DOCTRINE OF MUTUALITY IN INDIRECT TAX

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Indirect tax is typically levied on any economic activities between two persons for a consideration. However, can such a tax be levied in case of members' clubs where there is no sale by one person to another for a consideration? Can indirect tax be levied even in case of supply to oneself? Will the answer differ if the said members' club is an incorporated entity or an unincorporated one? These aspectsare discussed in this article.

➢ What is doctrine of mutuality?

Hon'ble Supreme Court in *Bangalore Club vs Commissioner of Income Tax reported in [(2013) 5 SCC 509]* set out the essential conditions for the doctrine of mutuality, which are as under:

- There must be complete identity of contributors to the fund and recipients the label or form by which organisation is known is of no significance.
- The action of the organisation must be in furtherance of its mandate for the benefit of its members. Determination of Mandate can be identified by the articles or MoA.
- When a club receives a surplus amount and if there is no direct benefit to the customers or members and such surplus amount is used for customers or members, that can be considered to be in furtherance of mandate;
- Impossibility of profits being derived by such contributions made by Members.

➢ Can Indirect tax be levied where doctrine of mutuality applies? (Pre GST regime)

There is a long history of litigation in the pre-GST regime where Revenue sought to levy tax even when doctrine of mutuality applied. The Hon'ble courts in Young Men's Indian Association [(1970)1 SCC 520]; Ranchi Club Ltd vs Chief Commissioner of Central Excise and Service Tax[(2012) 3 AIR Jhar R 255:(2012) 51 VST 369]; High Court of Gujarat Ltd. Vs Union of India [2013 64 VST 191] have consistently held that any sort of indirect tax cannot be levied where doctrine of mutuality can be applied.

Significantly not too long ago, Hon'ble Supreme Court in a now landmark judgment of *State of West Bengal & Orsvs Calcutta Club [AIR 2019 SC 5310]* upheld above judgments.

➢ Can Indirect tax be levied where doctrine of mutuality applies? (GST regime)

Similar long litigation was expected in the GST regime as well regarding applicability of GST when doctrine of mutuality applied. In expected lines, there were enough indications in the Rate notifications that government will try and levy GST on such transactions. Case in point being applicability of GST on maintenance fees collected by Residential Society above Rs 7,500/-.

Arguments can be made whether whatever activities a club/society is undertaking is merely as a pure agent for its members. Practically, in order to abstain from litigating such issue, GST is being levied on majority of transactions being carried out by a club/society considering the sheer amount of time it takes to resolve such an issue under litigation.

Noting the Hon'ble Supreme Court judgment *State of West Bengal&Orsvs Calcutta Club [AIR 2019 SC 5310]*, Section 7 (1) (aa) was inserted in CGST Act with ***retrospective effect and made applicable from 1st July 2017*** vide section 108 of The Finance Act 2021 to overcome the said decision. The activities or transactions, by a person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration shall also be considered as supply under GST Act and accordingly GST shall be applied.

Thus, on plain reading of the above section, it appears that the government's intention is clear. GST shall be levied on aforementioned transactions where doctrine of mutuality applies (whether or not entity is an incorporated entity or unincorporated). It should be noted that operability of section 108 of The Finance Act 2021 has not yet been notified as on the date of this article.

➢ Key points to deliberate:

- **Whether interest and penalties can be made applicable?:** Many clubs or society or associations may not have undertaken GST registration. The amendment being a retrospective one, interest and penal consequences could be applicable under GST law.It is a settled law that no offence and penalties can be created where there is an interpretation issue. The need to insert the amendment from retrospective date can favour such an argument. Further, the extended period of limitation also cannot be invoked based on the retrospective amendment in absence of any intent to evade the tax (refer K. SPINNING AND WEAVING MILLS LTD. v. UOI 1987 (32) E.L.T. 234 (S.C.).

- **Whether interest and penalties can be made applicable?:** The Hon'ble Supreme Court in the case of Star India Pvt. Ltd. vs. Comm. of Central Excise 2006 (1) STR 73 (S.C.) held that even the liability to pay interest would only arise on default and is really in the nature of a quasi-punishment. Such liability although created retrospectively may not entail the punishment of payment of interest with retrospective effect.

- **What about ITC of past periods?:** On plain reading of section 16 of GST Act, ITC may not be available to a club or association if it decides to make good the GST liability in view of the recent amendment. Argument can be made on the basis of doctrine of fairness in case of retrospective amendment and ITC can be claimed. However, this will be challenged by the Revenue.

➢ Conclusions

Number of clubs and associations would not be very large. Thus, after introducing this retrospective amendment, any significant increase in the revenue coffers is highly unlikely. Further, taxation of such transactions might discourage the cooperative movement. Though the "retrospective effect" of the amendment is likely to be challenged in higher forums, the amendment might well be applicable from a prospective date.

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