IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE DINESH KUMAR SINGH

TUESDAY, THE 23RD DAY OF JULY 2024 / 1ST SRAVANA, 1946

WP(C) NO. 23853 OF 2023

PETITIONER:

INDIAN MEDICAL ASSOCIATION, KERALA STATE BRANCH,
AGED 57 YEARS
REPRESENTED BY ITS SECRETARY DR. JOSEPH BENAVEN, IMA STATE HEAD QUARTERS, BYPASS ROAD, ANAYARA P.O., THIRUVANANTHAPURAM, PIN - 695029

BY ADVS.
GEORGE VARGHESE(PERUMPALLIKUTTIYIL)
MANU SRINATH
NIMESH THOMAS
SREELAKSHMI R.NAIR

RESPONDENTS:

1. UNION OF INDIA,
REPRESENTED BY THE SECRETARY, DEPARTMENT OF REVENUE, MINISTRY OF FINANCE, GOVERNMENT OF INDIA, NORTH BLOCK, NEW DELHI, PIN - 110001
2. STATE OF KERALA,
REPRESENTED BY THE SECRETARY, DEPARTMENT OF FINANCE, GOVERNMENT SECRETARIAT, GOVERNMENT OF KERALA, THIRUVANANTHAPURAM, PIN - 695001
3. GST COUNCIL,
GST COUNCIL SECRETARIAT,5TH FLOOR, TOWER-II, JEEVAN BHARTI BUILDING,JANPATH ROAD, CONNAUGHT PLACE,NEW DELHI, PIN - 110001
4. ADDITIONAL DIRECTOR GENERAL,
DIRECTORATE GENERAL OF GST INTELLIGENCE, KOCHI ZONAL UNIT, 1ST FLOOR, CENTRAL EXCISE BHAVAN, KATHRIKKADAVU, KOCHI, PIN - 682017
5. DEPUTY DIRECTOR,
DIRECTORATE GENERAL OF GST INTELLIGENCE, KOZHIKODE REGIONAL UNIT, MAHE HOUSE, PANICKER ROAD, NADDAKAVU P.O.,KOZHIKODE, PIN - 673011

MUHAMED RAFIQ- SPL.GP

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 26.03.2024, ALONG WITH WP(C).21297/2023, THE COURT ON 23.07.2024 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE DINESH KUMAR SINGH

TUESDAY, THE 23RD DAY OF JULY 2024 / 1ST SRAVANA, 1946

WP(C) NO. 21297 OF 2023

PETITIONER:

INDIAN MEDICAL ASSOCIATION, KERALA STATE BRANCH, REPRESENTED BY ITS SECRETARY DR. JOSEPH BENAVEN, IMA STATE HEAD QUARTERS, BYPASS ROAD, ANAYARA P.O., THIRUVANANTHAPURAM -695029.

BY ADVS.
GEORGE VARGHESE(PERUMPALLIKUTTIYIL)
MANU SRINATH
NIMESH THOMAS
SREELAKSHMI R.NAIR

RESPONDENTS:

1. **UNION OF INDIA, REPRESENTED BY THE SECRETARY, DEPARTMENT OF REVENUE, MINISTRY OF FINANCE, GOVERNMENT OF INDIA, NORTH BLOCK, NEW DELHI-110 001.**
2. **STATE OF KERALA, REPRESENTED BY THE SECRETARY, DEPARTMENT OF FINANCE, GOVERNMENT SECRETARIAT, GOVERNMENT OF KERALA, THIRUVANANTHAPURAM-695001., PIN - 695001**
3. **GST COUNCIL, GST COUNCIL SECRETARIAT, 5TH FLOOR, TOWER-II, JEEVAN BHARTI BUILDING, JANPATH ROAD, CONNAUGHT PLACE, NEW DELHI-110 001, PIN - 110001**
4. **ADDITIONAL DIRECTOR GENERAL, DIRECTORATE GENERAL OF GST INTELLIGENCE, KOCHI ZONAL UNIT, 1ST FLOOR, CENTRAL EXCISE BHAVAN, KATHRIKKADAVU, KOCHI-682017., PIN - 682017**
5. **DEPUTY DIRECTOR , DIRECTORATE GENERAL OF GST INTELLIGENCE, KOZHIKODE REGIONAL UNIT, MAHE HOUSE, PANICKER ROAD, NADDAKAVU P.O., KOZHIKODE-673 011.**

BY ADV SHAIJU K.S., CGC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 26.03.2024, ALONG WITH WP(C).23853/2023, THE COURT ON 23.07.2024 DELIVERED THE FOLLOWING:

JUDGMENT **"CR"**

[W.P(C) Nos. 21297 & 23853 of 2023]

Both these writ petitions are connected and heard together and are disposed of by the common judgment.

2. W.P(C) No. 21297 of 2023 has been filed praying for a Declaration that Section 2(17)(e) and Section 7(1)(aa) and explanation thereto of the Central Goods and Service Tax Act, 2017 and corresponding provisions of Kerala Goods and Services Act 2017 are ultra-virus. Article 246A read with Article 366 (12A) and violative of Articles 14, 19(1) (g), Articles 265 and 300A of the Constitution of India; in the alternative the prayer has been made to issue a Declaration that the retrospective effect from 01.07.2017 of Section 7(1) (aa) as unconstitutional and violative of Articles 14, 19 (1) (g) Articles 265 and 300A of the Constitution of India.

3. The petitioner's case is that the petitioner is an association under the provisions of the Travancore – Cochin Literary Scientific & Charitable Societies Registration Act, 1955. Only qualified modern medical practitioners with a valid registration in the State of Kerala under the Travancore

Cochin Medical Practitioners Act, 1953 (predecessor Act of the Kerala State Medical Practitioners Act, 2021) are eligible to become members of the petitioner association.

4. Members are admitted to the petitioner association on payment of one-time admission fee. There are no shareholders. No dividends are declared, and there is no distribution of profits. Membership is not transferable. Membership can be terminated under certain specified circumstances. It is submitted that in the event of dissolution of the petitioner association, the property of the association is not allowed to be distributed among the members of the petitioner association but is to be given to any other non-profit organisation. It is further stated that the admission of a member in the petitioner association does not involve the rendering of any service to attract the GST on the contribution/admission fee.

5. It is also said that the petitioner association was formed in line with Part II, Rule 6 of the rules of the National Indian Medical Association, which was founded in 1928 and registered as a Society in Calcutta. Each State has its

association which is registered under the respective state laws. The petitioner association holds an Income Tax Permanent Account Number and is registered under Section 12AA of the Income Tax Act, 1961.

6. The petitioner association is like a club formed to promote medical science, upholding the interests of the medical profession, guiding government bodies in evolving a health policy for the state and in implementing it, formulating schemes and projects for the welfare of members of the association, their families and the general public, helping in proper disposal of Biomedical waste, etc.

7. The petitioner runs various mutual beneficial schemes for the benefit of its member- doctors, e.g. Social Security Schemes or SSS (I, II, and III), Professional Disability Support Scheme (PDSS), Professional Protection Scheme, Kerala Health Scheme, etc. All these Schemes are said to support fellow doctors, while one or two schemes support their immediate family members. Besides the admission fee, the member-doctors contribute annually and in cases of certain schemes (e.g.SSS, PDSS), a fraternity contribution upon the

death/disability of a fellow member doctor; the pooled sum is paid out to the widow/dependents of the deceased doctors, disabled doctors, doctors afflicted with specified diseases, etc. Each Scheme is run by a separately elected committee, in which the Secretary and President of the petitioner association are ex officio members. The schemes have separate bank accounts, and accounts of each scheme are drawn up and separately audited.

8. It is also stated that wherever activities involve outsiders, such as the activities relating to hospital waste collection, assisting in procuring quality hospital equipment at reasonable prices and in service of the equipment (PEPS i.e., Professional Equipment & Employment Protection Scheme), and running of a publication (Nammude Arogyam) are registered separately, with a separate income tax PAN and separate GST registration. For carrying out the aforesaid activities, GST is duly remitted.

9. The petitioner had earlier constructed and sold flats to its member doctors; for that activity, the petitioner had obtained a service tax/ GST registration and duly remitted

service tax / GST. It is stated that the object of the Social Security Scheme is to provide financial assistance to the families of the medical practitioners in the event of his or her death, or in the event of the member suffering permanent disability that renders the member unfit to practice the profession for life, the object is also encompass undertaking various charitable/philanthropic activities such as providing medical aid to the needy and poor, family welfare programs independently / jointly with the Government, organising blood donation camps, eye camps, promoting medical education, etc.

10. Any doctor who is a member of the petitioner may become a member of these Social Security Schemes upon payment of an admission fee which is graded depending upon the age of the doctor. The member is then required to pay an annual subscription of Rs.300 to Rs.1,000 for a period of 20 to 25 years.

11. In case of death / permanent disability of the member, every other member of that Scheme is to pay a specified "fraternity contribution" ranging from Rs 100 to Rs

500 depending upon the number of years for which the deceased member had been a member of the scheme. The fraternity contribution be handed over to the family of the deceased/permanently disabled member and the remaining portion, if any, is credited to the corpus of the scheme concerned to be paid out in the future.

12. The association also runs and administers a professional disability support Scheme, and the object of the said scheme is to provide financial assistance to a member of the scheme who has become so temporarily / permanently disabled that it renders him unfit to practice his / her profession. Any eligible member of the petitioner may become a member of this scheme upon payment of an admission fee that is graded based on age (Rs 5,000 to Rs 15,000). An annual fee of Rs 1,000/- is also payable by each member of the scheme. A member of the scheme is also required to make a disability contribution (graded) upon any member of the scheme suffering from disability. The aggregate disability contribution is paid out to the disabled member. Further, upon death, a fixed sum of Rs.50,000/- is

also paid to the family of the deceased member of the scheme. The total amount of such death benefits paid each year is also collected equally from the remaining members.

13. The Professional Protection Scheme of the petitioner association has two objects: -

> i) to protect members in the case of harassment, litigation, etc, and provide legal aid;
>
> (ii) to promote social service activities such as medical aid to the poor, family welfare programs, blood donation camps, medical attention, medical aid, etc.

14. Any member of the petitioner may become a member of this scheme upon payment of an annual subscription fee (Rs 2,000 for the first year, decreasing by Rs 100 every year, and stabilizing at Rs 1,500). This membership is for one unit of PPS membership. If any member of the scheme faces legal action (for acts done/omitted in the course of his profession), the petitioner engages and pays an advocate to provide legal services to the member concerned. Further, if the litigation results in damages being ordered to be paid by a member of

the scheme, the petitioner pays such damages up to a maximum of Rs 10 lakhs for a single case and Rs 20 lakhs for multiple cases in one year. A member may also opt for enhanced protection under this scheme upon payment of a membership fee of Rs 10,000/- p.a. The maximum compensation then payable to such a member of the scheme would be an additional amount of Rs 1 crore.

15. The petitioner's other Scheme is the Hospital Protection Scheme, to protect hospitals, clinics, and dispensaries (run by member-doctors/where member-doctors work) from litigation and from harassment by the media for any act of alleged negligence or carelessness or deficiency in service on the part of the doctors/staff. Membership fee ranges from Rs 5,000/- to Rs. 75,000/- per year depending upon the bed strength of the member institution. The maximum compensation paid by the scheme is Rs 10.00 lakhs for a single case and Rs 20.00 lakhs for multiple cases in a year. The petitioner would also engage advocates to act on behalf of member institutions and pay the related legal fees to such advocates.

16. The Kerala Health Scheme run by the petitioner association is to provide financial assistance to members of the scheme and his/her spouse, parents, and children in the event of any such person being diagnosed with specified diseases. The admission fees range from Rs 800/- to Rs 6,000/- depending upon the age of the doctor. All beneficiary members are additionally required to pay an annual membership subscription of Rs.100/- and Advance Finance Assistance Contribution ranging from Rs. 2400/- to Rs 7500/- p.a. Upon diagnosis/hospitalization for specified diseases, compensation ranging from Rs 5,000 to Rs 5 lakhs is paid.

17. The pension Scheme is to provide pension to life members of the Society. Admission fee for the said scheme is Rs. 3,000/- Rs. 5,000/-. Every member of the scheme shall also pay an annual membership fee of Rs. 500/-. Further, the minimum annual contribution to be made by every member of the scheme is Rs. 12,000/-. When a member of the scheme requests payment after he or she attains 60 years, 30% of the pension corpus of a member may be paid to the member at the time of starting the pension payment if so requested by

the member. The pension is then paid for the rest of the life of the member from the remaining 70% corpus amount of the member. Upon the death of a member, his nominee may similarly take a lump-sum payment of 30% of the corpus. The full maturity amount is to be paid to the nominee, if a pension for a spouse is not opted for. If death occurs before the age of 60, the scheme provides for stated pay-outs.

18. Mutual benefit Schemes to provide financial support, encourage the habit of thrift amongst members and encourage financial planning amongst the members. However, this Scheme has since been discontinued.

19. The Patient Care Scheme is to institute a corpus fund to provide assistance to deserving patients, who seeks care in modern medicine, to establish an information/assistance center for patients seeking medical services, to create a network of health care facilities across Kerala to assist poor patients and patients in emergency situations. Any member of the petitioner association may join the Scheme for a period of 3 years on payment of a membership fee of Rs.1000/-. The members of the Scheme

are entitled to participate in the general body of this Scheme and are eligible to cast their votes. The criteria and expenditure of the patient care fund are decided by the managing committee of the Scheme from time to time. The payments to deserving patients are made from the corpus of this fund / Scheme.

20. Mr. Aravind P. Datar the learned Senior Advocate for the petitioner submits that the petitioner association is like a member’s club. Only qualified modern medical doctors are eligible to become members of the petitioner association. The property of the association is held for and on behalf of the members. There are also regional branches of the petitioner in various towns in Kerala, which are separate bodies. The petitioner association runs schemes as a self-help group. These schemes are run with an aim to help one another / their family members to tide over difficulties such as disabilities, death, legal action, etc. The members, pool in their money by way of admission and annual subscription, which is distributed to individual members / their families upon the happening of the events (death, disability, etc). The

petitioner association has guest houses, and it lets out rooms to its traveling members / their guests. Many charitable activities, such as HIV awareness, End-TB campaigns, etc., have been carried out by the association. The activities of the Petitioner Society 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.

21. The learned Senior counsel for the petitioner has placed reliance on the following judgments:-

- ***1)Graf v. Evans [(1882) 8 QBD 373]***
- ***2)Trebanong Working Men's Club and Institute Ltd v. Macdonald [(1940) 1 All ER 454]***
- ***3)Inland Revenue Commissioners v. Westleigh Estate Co. Ltd [1924 (1) KB 6390]***

22. It is submitted that the said principle is well recognised in India and has been taken note of several judgments by the High courts and Supreme Court;

- ***Bengal Nagpur Cotton Mills Club v Sales Tax Officer, Raipur and Another [8 STC 781] , Century Club and Another v. The State of Mysore and Another [16 STC 38]***

23. The Supreme Court, in the case of ***Secretary, Madras Gymkhana Club Employees Union v. Management of the Gymkhana Club [1967 SCC OnLine SC 51]***, has held that in the case of the club, the services provided by the club are to the members themselves. The club is a self-serving Institution (even where guests are admitted). The club is identified with its members, and it does not have any existence apart from the members. The services provided by the club for members have to be treated as activities of a self-serving institution, even if the club is incorporated as a limited company under the Companies Act, as held in ***[Cricket Club of India Ltd v. Bombay Labour Union [AIR 1969 SC 276]***. There can be no sale or transfer

between the club and its members. The learned Senior counsel for the petitioner submits that the Supreme Court struck down the levy of sales tax on the supply of food/beverages made by a club to its members on the ground of principles of mutuality in ***JCTO, Madras v. The Young Men's Indian Association (Regd.) [(1970) 1 SCC 462]***.

24. In the 46th Amendment (1981) of the Constitution, in an attempt to legitimise the levy of sales tax on a club/association, the "tax on sale or purchase of goods" is defined in broader terms to include a tax on the supply of goods by an unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration. However, the Supreme Court in ***State of West Bengal v. Calcutta Club [2019 (29) GSTL 545 (SC)]*** emphatically held that the principle of mutuality continued even after the 46th Amendment. Learned counsel for the petitioner has placed reliance on the judgment of ***Ranchi Club v. Chief Commr of Central Excise & Services Tax [2012 SCC OnLine 306],*** wherein it was held that the sale and services would require the existence of two

parties. However, with respect to the clubs, and services provided by the club to its members, there is no service that would affect the service tax as it would not be a service by one to another as there would be no existence of foundational facts between two legal entities in such a transaction.

25. The Parliament brought in the 101st Amendment by inserting Article 246A, empowering the Parliament and the State legislatures to levy goods and services tax under Article 246A. Article 366 was also amended, and 366 (12A) was inserted by the 101st Constitution Amendment, which defined goods and services tax as a "tax on supply of goods or services or both". Supply of goods or services would mean supply by one person to another. There cannot be a supply of goods or services by a person/entity to itself, such as in the case of a club/association, as they are not two separate persons/entities.

26. After the judgment in State of ***West Bengal v. Calcutta Club (supra)***, the parliament introduced Section 7(1)(aa) by the Finance Act, 2021, retrospectively that is with effect from the date of commencement of the GST regime ie.,

01.07.2017, inserting a legal fiction and artificially deeming a club/association and its members to be two separate persons. The taxable event was also artificially enlarged to include "activities or transactions" between a club/association and its members.

27. The learned Senior counsel for the petitioner submits 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 ie., 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 (supra)***.

28. The legislative power granted by the Constitution cannot be extended beyond the known legal connotations, it can be done only by a constitutional amendment. 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-virus as the said amendment runs

contrary to the long-established and well-recognized concept of mutuality. The submission is that only the constitutional amendment, which invests the parliament and State legislature with the power to levy GST on self-sale / self-services between a club and its members, would be required to do away with the concept/principle of mutuality. Statutory amendments, however, creatively worded and ingeniously couched as a clarification, would not be sufficient to do away with the concept of mutuality. It is also submitted that the supply of goods and services cannot cover all activities and transactions carried out by the petitioner association.

29. The learned Senior counsel has submitted that the effect of the judgments may be nullified by the legislative act removing the basis of the judgment. However, where a judgment recognizes a position of law – especially a well-entrenched position in a fairly long time and the said position determines the scope of the power conferred on a legislature by constitutional provision, then any amendments to that position of law can be made only by a constitutional amendment and not amending statute by legislature.

30. Alternatively, it has been submitted that the provision under Section 7(1)(aa) and the explanation thereto cannot be given retrospective operation.

31. In view of the settled position of law in a series of judgments, including in Calcutta Club (supra), GST on clubs and associations prior to the insertion of Section 7(1)(aa) and explanation thereto was not applicable. The insertion of Section 7(1) (aa) by the Finance Act 2021 has created a new levy and therefore, the new provision inserted for determining input tax credit cannot be a retrospective operation.

32. The petitioner was not collecting any GST in view of the settled position of law from its members on transactions done. 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.

33. The learned counsel for the petitioner has placed reliance on the judgment of ***Rai Ramkrishna and others v. State of Bihar [1963 SCC OnLine SC 31]*** and ***Jayam and Company v. Assistant Commissioner [(2016) 15 SCC 125]***

34. The court has to determine whether an amendment is clarificatory or it is a substantive change and mere legislature assertion that the amendment is clarificatory is not conclusive. It is a matter of statutory interpretation. Learned counsel for the petitioner has placed reliance on the judgment in the case of ***Union of India v. Martin Lottery Agencies Ltd [2009 (12) SCC 209]***

35. The learned counsel for the petitioner further submitted that no GST was payable prior to the Finance Act, 2021 amendment, which was notified on 01.01.2022, as the impugned amendments were inserted by Section 108 of the Finance Act, 2021. Under Section 1(2) of the Finance Act, 2021, the government was empowered to specify the date of commencement of any provision thereof. In the exercise of the said power under Section 1(2), the government issued

notification No.39/2021 dated 21.12.2021 specifying 01.01.2022 as the date on which the aforesaid Section 108 of the Finance Act 2021 would come into force. However, Section 108 itself states that the insertion of Section 7(1)(aa) in CGST Act 2017, shall be deemed to have been made with effect from 01.07.2017. Thus, prior to 01.01.2022, it could not have been known that GST ought to have been paid by clubs/associations. Interest is merely a compensation for belated payment of what ought to have been paid earlier. But, the question of payment earlier did not arise in this case as it was impossible to know that whether GST was payable by the club or association. The law does not expect the impossible [*lex non cognit ad impossibilia*]. Therefore, there should be no levy of interest for any period prior to 01.01.2022. In support of the said contention, the learned counsel for the petitioner has placed reliance on the judgment of ***Star India (P) Ltd v. CCE (2005) 7 SCC 203]***

36.The learned counsel for the petitioner submits that the amendment in Section 7 by Finance Act 2021, particularly the insertion of Section 7(1)(aa) in the GST Act

2017 also falls foul of Government constituted committee report pursuant to the Vodafone saga. The Standing Committee on Finance presented its report on the current economic situation and policy options to Parliament on 30.8.2012. The Committee *inter alia* found that the investment climate in the country had suffered a serious setback, and investors' confidence had been hit mainly because of the concerns over the impact of retrospective tax laws and new General Anti Avoidance Rules (GAAR). The Government then constituted an Expert Committee headed by Dr. Parthasarathi Shome on GAAR on 13.07.2012. After examining the matter in some detail, the committee submitted its report and conclusions of the report of the committee are summarised as below:-

> “The Committee concluded that retrospective application of tax law should occur in exceptional or rarest of rare cases, and with particular objectives: first, to correct apparent mistakes/anomalies in the statute; second, to apply to matters that are genuinely clarificatory in nature, i.e. to remove technical defects, particularly in procedure, which have vitiated the substantive law; or, third, to "protect" the tax base from highly abusive tax planning schemes that have the main purpose of avoiding tax, without economic substance, but not to "expand" the tax base. Moreover, retrospective application of a tax law should occur only after exhaustive and transparent consultations with stakeholders who would be affected. [Indeed, reflecting the

> challenges behind just and correct application of retrospective application, there is a constitutional or statutory protection against it in several countries. Countries such as Brazil, Greece, Mexico, Mozambique, Paraguay, Peru, Venezuela, Romania, Russia, Slovenia and Sweden have prohibited retrospective taxation.)"

37. It is also submitted that the impugned amendment in the GST Act also falls foul of the Government constituted committee report in 2013. The World Bank published a report downgrading India in the index of investment friendliness from its position of 131 in 2011 to 134. India's position remained below countries like Uganda, Ethiopia, Yemen, etc, while its smaller neighbors like Srilanka fared better. To address this fall in confidence, the government appointed a committee headed by Mr. Damodaran. The mandate of this committee was generally to examine issues that contributed to the decline of India's position in the index of investment friendliness. The committee exhaustively dealt with the retrospective taxation and summed up its recommendation as under:-

> "It has often been said that death and taxes are equally undesirable aspects of human life. Yet, it can be said in favour of death that it is never retrospective. Retrospective taxation has the undesirable effect of creating major uncertainties in the business environment and constituting a

> significant disincentive for persons wishing to do business in India. While the legal powers of a Government extend to giving retrospective effect to taxation proposals, it might not pass the test of certainty and continuity. This is a major area where improvements should be attempted sooner rather than later ...”

38. It is therefore submitted that the retrospective amendment provision is against the well-settled position of law, and it is unreasonable and arbitrary.

39. The learned counsel for the petitioner also submitted that whenever the petitioner association renders services to third parties, such as waste collection, equipment production, or advertisements in the petitioner’s magazine, these activities are registered, and GST is paid. The petitioner association has paid GST of Rs.16 crores over the last year on these activities/services rendered to third parties.

40. The submissions/contentions made on behalf of the petitioners have been refuted by, Mr. A.R.L Sundaresan, the learned Senior counsel and the learned Additional Solicitor General of India. He has submitted that a combined reading of Articles 246(A) and 366 (12A) would provide that the goods and services tax means any tax on the supply of goods and services or both. As such, the parliament and the State

legislature have concurrent powers to make laws with respect to goods and services tax viz tax on supply of goods and services or both. The power conferred by the Constitution on the parliament and the State legislature is to make laws to levy tax on the supply of goods and services. 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.

41. The Constitution does not put any limitations/restrictions on making laws to tax on the supply of goods and services; no such limitations can be read into such power and prevent parliament and legislatures from defining person(s) for the purposes of levying the tax on the supply of goods and services. The learned Assistant Solicitor General of India (hereinafter referred to as ‘ASG’) has placed reliance on the judgment in ***Karnataka Bank Ltd V. State of Andra***

Pradesh [(2008) 2 SCC 254], the said judgment deals with the levy of professional tax under Article 276 of the Constitution of India. Article 276 of the Constitution of India empowers the State legislature to impose professional tax on any person, subject to the maximum cap of Rs.2500/-. The Andra Pradesh State legislature defined the term person under Section (2)(j) of the Act and explanation to Section 2(j) of the Act provided that every branch of a firm, company, corporation, or other corporate body, any Society, Club or Association shall be deemed to be a person. In view of such a definition, several branches of Karnataka Bank Limited were considered to be a person and levied a professional tax of Rs. 2500/- per branch. This was the subject matter of the argument contending that when the Constitution had imposed a maximum limit of Rs.2500/- as professional tax, the State legislature, cannot define '**Person**' against the definition contained in the General Clauses Act and levy tax on every Branch and thereby collect tax more than Rs. 2500/-.

42. The Supreme Court did not accept the said submission and held that the legislature should be given the widest power to define the term '**Person'** for the purposes of imposing the tax and a different meaning than the definition in the General Clauses Act can be given for the purpose of taxation and the Legislature in its wisdom can create an artificial unit to define a person for the purpose of levy of tax. It was therefore, held that the definition that every branch of a Corporate entity would be deemed to be a person, and each such branch would be liable for tax independently.

43. In the ***State of Madhya Pradesh V. Rakesh Kohli [(2012) 6 SCC 312]*** it has been held that the legislature enjoys a greater latitude for classification, and it is open to the Legislature to identify areas of evasion of tax and brings in provision to plug the loopholes even by deeming fiction or artificial definitions.

44. The learned ASG has submitted that the vires of taxation law can be tested on the following grounds;

> "1)There is always a presumption in favor of the Constitutionality of a law made by the Parliament or the State Legislature.
> 2) No enactment can be struck down by saying that it is arbitrary or unreasonable or irrational but some Constitutional infirmity has to be found.

> 3) The Court is not concerned with the wisdom, justice, or injustice of the law as Parliament and the State Legislature are supposed to be alive to the needs of the people whom they represent and they are the best judge of the Community by whose suffrage they came into existence.
> 4)Hardship is not relevant in pronouncing the Constitutional validity of a fiscal statute or economic law, and
> 5) In the field of taxation, the legislature enjoys a greater latitude for classification."

45. It is further submitted that the judgments in ***State of Madras v. Ganon Dunkerly (AIR 1958 SC 560)*** and ***Calcutta Club (supra)*** relied on by the petitioners would not be applicable to the facts and circumstances of the present case.

46. In ***Ganon Dunkerly (supra)*** it was held that Entry 48 of List 2 of the Government of India Act, 1935 did not provide power to the State Legislature to " Tax on the sale of goods". The sale of goods was not defined in the Government of India Act, 1935, and therefore, the court was of the opinion that the sale of goods defined under the Sale of Goods Act ought to be adopted, and in that event, the sale of goods would take place only if there would be a transfer of title in movable property for consideration under a contract.

47. In ***Calcutta Club (supra),*** the matter was in respect of service tax, and it was held that the transaction

between the club and its members was by one to oneself, by the club to its own members, which would amount that one is supplying goods to oneself and therefore it cannot be taxed. Further, it was held that Article 366(29A) enables the levy of tax on the supply of goods by the unincorporated association of a body of persons to a member. Therefore, it was held that when the Constitution itself had left out the incorporated association, the levy of tax cannot be extended in respect of incorporated association within the expression body of persons as the Parliament has referred to only unincorporated association, it would obviously exclude incorporated association and what is excluded cannot be indirectly brought under the definition of body of persons. In the present case Article 246 A and Article 366(12A) refers to the supplier of goods and services nor the recipients of the goods and services. Article 246 A and Article 366(12A) are very wide in conferring power of the Parliament and State Legislature. It is, therefore, submitted that the subject matter of the present case is completely different from the facts of the case and subject matter of ***Calcutta Club (supra)***.

48. There is neither a lack of legislative competence nor the impugned provisions of the GST Act offends any of the fundamental rights guaranteed under Part III of the Constitution, nor can the provisions be said manifestly arbitrary and capricious. Section 7(1)(aa) of the GST Act cannot be said to be offending any of the aforesaid tests to be declared as unconstitutional.

49. In respect of the challenge to the retrospective amendment in Section 7(1)(aa), it has been submitted that the Legislature has the power to make laws prospectively and retrospectively. Clarificatory amendments are always retrospective in operation. The amendment introducing Section 7(1)(aa) and the explanation are only clarificatory. The liability was always there even under Section 7(1)(a) of the Act.

50. It has been further submitted that the judgment in ***Jayam & Co (supra)*** is not applicable in the facts of the present case as no vested right of the petitioner association is being taken away by the retrospective amendment in the

present case. The only liability which has always been on the petitioner is sought to be enforced by way of the amendment.

51. The doubt which arose in view of the judgment of the Supreme Court in the case of ***Calcutta Club(supra)***, with regard to the correct position of levy of tax on transactions between club/association and its members, and therefore, the amendment had been made by the parliament to remove any such doubt and the basis of the judgment in ***Calcutta Club (supra)*** was corrected, and therefore, it was made with retrospective effect.

52. Even otherwise, retrospectivity of the law cannot be a ground of attack on a provision, if it is within the power of the Legislature and if such retrospective law is not manifestly arbitrary or confiscatory in nature.

53. It is further submitted that in the present case, the entire community has understood the fact and purport of Section 7(1)(a) of the GST Act, and almost all associations/clubs / incorporated bodies and unincorporated bodies have been collecting and paying GST for the supply of goods and services to their members. Therefore, the

petitioner cannot contend that they were taken by surprise or that the imposition was unforeseen and could not have been anticipated.

54. In respect of the challenge to Section 83 of the GST Act, it has been submitted that Section 83 provides for interim protection in the interest of revenue and it does not suffer from vice or lack of legislative competence, nor does it offend any fundamental right guaranteed under part III of the Constitution neither it is manifestly arbitrary or capricious and therefore the challenge to the vires of Section 83 has no merit.

55. It is further submitted that after the order of attachment is passed under Section 83, the rules provide for a remedy for the affected person to apply for removal of the order of attachment by resort to rule 159 of the CGST Rules 2017. Section 83 is not an unreasonable restriction. The said provisions has been incorporated in the law by the parliament in its wisdom in larger public interest and to ensure the taxes are duly collected.

56**.** In the writ petition, the challenge is to the levy of GST on activities/transactions of the petitioner's association with its members. The petitioners have also challenged the provision under Section 7(1)(aa) and explanation thereto r/w Section 2(17)(e) of the CGST / KGST Act. Two main contentions on behalf of the petitioner are that it was the well-established provision of law that there is an identity between the club/association and its members, under the principle of mutuality, and there can be no sale/service by the club to its members. The well-recognized principles of mutuality could not have been erased by the amendment in the GST Act by inserting Section 7(1)(aa) retrospectively ie., from the date of commencement of the GST regime (01.07.2017) whereby inserting a legal fiction and artificially deeming a club/association and its members to be two separate persons.

57. Second contention is that Article 246 (A) empowers the Parliament and the State Legislature to enact laws to tax on supply of goods or services or both. The supply of goods and services means supply by one person to another and

unless the Constitution provides for taxing the supply of goods or services where the principle of mutuality involves such as sale/services to its members by amending the legislation on the subject, the principle of mutuality could not have been done away with. The submission is that the amendment is ultra-virus the provision of the Constitution. Such a levy could have been only by amendment in the Constitution and not otherwise.

58. The relevant provisions of the Constitution and GST Act (the KGST Act) are extracted hereunder:-

Article 246(A):-

(1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State. Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Article 366 (12A)"goods and services tax" means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption.

Relevant portion of Section 2(17) of the CGST Act:

"business" includes-

(a)...

... .

(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,

Relevant portion of Section 2(17) of the CGST Act: 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;

1[(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.

Explanation.—For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another;]

(b) import of services for a consideration whether or not in the course or furtherance of business [and]

(c)the activities specified in Schedule I, made or agreed to be made without a consideration;

The Constitutionality of a provision can be challenged principally on the following grounds:-

1)the legislature lacks legislature competence enact the provision;
2)the impugned provision(s) offends any of the fundamental rights guaranteed under Part III of the Constitution;
3)the provision is manifestly arbitrary and capricious."

59. Mr. Aravind P Datar, the learned Senior counsel for the petitioner, has submitted that unless Article 246A would have been amended to provide for taxing of services by the club / association to its members, the activities of

club/association could not be brought within the ambit of GST Act.

60. In support of the submission, he has placed reliance on the judgment of ***Gannon Dunkerly (supra)*** **and** ***Calcutta Club (supra).***

61. The judgment in the case of ***Gannon Dunkerly (supra)*** involved the question of the construction of entry 48 in list 2 of Schedule 7 to the Government of India Act, 1935, which provided " Tax on the sale of goods." The court was dealing with a levy of tax on the sale of goods over the materials which was used in construction and building under a contract.

62. The Supreme Court held that the legislature had the power to levy tax only on the "sale of goods." The sale of goods has not been defined in the Constitution, the court opined that the definition of the sale of goods under the Sale of Goods Act ought to be adopted and if so, the event of sale of goods would take place only if there is a transfer of title in movable property for consideration under a contract.

63. It was also held that when goods or materials are used in the construction of a building under a building contract, and the constructed building is transferred, there can be a definite identity of the material that is used in the construction. There is no break up that can be provided for the materials and the value of the materials which are used for such construction, and there is no separate transfer of possession of the movable property for consideration under the contract and hence levy of Sales tax on the material used in construction works contract was held as ultra-virus.

Paragraphs 24,34,35 and 36 are extracted hereunder:-

> "24.The principle of these decisions is that when, after the enactment of a legislation, new facts and situations arise which could not have been in its contemplation, the statutory provisions could properly be applied to them if the words thereof are in a broad sense capable of containing them. In that situation, " it is not ", as observed by Lord Wright in James v. Commonwealth of Australia (1), " that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning ". The question then would be not what the framers understood by those words, but whether those words are broad enough to include the new facts. Clearly, this principle has no application to the present case. Sales tax was not a subject which came into vogue after the Government of India Act, 1935. It was known to the framers of that statute and they made express provision for it under Entry 48. Then it becomes merely a question of interpreting the words, and on the principle, already stated, that words having known legal import should be construed in the sense which they had at the time of the enactment, the expression " sale of goods "must be construed in the sense which it has in the Indian Sale of Goods Act.
>
> 34.To sum up, the expression " sale of goods " in Entry 48 is a nomen juris, its essential ingredients being an agreement to sell movables for

a price and property passing therein pursuant to that agreement. In a building contract which is, as in the present case, one, entire and indivisible and that is its norm, there is no sale of goods, and it is not within the competence of the Provincial Legislature under Entry 48 impose a tax on the supply of the materials used in such a contract treating it as a sale

35.This conclusion entails that none of the legislatures constituted under the Government of India Act, 1935, was competent in the exercise of the power conferred by s. 100 to make laws with respect to the matters enumerated in the Lists, to impose a tax on construction contracts and that before such a law could be enacted it would have been necessary to have had recourse to the residual powers of the Governor General under s. 104 of the Act. And it must be conceded that a construction which leads to such a. result must, if that is possible, be avoided. Vide Manikkasundara v. R. S. Nayudu (1). It is also a fact that acting on the view that Entry 48 authorises it, the States have enacted laws imposing a tax on the supply of materials in works contracts, and have been realising it, and their validity has been affirmed by several High Courts. All these laws were in the statute book when the Constitution came into force, and it is to be regretted that there is nothing in it which offers a solution to the present question. We have, no doubt,Art. 248 and Entry 97 in List I conferring residual power of legislation on Parliament, but clearly it could not have been intended that the Centre should have the power to tax with respect to works constructed in the States. In view of the fact that the State Legislatures had given to the expression " sale of goods " in Entry 48 a wider meaning than what it has in the Indian Sale of Goods Act, that States with sovereign powers have in recent times been enacting laws imposing tax on the use of materials in the construction of buildings, and that such a power should more properly be lodged with the States rather than the Centre, the Constitution might have given an inclusive definition of " sale " in Entry 54 so as to cover the extended sense. But our duty is to interpret the law as we find it, and having anxiously considered the question, we are of opinion that there is no sale as such of materials used in a building contract, and that the Provincial Legislatures had no competence to impose a tax thereon under Entry 48

36.To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible, as the contracts of the respondents have been held by the learned Judges of the Court below to be. The several forms which such kinds of contracts can assume are set out in Hudson on Building Contracts, at p.165. It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and

> the power of the State to separate the agreement to sell, from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment."

64. Thus, 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. 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.

65. Article 366 (12)(A) defines goods and services tax to mean any tax on the supply of goods and services or both except taxes on the supply of alcoholic liquor for human consumption. Thus, a combined reading of Article 246A and Article 366(12A) provides that goods and services tax means any tax on the supply of goods and services or both. The parliament and State Legislature would have the power to

make laws with respect to goods and services tax viz, Tax on supply of goods and services or both.

66. Article 246A or Article 366(12A) does not have any reference to the term Person. The tax is on activities, i.e., the supply of goods and services or both. Therefore, I am of the view that the Parliament as well as the State Legislature, in the exercise of their power under Article 246A r/w Article 366(12A), would be empowered to Legislate for imposing tax on the supply of goods and services, irrespective of the person / individual involved.

67. The 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.

68.The Supreme Court in its judgment in the case of ***Karnataka Bank Ltd v. State of Andra Pradesh [2008 (2) SCC 254]*** deals with the levy of professional tax under

Article 276 of the Constitution of India held that the Constitution empowers the State Legislatures to impose professional tax on any person subject to the maximum cap of Rs.2500/- per person. The Andra Pradesh State Legislature defines the term person under Section 2(j) of the Act and explanation to Section 2(j) of the Act provided that every branch of a firm, company, corporation or other Corporation Body, any Society, Club or Association shall be deemed to be a person.

69. The State Government, therefore, in the exercise of the powers conferred by the legislature, considered every branch of Karnataka Bank to be a person and levied a professional tax of Rs.2500/- per branch. This levy on every branch of professional tax was challenged before the Supreme Court on the ground that the Constitution had imposed a maximum limit of Rs. 2500/- as a professional tax, therefore, the State Legislature cannot define a person against the definition contained in the General Clauses Act and levy of tax on every Branch would be unconstitutional.

70. The Supreme Court held that the Legislature should be given the widest power to define the term **Person** who is to be taxed and a different meaning that the definition in the General Clauses Act can be given for the purposes of taxation and the Legislature in its wisdom can create an artificial unit to define a person for the purposes of levy of tax, and hence, the definition that every branch of a corporate entity would be deemed to be a person and each such branch would be liable for tax independently was upheld.

Paragraphs 21,22,30,33,34,35,36,37,42,43 and 45 of the said judgment are extracted hereunder:

> "21. The Privy Council, in R. v. Burah, 1878 (5) I.A. 178 laid down a fundamental principle for the interpretation of a written Constitution. Lord Selborne in a classic passage observed: The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large and of the same nature, as those of Parliament itself. The established of courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created,

and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it) it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

In Kesavananda v. Kerala this Court reaffirmed the correctness of the principle laid down in Burah (supra)

22. In Bharat Kala Bhandar Ltd. v. Municipal Committee, Dhamangaon, this court held that the provisions of Art.276 of the Constitution which precludes State Legislature from making a law enabling a local authority to impose a tax on profession etc. in excess of Rs. 2500/- per annum and the said provision is to be read in the Act or to be deemed by implication to be there as the Constitution is a paramount law to which all other laws are subject. It is further held moreover, we must bear in mind the provision of Art.265 of the Constitution which preclude the levy or collection of a tax except by authority of law which means only a valid law.

30. In East India Tobacco Co. v. State of Andhra Pradesh, this court approved Willis : Constitutional law to the effect: A State does not have to tax every thing in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably.

33. We do not find any merit in the contention that the Legislature lacks legislative competence to define person who is liable to pay profession tax etc. which includes every branch of a firm, Company, Corporation or other corporate body, any Society, Club or Association. The term person is not defined in the Constitution. But Art.367 of our Constitution provides that the definitions contained in the General Clauses Act apply for the interpretation of the

Constitution. Therefore, we are required to consider whether the definition of person in S.3 (42) of the General Clauses Act restrict the power of State Legislature to define the term person and adopt a meaning different from the definition in the General Clauses Act. In our considered opinion, the definition of person in General Clauses Act, would not restrict the power of the State Legislature to define a person and adopt a meaning different from or in excess of the ordinary acceptation of the word as is defined in the General Clauses Act.

34. In N. Subramania Iyer Versus Official Receiver Quilon & Anr. this Court while considering the question whether it was necessary in annulment proceedings under S.53 of the Provincial Insolvency Act to prove that the transferor who has been subsequently adjudged an insolvent should have been honest and straightforward in the matter of transaction impeached held that even if the transferor was wanting in bona fides the crucial question still remains to be answered and unless it is found that the transferee was wanting in bona fides in respect of the transaction in question, he cannot be affected by the dishonest course of conduct of the transferor. The High Court in that case had taken the view that the mortgagee had failed affirmatively to prove its bona fides and the said conclusion was based upon the consideration that the General Clauses Act defined good faith as nothing is said to be done or believed in good faith which is done or believed without due care and attention. It is in that context this Court while analyzing the scope of provisions of the General Clauses Act observed that the General Clauses Act is enacted in order to shorten language used in parliamentary legislation and to avoid repetition of the same words in the course of the same piece of legislation. Such an Act is not meant to give a hide bound meaning to terms and phrases generally occurring in legislation. That is the reason why definition section

contains words like unless there is anything repugnant in the subject or context. Words and phrases have either a very narrow significance or a very wide significance according as the context and subject of the legislation requires the one or the other meaning to be attached to those words or phrases. The Court recognized that the legislature is entitled in its wisdom to give a special definition of the terms already defined in the General Clauses Act and different from the one in the General Clauses Act. It is observed the definition of good faith in the General Clauses Act would have been applicable to the Limitation Act also but the legislature in its wisdom has given a special definition of good faith different from the one in the General Clauses Act advisedly.

35. In Hasmukhalal Dahyabhai and Others Versus State of Gujarat and Others interpretation of Arts.31A and 31B of the Constitution of India in relation to the Gujarat Agricultural Land Ceiling Act, 1961 came up for consideration. The Gujarat Agricultural Land Ceiling Act, 1961 conceives of each person holding land in the single unit whose holding must not exceed the ceiling limit. S.2, sub-section (21) says: person includes a joint family. This has been done apparently to make it clear that, in addition to individuals, as natural persons, families, as conceived of by other provisions, can also be and are persons. It was argued that the concept of the term person having been fixed by the General Clauses Act, this concept and no other must be used for interpreting the second proviso to Art.31A of the Constitution of India. This Court held:

10. It is true that, but for the provisions of S.6, sub-section (2) of the Act, the term person, which includes individuals, as natural persons, as well as groups or bodies of individuals, as artificial persons, such as a family is, the entitlement to the ceiling area would be possessed by every person, whether artificial or natural. In other words, if

S.6(2) of the Act was not there, each individual member of a family would have been entitled to hold land upto the ceiling limit if it was his or her legally separate property. This follows from the obvious meaning of the term person as well as the inclusive definitions given both in the Act under consideration and in the General Clauses Act.

36. The expression person is employed in more than one Article of the Constitution of India. We shall not refer to all those Articles where the expression person has been used. It would be enough to notice Arts.20, 21, 22 and 226 of the Constitution of India where it has been used. The provision of the General Clauses Act, 1897 which is applicable for the interpretation of the Constitution as provided for under clause (1) of Art.367 itself restricts the applicability of the Act and makes such an application subject to the context as otherwise may require. The trinity of Arts.20, 21, 22 broadly guarantee the personal liberties against the State to individual person. They are not guaranteed to all those who are included in the definition of person under S.3 (42) of the General Clauses Act. Person under S.3(42) of the General Clauses Act shall include any company or association or body of individuals whether incorporated or not. Does it mean that the High Court is entitled to issue a writ or order or direction under Art.226 of the Constitution against every person under S.3(42) of the General Clauses Act? It is well settled that the remedy available under Art.226 is a public law remedy and a writ and does not lie against a person not discharging public law duties. It is thus clear that the definition of person under S.3(42) of the General Clauses Act is not applicable automatically to interpret the provisions of the Constitution unless the context so requires and makes that definition applicable.

37. S.3 of the General Clauses Act, 1897 itself says that unless there is anything repugnant in the subject or context the term person shall include any company or association or

body of individuals, whether incorporated or not. The word includes is often used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute. When it is so used, these words and phrases must be construed as comprehending not only such things as they signify according to their nature and import but also those things which the interpretation clause declares that they shall include. [See The Commissioner of Income tax, Andhra Pradesh v. M/s Taj Mahal Hotel, Secunderabad.

42. Shri A. V. Rangam, learned counsel relying on the decision of this Court in English Electric Company of India Ltd. v. The Deputy Commercial Tax Officer submitted that the branches of a company have no independent and separate existence. The company is one entity but its branches are not separate entities. The submission was that the definition of person has the effect of destroying the legal identity of the company. The definition of person creates an artificial entity unknown to law. We find no substance in the submission so made by the learned counsel for the appellant. The observations of this Court in English Electric Company of India Ltd. (supra) that the appellant company therein was one entity and it carries on business at different branches. Branches have no independent and separate entity. Branches are different agencies is to be understood in the proper context. The appellant company therein had branches at different places. The buyer at Bombay ascertained quotations for goods from the Bombay branch. The Bombay branch referred the enquiry to its Madras factory and on receiving reply quoted the prices and the Bombay buyer placed orders for the goods with the Bombay Branch but the goods were despatched from Madras though in the name of Bombay Branch at the risk of the Bombay buyer. It is under those circumstances this Court observed that when a branch of a company forwards a buyers order to

> the principal factory of the company and instructs them to despatch the goods direct to the buyer and the goods are sent to the buyer under those instructions it would not be a sale between the factory and its branch. The observations so made have no bearing whatsoever on the issue with which we are concerned in the present case.
>
> 43. The appellant company herein continues to be company within the meaning of S.3 of the Companies Act, 1956 which defines the company, existing company, private company and public company for the purposes of the Companies Act. Its status as one entity continues to be the same. It is only for the purposes of the present Act viz. Andhra Pradesh Tax on Professions, Trades, Callings and Employments Act, 1987 even its branches are treated as a person enabling the authorities to levy and collect profession tax.
>
> 45. For the aforesaid reasons, we hold the definition of the word person in the impugned Explanation and also Explanation No. I to the First Schedule of the Act is not intended to tax a person at a rate higher than Rs. 2500/- per annum, per person, but to treat even a branch of a firm, company, corporation or other corporate body, any society, club or association as a separate person, and therefore, a separate assessee within the meaning of S.2(b) of the Act and the Andhra Pradesh State Legislature has undoubtedly the competency to adopt such a devise of taxation. The Andhra Pradesh State Legislature did not violate the mandate of Art.276(2) of the Constitution. “

71. In the case of ***State of Madya Pradesh v. Rakesh Kohli (supra)***, the Supreme Court held that the Legislature enjoys a greater latitude for classification, and it is open to the Legislature to identify areas of evasion of tax and bring in

provisions to plug the loopholes even by deeming fiction or artificial definitions.

Paragraphs 9,15,17,20 and 30 of the said judgment is extracted hereunder:-

> “9. S.2(21) defines 'power of attorney'. It reads as follows:
> 'S.2(21) 'Power - of - attorney' includes any instrument (not chargeable with a fee under the law relating to Court - fees for the time being in force) empowering a specified person to act for and in the name of the person executing it;'
> 15. In Mcdowell and Co.2 while dealing with the challenge to an enactment based on Art.14, this Court stated in paragraph 43 (at pg. 737) of the Report as follows:
> '''.. A law made by Parliament or the legislature can be struck down by Courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground'''.
> ''.. if an enactment is challenged as violative of Art.14, it can be struck down only if it is found that it is violative of the equality clause / equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Art.19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Art.19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that Court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The Court cannot sit in judgment over their wisdom''.'
> Then dealing with the decision of this Court in State of T.N. and Others v. Ananthi Ammal and Others, 1995 KHC 759 : 1995 (1) SCC 519 : AIR 1995 SC 2114, a three Judge Bench in Mcdowell and Co.2 observed in paragraphs 43 and 44 [at pg. 739) of the Report as under:
> ''' Now, coming to the decision in Ananthi Ammal, we are of the opinion that it does not lay down a different proposition. It was an appeal from the decision of the Madras High Court striking down the Tamil Nadu Acquisition of Land for Harijan Welfare Schemes Act, 1978 as violative of Art.14, Art.19 and Art.300A of the Constitution. On a review of the

provisions of the Act, this Court found that it provided a procedure which was substantially unfair to the owners of the land as compared to the procedure prescribed by the Land Acquisition Act, 1894, insofar as S.11 of the Act provided for payment of compensation in instalments if it exceeded rupees two thousand. After noticing the several features of the Act including the one mentioned above, this Court observed: (SCC p. 526, para 7)

'7. When a statute is impugned under Art.14 what the Court has to decide is whether the statute is so arbitrary or unreasonable that it must be struck down. At best, a statute upon a similar subject which derives its authority from another source can be referred to, if its provisions have been held to be reasonable or have stood the test of time, only for the purpose of indicating what may be said to be reasonable in the context. We proceed to examine the provisions of the said Act upon this basis.'

44. It is this paragraph which is strongly relied upon by Shri Nariman. We are, however, of the opinion that the observations in the said paragraph must be understood in the totality of the decision. The use of the word 'arbitrary' in para 7 was used in the sense of being discriminatory, as the reading of the very paragraph in its entirety discloses. The provisions of the Tamil Nadu Act were contrasted with the provisions of the Land Acquisition Act and ultimately it was found that S.11 insofar as it provided for payment of compensation in instalments was invalid. The ground of invalidation is clearly one of discrimination. It must be remembered that an Act which is discriminatory is liable to be labelled as arbitrary. It is in this sense that the expression 'arbitrary' was used in para 7.'

17. That stamp duty is a tax and hardship is not relevant in interpreting fiscal statutes are well known principles. In Bengal Immunity Co. Ltd. v. State of Bihar and Others, 1955 KHC 405 : AIR 1955 SC 661 : 1955 (2) SCR 603 : 1955 (6) STC 446, a seven - Judge Bench speaking through majority in paragraph 43 (at pg. 685) of the Report while dealing with hardship in the statutes stated as follows:

''''.If there is any real hardship of the kind referred to, there is Parliament which is expressly invested with the power of lifting the ban under clause (2) either wholly or to the extent it thinks fit to do. Why should the Court be called upon to discard the cardinal rule of interpretation for mitigating a hardship, which after all may be entirely fanciful, when the Constitution itself has expressly provided for another authority more competent to evaluate the correct position to do the needful?'

20 . In P. Laxmi Devi (Smt.), 2008 KHC 6136 : 2008 (4) SCC 720 : 2008 (3) SCALE 45 : 2008 (2) KLT SN 13 : AIR 2008 SC 1640, a two - Judge Bench of this Court was concerned with a judgment of the Andhra Pradesh High Court. The High Court had declared S.47A of the 1899 Act as amended

by AP Act 8 of 1998 that required a party to deposit 50% deficit stamp duty as a condition precedent for a reference to a Collector under S.47A unconstitutional. The Court said in P. Laxmi Devi (Smt.), 2008 KHC 6136 : 2008 (4) SCC 720 : 2008 (3) SCALE 45 : 2008 (2) KLT SN 13 : AIR 2008 SC 1640 as follows:

'19. It is well settled that stamp duty is a tax, and hardship is not relevant in construing taxing statutes which are to be construed strictly. As often said, there is no equity in a tax vide CIT v. V.MR.P. Firm Muar. If the words used in a taxing statute are clear, one cannot try to find out the intention and the object of the statute. Hence the High Court fell in error in trying to go by the supposed object and intendment of the Stamp Act, and by seeking to find out the hardship which will be caused to a party by the impugned amendment of 1998.

30. Had the High Court kept in view the above well - known and important principles in law, it would not have declared Clause (d), Art.45 of Schedule 1A as violative of Art.14 of the Constitution being arbitrary, unreasonable and irrational while holding that the provision may pass test of classification. By creating two categories, namely, an agent who is a blood relation, i.e. father, mother, wife or husband, son or daughter, brother or sister and an agent other than the kith and kin, without consideration, the Legislature has sought to curb inappropriate mode of transfer of immovable properties. Ordinarily, where executant himself is unable, for any reason, to execute the document, he would appoint his kith and kin as his power of attorney to complete the transaction on his behalf. If one does not have any kith or kin who he can appoint as power of attorney, he may execute the conveyance himself. The legislative idea behind Clause (d), Art.45 of Schedule 1A is to curb tendency of transferring immovable properties through power of attorney and inappropriate documentation. By making a provision like this, the State Government has sought to collect stamp duty on such indirect and inappropriate mode of transfer by providing that power of attorney given to a person other than kith or kin, without consideration, authorizing such person to sell immovable property situated in Madhya Pradesh will attract stamp duty at two per cent on the market value of the property which is subject matter of power of attorney. In effect, by bringing in this law, the Madhya Pradesh State Legislature has sought to levy stamp duty on such ostensible document, the real intention of which is the transfer of immovable property. The classification, thus, cannot be said to be without any rationale. It has a direct nexus to the object of the 1899 Act. The conclusion of the High Court, therefore, that the impugned provision is arbitrary, unreasonable and irrational is unsustainable.”

72. So far as the question of mutuality as held in ***Calcutta club (supra)*** is concerned, this court was dealing with the levy of service tax under Section 366(29A) of the Constitution of India. The Supreme Court held that the transaction between the club and its members was by one to oneself, and there was no service. It was held that since the club (incorporated club) was rendering service to its members, it was not liable for service tax.

> "**Article 366 (29A) would read as under:-**
> 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 installments;
> (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;(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; "

73. 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.

74. 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-virus.

75. The next issue that requires consideration is whether the petitioner can be asked to pay tax retrospective, i.e., w.e.f

01.07.2017 when the principal of mutuality was in vogue, and GST authorities never issued a notice to the petitioner for payment of GST by them. Thus, 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. The GST is an indirect tax to be paid by the recipient of goods and services. When the law of mutuality, as held in the Calcutta club case, was understood by the authorities as well as the petitioner, the petitioner did not collect the GST. However, once the amendment has been brought into statute by inserting Section 7(aa) by the Finance Act 2021, the petitioners have become liable to pay the GST on the supply of goods and services to their members. 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 ie., 01.01.2022

76. The other question that requires consideration is whether all the activities undertaken by the petitioner involve

the supply of goods and services to its members. The various activities undertaken by the petitioner association have been mentioned in previous paragraphs of the judgment. Therefore, the assessing authority is required 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. However, this court would not like to comment on this aspect, and it is left open to the petitioner to satisfy the assessing authority that the particular activity is not involved in any supply of goods and services.

In view of the aforesaid discussion, 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. The petitioner shall cooperate with the assessment proceedings. Till the

assessment is complete, the interim order passed by this court shall remain in operation.

Sd/-

DINESH KUMAR SINGH

JUDGE

SJ

APPENDIX OF WP(C) 21297/2023

PETITIONER EXHIBITS

EXHIBIT P1	A TRUE COPY OF CERTIFICATE OF REGISTRATION REGISTERED UNDER THE TRAVANCORE-COCHIN LITERARY SCIENTIFIC & CHARITABLE SOCIETIES REGISTRATION ACT, 1955
EXHIBIT P2	A TRUE COPY OF LETTER NO. DIN:202211DSS55000000E930 DATED 21.11.2022 ISSUED BY THE 5TH RESPONDENT-DGGI
EXHIBIT P2(A)	A TRUE COPY OF LETTER NO. DIN:202211DSS 50000777ACB DATED 21.11.2022 ISSUED BY THE 5TH RESPONDENT-DGGI
EXHIBIT P2(B)	A TRUE COPY OF SUMMONS VIDE CBIC-DIN-202211DSS5000052045D DATED 21.11.2022 (SUMMONS NO. 93/2022-23) ISSUED BY THE 5TH RESPONDENT-DGGI
EXHIBIT P3	A TRUE COPY OF SUMMONS VIDE CBIC-DIN-202211DSS5000081338B DATED 22.11.2022 (SUMMONS NO. 94/2022-23) ISSUED BY THE 5TH RESPONDENT-DGGI
EXHIBIT P3(A)	A TRUE COPY OF SUMMONS VIDE CBIC-DIN-202211DSS50000919319 DATED 22.11.2022 (SUMMONS NO. 95/2022-23) ISSUED BY THE 5TH RESPONDENT-DGGI
EXHIBIT P3(B)	A TRUE COPY OF SUMMONS VIDE CBIC-DIN-202211DSS50000CAB5 DATED 22.11.2022 (SUMMONS NO. 96/2022-23) ISSUED BY THE 5TH RESPONDENT-DGGI
EXHIBIT P4	A TRUE COPY OF SUMMONS VIDE CBIC-DIN-202212DSS50000116244 DATED 08.12.2022 (SUMMONS NO. 100/2022-23) ISSUED BY THE 5TH RESPONDENT-DGGI
EXHIBIT P5	A TRUE COPY OF SUMMONS VIDE CBIC-DIN-202304DSS50000162343 DATED 26.04.2023 (SUMMONS NO. 22/2023-24) ISSUED BY THE 5TH RESPONDENT-DGGI TO SECRETARY OF THE SOCIAL SECURITY SCHEME II
EXHIBIT P5(A)	A TRUE COPY OF SUMMONS VIDE CBIC-DIN-202304DSS500000E425 DATED 26.04.2023 (SUMMONS NO. 23/2023-24) ISSUED BY THE 5TH RESPONDENT-DGGI TO SECRETARY OF THE SOCIAL SECURITY SCHEME II

EXHIBIT P6	**TRUE COPY OF THE LETTER NO. CBIC DIN-202306DSS50000717667 DATED 19.06.2023 ISSUED BY THE 5TH RESPONDENT**
EXHIBIT P7	**TRUE COPY OF THE LETTER NO. IMA KSB/SS/HQ/382/2022-23 DATED 22.06.2023 ISSUED BY THE PETITIONER TO THE 5TH RESPONDENT**
EXHIBIT P8	**A TRUE COPY OF LETTER NO. CBIC DIN/202306DSS5000000FCC1 DATED 23.06.2023 ISSUED BY THE 5TH RESPONDENT**

RESPONDENT EXHIBITS

EXHIBIT R5(7)	**TRUE PRINT OUT OF THE BOARD SHOWING BAR LICENSE DETAILS IN THE NAME OF IMA AS RETAINED AT IMA HOUSE**
EXHIBIT R5(1)	**TRUE PHOTOSTAT COPY OF BILL ISSUED ON 07.01.2024 BY THE BAR RUN IN THE IMA'S BUILDING COMPLEX FOR SUCH SALE OF LIQUOR**
EXHIBIT R5(3)	**TRUE PHOTOSTAT COPY OF A LEDGER ENTRY OF THE PETITIONER REGARDING SUCH A RECEIPT OF RS. 50,00,000/-**
EXHIBIT R5(4)	**TRUE PRINT OUT OF A WHITE PAPER HOSTED ON THE PETITIONER'S OWN WEBSITE**
EXHIBIT R5(5)	**TRUE PHOTOCOPY OF IMA ENDORSEMENT ON ASIAN PAINTS**
EXHIBIT R5(6)	**TRUE PRINT OUT OF DETAILS OF IMMOVABLE PROPERTY HELD BY THE PETITIONER IMA PRODUCED BY THEM AS PER THE DIRECTIONS OF THIS HON'BLE COURT**
EXHIBIT R5(8)	**TRUE PRINT OUT OF THE RELEVANT PAGES OF THE RULES AND REGULATIONS OF IMAGE**
EXHIBIT R5(2)	**TRUE COPY OF BILL ISSUED ON 08.01.2024 BY IMA FOR AMOUNT CHARGED FOR STAY**

PETITIONER EXHIBITS

EXHIBITP9	**A TRUE COPY OF SHOW CAUSE NOTICE NO. 17/2023-24(GST) DATED 18.08.2023**
EXHIBIT P10	**A TRUE COPY OF THE REPORT IN MANORAMA, A VERNACULAR DAILY DATED 29.02.2024**
EXHIBIT P11	**A TRUE COPY OF G.O.(M.S.) NO. 156/2005/H AND FWD DATED 14.06.2005 OF THE HEALTH AND FAMILY WELFARE (M) DEPARTMENT**
EXHIBIT P12	**A TRUE COPY OF THE ASSESSMENT ORDER DATED 22.03.2016 OF THE INCOME TAX DEPARTMENT**

APPENDIX OF WP(C) 23853/2023

PETITIONER EXHIBITS

EXHIBIT P1	**A TRUE COPY OF CERTIFICATE OF REGISTRATION**
EXHIBIT P2	**A TRUE COPY OF LETTER BEARING DIN:202211DSS55000000E930 DATED 21.11.2022 ISSUED BY THE 5TH RESPONDENT-DGGI**
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