Topic : GST on CHS

Hosted by : WIRC of ICAI

Day & Date : Saturday, 7th March 2020

CA Gopal Kedia

The second appellant M/s. **Tahnee Heights Co-operative Housing Society** formed a society in which all the **members are shareholders**. The society is **registered** under the Maharashtra Co-operative Societies Ltd. Charges are collected from the members for maintenance, repair, beautification etc. According to the appellant, **they offer services to self** and, therefore, would not be covered under Service Tax. In their view they are covered by the exclusion clause under Section 65(25a) which excludes any body **established or constituted by** or under any law from the coverage of 'club or association'. The appellant had however, paid Service Tax on persuasion by the department. Later they filed refund claims on self service - which were rejected on merits.

Revenue was of the view that the above exclusion clause only refers to bodies ***which are established or constituted under a statute and not bodies which are formed and registered under*** a statute. Therefore, the refund claims were rejected on merits without going into the aspects of unjust enrichment.

The ld. Counsel relied on three judgments namely :

(i) *Ranchi Club* v. *Chief Commr. of C. Exc. & ST, Ranchi* - 2012 (26) S.T.R. 401 (Jhar.)

(ii) *Sports Club of Gujarat* v. *Union of India* - 2013 (31) S.T.R. 645 (Guj.)

(iii) *M/s. Federation of Indian Chambers of Commerce & Industry* v. *Commissioner of Service Tax, Delhi* - 2014-TIOL-701-CESTAT-Del.

8. We find that the subject matter in the present appeals has also been the subject issue in various judgments. In the case of *Ranchi Club* (supra), **the Hon'ble Jharkhand High Court** held that "Since the issue ***whether there are two persons or two legal entity in the activities of the members' club has been already considered and decided by the Hon'ble Supreme Court*** as well as by the Full Bench of this Court in the cases referred above, therefore, this issue is no more *res integra* and issue is to be answered in favour of the writ petitioner and it can be held that in view of the mutuality and in view of the activities of the club, if club provides any service to its members, may be in any form including as mandap keeper, then it is **not a service by one to another** in the light of the decisions referred above as foundational facts of existence of two legal entities in such transaction is missing. *However, so far as services by the club to other than members, learned counsel for the petitioner submitted that they are paying the tax."*

Refund of - Interest paid by assessee - **Tribunal holding that Service Tax was not recoverable**, setting aside orders of authorities below, and allowed assessee's appeal with consequential reliefs

- *HELD* : Department could not withhold refund of interest on the ground that they have not accepted Tribunal decision and have filed appeal against it before Supreme Court –

- *Revenue allowed two more months to obtain interim orders from Supreme Court, failing which, directions given for release of interest to assessee*

- Section 11B of Central Excise Act, 1944 as applicable to Service Tax vide Section 83 of Finance Act, 1994

Taxability - Undisputedly said **activity undertaken by Association for its own member** banks as per norms/rules of Association

8. We also find that this Bench in the case of *Matunga Gymkhana* 2015-TIOL-108-CESTAT-MUM = 2015 (38) S.T.R. 407 (Tri.) has held the same view that any association is not providing services to its own members and the Bench relied upon the judgment of the Hon'ble High Court of Jharkhand in the case of *Ranchi Club* v. *Chief Commissioner of Central Excise & Service Tax, Ranchi* - 2012-TIOL-1031-HC-JHARKHAND-ST = 2012 (26) S.T.R. 401 (Jhar.) and also the judgment of the Hon'ble High Court of Gujarat in the case of *Sports Club of Gujarat* v. *Union of India* 2013-TIOL-528-HC-AHM-ST = 2013 (31) S.T.R. 645 (Guj.).

In view of the foregoing and the authoritative judicial pronouncements on the issue, we find that the impugned order is unsustainable and liable to be set aside and we do so. The impugned order is set aside and the appeal is allowed with consequential relief, if any.

COMMISSIONER OF S.T.-I, MUMBAI Versus APSARA CO-OP HOUSING SOCIETY LTD = 2016 (44) S.T.R. 303 (Tri. - Mumbai) – dtd 19-10-2015

3. The facts are that the appellant who are a Co-operative Housing Society were collecting monthly subscription **from its members** and utilised the funds so collected to manage, maintain and administer the buildings. Department sought to impose Service Tax on such service provided.

4. We find the matter stand covered in appellant's favour by the following judgments :-

(i) *Matunga Gymkhana* (2015-TIOL-108-CESTAT-MUM) = 2015 (38) S.T.R. 407 (Tri.)

(ii) *Ranchi Club* (2012-TIOL-031-HC-Jharkhand-ST) = 2012 (26) S.T.R. 401 (Jhar.)

(iii) *Sports Club of Gujarat* (2013-TIOL-528-HC-AHM-ST) = 2013 (31) S.T.R. 645 (Guj.)

(iv) *Federation of Indian Chambers of Commerce & Industry* (2014-TIOL-701-CESTAT-DEL) = 2015 (38) S.T.R. 529 (Tri.).

5. In the circumstances, both stay petition and **appeal are dismissed**

TAHNEE HEIGHTS CO-OPERATIVE HOUSING SOCIETY LIMITED 2019 (21) G.S.T.L. 440 (Tri. - Mumbai) dtd **12-10-2018**

10. On perusal of the above statutory provisions, it reveals that upon registration of the society, the same is legally accepted as a body corporate and thereafter, its function and operation are strictly guided as per the laid down bye laws, provided for the purpose. In this case, it is no doubt, a fact that the **appellant is a co-operative society and is duly incorporated under the Act of 1960**. The appellant also do not provide any services to its members, who pay the amount towards their share of contribution, for occupation of the units in their respective possession. Further, **the fact is also not under dispute that the appellant do not provide any facilities or advantages for subscription or any other amount paid.** Thus, under such circumstances, the appellant cannot be termed **as an unincorporated association or a body of persons, for the purpose of consideration as a 'distinct person'**. Accordingly, the explanation furnished under clause 3(a) in Section 65B of the Act will not designate the appellant as an entity separate from its members. .....

TAHNEE HEIGHTS CO-OPERATIVE HOUSING SOCIETY LIMITED 2019 (21) G.S.T.L. 440 (Tri. - Mumbai) dtd 12-10-2018

10. ..... Furthermore, the purpose for which the appellant's society **was incorporated, clearly demonstrate that it is not at all providing any service to its members** and the share of contribution is to meet various purposes as stated above. Therefore, I am of the considered view that the case of the appellant is **not confirming to the requirement of 'service'**, as per the definition contained in Section 65B(44) of the Act.

11. In view of the foregoing discussion and analysis, it is concluded that the activities undertaken by the appellant should not fall within the scope and ambit of taxable service, for payment of service tax. Therefore, **service tax amount paid by the appellant should be eligible for refund**. Accordingly, the impugned order is set aside and the appeals are allowed in favour of the appellant.

CASA GRANDE CO-OPERATIVE HOUSING -2019 (29) G.S.T.L. 349 (Tri. - Mumbai) Dtd 11-1-2019 in

Refund - Limitation - Relevant date - Service Tax paid during period from September, 2009 to 30-4-2014 on consideration received by Housing Society from its Members for providing Club or Association services which were held not taxable - Refund claim having been filed under Section 11B of Central Excise Act, 1944 and also being beyond one year from the relevant date which is the date of payment as per said Section, same rightly barred by time - Section 11B of Central Excise Act, 1944 as applicable to Service Tax vide Section 83 of Finance Act, 1994

STATE OF WEST BENGAL Versus CALCUTTA CLUB LIMITED - 2019 (29) G.S.T.L. 545 (S.C.)

IN THE SUPREME COURT OF INDIA dtd 3-10-2019 ***civil appeal no 4184 of 2009***

Hon'ble Supreme court in the case – civil appeal **21572 of 2019 – *FILED BY DEPARTMENT-***

COMMISSIONER OF SERVICE TAX II MUMBAI Appellant(s)

VERSUS

TAHNEE HEIGHTS CO-OP HOUSING LTD. Respondent(s)

held that

In view of the decision of this Court in State of West Bengal & Ors. vs Calcutta Club Limited (Civil Appeal No. 4184/2009) decided on 3 October 2019, the civil appeal is dismissed.

STATE OF WEST BENGAL Versus CALCUTTA CLUB LIMITED - 2019 (29) G.S.T.L. 545 (S.C.)

IN THE SUPREME COURT OF INDIA dtd 3-10-2019 *civil appeal no 4184 of 2009- 3 MEMBERS*

C.A. No. 4184 of 2009 : This appeal arises out of a reference order by a **Division Bench of this Court**, reported in *State of West Bengal* v. *Calcutta Club Limited* - (2017) 5 SCC 356. The facts of Civil Appeal No. 4184 of 2009 are set out in the said reference order as follows

"2. The department issued a notice to the respondent Club assessee apprising it that it had failed to make **payment of sales tax on sale of food and drinks** to the permanent members during the quarter **ending 30-6-2002**.

After the receipt of the notice, the respondent Club made submissions before assessing authority.

The notice and the communication sent for personal hearing was assailed by the respondent before the Tribunal praying for a declaration that it is not a dealer within the meaning of the Act as there is no sale of any goods in the form of food, refreshments, drinks, etc., by the Club to its permanent members and hence, it is not liable to pay Sales Tax under the Act.

3. It was contended before the Tribunal that there could be no sale by the respondent Club to its own permanent members, for doctrine of mutuality would come into play. To elaborate, the respondent Club treated itself as the agent of the permanent members in entirety and advanced the stand that no consideration passed for supplies of food, drinks or beverages, etc. and there was only reimbursement of the amount by the members and **therefore, no sales tax could be levied**.

4. The Tribunal referred to Article 366(29A) of the Constitution of India, **Being of this view, the Tribunal accepted the contention of the respondent Club and opined that it is not eligible to tax under the Act.**

5..... Revenue preferred a writ petition and the High Court opined that the decision rendered in Automobile Assn. of Eastern India [Automobile Assn. of Eastern India v. State of W.B., (2017) 11 SCC 811 : (2002) 40 STA 154 (SC)], was not a precedent and came to hold that reading of the constitutional amendment, as well as the provisions of the definition under the Act, it was clear that supply of food, drinks and beverages had to be made upon payment of consideration, either in cash or otherwise, to make the same exigible to tax but in the case at hand, ***the drinks and beverages were purchased from the market by the Club as agent of the members****. The High Court further ruled that the members collectively was the real life and the Club was a superstructure only and, therefore, mere fact of presentation of bills and non-payment thereof consequently, striking off membership of the Club, did not bring the Club within the net of Sales Tax. The High Court further opined that in the obtaining factual matrix the element of* ***mutuality was not obliterated****. The expression of the aforesaid view persuaded the* ***High Court to lend concurrence to the opinion projected by the Tribunal***

9. At the very outset, we may mention certain undisputed facts. It is beyond cavil that the ***respondent is an incorporated entity under the Companies Act, 1956***.

The respondent assessee charges and ***pays Sales Tax when it sells products to the non-members or guests*** who accompany the permanent members.

But when the invoices are raised in respect of supply made in favour of the permanent members

, no Sales Tax is collected."

2. After setting out the definition of "sale" in Section 2(30) of the West Bengal Sales Tax Act, 1994 (hereinafter referred to as the "West Bengal Sales Tax Act") and Article 366(29A) of the Constitution of India, **the Court** then referred to …….:

"14. Earlier the **Constitution Bench** decision in *CTO* v. *Young Men's Indian Assn.* [*CTO* v. *Young Men's Indian Assn.*, **(1970) 1 SCC 462]** dealing with the liability of a **club to pay Sales Tax when there is supply of refreshment to its members**, the Court had concluded thus : (SCC pp. 467-68, para 11)

*"11. The essential question, in the present case, is whether the supply of the various preparations by each club to its members involved a transaction of sale within the meaning of the Sale of Goods Act, 1930. The State Legislature being competent to legislate only under Schedule VII List II Entry 54 to the Constitution the expression "sale of goods" bears the same meaning which it has in the aforesaid Act. Thus in spite of the definition contained in Section 2(n) read with Explanation I of the Act if there is no transfer of property from one to another there is no sale which would be eligible to tax. 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.** This position has been rightly accepted even in the previous decision of this Court."*

3. After then referring to a number of decisions on the doctrine of mutuality, the Court observed :

"23. In the light of the aforesaid position and the law of mutual concerns, we have to ascertain the impact and ***the effect of sub-clause (e) to clause (29A) to Article 366 of the Constitution of India, as enacted vide 46th Amendment in 1982 and applicable and applied to Sales or VAT Tax.*** The said clause refers to tax on supply of goods by an unincorporated association or body of persons. The question would be whether the expression "**body of persons**" would include **any incorporated company, society, association**, etc. The second issue is what would be included and can be classified as transactions relating to supply of goods by an **unincorporated association** or **body of persons** to its members by way of cash, deferred payment or valuable consideration. Such transactions are treated and regarded as sales. The decisions of the Court in *Fateh Maidan Club* [*Fateh Maidan Club* v. *CTO,* (2017) 5 SCC 638 : (2008) 12 VST 598 (SC)] and *Cosmopolitan Club* [*Cosmopolitan Club* v. *State of T.N.,* (2017) 5 SCC 635 : (2009) 19 VST 456 (SC)] in that context have drawn a distinction when a club acts as an agent of its members and when the property in the goods is sold i.e. the property in food and drinks is passed to the members

4. The Division Bench then set out 3 questions to be answered by a Larger Bench as follows :

" (i) Whether the **doctrine of mutuality** is still applicable to **incorporated clubs or any club** after the 46th Amendment to Article 366(29A) of the Constitution of India?

(ii) Whether the judgment of this Court in *Young Men's Indian Assn.* [*CTO* v. *Young Men's Indian Assn.*, (1970) 1 SCC 462] still holds the field even after the 46th Amendment of the Constitution of India; and whether the decisions in *Cosmopolitan Club* and *Fateh Maidan Club* which remitted the matter applying the doctrine of mutuality after the constitutional amendment can be treated to be stating the correct principle of law?

(iii) Whether the 46th Amendment to the Constitution, by deeming fiction provides that provision of food and beverages by the incorporated clubs to its permanent members constitute sale thereby holding the same to be liable to sales tax?"

the relevant Constitutional and statutory provisions. Article 366(29A) reads as follows :

"366.(29A) "tax on the sale or purchase of goods" includes -

(a) **a tax on the transfer,** otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the *execution of a works contract*;

(c) a tax on the delivery of **goods on hire-purchase** or any system of payment by instalments;

(d) a tax on the transfer of **the right to use** any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

Contd ..

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a **sale of those goods by the person making the transfer**, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;"

Sr no	Arguments of department- para 5 of the judgment
1	61st Law Commission Report"), which preceded the enactment of Article 366(29A) of the Constitution of India; the 'Statement of Objects and Reasons' appended to the Constitution (Forty-sixth Amendment) Bill, 1981 [enacted as the Constitution (Forty-sixth Amendment) Act, 1982] (hereinafter referred to as the "Statement of Objects and Reasons"), which led to the insertion of Article 366(29A); [Article] 366(29A)(e) was inserted in order to do away with the doctrine of agency/trust or mutuality, insofar as it applied to members' clubs and, therefore, sought to do away with the basis of the judgment in *Young Men's Indian Association* (supra). He argued that the language of [Article] 366(29A)(e) did away with transfer of property in goods and was specifically differently worded from [Article] 366(29A)(a) and (b), which referred to such transfer. According to him, the expression "unincorporated association or body of persons" in sub-clause (e) must be read disjunctively, **and so read would include incorporated persons such as companies, cooperative societies, etc**

Arguments of department- para 5 of the judgment

2 assuming that "**body of persons" under [Article] 366(29A)(e) did not include incorporated persons,**

[Article 366(29A)(f) would take within its wide sweep the supply of goods, being food or any other article for human consumption or drink, given that sub-clause (f) does not refer to incorporated or unincorporated bodies, and takes within its sweep a tax in the supply of goods "in any other manner whatsoever", which are words of extremely wide import.

3 **relied heavily** on *Deputy Commercial Tax Officer, Saidapet & Anr.* v. *Enfield India Ltd., Co-operative Canteen Ltd.* (1968) 2 SCR 421 for the proposition that the English cases which dealt with the doctrine of mutuality had no application in the context of a taxing statute, as these judgments dealt with criminal liability. He also relied strongly on this judgment to show that **profit-motive is** totally unnecessary where a supply of goods by a club to its members, falls within the definition of "sale" under the Madras General Sales Tax Act, 1959 in that case

Arguments of department- para 5 of the judgment

4 according to the Learned Senior Advocate, the doctrine of mutuality has no application when a members' club is in the corporate form, as it is clear from *Bacha F. Guzdar* v. *Commissioner of Income Tax, Bombay,* (1955) 1 SCR 876, **where it was held that a shareholder is not the owner of the assets of a company** and, therefore, the aforesaid principle cannot possibly apply to members' clubs in corporate form. According to him, it **makes no difference that the company is one registered under Section 25 of the** Companies Act, 1956 (hereinafter referred to as the "Companies Act"), as is the case in the appeal in the present case.

Sr no	***Arguments of the club & others against the department- para 6***
1	Mutuality- Constitution (Forty-sixth Amendment) Act, 1982 (hereinafter referred to as the "46th Amendment"), which inserted Clause (29A) into Article 366 of the Constitution, has not done away with the *Young Men's Indian Association* (supra), as there cannot possibly be a supply of goods by one person to itself; and that, therefore, the doctrine of agency/trust/mutuality continues as before. He referred to the definition of "consideration" in Section 2(d) of the Indian Contract Act, 1872, which according to him made it clear that consideration **must flow from one person to another and in the absence of two players**, as in the case of *Young Men's Indian Association* (supra), Article 366(29A) would have no application

Sr no	***Arguments of the club & others against the department- para 6***
2	Incorporated- the Statement of Objects and Reasons, which according to him, made it clear that only unincorporated clubs or associations of persons were referred to in Article 366(29A)(e). He also argued that under **no circumstances can a company be fitted within "body of persons"**, as a result of which Article 366(29A)(e) will not apply to sales of food or refreshments by a club to its members Article 366(29A)(f) may apply- it is clear that (f) was enacted for a very different purpose, namely, to get over the judgment of *Northern India Caterers (India) Ltd.* v. *Lt. Governor of Delhi,* (1978) 4 SCC 36, which dealt with the service element contained in a bill for food or drinks being **consumed in restaurants**. The expression "in any other manner whatsoever" only seeks to re-emphasise that where goods are supplied in such restaurants, then the service element will not interdict the State Legislature from taxing food, etc., under Article 366(29A)(f). In any case, going back to sub-clause (e), the Learned Senior Advocate said that it is clear that the expression "unincorporated associations" must be read as *ejusdem generis* with "body of persons" and **so read would not include members' clubs in corporate form.**

Sr no	***Arguments of the club & others against the department- para 6***
3	**Profit motive-** relied strongly upon *State of Gujarat* v. *Raipur Manufacturing Co. Ltd.*, (1967) 1 SCR 618, for the proposition that the expression "profit-motive" does not refer to surplus being made, but only refers to a **motive of making money** from sale transactions
4	**Bacha Guzdar case -** a company is registered under Section 25 only if it intends to apply its profits and other income in promoting its objects, and prohibits payment of dividend to its members. For this reason, the ratio of *Bacha F. Guzdar* which ***was normal company – i.e. Non-section 25 company*** (supra) cannot possibly apply to members' clubs **which are Section 25 – Non profit Companies**

Sr no	Findings of Hon'ble 3 member Bench in pleas made before them-
1	On Mutuality- Article 366(29-A) clause e)

(e)a tax on the supply of goods **by** any **unincorporated association** or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

61st Law Commission Report which deliberated on Article 336(29-A) prior to its insertion referred to Young Mens Indian association (supra) – for wrongly concluding viz

10. *It will be seen from the above that the Law Commission was of the view that the Constitution* ***ought not to be amended*** *so as to bring within the tax net* ***members' clubs****. It gave three reasons for so doing.*

First, it stated that the number of such clubs and associations would not be very large;

second, taxation of such transactions might discourage the cooperative movement; and

third, no serious question of evasion of tax arises as a member of such clubs really takes his own goods.

11. *However, despite the aforesaid,* **Article 366(29A) included within it sub-clause (e).**

Sr no	Findings of Hon'ble 3 member Bench in pleas made before them-
1	On Mutuality- Article 366(29-A) clause e) 12. …**Statement of Objects and Reasons which led up to the 46th Amendment**. The relevant portions of the Statement of Objects and Reasons read as follows ….This position has resulted in scope for avoidance of tax in various ways. An example of this is the practice of inter-State consignment transfers, i.e., **transfer of goods from head office or a principal in one State to a branch** or agent in another State or *vice versa* or transfer of goods on consignment account, to avoid the payment of sales tax on inter-State sales under the Central Sales Tax Act. While in the case of **a works contract**, if the contract treats the sale of materials separately from the cost of the labour, the sale of materials would be taxable, but in the case of an indivisible works contract, it is not possible to levy Sales Tax on the transfer of property in the goods involved in the execution of such contract as it has been held that there is no sale of the materials as such and the property in them does not pass as movables. Though practically the purchaser **in a hire-purchase agreement** gets the goods on the date of the hire-purchase, it has been held that there is sale only when the purchaser exercises the option to purchase at a much later date and therefore only the depreciated value of the goods involved in such transaction at the time the option to purchase is exercised becomes assessable to Sales Tax.

Sr no	***Findings of Hon'ble 3 member Bench in pleas made before them-***
1	On Mutuality- Article 366(29-A) clause e) 12. …**Statement of Objects and Reasons which led up to the 46th Amendment**. The relevant portions of the Statement of Objects and Reasons read as follows …… *Similarly, **while sale by a registered club or other association of persons** (the club or association of persons having corporate status) to its members is taxable,* *sales by an unincorporated club or association of persons to its members is not taxable as such club or association, in law, **has no separate existence from that of the members.*** In the *Associated Hotels of India* case (A.I.R. 1972 S.C. 1131), the Supreme Court held that there is **no sale involved in the supply of food** or drink by a hotelier to a person lodged in the hotel.

Sr no	***Findings of Hon'ble 3 member Bench in pleas made before them-***
1	On Mutuality- Article 366(29-A) clause e) **17.** We have thus to discover for ourselves whether the doctrine of mutuality has been done away with by Article 366(29A)(e), and whether the ratio of *Young Men's Indian Association* (supra SC-6 Mem-bench) would continue to operate even after the 46th Amendment. **18.** At this juncture, it is important to set out the two pillars, so to speak, on which the *Young Men's Indian Association* (supra) is largely based. In ***Graff v. Evans,* (1882) 8 Q.B. 373**, the Grosvenor Club was incorporated in the form of a trust, the Appellant Graff acting as Manager of the club for and on behalf of a Managing Committee, which conducted the general business of the club. Food and refreshments such as wine, beer and spirits were **served to members on payment** for the same. The question was whether **a license** was required under the Licence Act, 1872, **to sell liquor by retail.** In this context -----

Sr no	Findings of Hon'ble 3 member Bench in pleas made before them-
1	On Mutuality- Article 366(29-A) clause e)

---

*The question here is, **Did Graff, the manager**, who supplied the liquors to Foster, **effect a "sale"** by retail? I think not. **I think Foster was an owner of the property together with all the other members of the club**. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here, nor any contract with Graff with respect to the goods. **Foster was acting upon his rights as a member of the club**, not by reason of any new contract, but under his old contract of association by which he subscribed a sum to the funds of the club, and became entitled to have ale and whisky supplied to him as a member at a certain price. I cannot conceive it possible that Graff could have sued him for the price as the price of goods sold and delivered. **There was no contract between two persons**, because **Foster was vendor as well as buyer**. Taking the transaction to be a purchase by Foster of all the other members' shares in the goods, **Foster was as much a co-owner as the vendor***

Sr no	Findings of Hon'ble 3 member Bench in pleas made before them-
1	On Mutuality- Article 366(29-A) clause e) **19.** Likewise, in **Trebanog Working Men's Club and Institute Ltd. v. Macdonald**, (1940) 1 K.B. 576, a similar question arose before the Kings Bench Division. Graff (supra) was applied and followed thus : *"In our opinion, the decision in Graff v. Evans applies to and governs the present case. Once it is conceded that a members' club does not necessarily require a licence to serve its members with intoxicating liquor, **because the legal property in the liquor is not in the members themselves**, it is difficult to draw any legal distinction between the various legal entities that may be entrusted with the duty of holding the property on behalf of the members, be it an individual, or a body of trustees, or a company formed for the purpose, so long as the real interest in the liquors remains, as in this case it clearly does, **in the members of the club**. There is no magic in this connection in the expression "trustee" or "agent." What is essential is that the holding of the property by the agent or trustee must be a holding for and on behalf of, and not a holding **antagonistic** to, the members of the club. We are dealing here with a quasi-criminal case, where the Court seeks to deal with the substance of a transaction rather than the legal form in which it may be clothed.*

Sr no	Findings of Hon'ble 3 member Bench in pleas made before them-
1	On Mutuality- Article 366(29-A) clause e)

20. The stage is now set for a consideration of the judgment in *Young Men's Indian Association* (supra). Three separate appeals were heard and decided by a Six Judge Bench of this Court in this case.

The first considered the Cosmopolitan Club, Madras, which was registered under Section 26 of the Companies Act, 1913 as a non-profit earning institution.

Young Men's Indian Association was also considered, being a Society registered under the Societies Registration Act, 1860.

The third case involved the Lawley Institute which came into existence by a deed of trust.

In all these cases, food preparations were supplied to members at prices fixed by the club. In the *Cosmopolitan Club* case, a member is allowed to bring guests with him, but if any article of food is consumed by the guest, it is the member who has to pay for the same, which was similar to the position in the *Young Men's Indian Association.* The Madras Sales Tax Act, 1959 came up for consideration in the aforesaid judgment. This Court referring to the two English cases cited hereinabove held

Sr no	Findings of Hon'ble 3 member Bench in pleas made before them-
1	On Mutuality- Article 366(29-A) clause e) 20…… *8. In the various cases which came to be decided by the High Courts in India the view which had prevailed in England was accepted and applied. We may notice the decisions of the Madhya Pradesh High Court in Bengal Nagpur Cotton Mills Club, Rajnandangaon v. Sales Tax Officer, Raipur, [8 STC 781] and of the Mysore High Court in Century Club v. State of Mysore, [16 STC 38] . In the former it was held that the supply to the member of a members' club registered under Section 26 of the Indian Companies Act, 1913 of refreshments purchased out of club funds which consisted of members' subscription was not a transfer of property from the club as such to a member and the club was not liable to Sales Tax under the C.P. and Berar Sales Tax Act, 1947, in respect of such supplies of refreshments.* ***The principle adverted to in Trebanog Working Men's Club was adopted and it was said that if the agent or a trustee supplied goods to the members such supplies would not amount to a transaction of sale****. The Mysore court expressed the same view that a purely members' club which makes purchases through a Secretary or Manager and supplies the requirements to members at a fixed rate* ***did not in law sell those goods to the members****."*

Sr no	***Findings of Hon'ble 3 member Bench in pleas made before them-***
1	On Mutuality- Article 366(29-A) clause e)

21. The judgment heavily relied upon by Shri Dwivedi, namely, *Enfield India Ltd.* (supra) was then distinguished thus :

"9. On behalf of the appellants reliance has been placed on a decision of this Court in Deputy Commercial Tax Officer v. Enfield India Ltd., [(1968) 2 SCR 421]. In that case the Explanation to Section 2(g) was found to be intra vires and within the competence of the State Legislature. The judgment proceeded on the footing that when a ***cooperative society supplied refreshments to its members for a price the following four constituent elements of sale were present*** *: (1) parties competent to contract; (2) mutual consent; (3) thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) price in money paid or promised. The mere fact that the society supplied the refreshments to its members alone* ***and did not make any profit was not considered sufficient to establish that the society was acting only as an agent of its members.*** *As a registered society was a body corporate it could not be assumed that the property which it held was the property of which its members were owners. The English decisions were* ***distinguished on the ground that the courts in those cases were dealing with matters of quasi-criminal nature."***

Sr no	***Findings of Hon'ble 3 member Bench in pleas made before them-***
1	On Mutuality- Article 366(29-A) clause e) **22. Finally, the Court concluded :** "11. The essential question, in the present case, is whether the supply of the various preparations by each club to its members involved a transaction of sale within the meaning of the Sale of Goods Act, 1930. The State Legislature being competent to legislate only under Entry 54, List II, of the Seventh Schedule to the Constitution the expression "sale of goods" bears the same meaning which it has in the aforesaid Act. Thus in spite of the definition contained in Section 2(n) read with Explanation I of the Act *if there is no transfer of property from one to another there is no sale which would be eligible to tax. 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.*** This position has been rightly accepted even in the previous decision of this Court.

Sr no	***Findings of Hon'ble 3 member Bench in pleas made before them-***
1	On Mutuality- Article 366(29-A) clause e)

24. It can be seen that *Young Men's Indian Association* (supra) expressly **distinguished *Enfield India Ltd.* (supra), in paragraph 9 therein.** The judgment in *Enfield India Ltd.* (supra), held on the facts of that case that there was nothing to show that the society in that case was acting as an agent of its members in providing facilities for making food available to them. A distinction was then made between a society which is a body corporate and its members, stating that the body corporate is a separate person in law. It then referred to various English judgments including *Trebanog* (supra), and refused to apply them on the ground that they were cases which dealt with criminal proceedings. **The judgment then ended by stating that the Court was not called upon to decide whether an unincorporated club, supplying goods for a price to its members, may be regarded as selling goods to its members**

Sr no	***Findings of Hon'ble 3 member Bench in pleas made before them-***
1	On Mutuality- Article 366(29-A) clause e) **25.** It can be seen from the above, that the ratio of the Three Judge Bench in *Enfield India Ltd.* (supra) does not square with the ratio of the Six Judge Bench in *Young Men's Indian Association* (supra). *Young Men's Indian Association* (supra) is expressly based upon the English judgments **which disregarded the corporate form** and stated that there could not be a sale, on the facts of those cases, between two persons because Foster, i.e. a member of the club, could be regarded as vendor as well as purchaser in *Graff* (supra). Likewise, in *Trebanog* (supra), the form in which the club was clothed was of no moment, it being stated that there is no magic in the expression "trustee or agent". **What is essential is that the holding of the property by the trustee or agent must be a holding for and on behalf of, and not a holding *antagonistic* to, the members of the club.**

Sr no	Findings of Hon'ble 3 member Bench in pleas made before them-
1	On Mutuality- Article 366(29-A) clause e)

26. *It is thus clear that Enfield India Ltd. (supra) does not take the matter any further. Young Men's Indian Association (supra) made no distinction between a club in* ***the corporate form*** *and a club by way of* ***a registered society or incorporated*** *by a deed of trust. What is the essence of the judgment is that the holding of property must be a holding for and on behalf of the members of the club, there being no transfer of property from one person to another.*

-Proprietary clubs were distinguished, as there the owner of the club would not be the members themselves, but somebody else.

Sr no	***Findings of Hon'ble 3 member Bench in pleas made before them-***
1	On Mutuality- Article 366(29-A) clause e)

30. The doctrine of mutuality as applied to clubs is elaborately discussed in *Bangalore Club* v. *Commissioner of Income Tax and Anr.*, (2013) 5 SCC 509. In discussing the fact that in **members' clubs** there is a complete identity between **contributors** and **participators**, this Court held....

Given these observations, it is clear that if persons carry on a certain activity in such a way that there is a ***commonality between contributors of funds and participators in the activity, a complete identity between the two is then established***. This identity is not snapped because the surplus that arises from the common fund is not distributed among the members - it is enough that there is a right of disposal over the surplus, and in exercise of that right they may agree that on winding up, the surplus will be transferred to a club or association with similar activities.

Sr no	***Findings of Hon'ble 3 member Bench in pleas made before them-***
1	On Mutuality- Article 366(29-A) clause e) Most importantly, the surplus that is made ***does not come back to the members*** of the club as shareholders of a ***company in the form of dividends upon their shares***. Since the members perform the activities of the club for themselves, the fact that they ***incorporate a legal entity to do it for them makes no difference***. This judgment was also followed by this Court in *Income Tax Officer, Mumbai* v. *Venkatesh Premises Cooperative Society Limited,* (2018) 15 SCC 37. What is of essence, therefore, in applying this doctrine is that there is no sale transaction between two persons, ***as one person cannot sell goods to itself***

Sr no	***Findings of Hon'ble 3 member Bench in pleas made before them-***
1	On Mutuality- Article 366(29-A) clause e) **33.** Quite obviously, the **Statement of Objects and Reasons has not read** **the case of *Young Men's Indian Association* (supra) in its correct perspective**. As has been noticed hereinabove, *Young Men's Indian Association* (supra) had three separate appeals before it, in one of which a company was involved. To state, therefore, that under the law as it stood on the date of the 46th Amendment, a sale of goods by a club having a corporate status to members is taxable, is wholly incorrect. **Proceeding on this incorrect basis**, what the 46th Amendment sought to do was to then bring to tax sales by clubs which have no separate existence from that of their members. In so doing, the 46th Amendment used the expression "**any unincorporated association or body of persons**". This expression, when read with the Statement of Objects and Reasons, makes it clear that it was only clubs which are ***not in corporate form that were sought to be brought within the tax net***, as it was wrongly assumed that sale of goods by members' clubs in the **corporate form were taxable**. "Any" is the equivalent of "all". This word, therefore, also lends itself to the aforesaid interpretation, as the emphasis of the Legislature is on ***all*** **unincorporated associations or bodies being brought within sub-clause (e).**

Sr no	***Findings of Hon'ble 3 member Bench in pleas made before them-***
1	On Mutuality- Article 366(29-A) clause e) Article 366(29A) does not use this expression, as "person" would then include corporate persons as well. On the other hand, "***body of persons***" is used to make it clear beyond doubt ***that corporate persons are not referred to***. **36.** The definition of "person" in other Acts such as the Income-tax Act, 1961 is also very wide, and includes an association of persons or body of individuals, whether incorporated or not - see Section 2(31) of the Income-tax Act, 1961. Quite clearly, this language was available and in common usage by the Legislature, as the definition of "person" under the Income-tax Act has stood in the statute book since 1961. The contrast in the language of the Income-tax Act, 1961 and Article 366(29A)(e) again leads to the conclusion that "body of persons" would not refer to the corporate form unless "person" by itself is accompanied by the expression "***whether incorporated or not".***

Sr no	Findings of Hon'ble 3 member Bench in pleas made before them-
1	On Mutuality- Article 366(29-A) clause e)

37. Even otherwise, the "supply" of goods by an unincorporated association or body of persons has to be a member for cash, deferred payment or other valuable consideration. As has been correctly argued by Shri Jaideep Gupta, the definition of "consideration" in Section 2(d) of the Indian Contract Act, 1872 necessarily posits consideration passing ***from one person to another***. The definition of "consideration" as stated in the Indian Contract Act, 1872 ....

38. This is further reinforced by the last part of Article 366(29A), as under this part, the supply of such goods shall be deemed to be sale of those goods **by the person making the supply**, and the purchase of those goods **by the person to whom such supply is made**. As the *Young Men's Indian Association* (supra) case and the doctrine of mutuality state, ***there is no sale transaction between a club and its members***. As has been pointed out above, there cannot be a sale of goods to oneself. Here again, it is clear that the ratio of *Young Men's Indian Association* (supra) has not been ***done away with by the limited fiction introduced by Article 366(29A)(e).***

Sr no	***Findings of Hon'ble 3 member Bench in pleas made before them-***
1	On Mutuality- Article 366(29-A) clause e) **45.** That the doctrine of mutuality has not been done away with by sub-clause (e) is also clear when sub-clause (e) is contrasted with certain provisions of the Income Tax Act, 1961. Section 2(24)(vii) of the Income Tax Act, 1961... **47.** In fact, Section 2(24)(vii) has been expressly noticed in *Venkatesh Premises Cooperative Society Limited* (supra) as follows : *"14. The doctrine of mutuality, based on common law principles, is premised on the theory that a person cannot make a profit from himself. An amount received from oneself, therefore, cannot be regarded as income and taxable. Section 2(24) of the Income-tax Act defines taxable income.* ***The income of a cooperative society from business is taxable under Section 2(24)(vii) and will stand excluded from the principle of mutuality."*** **48.** Also, Section 45(2) of the Income Tax Act, 1961 is an example of a provision by which a deemed transfer by a person to himself gets taxed. Section 45(2) reads as follows : **"45. Capital gains. -** XXX XXX XXX *(2) Notwithstanding anything contained in sub-section (I), the profits and gains arising from the transfer by way of conversion by the owner of a capital asset into, or its treatment by him as, stock-in-trade of a business carried on by him shall be chargeable to income-tax as his income of the previous year in which such stock-in-trade is sold or otherwise transferred by him and, for the purposes of Section 48, the fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset."*

Sr no	***Findings of Hon'ble 3 member Bench in pleas made before them-***
1	On Mutuality- Article 366(29-A) clause e) Contd..... *It can be seen from this provision that profits or gains arising from a transfer by way of conversion by the owner of a capital asset into, or its treatment by him as stock-in-trade of a business, is by a deeming fiction brought to tax, despite the fact that there is no transfer in law by the owner of a capital asset to another person.* **Modalities such as these to bring to tax amounts that would do away with any doctrine of mutuality are conspicuous by their absence in the language of Article 366(29A)(e).**

Sr no	Findings of Hon'ble 3 member Bench in pleas made before them-
2	Incorporated -

13. *BSNL* v. *Union of India,* (2006) 3 SCC 1 = 2006 (2) S.T.R. 161 (S.C.). This judgment concerned itself with the nature of the transaction by which mobile phone connections are enjoyed. The question that arose before this Court was whether the transaction in question was a service transaction and not a transaction for sale or supply of goods. In answering this question, the Court, after referring to Article 366(29A), observed as follows – para 41- relevant extract – viz

46

> ***41. Sub-clause (a) covers a situation where the consensual element is lacking. This normally takes place in an involuntary sale.....*** Sub-clause (e) covers cases which in law may not have amounted to sale because the ***member of an incorporated association*** would have in a sense begun as both the supplier and the recipient of the supply of goods. Now such transactions are deemed sales. Sub-clause (f) pertains to contracts which had been held not to amount to sale in *State of Punjab* v. *Associated Hotels of India Ltd.,* [(1972) 1 SCC 472 : (1972) 29 STC 474]. That decision has by this clause been effectively legislatively invalidated."

15. The observations made in the judgment on sub-clause (e) **cannot possibly be said to form the *ratio decidendi*** of the judgment, as what came up for consideration in that case was whether electro-magnetic waves can be said to be 'goods', so as to be the subject matter of taxation within Article 366. **This was answered in the negative.....**

In any case, paragraph 41 of the judgment, when it refers to sub-clause (e), cannot possibly refer to ***"incorporated"*** associations contrary to the plain language of sub-clause (e), which refers to "***unincorporated" associations***

Sr no	Findings of Hon'ble 3 member Bench in pleas made before them-
2	Article 366(29A)(f) may apply-

39. But, says Shri Dwivedi, even if sub-clause (e) does not apply, sub-clause (f) would apply, given the width of its language. Here again, it is clear that the reason for sub-clause (f), as has been stated in the Statement of Objects and Reasons, is the doing away with of two judgments of this Court, namely, *State of [Himachal Pradesh]* v. *Associated Hotels of India Limited,* AIR 1972 SC 1131 = 2015 (330) E.L.T. 3 (S.C.) and *Northern India Caterers (India) Ltd.* (supra).

41. Sub-clause (a) refers to 7th September, 1978, which is the date on which *Northern India Caterers* (supra) was pronounced and sub-clause (b) refers to 4th January, 1972, which is the date on which *Associated Hotels of India Ltd.* (supra) was pronounced. The 46th Amendment Act, therefore, when read as a whole, would make it clear that Article 366(29A)(f) refers only to an undoing of the aforesaid two judgments, ***the subject matter being the taxability of food or drink served in hotels and restaurants***. This being the case, it is obvious that the taxability of food or drink served in members' clubs is not the subject matter of sub-clause (f).

Sr no	Findings of Hon'ble 3 member Bench in pleas made before them-
2	Article 366(29A)(f) may apply-

44. In a recent judgment of this Court, *Federation of Hotel and Restaurant Associations of India* v. *Union of India and Ors.*, (2018) 2 SCC 97 = 2018 (359) E.L.T. 97 (S.C.), this Court referred to the reason for the enactment of sub-clause (f) as follows :

"11. As has been stated in the trilogy of judgments in *Associated Hotels of India Ltd. [State of Punjab* v. *Associated Hotels of India Ltd.*, (1972) 1 SCC 472] and the two *Northern India Caterers (India) Ltd. [Northern India Caterers (India) Ltd.* v. *State (UT of Delhi)*, (1978) 4 SCC 36 : 1978 SCC (Tax) 198 : (1979) 1 SCR 557] - *[Northern India Caterers (India) Ltd.* v. *State (UT of Delhi)*, (1980) 2 SCC 167 : 1980 SCC (Tax) 222], it is clear that when "sale" of food and ***drinks takes place in hotels and restaurants***, there is really one indivisible contract of service coupled incidentally with sale of food and drinks. Since it is not possible to divide the "service element", which is the dominant element, from the "sale element", it is clear that such composite contracts cannot be the subject-matter of sales tax legislation, as was held in those judgments.

Sr no	Findings of Hon'ble 3 member Bench in pleas made before them-
4	**Bacha Guzdar case –** **present appeals deasl with companies registered under Section 25 of Companies Act,** **28.** It will thus be seen that in these companies, payment of dividend to shareholders is prohibited, and the profits, if any, have to be applied to promote the objects of the company. ***Bacha F. Guzdar*** **(supra) did not deal with a Section 25 to Companies Act** - it dealt with two tea companies which **were Public Limited Companies**, registered under the Companies Act.... **29.** Given the differences pointed out in *Cricket Club of India* (supra) between clubs registered as Companies under Section 25 of the Companies Act and other companies, **it is clear that the *ratio decidendi* in the judgment in *Bacha F. Guzdar* (supra) would not apply to such clubs** - there being no shareholders, no dividends declared, and no distribution of profits taking place. **Such clubs, therefore, cannot be treated as separate in law from their members.**

Sr no	Findings of Hon'ble 3 member Bench in pleas made before them-

50

49. *In light of the view that we have taken, it is unnecessary to advert to Shri Dwivedi's arguments that the explanation (1) to Section 2(10) of the West Bengal Sales Tax Act is a stand-alone provision and not an explanation in the classical sense. We, therefore, answer the three questions posed by the Division Bench in State of West Bengal v. Calcutta Club Limited (supra) as follows :*

(1) ***The doctrine of mutuality continues to be applicable*** *to incorporated and unincorporated members' clubs after the 46th Amendment adding Article 366(29A) to the Constitution of India.*

(2) ***Young Men's Indian Association (supra) and other judgments which applied this doctrine continue to hold*** *the field even after the 46th Amendment.*

(3) ***Sub-clause (f) of Article 366(29A) has no application to members' clubs.***

STATE OF WEST BENGAL Versus CALCUTTA CLUB LIMITED – dtd 3-10-2019 - *civil appeal no 4184 of 2009- 3 MEMBERS-SC was disposed alongwith*

CCEX v/s Ranchi Club in CA- 7497 of 2012 for service tax matters – during 16-6- 2005 till 1-7-2017

53. Primarily two judgments have been impugned before us by the Revenue; one by the High Court of Jharkhand at Ranchi in W.P (T) No. 2388 of 2007, dated 15th March, 2012; and the other by the High Court of Gujarat in S.C.A. Nos. 13654-13656 of 2005, dated 25th March, 2013. The impugned judgment dated 15th March, 2012 by the High Court of Jharkhand set out the relevant provisions of the Finance Act, 1994 (hereinafter referred to as the "Finance Act"), by which Service Tax was levied on members' clubs, and arrived at the conclusion that such clubs stand on a different footing from proprietary clubs, as has been held in ***Young Men's Indian Association* (supra).** The High Court following *Young Men's Indian Association* (supra) then held, stating :

STATE OF WEST BENGAL Versus CALCUTTA CLUB LIMITED – dtd 3-10-2019 - civil appeal no 4184 of 2009- 3 MEMBERS-SC was disposed alongwith CCEX v/s Ranchi Club in CA- 7497 of 2012 for service tax matters – during 16-6- 2005 till 1-7-2017

53. Contd :

"18. However, Learned Counsel for the petitioner submits that sale and service are different. It is true that ***sale and service are two different*** *and distinct transaction. The sale entails transfer of property whereas in service, there is no transfer of property. However, the basic feature common in both transactions requires existence of the two parties; in the matter of sale, the seller and buyer, and* ***in the matter of service, service provider and service receiver.*** *Since the issue whether there are two persons or two legal entity in the activities of the members' club has been already considered and decided by the Hon'ble Supreme Court as well as by the* ***Full Bench of this Court*** *in the cases referred above, therefore, this issue is no more res integra and issue is to be answered in favour of the writ petitioner and it can be held that* ***in view of the mutuality and in view of the activities of the club, if club provides any service to its members may be in any form*** *including as mandap keeper, then it is not a service by one to another in the light of the decisions referred above as foundational facts of existence of two legal entities in such transaction is missing.* ***However, so far as services by the club to other than members, Learned Counsel for the petitioner submitted that they are paying the tax.***

19. Therefore, this writ petition deserves to be allowed and it is held that ***rendering of service by the petitioner-club to its members is not taxable service under the Finance Act, 1994*** *and the writ petition of the petitioner is allowed accordingly*

CCEX v/s Ranchi Club in CA- 7497 of 2012 for service tax matters – during 16-6- 2005 till 1-7-2017 -- 3 MEMBERS-SC

55. *The appeals that are listed before us concern impugned judgments that have in essence followed these two judgments, insofar as Service Tax that is levied on* ***members' clubs*** *is concerned. The vast majority of cases before us concerns members' clubs that have been* ***registered as Companies u****nder Section 25 of the Companies Act, or* ***registered cooperative societies*** *under various State Acts, such societies being bodies corporate under the aforesaid Acts*

58. As was stated hereinabove, Service Tax was introduced for the first time by the Finance Act, 1994. Under Section 64(3), Chapter V of the Finance Act applied to taxable services as defined, with effect from **16th June, 2005**. Under Section 65(25a),

"club or association" was defined as follows :

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

(i) anybody established or constituted by or under any law for the time being in force, or

59. Under Section 65(105)(zze), "taxable service" was defined as follows :

" "Taxable service" means any service provided -

(zze) to its members by any club or association in relation to provision of services, facilities or advantages for a subscription or any other amount."

71. With this background, it is important now to examine the Finance Act as it obtained, firstly from 16th June, 2005 uptil 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

Contd…

*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***

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 Ist July, 2012 were not included in the Service Tax net.

PS: With this it will be implied apart from owners club

- **even the proprietors club which are incorporated will become non taxable till 1-7-2012.**

74. *The next question that arises is - was any difference made to this position post-1st July, 2012?*

75. It can be seen that the definition of "service" contained in Section 65B(44) is very wide, as meaning any activity carried out **by a person for another** for consideration. "Person" is defined in Section 65B(37) as including, *inter alia*, a company, a society and every artificial juridical person not falling in any of the preceding sub-clauses, as also any **association of persons or body of individuals** ***whether incorporated or not.***

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***

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.**

CCEX v/s Ranchi Club in CA- 7497 of 2012 for service tax matters – during 16-6- 2005 till 1-7-2017 -- 3 MEMBERS-SC

84. We are therefore of the view that the **Jharkhand High Court** and the Gujarat High Court are correct in their view of the law in following *Young Men's Indian Association* (supra). We are also of the **view that from 2005 onwards,**

the Finance Act of 1994 does not purport

to levy Service Tax on

members' clubs

in the incorporated form.

VALIDITY IN GST REGIME

Implication under GST when ratio of CCEX v/s Ranchi Club in CA- 7497 of 2012 - 3 MEMBERS-SC is applied

The Article 366(29A), clause (e) still exits in the constitution without any change even during GST regime for which constitution was amended to provide powers to both Centre & State to tax SUPPLY under GST at which ever stage it may be within territory of India.

Under GST if any activity fulfills being a Supply under Section 7 of CGST, Act, 2017 (always read with corresponding state GST act) – then only Section 9 imposing LEVY thereto such Supply will commence.

Section 7 of CGST Act states that viz;

Supply includes –

a) all forms of supply of goods and services or both such as.....made for or agreed to be made for a consideration by a person in course or furtherance of business:

Supply ????

LEVY AND COLLECTION OF TAX

Scope of supply.

7. (1) For the purposes of this Act, the expression "supply ***" INCLUDES—***

(a)	all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;
(b)	import of services for a consideration whether or not in the course or furtherance of business; [36][and]
(c)	the activities specified in Schedule I, made or agreed to be made without a consideration [37][***]
(d)	[38] [***]

A careful consideration of the above explanation would indicate that the draftsman is uncertain about any transaction of supply that could escape the ambit of levy. It is for this reason that despite being exhaustive, the legislature has used the word "includes".

Section	Specified 'forms' of supply	Furtherance of Business	Existence of Consideration	Supply	
				'made'	*'agreed to be made'*
7(1)(a)	✓	✓	✓	✓	✓
7(1)(b)	✓	✓/×	✓	✓	×
7(1)(c)	✓	✓	✓/×	✓	×

[39] [*(1A) Where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.*]

38***. Omitted w.e.f 1-2-2019 by the Central Goods and Services Tax (Amendment) Act, 2018, w.r.e.f. **1-7-2017**.
Prior to its omission, clause (*d*) read as under :

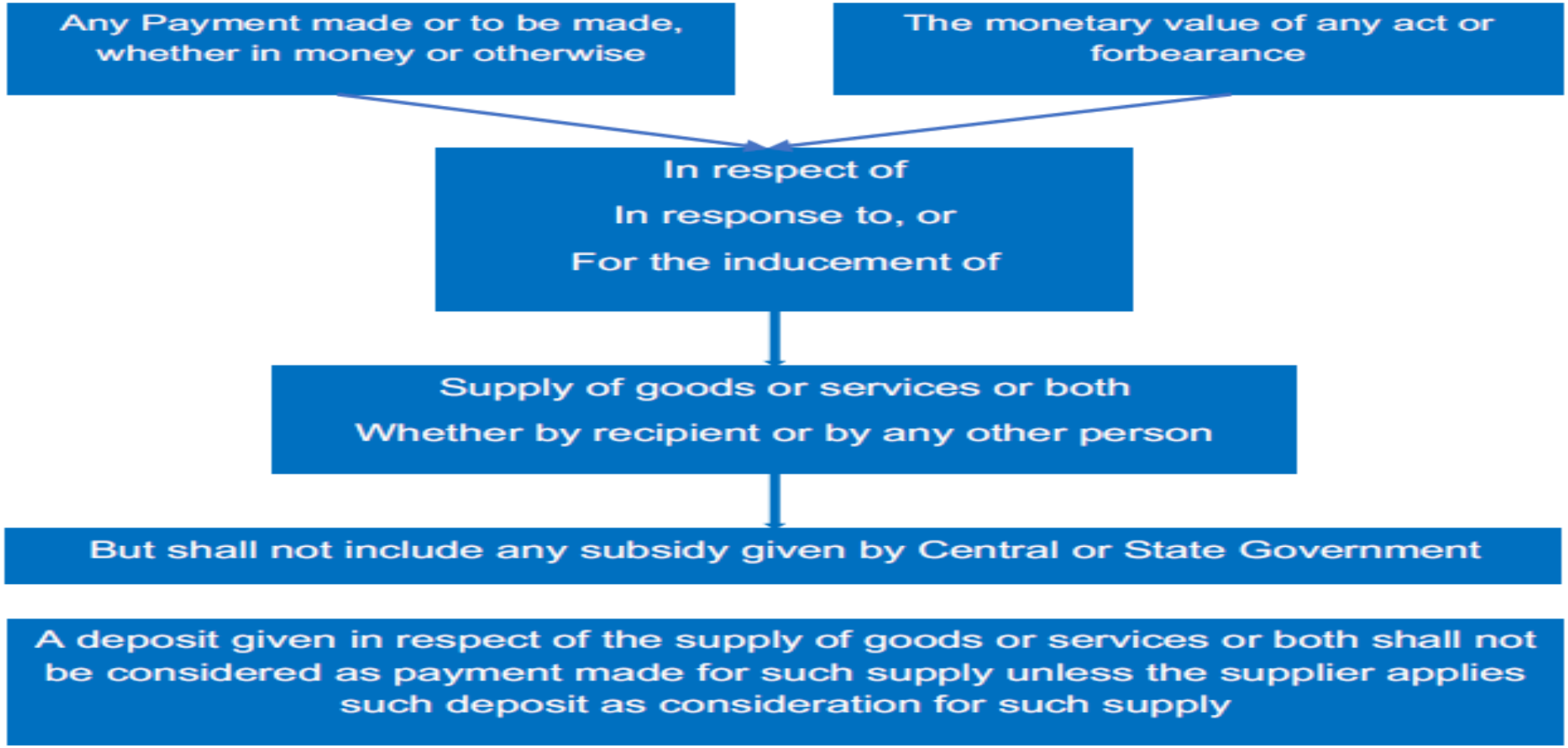
"(*d*) **the activities to be treated as supply of goods or supply of services as referred to in Schedule II."**

39 Inserted w.e.f 1-2-2019 by the Central Goods and Services Tax (Amendment) Act, 2018, w.r.e.f. 1-7-2017.

- *Implication under GST when ratio of CCEX v/s Ranchi Club in CA- 7497 of 2012 - 3 MEMBERS-SC is applied*

Sec. 2(31) of CGST Act – CONSIDERATION

Consideration in relation to goods and services or both includes-



Implication under GST when ratio of CCEX v/s Ranchi Club in CA- 7497 of 2012 - 3 MEMBERS-SC is applied

From the definition of Supply above - **Supply must be** *made for a consideration* ***by a person***. Here the person making supply would be inferred as "Supplier" who will make supply for a consideration. The term consideration is defined as payment towards supply **by a recipient** or any other person.

Therefore for being supply of services ***(for our purposes here)*** + under GST there must be 2 persons viz; a supplier & a recipient of said supply who will pay for it to the supplier.

Two different persons are prerequisite & envisaged under GST for completing a supply

IN COURSE OF FURTHERANCE OF BUSINESS

"(17) "business" **includes—**

(a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, **whether or not it is for a pecuniary benefit**;

(b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);

(c) any activity or transaction in the nature of sub-clause (a), **whether or not there is volume, frequency, continuity or regularity of such transaction;**

(d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;

(e) **provision by a club, association**, society, or any such body (for a subscription or any other consideration) of the facilities or benefits **to its members**;

Implication under GST when ratio of CCEX v/s Ranchi Club in CA- 7497 of 2012 - 3 MEMBERS-SC is applied

Under GST in absence of two persons - as in case of registered /incorporated Co-operative Housing society –**CHS due to Mutuality concept -members are** Supplier & Receiver Both – CHS is just an agent in between - there cannot be a SUPPLY - thus the LEVY itself in Section 9 fails.

Therefore Members and Society are one person- in Owners CHS & any activity of collecting contribution for sharing of common expenses will be self-supply by CHS.

Therefore it cannot be said Members being separate person from CHS while contributing its share in common expenses of society. Condition of paying consideration by recipients to supplier fails.

Further merely when condition of being **business** seems to be satisfied ; but on closer look it will be evident that in business of club " provision of facilities by society – to its members – is treated as business - even here 2 persons are envisaged – further for **consideration** as explained above- which needs a recipient who will pay to supplier – both needs to be separate persons.

💣, therefore the activity of CHS collecting contribution from its members will not be held as supply under Section 7 of CGST, Act, 2017

💣, thus LEVY under Section 9 fails

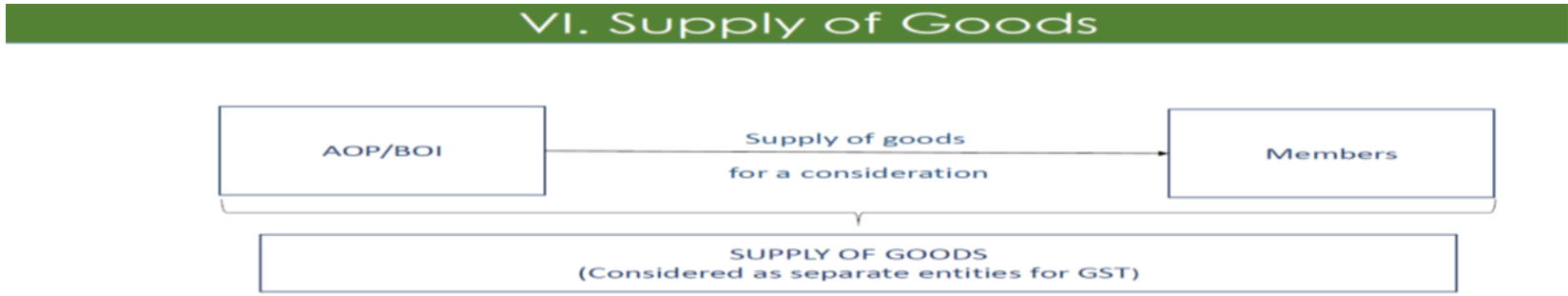
- *Implication under GST when ratio of CCEX v/s Ranchi Club in CA- 7497 of 2012 - 3 MEMBERS-SC is applied*

Section 7(1A) of CGST, 2017 provides - *Where certain activities* or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.

7. Supply of Goods

The following shall be treated as supply of goods, namely:—

*Supply of goods **by any unincorporated association** or body of persons **to a member thereof** for cash, deferred payment or **other valuable consideration.***



Implication under GST when ratio of CCEX v/s Ranchi Club in CA- 7497 of 2012 - 3 MEMBERS-SC is applied

- The Supreme court (supra) held that even in case of sale /supply of goods by
- *unincorporated* associations or body of persons to members, **THE REQUIREMENT OF CONSIDERATION IS NOT FULFILLED**
- Since in case of sale of goods to self, there exist no consideration as per the provisions of the contract act, 1872. Accordingly, the court ruled that there is no sale in the eyes of LAW - even in cases of sale by unincorporated association or body of persons to its member – Young mens (SC -6MB) will be applicable for applying MUTUALITY even here.

Following the ratio of the judgement, it follows that:

Even with deeming fiction in Schedule II, it is possible to take a view that supply of goods by an unincorporated entity to its members will still not be held as supply – thus out of GST. ???

Implication under GST when ratio of CCEX v/s Ranchi Club in CA- 7497 of 2012 - 3 MEMBERS-SC is applied

Supply of **service**s by unincorporated association to its members for consideration

is not deemed as Supply- anywhere under GST Act- **Nor any Section states that Association & its members are deemed to be distinct persons -** viz As defined under Section 25 for different state units of same PAN holder in India- deemed to be distinct persons whether regd/or not

a) *At the onset entry in Schedule II of CGST Act is merely for the purposes of ascertaining whether supply as per Section 7(1) is that of goods or services. It is to be used only for classification purposes only. Entry therein will not mean that particular activity is & will be treated as supply.*

b) *In the present case the Housing society is incorporated CHS collecting contribution from its members for sharing common expenses. Therefore in absence of any deeming fiction to treat incorporated associations/CHS & its members as distinct persons for supply of services. Following ratio of the Calcutta Club judgement, it follows that:*

(i) Supply of goods and / or services or both by incorporated entities to its members would not be taxable under GST.

(ii) Supply of services by an unincorporated entities to its members would also not be taxable under GST.

Exemption Notification no 12/2017 –CT Rate – exempts supply of described services from so much of central **tax leviable under Section 9(1) of CGST Act**,

*Service by an **unincorporated body** or a **non- profit entity** **registered under any law** for the time being in force, **to its own members** by way of reimbursement of charges or **share of contribution** '*

(a) as a trade union;

(b) for the provision of carrying out any activity which is exempt from the levy of Goods and service Tax; or

*(c) **up to an amount** of 12[seven thousand five hundred] **old[five thousand]** rupees **per month per member** for sourcing of goods or services from a third person for the **common use of its members in a housing society** or a residential complex*

12.Substituted Vide: *Notification No. 02/2018-Central Tax(Rate),dt. 25/01/2018*

Implication under GST when ratio of CCEX v/s Ranchi Club in CA- 7497 of 2012 - 3 MEMBERS-SC is applied

✓When there is no service at all by incorporated entity to its members in view of above

There is NO SUPPLY –

Thus no LEVY of GST under Section 9.

- Question of applying the exemption will not arise in the first place.

Meaning thereby if there is NO LEVY under GST ; applying exemption thereto will be meaningless & serve no purpose.

? Therefore merely because exemption notification provides for exemption upto Rs 7500/- per month per member

? This cannot be basis to conclude that **there is a levy on Supply of services** by Registered Housing co-operative society –CHS to its members.

Levy must be independently established first before applying exemption to it & not other way round.

REFUND OF TAXES

Refund under GST regime of GST wrongly paid on the on the activity of collecting contribution from members by registered Housing co-operative society

Section 54: Refund of tax. ***(Relevant Rules 89 to 96A)***

(1) ***Any person claiming refund of any tax*** *and interest, if any, paid on such tax or any* ***other amount paid by him****, may make an application before the expiry* ***of two years from the relevant date in*** *such form and manner as may be prescribed:*

(8) Notwithstanding anything contained in sub-section (5), the refundable amount shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to'

(a) refund of tax paid on 1[export] of goods or services or ....] ;

(b) refund of unutilised input tax credit under sub-section (3);

(c) refund of tax paid on a supply which is not provided, ...;

(d) refund of tax in pursuance of section 77;

(e) the tax and interest, if any, or ***any other amount paid by the applicant****, if he had not* ***passed on the incidence of such tax and interest to any other person;***

Implication under GST when ratio of CCEX v/s Ranchi Club in CA- 7497 of 2012 - 3 MEMBERS-SC is applied

(9) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in **any other provisions of this Act** or the rules made thereunder or in any other law for the time being in force, no refund shall be made except in accordance with the provisions of sub-section (8).

Explanation. 'For the purposes of this section

(2) 'relevant date' means' ...

(g) **in the case of a person, other than the supplier**, the date of receipt of goods or services or both by such person; and

(h) **in any other case, the date of payment of tax.**

Implication under GST when ratio of Mafatlal Industries Limited & Others v. Union of India & Others - 1997 (89) E.L.T. 247 (S.C.) is applied

*" 76. The first question that has to be answered herein is **whether Kanhaiya Lal (SC) has been rightly decided insofar** as it says*

*(1) that where the **taxes are paid under a mistake of law, the person paying it is entitled** to recover the same from the State on establishing a mistake and that this consequence flows from Section 72 of the Contract Act;*

*(2) that it is open to an assessee to claim refund of tax paid by him under orders which have become final - or to reopen the orders which have become final in his own case - **on the basis of discovery of a mistake of law based upon the decision of a court in the case of another assessee, regardless of the time-lapse involved** and regardless of the fact that the relevant enactment does not provide for such refund or reopening;*

(3) whether equitable considerations have no place in situations where Section 72 of the Contract Act is applicable, and

(4) whether the spending away of the taxes collected by the State is not a good defence to a claim for refund of taxes collected contrary to law."

In finding the answer to the first question, the following extracts are necessary. We first extract the finding with respect to sub-section (3) of Section 11B as it now exists :

77. ...It started with a non obstante clause; it took in every kind of refund and every claim for refund and it expressly barred the jurisdiction of courts in respect of such claim. Sub-section (3) of S. 11B, as it now stands, it to the same effect - indeed, more comprehensive and all encompassing. It says,

> *"Section 11 (3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder or in any law for the time being in force, no refund shall be made except as provided in sub-section".*

The language could not have been more specific and emphatic. The exclusivity of the provision relating to refund is not only express and unambiguous but is in addition to the general bar arising from the fact that the Act creates new rights and liabilities and also provides forums and procedures for ascertaining and adjudicating those rights and liabilities and all other incidental and ancillary matters, as will be pointed out presently. This is a bar upon a bar - an aspect emphasised in Para 14, and has to be respected so long as it stands. The validity of these provision has never been seriously doubted. Even though in certain writ petitions now before us, validity of the 1991 (Amendment) Act including the amended S. 11B is questioned, **no specific reasons have been assigned why a provision of the nature of sub-section (3) of S. 11B (amended) is unconstitutional.**

(77) ...Once the constitutionality of the provisions of the Act including the provisions relating to refund is beyond question, they constitute "law" within the meaning of Art.265 of the Constitution. It follows that any action taken under and in accordance with the said provisions would be an action taken under the "authority of law", within the meaning of Art.265. In the face of the express provision which expressly declares that no claim for refund of any duty shall be entertained except in accordance with the said provisions, it is not permissible to resort to S.72 of the Contract Act to do precisely that which is expressly prohibited by the said provisions. .....

77……..In other words, it is not permissible to claim refund by invoking S.72 as a separate and independent remedy when such a course is expressly barred by the provisions in the Act, viz., R.11 and S.11B. For this reason, a suit for refund would also not lie. Taking any other view would amount to nullifying the provisions in R.11/S.11B, which, it needs no emphasis, cannot be done. It, therefore, follows that any and every claim for refund of excise duty can be made only under and in accordance with R.11 or S.11B. as the case may be. in the forums provided by the Act. No suit can be filed for refund of duty invoking S.72 of the Contract Act. ……..

77……..So far as the jurisdiction of the High Court under Art.226 - or for that matter, the jurisdiction for this Court under Art.32 - is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Art.226/Art.32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment……..

Refund of service tax paid during 2005 till 1-7-2017

- Thus it is very clear that it is only now in view o**f Calcutta Club (SC) the CHS came to knows that they have wrongly paid service tax which was not payable at all**.

As held by Mafatlal (SC) the CHS 's refund claim will be time barred . Due to expiry of one year from date of payment as per Section 11B of Central Excise Act, 1944 as made applicable to Service tax vide section 83 of Finance Act, 1994 as amended.

Further as per Section 11B (3) of CEA, 1944 cash refund of service tax was possible only under Section 11B & no other law would apply to it. Therefore remedy of Civil suit under Section 72 of Contract Act read with Section 17 of Limitation Act, 1963 within 3 years of discovery of such wrong payment of service tax will not be available.

Nor any writ before Hon'ble High court under Article 226 of Constitution of India will survive

– Bom HC is allowing it ???? **PARIJAT CONSTRUCTION - 2018 (9) G.S.T.L. 8 (Bom.) - take chance .....**

Refund of GST wrongly paid during 1-7-2017 till date

- ***In simple terms under Section 54 of CGST Act, above a supplier can claim CASH refund of GST wrongly paid alongwith any interest paid thereon or any other amount paid by him by filing Refund claim within 2 years from date of its payment.***

  Only hitch is Section 54(9) of CGST, 2017 which provides on the lines of Section 11B(3) viz refund of taxes paid in GST will have to be claimed as provided in Section 54.

  Therefore filing the refund claim application within 2 years from date of its payment becomes sacrosanct & no other method in any other law can be followed to claim this CASH refund, like we have concluded above.

  De-registration under GST will be required before proceeding to file refund in GSTR-RFD-01 on GST Portal.

Thank You

CA Gopal Kedia