TO BE OR NOT TO BE - TAXED!!!

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It has been a long drawn litigation on the issue as to whether a members' club is different from its members in order to attract tax viz., Sales Tax or Service Tax. The Constitutional Bench of the Hon'ble Supreme Court in the case of Young Men's Indian Association in the year 1970, while deciding on the levy of Sales Tax on the club for the sales effected to its members, had held that the club even though a distinct legal entity is only acting as an agent for its members in the matter of supply of various preparations to them and that no sale would be involved as the element of transfer would be completely absent. In order to over come this decision, the Constitution of India was amended by way of insertion of new Article. This decision and also the decision of the Hon'ble Supreme Court in the case of Northern India Caterers (India) (P) Ltd., had resulted in the forty-sixth amendment of the Constitution of India in 1982, wherein Article 366 (29-A) was inserted. The Divisional Bench of the Hon'ble Supreme Court in the case of Calcutta Club, Ranchi Club & others, while referring the case to Larger Bench, had framed three questions to be answered by the Larger Bench viz., a) Whether the Doctrine of Mutuality is still applicable to incorporated clubs or any club after the 46th Amendment to Article 366 (29-A) of the Constitution of India; b) Whether the judgement in the case of Young Men's Indians Association holds good even after the 46th Amendment of the Constitution of India and whether the decisions in Cosmopolitan Club [Cosmopolitan Club vs. State of T.N., (2017) 5 SCC 635: (2009) 19 VST 456 (SC)] and Fateh Maidan Club [Fateh Maidan Club vs. CTO, (2017) 5 SCC 638 : (2008) 12 VST 598 (SC)] which remitted the matter applying the doctrine of mutuality after the constitutional amendment can be treated to be stating the correct principle of law? and c) 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 Larger Bench of the Hon'ble Supreme Court, after hearing the detailed arguments and after considering the Statement of Objects and Reasons for the 46th Amendment of the Constitution, had held that the Doctrine of Mutuality is incorporated clubs is applicable and hence the members of the club are running the club for themselves only and hence the

element of transfer in order to constitute a sale is absent. While, however, dealing with the issues relating to applicability of service tax, the larger bench had examined the provisions of the Finance Act, 1994, containing for club or associations or body of persons, both pre-negative list and post-negative list period (i.e., before and after 01.07.2012). Reference is invited to the definition of 'Service' as per Section 65(44) of Finance Act, 1994, as amended and the explanation inserted therein is as follows:

> ***Explanation 3***.- *For the purposes of this Chapter,-*
>
> > *(a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;*
> >
> > *(b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.*

From a plain reading of the above it would be lucidly clear that what is purportedly sought to be covered in the definition of 'Service' is only those associations or body of persons, which are not incorporated under any act. Further reference is also invited to the definition of 'Club or Association of Person' as was contained in Section 65 (25)(aa) of Finance Act, 1994 as it stood prior to the introduction of 'Negative List'. For ease of reference, the relevant portion of the said definition is reproduced below:

> *"**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-*
>
> 1. *(i) any body established or constituted by or under any law for the time being in force; or*
> 2. *(ii) any person or body of persons engaged in the activities of trade unions, promotion of agriculture, horticulture or animal husbandry; or*
>
> *(iii) any person or body of persons engaged in any activity having objectives which are in the nature of public service and are of a charitable, religious or political nature; or*
>
> *(iv) any person or body of persons associated with press or media;*

It would be apparently clear that the definition of 'club or association' even prior to 01.07.2012, purportedly sought to excluded any body established or constituted under any law for the time being in force. On comparison of the provisions contained during the two periods mentioned supra, it would be crystal clear that it was never the intention of the Legislature to levy any service tax on incorporated clubs or association or body of persons

and more so falling in line with the 46th Amendment of the Constitution of India, as discussed above.

As the debate over the levy of both VAT and Finance Act, 1994 has been set to rest by the Larger Bench of the Hon'ble Supreme Court; all eyes are now turning towards the relevance of the landmark decision in the GST regime.

While the levy of Goods & Services Tax (GST) are proposed on all goods and services supplied by one person for a consideration for the furtherance of the business. The watch word in GST for examining the applicability or otherwise of the decision is the definition of 'supply' as per Section 7 of CGST Act, 2017 as well as serial no.7 of Schedule II of the said Act. For easy understanding the relevant provisions are reproduced below:

> ***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;*
>
> *(c) the activities specified in Schedule I, made or agreed to be made without a consideration; and*
>
> *(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II.*
>
> *(2) Notwithstanding anything contained in sub-section (1),—*
>
> *(a) activities or transactions specified in Schedule III; or*
>
> *(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council,*
>
> *shall be treated neither as a supply of goods nor a supply of services.*
>
> *(3) Subject to the provisions of sub-sections (1) and (2), the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as—*
>
> *(a) a supply of goods and not as a supply of services; or*
>
> *(b) a supply of services and not as a supply of goods.*

Entry No.7 as contained in Schedule II ibid:

SCHEDULE II

[See section 7]

ACTIVITIES TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES

1……;

2……;

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.

On simple reading of the above Schedule it would be clear that certain activities listed therein are deemed to be supply of either goods or services. As serial number 7 is very relevant to the point of discussion, the said point has been reproduced below. Reading the definition of 'supply' in conjunction with the relevant contained in Schedule II, referred above, it would be lucidly clear that supply of goods by an unincorporated association or body of persons to its members are deemed to be 'supply' within the ambit of Section 7 ibid. This in other words would entice the fact that incorporated associations or body of persons is deliberately kept out of the purview of GST. Further, even going by the consistency of the wordings in all the definitions of the Acts discussed supra, it would be clear that the intentions of Legislature has been very clearly laid down and now read with the well-reasoned judgement of the Hon'ble Supreme Court through its Larger Bench, it further supplements the fact that even GST would not be applicable to incorporated clubs or associations or body of persons.

While parting….

To be or not to be taxed under GST is still a million dollar question as the decision of the Hon'ble Supreme Court is spelt out only in the context of VAT and Finance Act, 1994, the department would certainly take a different stand for GST. Or will there be a retrospective amendment?