphs 10, 14 and 32 thereof) and *CIT, Kanpur and Anr. v. Canara Bank*, (2018) 9 SCC 322 (in particular paragraphs 12 and 17 therein), to the effect

that a company incorporated under the Companies Act cannot be said to be "established" by that Act. What is missed, however, is the fact that a Company incorporated under the Companies Act or a cooperative society registered as a cooperative society under a State Act can certainly be said to be "constituted" under any law for the time being in force. In *R.C. Mitter & Sons, Calcutta v. CIT, West Bengal, Calcutta*, (1959) Supp. 2 SCR 641, this Court had occasion to construe what is meant by "constituted" under an instrument of partnership, which words occurred in Section 26A of the Income Tax Act, 1922. The Court held :

"The word "constituted" does not necessarily mean "created" or "set up", though it may mean that also. It also includes the idea of clothing the agreement in a legal form. In the *Oxford English Dictionary*, Vol. II, at pp. 875 & 876, the word "constitute" is said to mean, *inter alia*, "to set up, establish, found (an institution, etc.)" and also "to give legal or official form or shape to (an assembly, etc.)". Thus the word in its wider significance would include both, the idea of creating or establishing, and the idea of giving a legal form to, a partnership. The Bench of the Calcutta High Court in the case of *R.C. Mitter and Sons v. CIT* [(1955) 28 ITR 698, 704, 705] under examination now, was not, therefore, right in restricting the word "constitute" to mean only "to create", when clearly it could also mean putting a thing in a legal shape. The Bombay High Court, therefore, in the case of *Dwarkanadas Khetan and Co. v. CIT* [(1956) 29 ITR 903, 907], was right in holding that the section could not be restricted in its application only to a firm which had been created by an instrument of partnership, and that it could reasonably and in conformity with commercial practice, be held to apply to a firm which may have come into existence earlier by an oral agreement, but the terms and conditions of the partnership have subsequently been reduced to the form of a document. If we construe the word "constitute" in the larger sense, as indicated above, the difficulty in which the Learned Chief Justice of the Calcutta High Court found himself, would be obviated inasmuch as the section would take in cases both of firms coming into existence by virtue of written documents as also those which may have initially come into existence by oral agreements, but which had subsequently been constituted under written deeds."

73. It is, thus, clear that companies and cooperative societies which are registered under the respective Acts, can certainly be said to be constituted under those Acts. This being the case, we accept the argument on behalf of the respondents that incorporated clubs or associations or prior to 1st July, 2012 were not included in the Service Tax net."

9. In this case, it is undisputed that the appellant is registered as a trust under the Indian Trusts Act. Therefore, the ratio of **Calcutta**

Club Ltd. squarely applies to this case. Hence, the demand under this head cannot be sustained.

Intellectual Property Rights Service [Section 65 (105)(zr) read with section 65(55a) and section 65(55b)]

10. Demands of service tax under this head have been confirmed against Divya Yog Mandir Trust, Divya Yog Sadhna and Divya Yog Sandesh. Learned counsel for the appellant submits that the demands of service tax under this head were confirmed on the amounts received by the appellants under the following agreements:

- a) An agreement with M/s. Geminin Overseas Ltd. for telecasting the programme in Russian language;
- b) Agreement with M/s. Diamond Comics, Delhi for grant of exclusive rights to print, publish and distribute the monthly publication 'YOG SANDESH'; and
- c) Agreement with M/s Garg Enterprises and M/s. GTC Infomedia Pvt. Ltd. for exclusive/sole marketing agent and grant of rights to manufacture, copy and print VCDs and DVDs, etc.

11. Learned counsel submits that the demands under this head on the appellants pertain to the period 1.4.2007 to 31.3.2010 when "intellectual property rights service" was taxable but copyrights were specifically excluded from the purview of IPR by law. He submits that subsequently, from 1.4.2010, a separate taxable head of 'copyrights service' was introduced under section 65(105)(zzzt).

12. On perusal of the agreements in question, we find that the appellants gave the service recipients the right to print or telecast or make copies of the Yoga programmes which they produced. In one

agreement, the programmes were also being translated into Russian and telecast to Russia and CIS countries (countries which were part of the former Soviet Union). Evidently, the appellants allowed their copyrighted materials to be used for a consideration. The demand of duty is under the head IPR services chargeable under section 65(105)(zr). This section reads as follows:

65 (105) '**taxable service**' means any service provided or to be provided:

...(zr) to any person, by the holder of intellectual property right, in relation to intellectual proper service;

13. Thus, as long as any service is provided or is to be provided to any person by the holder of IPR in relation to intellectual property service, it is taxable. This leads us to the next two questions as to what are the meanings of intellectual property right and intellectual property service in the context of service tax. These are defined in section 65(55a) and (55b) as follows:

(55a) "**intellectual property right**" means any right to intangible property, namely, trade marks, designs, patents or any other similar intangible property, under any law for the time being in force, **but does not include copyright;**

(55b) "**intellectual property service**" means-

- a) transferring temporarily; or**
 - b) permitting the use or enjoyment of,**
- any intellectual property right.**

14. Thus, an intellectual property service will be rendered if the IPR is either transferred temporarily or its use or enjoyment is permitted. The scope of the IPR in the service tax law specifically excludes copyrights. Therefore, the amounts earned under the agreements by the appellants are clearly excluded from the scope of the taxing

statute for IPR service. The demands under this head cannot, therefore, be sustained.

Transport of goods by road service

15. Demands under this head have been made against all the four appellants on the amounts paid by them as freight invoking Rule 2(1) (d) of the Service Tax Rules under reverse charge (under this Rule, the appellants as recipients of the service are liable to pay service tax). Learned counsel for the appellants submits that as per section 65(50b), goods transport agency is *any person who provides service in relation to transport of goods by road and issues consignment notes*. He submits that issue of consignment notes is essential to attract service tax under this head and no consignment notes have been issued in respect of the services on which tax is demanded from the appellants. He relies on the following case laws:

(a) Bharat Swabhiman (Nyas) vs. Commissioner, Dehradun⁷

(b) Bhoramdeo Sahakari Shakhar Utpadam Karkhana vs. Commissioner of Customs, Central Excise & Service Tax, Raipur⁸

(c) Doddanavar Brothers vs. CC, CE & ST-Belgaum,⁹

(d) Rohan Motors Ltd. vs. CCE, Meerut-I,¹⁰

16. As an alternative submission, learned counsel states that in some cases, the transporter had already paid service tax and collected it from the appellants and the demands need to be re-computed after reckoning such amounts.

17. Learned authorised representative supports the impugned order but does not dispute that there is no evidence of any consignment

⁷ 2022 (1) TMI 1127-CESTAT NEW DELHI
⁸ 2019 (10) TMI 1416-CESTAT NEW DELHI
⁹ 2020 (1) TMI 590-CESTAT BANGALORE
¹⁰ 2018 (7) TMI 29-CESTAT NEW DELHI

notes being issued in respect of the amounts paid by the appellants towards transportation.

18. We have considered the submissions. Charging sections of taxing statutes must be strictly interpreted. Section 65(50b) clearly defines goods transport agency as one who renders any service in relation to transportation of the goods and issues consignment notes. It is a well settled law that if no consignment notes are issued, the service provider is not covered by section 65(50b) and consequently, any services rendered by such a service provider are not exigible to service tax. Learned counsel for the appellants submits that no consignment notes were issued in their case. We find no evidence on record to the effect that consignment notes have been issued. We, therefore, find that the demand under this head is not sustainable and needs to be set aside.

Demand of service tax under 'Development and Supply of Content Service'

19. The demand under this head was made only against the appellant Divya Yog Mandir Trust on the amount received by it from M/s. Rajashri Media Pvt. Ltd. for grant of exclusive rights to all audio, visual, audio-visual and text materials of Divya Yog Mandir Trust. Learned counsel for the appellant submits that the appellant has not developed any content whatsoever for Rajashri Media Pvt. Ltd. As per the agreement, the appellant provided raw content to Rajashri Media who dubbed and developed the content and commercially exploited it. Of the Revenue so generated by which Rajashri Media Pvt. Ltd., the appellant got a share. Such a revenue share cannot be termed

provision of development and supply of content service. Learned authorised representative supports the impugned order.

20. We have considered the submissions. Evidently, as per the agreement between the appellant and Rajashri, the appellant provided material which was developed into audio and video content by the latter and it was also commercially exploited. Part of the Revenue earned was shared by Rajashri with the appellant. Thus, the relationship between the appellant and Rajashri is not one of service provider-service recipient but one of partners in a joint venture in which each contributed something to the project and shared the Revenue earned. In the absence of any service provider-service recipient relationship, there can be no service tax because service tax is chargeable on taxable services provided. There must be a service, it must be taxable, there must be a service provider and a service recipient and a consideration to levy service tax. There is no charge of service tax on sharing of revenues in any joint venture between two entities or persons.

PENALTIES

21. As far as the penalties are concerned, penalty under section 78 is imposable only when the service tax is not paid or short paid by reason of fraud or collusion or willful misstatement or suppression of facts. Penalty under section 76 is imposable in other cases. Penalty under section 77 is imposable for offences not covered under any other section. Further, as per section 80, no penalty is imposable under section 76 or section 77 if there is a reasonable cause for

failure to pay service tax. Sections 76, 77, 78 and 80 are reproduced below:

SECTION 76. Penalty for failure to pay service tax.— Any person, liable to pay service tax in accordance with the provisions of section 68 or the rules made under this Chapter, who fails to pay such tax, shall pay, in addition to such tax and the interest on that tax in accordance with the provisions of section 75, a penalty which shall not be less than one hundred rupees for every day during which such failure continues or at the rate of one per cent of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax:

Provided that the total amount of the penalty payable in terms of this section shall not exceed the service tax payable.

SECTION 77. Penalty for contravention of rules and provisions of Act for which no penalty is specified elsewhere. — (1) Any person, —

(a) who is liable to pay service tax or required to take registration, fails to take registration in accordance with the provisions of section 69 or rules made under this Chapter shall be liable to pay a penalty which may extend to ten thousand rupees or two hundred rupees for every day during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance;

(b) who fails to keep, maintain or retain books of account and other documents as required in accordance with the provisions of this Chapter or the rules made thereunder, shall be liable to a penalty which may extend to ten thousand rupees;

(c) who fails to —

(i) furnish information called by an officer in accordance with the provisions of this Chapter or rules made thereunder; or

(ii) produce documents called for by a Central Excise Officer in accordance with the provisions of this Chapter or rules made thereunder; or

(iii) appear before the Central Excise Officer, when issued with a summon for appearance to give

evidence or to produce a document in an inquiry, shall be liable to a penalty which may extend to ten thousand rupees or two hundred rupees for everyday during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance;

(d) who is required to pay tax electronically, through internet banking, fails to pay the tax electronically, shall be liable to a penalty which may extend to ten thousand rupees;

(e) who issues invoice in accordance with the provisions of the Act or rules made thereunder, with incorrect or incomplete details or fails to account for an invoice in his books of account, shall be liable to a penalty which may extend to ten thousand rupees.

(2) Any person, who contravenes any of the provisions of this Chapter or any rules made there under for which no penalty is separately provided in this Chapter, shall be liable to a penalty which may extend to ten thousand rupees.

SECTION 78. Penalty for failure to pay service tax for reasons of fraud, etc. —

(1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of- fraud or collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax,

the person, liable to pay such service tax or erroneous refund, as determined under sub-section (2) of section 73, shall also be liable to pay a penalty, in addition to such service tax and interest thereon, if any, payable by him, which shall be equal to the amount of service tax so not levied or paid or short-levied or short-paid or erroneously refunded.

Provided that where true and complete details of the transactions are available in the specified records, penalty shall be reduced to fifty per cent of the service tax so not levied or paid or short-levied or short-paid or erroneously refunded.

Provided further that where such service tax and the interest payable thereon is paid within thirty days from the date of communication of order of the Central Excise Officer determining such service tax, the amount of

penalty liable to be paid by such person under the first proviso shall be twenty-five per cent of such service tax.

Provided also that the benefit of reduced penalty under the second proviso shall be available only if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso:

Provided also that in case of a service provider whose value of taxable services does not exceed sixty lakh rupees during any of the years covered by the notice or during the last preceding financial year, the period of thirty days shall be extended to ninety days.

(2) Where the service tax determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunals or, as the case may be, the court, then, for the purpose of this section, the service tax as reduced or increased, as the case may be, shall be taken into account:

Provided that in case where the service tax to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the second proviso to sub-section (1), shall be available, if the amount of service tax so increased, the interest payable thereon and twenty-five per cent of the consequential increase of penalty have also been paid within thirty days or ninety days, as the case may be, of communication of the order by which such increase in service tax takes effect:

Provided further that if the penalty is payable under this section, the provisions of section 76 shall not apply.

Explanation- For the removal of doubts, it is hereby declared that any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the second proviso to sub-section (1) or the first proviso to sub-section (2) shall be sustained against the total amount due from such person.

Section 80. Penalty not to be imposed in certain cases.

(1) Notwithstanding anything contained in the provisions of section 76, or section 77, no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure.

(2) Notwithstanding anything contained in the provisions of section 76 or section 77 or section 78, no penalty shall be imposable for failure to pay service tax payable, as on the 6th day of March, 2012, on the taxable service referred to in sub-clause (zzzz) of clause (105) of section 65, subject to the condition that the amount of service tax along with interest is paid in full within a period of six months from the date on which the Finance Bill, 2012 receives the assent of the President."

22. In this case, we do not find any evidence to substantiate the elements required to levy penalty under section 78. Therefore, only Section 76 would apply. Except for small amounts of service tax under two heads, we have also found that the demands themselves are not sustainable. Therefore, we find this a fit case to invoke section 80 and set aside the penalties under section 76 and 77.

23. In view of the above, we find that the impugned order needs to be set aside to the extent it levies service tax on the appellant under the heads 'Club and Association Service', 'Intellectual property Rights service', 'Transport of goods by road service', and 'Development and supply of content service'. The demand under the heads 'Renting of immovable property service' and 'Health club and Fitness service' is upheld along with applicable interest. All penalties are set aside by invoking section 80 of the Finance Act, 1994.

24. Service Tax Appeal No. 53183 of 2014 filed by M/s Divya Yog Mandir Trust is partly allowed setting aside the demands under the head of "club and association service" "intellectual property right service" "transport of goods by road service" and "development and supply of content service". The demands under the head of "renting of immovable property service" and "health club and fitness service" are upheld. All penalties are set aside with consequential relief.

Service Tax Appeal No. 53184 of 2014 filed by M/s Yog Sandesh is allowed with consequential relief. Service Tax Appeal No. 53185 of 2014 filed by M/s Divya Yog Sadhna is allowed with consequential relief. Service Tax Appeal No. 53186 of 2014 filed by M/s Divya Prakashan is allowed with consequential relief.

[Order pronounced in open court on **23.12.2022**]

(JUSTICE DILIP GUPTA)
PRESIDENT

(P V SUBBA RAO)
MEMBER (TECHNICAL)

Tejo