AUTHORITY FOR ADVANCE RULINGS
(Central Excise, Customs and Service Tax)
Hotel Samrat, 4th Floor, Kautilya Marg, Chanakyapuri
New Delhi
Present:
Justice V.S. Sirpurkar (Chairman)
Shri S.S.Rana (Member)

The 11th day of September, 2015

Ruling No. AAR/ST/10/2015
in
Application No. AAR/44/ST/07/2014

Name & address of the applicant	:	M/s Emerald Leisures Limited, Mumbai (Formerly Apte Amalgamations Ltd). 14-A, The Club, NR Mangal Anand Hospital, Swastik Park, Chembur, Mumbai-400071
Commissioners concerned	:	The Commissioner of Service Tax, Mumbai-II, 115, New Central Excise Bldg., M.K.Road, Opp. Churchgate Station, Mumbai-400020
Present for the applicant	:	Shri B.J.Raichandani, Advocate,
Present for the Department	:	Shri Amresh Jain(AR)

Ruling

M/s Emerald Leisures Limited (hereinafter also referred to as applicant) is resident Public Limited Company. Applicant has entered into the business of establishing and running an indoor sports complex and club. The facilities and amenities to be provided at the upcoming indoor sports complex and club include lawn tennis courts, badminton court, swimming pool, table tennis, billiards, card room, board games, virtual sports, kids play area, a library, restaurant, spa, gymnasium, banquet halls and room to stay. Applicant proposes to invite membership from prospective members in terms of proposed scheme. The said scheme includes proposal for refundable interest free security deposit ranging between Rs. 3 lakhs / Rs 4.5 lakhs up-to Rs. 10 lakhs to be received from each

potential member in addition to non-refundable membership fee for an amount ranging from Rs. 50,000/- to Rs. 5,00,000/- depending on the category of membership. The maximum term of membership is 20 years. The club facility shall be allowed to be used only by the members.

2. Applicant has raised following issues for determination by the Authority.

(a) Whether the relationship between the applicant and members of the club could be considered as provision of "service" by one person (service provider) to another person (service receiver) for the purpose of Section 65B(44) of the Finance Act, 1994 read with Sections 66B, 66D and Section 66E of the Finance Act, 1994 and accordingly, would the Membership fee, Annual fee and other charges received from members from time to time be liable for Service Tax or in light of the settled legal concept of mutuality, the club and its members are not to be regarded as two separate entities and hence, there is provision of "service" by one person (service provider) to another person (service receiver)?

(b) Whether refundable security deposit would be subject to Service Tax is in accordance with the applicable provisions of law, in particular, the definition of service contained in Section 65B(44) read with sections 66B, 66D and Section 66E of the Finance Act, 1994 or not.

3. Applicant submits that in order to attract Service Tax, the service provider has to undertake an activity for another person (service receiver) for a consideration; that in the instant case, all the ingredients for imposition of Service Tax are not present. Applicant submit that there is no "activity" undertaken by the applicant for the members; that the term "activity" has not been defined under the Finance Act, 1994 or Central Excise Act, 1944 or the rules made there-under; that the dictionary meaning of "activity" is the state of being active or energetic action or movement, liveliness; that members shall use the available passive infrastructure; that no Service Tax is applicable on aforesaid transaction.

4. Further, applicant submits that no service is being provided by one person to another as there is complete absence of identity between the contributors and the beneficiaries thereof; that for a service to be regarded as taxable service,

there should be two distinct person i.e. service provider and service receiver; that in the case of the Dalhousie Institute 2005 (108) ELT 18, the Hon'ble Calcutta High Court held that immoveable property let out by a club to its members would not be liable to Service Tax as "Mandap Keeper" because the club is a mutual concern; that similar view was taken in case of Saturday Club Ltd Vs. CCE 2006 (30) STR 305 (Cal); that in case of Joint Commercial Tax officer, Madras vs. Young Men's Indian Association 1970(1)(SCC) 462 it was held by the Hon'ble Supreme Court that in spite of definition contained in Section 2 (n) of Sales of Goods Act, 1930 read with Explanation I, if there is no transfer of property from one to another, there is no sale, which would be exigible to tax. The Hon'ble Supreme Court further observed that if the club, even though a distinct legal entity, is only acting as an agent for its members in matter of, supply of various preparations to them, no sale would be involved as the element of transfer would be completely absent; that similar view was taken by Full Bench of the Patna High Court in case of CIT vs. Ranchi Club (1992 196 ITR 137 Patna) wherein it was inter-alia held that keeping in view the principle of mutuality, the surplus accruing to a Members' Club from the subscription charges received from its members cannot be said to be income within the meaning of the Act; that if such receipts are from source other than the members, no exemption can be claimed in respect of such receipts on the plea of mutuality; that Hon'ble Gujarat High Court in Sports Club of Gujarat Limited Vs U.O.I. reported in 2013 (31) STR 645 (Guj.) held provisions of Section 65(25a), Section 65 (105)(zzze) and Section 66 of the Finance Act, 1994 to levy Service Tax in respect of services purportedly provided by the petitioner club to its members to be ultra vires; that above rulings would apply even after 01.07.2012 in respect of submissions made by the applicant; that explanation to Section 65 B(44) would not apply in the facts of the present case.

5. Revenue submits the as per Section 65B (37), "person" includes an association of persons or body of individuals, whether incorporated or not. Section 65B (44) defines the term "service". The term "service" is defined as any activity carried out by a person for another for consideration. Explanation 3 to the said Section explicitly states that for the purpose of this Chapter, an unincorporated association or body of persons, as the case may be, and the

member thereof, shall be treated as distinct persons. The activity undertaken by the applicant is in the interest of the shareholders of the Company. Services are provided to the members of the Club. To become a member of the Club, the person is required to pay Membership Entrance Fee (Non-Refundable) and Refundable Security Deposit as specified. Having become the member of the Club, in order to avail the services of the Club, member is required to pay Annual Subscription charge. For specified services provided by the Club, member is required to pay the consideration separately. Membership provides privilege to avail the facilities and service of the Club. Revenue further submits that as per the Memorandum of Association, the objective of the company is to carry on various business including farming and establishing businesses which are considered to be conducive to the profit and interest of the company. The company has shareholders. Dividends are to be distributed to shareholders. M/s Emerald Leisures Limited, as part of the business activities runs the entity named as "The Club" for profit motive. Revenue inter-alia concludes that from the material facts made available, it does not merely seem to be an association or body of persons providing service to the members of such association or body of persons; that the activities under consideration undertaken or proposed to be undertaken by M/s Emerald Leisures Limited, is purely a business activity by M/s Emerald Leisures Limited for profit motives; that the name given "The Club" does not seem to signify the conventional Club providing services to its members, wherein there are no shareholders and consequently the question of distribution of the profit arising out of the activities of the club to the shareholders may not arise; that in the present case, M/s Emerald Leisures Limited, undertakes activities purely on profit motive and the profit arising out of the activities are required to be distributed only amongst the shareholders; that therefore, the issue of "principle of mutuality" is of no relevance or consequence for the issue under consideration in view of the material facts. Further, in view of the Section 66B read with Section 65 B (37) and Section 65B (44), the services provided by the applicant, which is a Public Limited Company and the profit of the company is shared amongst shareholders and not to the so called members of the Club is clearly a taxable service provided by one person (applicant) to another person (members of the club) and are accordingly leviable to Service Tax. "Principle of mutuality" raised by

the applicant does not seem to have relevance in view of the material facts on record.

6. First issue raised by the applicant is that there is no activity carried out by the club for its members, thus there is no service. In order to charge Service Tax, there should be "service". As per Section 65 B (44) of the Finance Act, 1994, "service" inter-alia means any activity carried out by a person for another for consideration. Therefore, "service" has following 4 ingredients;

a) Activity (carried out)
b) By one person
c) For another person
d) For consideration

7. According to the applicant, there is no "activity"; that making available passive infrastructure to members by the club is not an activity; that activity means state of being active. Revenue submits that there are "services" liable to Service Tax, which does not contain state of being active. As example, Revenue state that as per Section 66E(e) of the Finance Act, 1994, agreeing to the obligation to refrain from an act or to tolerate an act or a situation or to do an act, is declared service and liable to Service Tax, though there is no state of being active.

8. It is observed that the term "activity" has very wide connotation. It could be active or passive. Further, it includes provision of a facility provided by the club. Therefore, the contention of the applicant that the proposed service of club to members will not have the element of "activity" and thus, will not fall under the definition of "service", is not tenable.

9. Next issue raised by the applicant is that no service is being provided by one person to another as there is complete absence of identity between the contributors and the beneficiaries thereof. Further, for a service to be regarded as taxable service, there should be two distinct persons i.e. service provider and service receiver. Applicant has relied upon the judgment of Hon'ble Supreme Court in Joint Commercial Tax officer, Madras vs. Young Men's Indian Association,

wherein it was held that if there is no transfer of property from one to another, there is no sale, which would be exigible to tax. The Hon'ble Supreme Court further observed that if the club, even though a distinct legal entity, is only acting as an agent for its members in matter of, supply of various preparations to them, no sale would be involved as the element of transfer would be completely absent. It is noticed that the Hon'ble Supreme Court in this judgment observed as under:

With regard to incorporated club, a distinction has been drawn. Where such club has all the, characteristics of a members' club consistent with its incorporation, that is to say, where every member is a shareholder and every shareholder is a member, no license need to be taken out if liquor is supplied only to the members. If some of the shareholders are not members or some of the members are not shareholders that would be case of a proprietary club and would involve sale. Proprietary clubs stand on a different footing. The members are not owners of or interested in the property of the club. The supply to them of food or liquor through a fixed tariff is a sale.

10. In concurring judgment, Justice Shah observed as under;

It appears on the findings recorded by the High Court that the clubs or associations sought to be rendered liable in these appeals were not transferring property belonging to them but merely acting as agents for and on behalf of the members. They were not selling goods but were rendering a service to their members.

11. It is noticed from the above judgment of the Hon'ble Supreme Court that with regard to incorporated club, if some of the shareholders are not members or some of the members are not shareholders that would be case of a proprietary club and would involve sale. In the instant case before us, members may not be shareholders and shareholders may not be members of the club. Therefore, members are not owners of or interested in the property of the club. Hence, ratio of the judgment is not helpful to the applicant. One interesting aspect is noticed from the reading of said judgment, which states that clubs or associations were not transferring property belonging to them but were merely acting as agents for and on behalf of members; that they were not selling goods but rendering a

service to their members. The judgment makes it clear that activity of giving goods to its members by the club is not sale but service. Therefore, this verdict of the Hon'ble Supreme Court is in favour of the Revenue.

12. Applicant also relied upon the judgment of Full Bench of Patna High Court in CIT vs. Ranchi Club wherein it is held that members' club can seek exemption from the tax liability under the Income Tax Act only if it could satisfy the test of mutuality in respect of its receipts and not on any other ground, subject to the provisions of the Act. Whether the surplus in the hands of the club has resulted out of transactions entered into with a motive of profit earning which can be said to be tainted with commerciality, is wholly irrelevant for determining the taxability of the receipts because of non-commercial or casual receipts are liable to Income- Tax under the Act.

13. It is observed that the judgment in Commissioner of Income Tax vs. Ranchi Club Ltd. was rendered under the Income Tax Act. The case before us is in respect of Service Tax under the Finance Act, 1994. It may be mentioned here that with effect from 01.07.2012, a deeming provision has been introduced to the effect that the club and its members are separate persons. Therefore, the principles of mutuality are not applicable to the issue before us.

14. Further, Hon'ble Supreme Court in Chelmsford Club vs. C.I.T.(MANU / SC / 3001 / 2000) also mentioned 3 conditions stipulated by the Judicial Committee in the case of English & Scottish Joint Cooperative wholesale Society Ltd. vs. Commissioner of Agriculture Income Tax, Assam 1948 AC 405, existence of which establishes the doctrine of mutuality. They are;

a. the identity of the contributors to the fund and the recipients from the fund.
b. the treatment of the company, though incorporated as a mere entity for the convenience of the members and policy holders, in other words, as an instrument obedient to their mandate and
c. the impossibility that contributors should derive profits from contributions made by themselves to a fund which could only be expended or returned to themselves.

It is noticed that in the instant case before us, the applicant has number of businesses and share-holders, who may not be members of the club and vice-versa. Further, the applicant's prime objective is profit making and dividends are distributed among share-holders, who may not be members. Therefore, condition number (b) and (c) above are not satisfied and thus principles of mutuality are violated. Similarly, ratio of judgments of Hon'ble High Courts relied upon by the applicant in Ranchi Club Ltd. vs. Chief Commissioner of Central Excise & Service Tax, Ranchi Zone (2012-T10L-1031-HC-Jharkhand-ST) and Dalhousie Institute vs. Assistant Commissioner, Service Tax cell (2005 (180) ELT 18 (Cal)) are not applicable to the facts of the case before us.

15. Applicant also relied upon the judgments of the Hon'ble High Court in case Saturday Club Ltd vs. A.C Service Tax Cell, Calcutta [2006 (3) STR 305 (Cal)] and Sports Club of Gujarat ltd vs. U.O.I [2013 (31) STR 645 (Guj)] to emphasize that in view of principles of mutuality, no service tax is payable by the applicant. The Hon'ble High Court observed that principally there should be existence of two sides / entities for having transaction as against consideration – In a members club, there is no question of two sides – members and club, both are same entity. We observe that with effect from 01.07.2012, new system of taxation of services has been introduced by the Government. Besides other changes, the word "service" has also been defined under Section 65B (44) of the Finance Act, 1994. Explanation 3 (a) to said Section states that for the purposes of this chapter, an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons. Therefore, deeming provision has been introduced with effect from 01.07.2012 to the effect that the club and members are deemed to be separate persons. In view of these recent changes, the judgments of Hon'ble High Courts relied upon by the applicant, are no more applicable to facts of the case before us. Therefore, the contention of the applicant that club and its members are not two distinct persons, is incorrect.

16. Second issue raised by the Applicant before the Authority for determination is;

Whether refundable security deposit would be subject to Service Tax is in accordance with the applicable provisions of law, in particular, the definition of service contained in Section 65B(44) read with sections 66B, 66D and Section 66E of the Finance Act, 1994 or not.

17. Revenue inter-alia submits that notional interest earned on the refundable interest free security deposit needs to be added to the value for the purposes of valuation of service under Section 67 of the Finance Act, 1994; that receipt of interest free security deposit is in lieu of ad-idem between two contractees and is a condition of contract between the two persons i.e. applicant club and proposed members; that interest earned on said deposits results in enriching the applicant by additional consideration which should be taken as part of "gross consideration" under Section 67 of the Finance Act, 1994; that if members do not give said interest free security deposits, the cost of providing services would increase and such burden would shift to members. Revenue further submits that the legislative intent for determining value under Section 67 ibid is to determine the true value of the service in ordinary course of trade and value should be such which must be the sole consideration for the service. Revenue also relied upon stay order dated 07.07.2015 in case of Phoenix International Ltd vs. CCE & ST, Noida.

18. Applicant submits that as per Section 66B (44) of the Finance Act, 1994, in order to attract Service Tax, the service provider has to undertake an activity for another person (service receiver) for a consideration; that applicant is not going to undertake any activity per se for the members. Applicant further submits that refundable security deposit not retained by him, cannot be considered as a consideration; that receipt of said deposit is a condition of the contract and not consideration. Applicant relied upon the judgment CIT vs. Tollygunge Club Ltd. (1977) 2 SCC 790 and CIT vs. Bijli Cotton Mills (P) Ltd (179) 1 SCC 496 in support of his contention, besides some other judgments.

19. Applicant submits that Section 67 of the Finance Act, 1994 provides that value of taxable services shall be the gross amount charged by the service provider for such services provided or to be provided by him; that the terms

"gross amount charged" and "such service" has to be read in context and in tender with each other; that notional interest on the refundable security deposits, which is not charged by the applicant, cannot be considered as gross amount "charged" by the applicant; that there is no provision under the Finance Act, 1994 or rules made there-under allowing addition of notional amount to the value of taxable service; that notional interest on security deposits can be included in the value of the service only if the Revenue is in a position to establish that same has led to depression or reduction in the value of taxable service; that such is not the situation here.

20. The question raised before this Authority in short is whether refundable security deposit would be subject to Service Tax. From the submission made by the applicant and Revenue, it is noticed that the thrust of arguments is – whether interest accruing on the refundable security deposit is liable to Service Tax. We proceed to examine this issue.

21. It is observed that as per the Schedule of Membership Fees, applicant is charging Membership Entrance Fees (Non-Refundable) ranging from Rs. 50,000/- to Rs. 5,00,000/- depending on the type of membership. Further, Refundable Security Deposit ranging from Rs. 1.50 lakhs to Rs. 10 lakhs is also being charged for 20 years, for most of categories of members. The Refundable Security deposit is for security towards various facilities and amenities in the club. Applicant has submitted that the facilities and amenities to be provided at the upcoming indoor sport complex and club include the following: lawn tennis courts, badminton court, squash court, swimming pool, table tennis, billiards, card room, board games, virtual sports, kids play area, a library, restaurant, spa, gymnasium, banquet hall and rooms to stay. Section 67(1) of the Finance Act, 1994 provides for the measure of levy. The said section reads as follows:

(1) Subject to the provisions of this Chapter, Service Tax chargeable on any taxable service with reference to its value shall,-

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of Service Tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

22. It is noticed from Section 67(1)(i) ibid that consideration received in money for services rendered is liable to Service Tax. In the case before us, refundable security deposit ranging from Rs. 1.50 lakhs to Rs. 10 lakhs is to be taken by the applicant for a period of 20 years, for most of the categories of members. Since refundable security deposit is proposed to be taken from members in money (ranging from Rs. 1.50 lakhs to Rs. 10 lakhs), Section 67 (1) (ii) and (iii) ibid are not applicable. Further, said deposit is for security towards various facilities and amenities in the club. Therefore, refundable security deposit is not for any services rendered. Applicant proposes to take refundable security deposit from proposed members and same is not a consideration for service provided or to be provided, as same would be refunded to members. Further, Section 67(1)(i) ibid inter-alia envisages that Service Tax chargeable on any taxable service with reference to value, be the gross amount charged by the service provider for such service provided or to be provided by him. Therefore, "charged" means amount collected or to be collected by the service provider for service provided or to be provided by him. Notional interest on refundable security deposit is not a "charge" by the applicant. Since there is no "charge", there is no service in the present case.

23. Further, there is no provision under the Finance Act, 1994 or rules made there-under allowing addition of notional interest to the value of taxable service. Further, Revenue has not been able to establish that notional interest of refundable security deposit has led to depression or reduction in the value of taxable service.

24. Revenue has also raised an issue that receipt of interest free security deposit between two contractees i.e. service provider (club) and service receiver

(member) is a condition of contract between two persons. Therefore, same would tantamount to "additional consideration" and be part of "gross amount" under Section 67 of the Finance Act, 1994. It is noticed that in CIT vs. Tollygunge Club Ltd. (1977) 2 SCC 790, the assessee was a Company and owned a Social and Sports Club, one of whose activities consisted of conducting horse races. It charged for admission into the enclosure of the club, admission fees to the guests introduced by members of the club as well as members of the public. It also charged a surcharge of eight annas on the entrance ticket over and above admission fees, the proceeds of which were to go to the Red Cross Fund. The issue before the Apex Court was "Whether assessee's receipts from the surcharge levied on admission tickets for the purpose of charity could be included in the assessee's taxable income. The court ruling in favour of the assessee observed as under;

The surcharge is undoubtedly a payment which a race-goer is required to make in addition to the price of admission ticket if he wants to witness the race from the Club enclosure, but on that account it does not become part of the price for admission. The admission to the enclosure is the occasion and not the consideration for the surcharge taken from the race-goer.

25. Applying the ratio of judgment of Hon'ble Supreme Court in CIT vs. Tollygunge Club Ltd. to the case before us, it can be concluded that refundable security deposit and interest thereon, is not a consideration. Therefore, it cannot be charged to Service Tax.

26. Revenue has relied upon a Stay Order No. SO/52213/2015-CU [DB] dated 07.07.2015 of CESTAT in case of Phoenix International Ltd vs. CCE & ST, Noida by enclosing a copy of said order. It is not explained as to how said stay order is applicable to be present issue. On the other hand, applicant has relied upon Tribunal's judgment in case of Murli Realtors Pvt. Ltd. vs. CCE, Pune-II 2014-TIOL-1728-CESTATE-Mum, wherein it is held that notional interest on interest free security deposit cannot be added to be rent agreed upon between the parties for the purposes of levy of Service Tax on renting of immovable property. The order in case of Murli Realtors Pvt. Ltd. is not an interim / stay order, as in case of

Phoenix International Ltd. relied upon by the Revenue. Therefore, Murli Realtors Pvt. Ltd judgment will prevail over the stay order relied upon by the Revenue.

27. In view of the above, we rule as under;

(a) The relationship between the applicant and members of the club should be considered as provision of "service" by one person (service provider) to another person (service receiver) for the purpose of Section 65B (44) of the Finance Act, 1994 read with Sections 66B, 66D and Section 66E of the Finance Act, 1994 and accordingly, the Membership fee, Annual fee and other charges received from members from time to time be liable for Service Tax.

(b) Refundable security deposit and interest there-on should not be subjected to Service Tax as per provisions of the Finance Act, 1994.

Sd/- Sd/-

(S.S.Rana) **(V.S.Sirpurkar)**
Member **Chairman**