2014 (4) ECS (1) (HC- Delhi)

In the High Court of Delhi at New Delhi

DELHI CHIT FUND ASSOCIATION

V/s

UNION OF INDIA & ANR.

Date of decision: 23.04.2013

Writ Petition (C) :. 4512/2012
Appearance:
Mr. Venkatraman, Sr. Adv.
with Mr Ravi Sikri, Mr Hari Shankar,
Mr Ayush Kumar, Advocates. for the Appellant
Mr Rajeeve Mehra, ASG with Mr Mukesh Anand,
Mr Aditya Malhotra, Advcoates &
Mr Kamal Nijhawan, Sr. Standing Counsel for the Respondent

CORAM:-
Hon'ble Mr. Justice Badar Durrez Ahmed
Hon'ble Mr. Justice R. V. Easwar

"In a chit business, the subscription is tendered in any one of the forms of "money" as defined in section 65B(33). It would, therefore, be a transaction in money. So considered, the transaction would fall within the exclusionary part of the definition of the word "service" as being merely a transaction in money. This would be the result if the argument that the exclusionary part of the definition in clause (a) is considered to have been enacted ex abundant cautela; if the argument based on Explanation 2 read with the exclusionary part of the definition is accepted as correct, even then the services rendered by the foreman of the chit business for which a separate consideration is charged, not being an activity of the nature explained in the said Explanation, would be out of the clutches of the definition. Either way, there can be no levy of service tax on the footing that the services of a foreman of a chit business constitute a taxable service." (Para 13)

JUDGMENT

R.V. EASWAR, J

1. The short question which arises in this writ petition is whether the provision of services in relation to conducting a chit business is a taxable service for the purposes of section 65B(44) of the Finance Act, 1994 inserted w. e. f. 1st July, 2012.

2. The petitioner is an association of chit fund companies based in Delhi. By a notification No.26/2012 issued on 20th June, 2012, the

Department of Revenue, Ministry of Finance of the Government of India exempted: -

"the taxable service of the description specified in column (2) of the Table below, from so much of the service tax leviable thereon under section 66B of the said Act, as is in excess of the service tax calculated on a value which is equivalent to a percentage specified in the corresponding entry in column (3) of the said Table, of the amount charged by such service provider for providing the said taxable service, unless specified otherwise, subject to the relevant conditions specified in the corresponding entry in column (4) of the said Table, namely: -

Sr. No.	Designation of taxable Service	Percentage	Conditions
1	2	3	4
8	Service Provided in relation to chit	70	CENVAT Credit on inputs provided in capital goods used for providing chit the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004.

3. The petitioner prays that the notification should be quashed in so far as it seeks to subject the activities of a business chit fund companies to service tax to the extent of 70% of the consideration received for the services. The contention of the petitioner is that there is no question of exempting a part of the consideration received for the services in chit fund business when the law provides that such services are not taxable at all in the first place.

4. In order to appreciate the contention a few provisions have to be noticed. The Finance Act, 1994 provided for the levy of service tax in India for the first time. It received several amendments in the course of the time. Originally service tax was levied on the basis of a selective approach; in other words certain taxable services were specified in section 65 (105) of the said Act and it was those services that were chargeable to service tax. A drastic change was made w. e. f. 1st July, 2012 when the comprehensive approach was sought to be introduced by the Finance Act, 2012. The tax regime contemplated under the comprehensive approach was to treat all activities as services chargeable to service tax, except those placed in the negative list or specifically exempted. This fundamental change

was brought about by defining "service" in section 65B (44) in the following manner: -

"(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-

(a) An activity which constitutes merely,-

(i) A transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) Such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or.

(iii) A transaction in money or actionable claim;

(b) A provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

Explanation 1.— For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,

(A) the functions performed by the Members of Parliament, Members of State Legislature, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or

(B) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

(C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

Explanation 2.—For the purposes of this clause, transaction in money shall not include any activity relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination to another form, currency or denomination for which a separate consideration is charged.

Explanation 3.— For the purposes of this Chapter,

(a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;

(b) an establishment of a person in the taxable territory and any of his other establishment in a nontaxable territory shall be treated as establishments of distinct persons.

Explanation 4.— A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory;

4. Section 66B provided for the charge of service tax on and after the Finance Act, 2012. That section is as follows: -

> **"66B. Charge of service tax on and after Finance Act, 2012 -** There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed."

5. A negative list of services which were not taxable was set out in section 66D. It is not necessary to reproduce the said list as it is not the petitioner's case that the services rendered by the chit companies are included in the negative list and hence not taxable. Section 66E contains a list of "declared services" which are subjected to service tax by virtue of section 65B(44) which is quoted above. There are other provisions relating to valuation of the taxable services, registration, furnishing of returns, assessment and recovery, penalties, etc, which are not relevant for the purpose of the present writ petition.

6. It is necessary to give a brief account of the operations of a chit fund business. Supposing 50 persons come together to organise a chit. Let us further suppose that each of them undertake to contribute Rs. 1,000/-. The total chit amount would be Rs. 50,000/-. Let us further suppose that the fund would operate for a period of 50 months. Thus the member subscribers and the number of months for which the chit would operate would be the same. In this example at the end of each month, an amount of Rs. 50,000/- (Rs. 1,000/- x 50) would be available in the kitty of the chit fund. The said amount would be put to auction and those subscribers who are interested in drawing the money early because of their needs may participate in the auction. The successful bidder who is normally the person who offers the highest discount is given the chit amount. For example if there are three bidders offering to take the chit of Rs. 50,000/- for Rs. 40,000/-, Rs. 37,500/- and Rs. 35,000/- respectively, the chit would be given to that subscriber who is willing to take it for Rs.35,000/- since he has offered a discount of Rs.15,000/-. These leave a balance of Rs. 15,000/- (Rs. 15,000 - Rs. 50,000) in the kitty. The amount of Rs.15,000/- which represents the discount which the

successful bidder has foregone becomes the dividend which is to be distributed to all the subscribers after deducting a fixed amount representing the commission payable to the foreman. A foreman is normally a person who organises the auction and conducts the proceedings. If in the example given above, the commission payable to the foreman is fixed at 5%, then after deducting Rs. 2,500/- (5% of Rs. 50,000/-, the chit amount) the balance of `12,500/-would be distributed among all the 50 subscribers so that each would get Rs. 250/-. This amount of Rs. Rs. 250/- can be set off by the subscribers against the second month's installment of Rs. 1,000/- payable by him and he can give only Rs. 750/-. The auction would be repeated in the subsequent months and the same procedure is followed. Any subscriber who delays the bidding or does not bid at all stands to gain the maximum discount. The chit is thus somewhat like a recurring deposit with the bank. There is no bar on the foreman of the chit fund also participating as a subscriber.

7. The business of chit funds is strictly regulated by the Chit Funds Act, 1982. It contains detailed provisions relating to registration of chits, commencement and conduct of chit business. Rights andduties of foreman, rights and duties of the subscribers, termination of chits, meetings of general body of subscribers, provisions relating to winding up, disputes and arbitration and other miscellaneous provisions. Suffice to note that section 11 recognises that a chit business can be known by several names such as chit, chit fund, chitty, kuri, etc. Dealing with the Chit Funds Act, the Supreme Court in Sriram Chits & Investment (P) Ltd. vs. Union of India : AIR 1993 SC 2063 has laid down the following propositions: -

(a) The Act, in pith and substance, deals with special contract and consequently falls within entry 7 of list III of the 7th Schedule to the constitution of India;

(b) A chit fund transaction is not a case of borrowing, nor is it a loan transaction. If a subscriber advances any amount, he does so only to one of the members;

(c) The funds of the chit fund belong to the entire lot of subscribers;

(d) The amounts are in deposit which the stake holder only holds a trust for the benefit of the members of the fund;

(e) The foreman acts only as a person to bring together the subscribers and he is subject to certain obligations with a view to protecting the subscribers from any mischief or fraud committed by him by using the position;

(f) Commission is payable to the foreman for the service rendered by him as he does not lend money belonging to him.

8. The precise question that arises for consideration in this writ petition is whether the services rendered in connection with a chit business are taxable services or not. The contention advanced on behalf of the petitioner is based on the definition of the word "service in section 65B (44). The contention is that the definition excludes an activity which constitutes "merely a transaction in money or actionable claim; a chit business is a transaction in money and it is obvious that a transaction in money by itself cannot be a service in the sense of being an activity carried out by any person for consideration. Therefore, there can be no question of excluding what is not a service from the definition and that being so, what stands excluded is a service rendered in relation to a transaction in money and chit business being a transaction in money, the services rendered in connection with the said business is excluded from the definition. This argument is sought to be supported by reference to Explanation 2 to Section 65B (44). According to the petitioner, this Explanation makes it clear that an activity relating to the use of money or its conversion from one form, currency or denomination to another form, currency or denomination shall not be treated as a transaction in money and, therefore, will be chargeable to service tax and by holding so it seeks to put at rest any ambiguity that may arise in the interpretation of the definition of "service". The only service in relation to a transaction in money or actionable claim, which is taxable, according to the Explanation, being the activity relating to the use of money or its conversion from one form, currency or denomination to another form currency or denomination for which a separate consideration is charged, it clearly implies that all other services rendered in connection with a transaction in money or actionable claim, including the services rendered by the foreman of a chit business, stand excluded from the definition. It is accordingly submitted that the commission received by the foreman or any other person conducting the chit business is not subject to service tax. These contentions are stoutly controverted on behalf of the respondents.

9. We shall first address the argument that what is excluded is only a service in relation to an activity which constitutes merely a transaction in money or actionable claim. The basis of this argument is the principle that a provision cannot exclude something from the definition, unless it is included in the definition. Section 65B (44) defines "service" as any activity carried out by a person for another for consideration. This implies, as pointed out on behalf of the petitioner, that there are four elements therein: the person who provides the service, the person who receives the service, the actual rendering of the service and, lastly, the consideration for the service. The opening words of the definition consist of the above four aspects or characteristics and unless all the four are present,

the activity cannot be charged with service tax. A mere transaction in money or actionable claim cannot under the ordinary notions of a service be considered as a service, neither can it be considered as falling within the first part of the definition because it lacks the four constituent elements which are required by the definition. In a mere transaction in money or actionable claim, no service is involved; there is just the payment and receipt of the money. The word "money is defined in section 65B (33) in the following manner:"-

> "(33) "money" means legal tender, cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveler cheque, money order, postal or electronic remittance or any similar instrument but shall not include any currency that is held for its numismatic value;

10. A mere transaction in money represents the gross value of the transaction. But what is chargeable to service tax is not the transaction in money itself since it can by no means be considered as a service. The exclusionary part of the definition of the word "service however refers to "an activity which constitutes merely a transaction in money or actionable claim". Since a mere transaction in money or actionable claim cannot under the common notions of a service be considered as a service by any stretch of imagination, it is necessary to examine what could have been the intention of the legislature in excluding it from the definition. The obvious answer is that it is not the mere transaction in money or actionable claim that is sought to be excluded from the definition but what is sought to be excluded is any service rendered in connection with a transaction in money or actionable claim. But the difficulty which could arise in this line of reasoning can be that the language of the exclusionary part of the definition in terms refers to the very activity which constitutes a transaction in money and contains no reference to any service rendered in connection therewith. The possible answer to this conundrum is that the legislature deemed it fit, ex abundanti cautela, to exclude an activity which constitutes merely a transaction in money, which even otherwise could not have been considered as a service in any sense of the word. This however appears to us to be a far-fetched answer. A clue to a proper interpretation of the exclusionary part of the definition is embedded in Explanation 2. This Explanation carves out an exception to the exclusionary part of the definition by providing that any activity relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination to another form, currency or denomination for which a separate consideration is charged shall not be considered as a transaction in money.

Therefore, if the only activity, for which a separate consideration is charged, and which cannot be considered as a transaction in money is the activity mentioned in the Explanation, and service tax would accordingly be charged on the consideration received in respect of such an activity, then it follows that all other cases of transaction in money shall stand excluded from the charge of service tax, including the consideration charged for the services of a foreman in a chit business. The Explanation, therefore, seems to offer a clue to the problem which appears to us to be a creation of the very confounding manner in which the definition is found to have been drafted. However, we have to make sense of what we have.

11. It is the function of an Explanation to explain the meaning and effect of the main provision to which it is an Explanation and to clear up any doubt or ambiguity in it. Ultimately, however, it is the intention of the legislature which is paramount and a mere use of a label cannot control or deflect such a function. This is the principle laid down by a Constitution Bench of the Supreme Court in Dattatraya Govind Mahajan & Ors. vs. State of Maharashtra & Anr. : (1977) 2 SCC 548. In S. Sundaram Pillai, etc. v. P. Lakshminarayana Charya and Ors. : AIR 1985 SC 582, a three-Judge Bench of the Supreme Court considered the object of an Explanation and observed as follows: -

"52. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is -

(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same."

Moreover, "every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make

a consistent enactment of the whole statute or series of statutes relating to the subject matter", as held in Canada Sugar Refining Company Vs. R. (1898) A.C. 375, a principle that is frequently applied in case of difficulty in construing a statute. In N. T. Veluswami's case (AIR 1959 SC 422), a three-judge Bench of the Supreme Court speaking through T.L. Venkatarama Aiyar, J, held as follows :

> "…… It is no doubt true that if on its true construction, a statute leads to anamolous result, the courts have no option but to give effect to it and leave it to the legislators to amend and alter the law. But when on a construction of a statute, two views are possible, one which results in an anamoly and the other, not, it is our duty to adopt the latter and not the former, seeking consolation in the thought that the law bristles with anamolies".

12. If these rules of interpretation are applied, it appears to us that even if it is assumed that there is an ambiguity or doubt in the interpretation of the exclusionary part of the definition of the word "service" and as to what types of activities in relation to a transaction or money or actionable claim are exempted from the levy of service tax, that doubt or ambiguity gets cleared up on a careful examination of the implications of the Explanation 2. The Explanation has been enacted only "for the purposes of this clause" and since it is placed below clause (c), strictly speaking it is relevant only for the purpose of the aforesaid clause. However, clause (c) refers to fees taken in any Court or Tribunal established under any law for the time being in force. It is obvious that Explanation 2 can have no relevance to this clause. If we refer to clause (c) immediately below which the Explanation is placed, we find that the said clause refers to duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section. It is obvious that the Explanation can have no relevance to this clause also. In these circumstances we are constrained to hold that Explanation 2, when it says "for the purpose of this clause", the reference can only be to clause (a) and more precisely to sub-clause (iii) which refers to "a transaction in money or actionable claim". Be that as it may, if the exclusionary part of the definition [i.e., clause (a)(iii)] is construed on its own terms there would be an anamoly in as much as what was not a "service" in the first place within the opening words of Section 65B (44) would fall to be excluded - a construction that would be aimless or futile; but if that part is construed in the light of or with the aid of Explanation 2 and what it signifies or implies, then the anamoly gets ironed out or removed, as we have explained earlier. Obviously, we have to prefer the latter interpretation and not the former.

13. In a chit business, the subscription is tendered in any one of the forms of "money" as defined in section 65B(33). It would, therefore, be a transaction in money. So considered, the transaction would fall within the exclusionary part of the definition of the word "service" as being merely a transaction in money. This would be the result if the argument that the exclusionary part of the definition in clause (a) is considered to have been enacted ex abundant cautela; if the argument based on Explanation 2 read with the exclusionary part of the definition is accepted as correct, even then the services rendered by the foreman of the chit business for which a separate consideration is charged, not being an activity of the nature explained in the said Explanation, would be out of the clutches of the definition. Either way, there can be no levy of service tax on the footing that the services of a foreman of a chit business constitute a taxable service.

14. Our attention was drawn on behalf of the petitioner to the Education Guide issued by the Central Board of Excise and Customs and particularly to paragraph 2.8 under the heading —transactions only in money or actionable claims do not constitute service||. Paragraph 2.8.2 is in the following terms: -

> "2.8.2 Would a business chit fund comes under transaction only in money'?
>
> In business chit fund since certain commission received from members is retained by the promoters as consideration for providing services in relation to the chit fund it is not a transaction only in money. The consideration received for such services is therefore chargeable to service tax."

15. The argument is that the answer given in the Education Guide is not correct having regard to the proper interpretation of the statutory provision. We have come to the conclusion that no service tax is chargeable on the services rendered by the foreman in a business chit fund on an interpretation of the statutory provisions. It is not necessary for us to therefore express any opinion as to the correctness of the views expressed in the aforesaid Education Guide issued by the Central Board of Excise and Customs.

16. In the result the writ petition succeeds and prayer (i) is granted. The notification No.26/2012-ST dated 20.06.2012 issued by the Government of India, Ministry of Finance (Department of Revenue) is quashed to the extent of the entry in serial No.8 thereof. The writ petition is allowed with no order as to costs.