

**GST not leviable on subscription/infrastructure development fee collected from members, unless the amended provision is notified**

The AAR, Karnataka in the matter of *M/s. Bow-ring Institute [Order No. KAR ADRG 27/2021, dated April 22, 2021]* held that, the members-club is not liable to pay Goods and Services Tax (“GST”) on subscription fees and infrastructure development fund collected from the members, unless the amended Section 7 of Central Goods and Services Tax Act, 2017 (“CGST Act”) is notified by the government.

**Facts:**

M/s. Bow-ring Institute (“**the Applicant**”) is a club and a non-profit organization established by the British in the year 1868 as a literary and scientific society. It is a members-club as opposed to a proprietary club. The members contribute by way of subscription fees and infrastructure development fund which is used for the purposes of provision of services and goods and a reading room, library, chambers for accommodating family and guests, a bar and sports facilities. In addition to the subscription fees at the time of admission of the member to the Applicant, an admission fee as an infrastructure development fund is collected. Further, the Applicant outsources catering services who supply foods and beverages and run a super market within the premise of the Applicant, which are only available for use by the members. These outsourced agencies charge GST on their supplies of food, beverages and sale of goods to members. The Applicant bears the cost of such goods and services from the subscription fees paid by the members.

The Applicant has contended that the provisions of CGST Act, in so far as it seeks to cover member's clubs as opposed to proprietary clubs, are illegal in the light of the judgment of the Hon’ble Supreme Court in *State of West Bengal v. M/S. Calcutta Club Limited [Civil Appeal No.4184 of 2009, Civil Appeal No. 7497 of 2012, dated October 3, 2019]* wherein, the Court applied the doctrine of mutuality and held that, clubs are not entitled to charge, collect, and pay service tax on any services made to members.

**Issues:**

- Whether amount collected as membership subscription fees paid by the members of the Applicant towards facilities provided by the Applicant are liable to GST as supply of service under CGST Act?
- Whether amount collected as infrastructure development fund for the development and maintenance of the facilities provided by the Applicant are liable to GST as supply of service under CGST Act?

### **Held:**

The AAR, Karnataka in **Order No. KAR ADRG 27/2021, dated April 22, 2021** held as under:

- Noted that the judgment of the Hon'ble Supreme Court in **M/s. Calcutta Club Limited** (supra) is fully applicable on the Applicant.
- Observed that, Section 108 of the Finance Act, 2021 ("**Finance Act**") brought in a retrospective amendment in Section 7 of CGST Act and stated that, the Finance Act has over ruled what the Courts have held till now and has countered the doctrine of mutuality by way of Explanation which states that the members or constituents of the club and the club are two separate entities and persons for the purpose of Section 7 of CGST Act, which defines Supply.
- Noted that, the amendment brought in Section 7 of CGST Act, will only come into effect on the date when Central Government notifies the same and then the same will be notified with the corresponding amendments passed by the respective States and Union Territories in respective Acts.
- Held that unless the amended Section 7 of CGST Act, is notified, the Applicant is not liable to pay GST on subscription fees and Infrastructure development fund collected from the members as per the Hon'ble Supreme Court judgment in the case of **M/s. Calcutta Club Limited** (supra).

### **Our Comment:**

A retrospective amendment (w.e.f. July 1, 2017) has been proposed by inserting a new clause '(aa)' after clause (a), in Section 7(1) of the CGST Act to widen the scope of term 'supply' by including therein activities or transactions of supply of goods or services or both between any person (other than individual) to its members or constituents or vice versa for cash, deferred payment or other valuable consideration.

Further, an explanation is added to say that the person and its members or constituents shall be deemed to be two separate persons and overriding effect has been given to the said explanation over anything contained in any other law for the time being in force and even to the judgements of any Court, Tribunal or any other authority.

Consequently, Para 7 of Schedule II of the CGST Act has been proposed to be deleted retrospectively (w.e.f. July 1, 2017) which is related to 'supply of goods by unincorporated associations or body of persons to a member thereof for cash, deferred payment or other valuable consideration' being activity/ transaction treated as supply of goods.

The introduction of clause 'aa' and 'explanation' under Section 7(1) vide the Finance Act will have an overriding effect on landmark judgment of the Hon'ble Supreme Court in **M/s Calcutta Club Limited** (supra), which upheld the doctrine of mutuality to settle the unresolved issue of taxability of transactions between the members and clubs under the Sales Tax regime as well as under the Service Tax regime, and held that there cannot be the sale of goods or provision of services between the unincorporated private clubs/associations and its members owing to the principle of mutuality which treats such clubs/associations and its members as the same person. Hence, the decision was that the clubs are not entitled to charge, collect and pay service tax on any services made to members.

In our view the same should hold true for the GST regime as well. However, the said clause if notified by the government, would include supply of goods or services by clubs or associations to its members irrespective of whether or not the entity is incorporated and that too retrospectively from July 1, 2017, for cash, deferred payment or other valuable consideration. Hence, this amendment seems to be doing away with the principle of mutuality and is unsettling the settled jurisprudence. Though the above amendment is made applicable retrospectively, but the validity of such retrospective amendment may still be debated and subjected to litigation.

### **Relevant Provision:**

#### **Section 7(1) of the CGST Act:**

*“Scope of supply.*

*(1) For the purposes of this Act, the expression “supply” includes—*

*(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;*

***(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”*

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