

HC: GST on activities of association with members not ultra-vires; Calcutta-Club's 'mutuality' principle inapplicable

Jul 24, 2024

Indian Medical Association vs. UOI [TS-433-HC(KER)-2024-GST]

Conclusion

Kerala HC (Ernakulam) upholds the constitutional validity of amendment that levies GST on activities/transactions of association with its members, however denies applicability retrospectively w.e.f. July 1, 2017 while clarifying same “*should be given effect from the date when it was notified i.e., 01.01.2022*”; Dismissing the writ petition filed by Petitioner, an association of Medical Practitioners registered in State of Kerala, HC categorically remarks, “*Parliament / State Legislature has amended Section 7(a) by inserting Section 7(aa) by the Finance Act, 2021. The amendment,... is neither beyond legislative competence nor offends any of the fundamental rights guaranteed under.. Constitution of India nor is manifestly arbitrary or capricious..*”; Before the HC, Petitioner argues that (i) well-recognized principles of mutuality could not have been erased by the amendment in the GST Act by inserting Section 7(1)(aa) retrospectively and (ii) unless Article 246A would have been amended, the activities of club/association could not be brought within the ambit of GST Act; Discarding said contention, in clear language, HC observes that, “*Constitution does not put any restriction or limitation from defining a person(s) for the purpose of levy of GST. This supply of goods and services may be by club / association to its member and therefore, the principal of the mutuality will not come in a way of the Parliament or the State legislature to enact law for tax on supply of goods and services*”; HC places reliance upon SC judgment in the case of Karnataka Bank Ltd; As regards reliance placed by the Petitioner on SC ruling in landmark case of [Calcutta Club](#) on principles of mutuality, HC explains that, “*basis of the judgment can be altered or removed by necessary amendments in the legislature*”; Remands matter to authorities for completing the assessment after examining each activity independently to arrive at a conclusion as to whether such an activity involves the supply of goods and services so that the tax may or may not be imposed on such activity:HC KER

Decision Summary

The judgment was delivered by Justice Dinesh Kumar Singh

Sr. Advocate Aravind P. Datar along with Advocates George Varghese, Manu Srinath, Nimesh Thomas and Sreelakshmi R Nair appeared on behalf of the Assessee while Additional Solicitor General of India A.R.L Sundaresan along with Spl GP Muhamed Rafiq appeared on behalf of the Revenue.

Writ Petition has been filed challenging the levy of GST on activities/transactions of the petitioner's association with its members. Petitioner prays for a declaration that Section 2(17)(e) and Section 7(1)(aa) and Explanation thereto of Central Goods and Service Tax Act, 2017 (CGST Act) and corresponding provisions of Kerala Goods and Services Act, 2017 (KGST Act) are ultra-vires.

Petitioner is an association under the provisions of Travancore - Cochin Literary Scientific & Charitable Societies Registration Act, 1955 wherein only qualified modern medical practitioners holding a valid registration in the State of Kerala under the Travancore Cochin Medical Practitioners Act, 1953 (predecessor Act of Kerala State Medical Practitioners Act, 2021) are eligible to become members of the petitioner association.

Petitioner submitted that its activities are like mutual self-help and the petitioner association is a kind of charitable organisation. The association is only a group of individuals serving themselves and as per the doctrine of mutuality, there is no service by one person to another. Therefore, it cannot be said that there is a supply of goods and services in carrying out the activities by the petitioner association, and therefore, no GST is payable in respect of the activities of the petitioner association.

Petitioner argued that Section 246 to 246A empowers the Central and State to levy only the “tax on supply of goods and services” which postulates two entities i.e., supplier and the person who receives the supply on consideration. In the case of a club and association, such as the petitioner, which is a self-serving institution, the principle of mutuality would apply as there could be no supply of goods and services between the club and its members as held in the Calcutta Club. The submission is that the amendment brought in the GST/CGST Act by inserting Section 7(1)(aa) retrospectively by way of the Finance Act 2021 is ultra-vires as the said amendment runs contrary to the long-established and well-recognized concept of mutuality.

Petitioner thus averred that by way of amendment in the GST Act by inserting Section 7(1)(aa) expression thereto, a heavy, unforeseen burden is thus cast on the petitioner, and the petitioner is not in a position to collect tax from its members. The submission is that the retrospective levy, thus violates Article 19 (1) (g) of the Constitution of India.

On the other hand, Revenue counters that there is no reference to the term ‘person’ either under Article 246A or 366 (12A). When there is no reference to the term ‘person’ in the Constitution for the levy of goods and service tax, it is well within the wisdom of the parliament and the State legislature to define ‘Person’ and levy of tax on transactions on supply of goods and services between such persons.

HC peruses Article 246(A) and relevant portions from Section 2(17) of the CGST Act. Referring to the judgment in the case of Gannon Dunkerly as relied upon by the Petitioner, HC remarked that “the said judgment does not lay down a principle that the Constitution will be required to be amended for bringing every transaction involved in the supply of goods and services”.

HC further explained that “Article 246-A empowers the parliament and State Legislature to enact law(s) with respect to the goods and services tax whether the supply of goods or services or both takes place. The power conferred under Article 246- A is plenary power for making laws by the parliament and State Legislature for imposing tax on the supply of goods and services and without any limitation put by the Parliament in the provision of Article 246-A”.

In clear language, HC observed that “Constitution does not put any restriction or limitation from defining a person(s) for the purpose of levy of GST. This supply of goods and services may be by club / association to its member and therefore, the principle of mutuality will not come in a way of the Parliament or the State legislature to enact law for tax on supply of goods and services”.

HC relied upon SC judgment in the case of Karnataka Bank Ltd v. State of Andhra Pradesh wherein it was held that the Legislature should be given the widest power to define the term ‘Person’ who is to be taxed. With respect to reliance placed upon SC ruling in Calcutta club, HC infers that from the “perusal of Article 366(29A), it would be evident that a levy of service tax on the supply of goods by an unincorporated Association or body of persons to a member for cash, deferred payment, or other valuable consideration would be covered. However, Article 366(29A) does not provide the service tax on incorporated associations. Even otherwise, if it is held that the principle of mutuality is involved in the supply of goods or services by a club/association to its members, the basis of the judgment can be altered or removed by necessary amendments in the legislature”.

HC thus concludes that, “In view thereof, the Parliament / State Legislature has amended Section 7(a) by inserting Section 7(aa) by the Finance Act, 2021. The amendment, as held, is neither beyond legislative competence nor offends any of the fundamental rights guaranteed under Part III of the Constitution of India nor is manifestly arbitrary or capricious. Therefore, the amendment brought in Section 7(a) by inserting Section 7(aa) is well within the legislative competence and not ultra-vires”.

However on aspect of retrospective application of said Section, HC agreed that “before the amendment was brought in inserting Section 7(aa) by the Finance Act, 2021, the law of mutuality was well established in the principle of taxation in case of supply of goods and services by clubs/associations to its members”. Thus, HC conceded that “Section 7(aa) in my view, therefore, should not be given retrospective operation w.e.f 01.07.2017 but it should be given effect from the date when it was notified i.e., 01.01.2022”.

As regards the various activities undertaken by the petitioner association, HC requires the assessing

authority to examine each activity independently to arrive at a conclusion as to whether such an activity involves the supply of goods and services so that the tax may or may not be imposed on such activity.

In conclusion, HC held that “the present writ petitions so far as the challenge to the constitutionality of Section 7(aa) is concerned are dismissed. However, it is held that the provisions of Section 7(aa) will have prospective operation with effect from 01.01.2022. Petitioners are directed to file their response to its impugned show-cause notices, and the matters are remanded back to respondents 4 and 5 to complete the assessment” and till then “the interim order passed by this court shall remain in operation”.

GSTsutra Note

- Vide [Notification No. 39/2021- Central Tax dated December 21, 2021](#), Government notified Section 108 of the Finance Act, 2021 enforceable from January 01, 2022. Section 108 of Finance Act, 2021 sought to amend Section 7 of CGST Act wherein in sub-section (1), after clause (a), the clause shall be inserted and shall be deemed to have been inserted, namely “(aa) 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”.
- [Madras HC](#) had admitted writ petition challenging Section 108 of Finance Act, 2021, insofar as it purports to levy GST on member’s club in an incorporated form by inserting Section 7(1)(aa) in CGST Act, 2017.

Case Law Information

Appellant/Applicant/Complainant Name

- Indian Medical Association

Respondent Name

- Union of India

Counsel of Appellant/Applicant/Petitioner

- Aravind P. Datar

Respondent Counsel

- A.R.L Sundaresan

Authority Level & Location

- High Court Kerala

Appeal Number

- WP(C) NO. 23853 OF 2023

Date of Pronouncement

- 2024-07-23

Ruling in favour of

- Respondent

Judges

- Justice Dinesh Kumar Singh