2025:KER:30517

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR. JUSTICE EASWARAN S.

FRIDAY, THE 11TH DAY OF APRIL 2025/21ST CHAITHRA, 1947

W.A.NO.1659 OF 2024

AGAINST THE JUDGMENT DATED 23.07.2024 IN W.P(C).NO.21297 OF 2023 OF HIGH COURT OF KERALA

APPELLANT(S)/PETITIONER IN THE WRIT PETITION:

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

BY ADV.SRI.ARVIND P. DATAR (SR.)
BY ADV.SRI.P.R.RENGANATH
BY ADV.SRI.GEORGE VARGHESE(PERUMPALLIKUTTIYIL)
BY ADV.SRI.MANU SRINATH
BY ADV.SRI.NIMESH THOMAS
BY ADV.SRI.LIJO JOHN THAMPY

RESPONDENT(S)/RESPONDENTS IN THE WRIT PETITION:

1 UNION OF INDIA, REPRESENTED BY THE SECRETARY, DEPARTMENT OF REVENUE, MINISTRY OF FINANCE, GOVERNMENT OF INDIA, NORTH BLOCK, NEW DELHI-110001., PIN - 110001

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,

2025:KER:30517

NEW DELHI-110001, 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-673011, PIN – 673011

BY SRI.AR.L. SUNDARESAN, ADDITIONAL SOLICITOR GENERAL
BY SRI.MOHAMMED RAFIQ, SPECIAL GOVERNMENT PLEADER (TAXES)

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 20.03.2025, ALONG WITH W.A.NO.1487/2024 & W.A.NO.468/2025, THE COURT ON 11.04.2025 DELIVERED THE FOLLOWING:

2025:KER:30517

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR. JUSTICE EASWARAN S.

FRIDAY, THE 11TH DAY OF APRIL 2025/21ST CHAITHRA, 1947

W.A.NO.1487 OF 2024
AGAINST THE JUDGMENT DATED 23.07.2024 IN W.P(C).NO.21297 OF 2023
OF HIGH COURT OF KERALA

APPELLANT(S)/RESPONDENTS 4, 1, 3 AND 5:

1 ADDITIONAL DIRECTOR GENERAL, DIRECTORATE OF GST INTELLIGENCE, REPRESENTED BY THE SECRETARY, DEPARTMENT OF REVENUE, MINISTRY OF FINANCE, GOVERNMENT OF INDIA, NORTH BLOCK, NEW DELHI – 110 001.

2 UNION OF INDIA,
REPRESENTED BY THE SECRETARY, DEPARTMENT OF REVENUE, MINISTRY OF FINANCE, GOVERNMENT OF INDIA, NORTH BLOCK, NEW DELHI, PIN - 110001

3 GST COUNCIL,
GST COUNCIL SECRETARIAT, 5TH FLOOR, TOWER-II, JEEVAN BHARTI BUILDING, JANPATH ROAD, CONNAUGHT PLACE, NEW DELHI, PIN - 110001

4 DEPUTY DIRECTOR,
DIRECTORATE GENERAL OF GST INTELLIGENCE, KOZHIKODE REGIONAL UNIT, MAHE HOUSE, PANICKER ROAD, NADDAKAVU P.O., KOZHIKODE, PIN - 673011

BY SRI.AR.L. SUNDARESAN, ADDITIONAL SOLICITOR GENERAL
BY ADV.SRI.P.R.RENGANATH
BY ADV.SRI.SREELAL N.WARRIER, SC, GST INTELLIGENCE
BY ADV.SRI.SHAIJU K.S., CGC

2025:KER:30517

RESPONDENTS/PETITIONER & RESPONDENT 2:

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

2 STATE OF KERALA,
REPRESENTED BY THE SECRETARY, DEPARTMENT OF FINANCE, GOVERNMENT SECRETARIAT, GOVERNMENT OF KERALA, THIRUVANANTHAPURAM, PIN - 695001

BY ADV.SRI.ARVIND P. DATAR (SR.)
BY ADV.SRI.P.R.RENGANATH
BY ADV.SRI.GEORGE VARGHESE(PERUMPALLIKUTTIYIL)
BY ADV.SRI.MANU SRINATH(D/1420/2014)
BY ADV.SRI.NIMESH THOMAS(K/1324/2018)
BY ADV.SRI.LIJO JOHN THAMPY(K/1313/2018)
BY SRI.MOHAMMED RAFIQ, SPECIAL GOVT. PLEADER (TAXES)

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 20.03.2025 ALONG WITH W.A.NO.1659 OF 2024 AND W.A.NO.468 OF 2025, THE COURT ON 11.04.2025 DELIVERED THE FOLLOWING:

2025:KER:30517

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR. JUSTICE EASWARAN S.

FRIDAY, THE 11TH DAY OF APRIL 2025/21ST CHAITHRA, 1947

W.A.NO.468 OF 2025
AGAINST THE JUDGMENT DATED 23.07.2024 IN W.P(C).NO.21297 OF 2023
OF HIGH COURT OF KERALA

APPELLANT(S)/2ND RESPONDENT IN WPC:

STATE OF KERALA,
REPRESENTED BY THE SECRETARY, DEPARTMENT OF FINANCE,
GOVERNMENT SECRETARIAT, GOVERNMENT OF KERALA,
THIRUVANANTHAPURAM-695001, PIN - 695001

BY SRI.MOHAMMED RAFIQ, SPECIAL GOVT. PLEADER (TAXES)

RESPONDENT(S)/PETITIONER AND RESPONDENTS 1, 3, 4 ADN 5 IN WPC:

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

2 UNION OF INDIA,
REPRESENTED BY THE SECRETARY, DEPARTMENT OF REVENUE,
MINISTRY OF FINANCE, GOVERNMENT OF INDIA, NORTH BLOCK,
NEW DELHI, PIN - 110001

3 GST COUNCIL,
GST COUNCIL SECRETARIAT, 5TH FLOOR, TOWER-II,
JEEVAN BHARTI BUILDING, JANPATH ROAD, CONNAUGHT PLACE,
NEW DELHI-110 001.

4 ADDITIONAL DIRECTOR GENERAL,

2025:KER:30517

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., PIN – 673011

BY ADV.SRI.ARVIND P. DATAR (SR.)
BY ADV.SRI.P.R.RENGANATH
BY ADV.SRI.AR. L. SUNDARESAN, ADDITIONAL SOLICITOR GENERAL

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 20.03.2025, ALONG WITH W.A.NO.1659 OF 2024 AND W.A.NO.1487 OF 2024, THE COURT ON 11.04.2025 DELIVERED THE FOLLOWING:

2025:KER:30517

"C.R."

J U D G M E N T

Dr. A.K. Jayasankaran Nambiar, J.

These Writ Appeals, one preferred by the petitioner in W.P.(C).No.21297 of 2023 and the other two preferred by the GST Officials of the Union and the Kerala State, impugn the judgment dated 23.07.2024 of a learned Single Judge in W.P.(C).No.21297 of 2023.

The Facts in Brief:

2. The essential facts necessary for disposal of these Writ Appeals are as follows:

W.P.(C).No.21297 of 2023 was preferred by the Kerala State Branch of the Indian Medical Association apprehending coercive action from the Directorate General of GST Intelligence for recovery of tax on various services rendered by it to its members. While it was the petitioner's contention that it was not liable to pay tax on the supply of services to its members, it apprehended coercive action for recovery of tax when it was served with summons requiring it to produce details of the registration taken by it under the GST Act and their audited books of accounts and other financial documents for the financial years from 2017-18 to 2021-22.

3. The petitioner runs various mutual 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 the Schemes are to support fellow doctors, while one or two Schemes support their immediate family members. The member-doctors contribute an admission/annual fee, and in cases of certain Schemes (*e.g.* SSS, PDSS) also a fraternity contribution upon the death/disability of a fellow member doctor; the pooled sum is paid out to the widow of 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 are *ex officio* members. The Schemes have separate bank accounts, and accounts of each Scheme are drawn up and separately audited. A brief description of the Schemes is as given below:

> "**Social Security Schemes**
>
> i) Objects: The objects of the schemes are to provide financial assistance to the families of the medical practitioner in the event of his or her death, or in the event of a member suffering permanent disability that renders the member unfit to practice the profession for life. The objects also encompass undertaking various charitable/philanthropic activities such as providing medical aid to the needy and poor, family welfare programmes independently/jointly with the Government, organising blood donation camps, eye camps, promoting medical education, etc.
>
> ii) Payment: 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.
>
> iii) Death/Permanent disability: Upon the death/permanent disability of a 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 (calculated as a product of the individual fraternity contribution and the net membership of scheme concerned, subject to a maximum specified under the bye-laws) is 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 future.

Professional Disability Support Scheme

i) Object: The object of the 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 her / his profession.

ii) Payment: 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 disability.

iii) Benefit: As with the Social Security Schemes above the aggregate disability contribution is a 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.

Professional Protection Scheme

i) Object: The two objects of this scheme are: (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 programmes, blood donation camps, medical attention, medical aid, etc.

ii) Payment: 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, and decreasing by Rs.100/- every year, and stabilising at Rs.1,500/-). This membership is for one unit of PPS membership.

iii) Benefit: 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.

iv) A member may also opt for enhanced protection under this scheme, upon payment of membership fee of Rs.10,000/- p.a. The maximum compensation then payable to such a member of the scheme would be an additional Rs.1 crore.

Hospital Protection Scheme

i) Object: The object of the scheme is to protect hospitals, clinics, 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 of service on the part of the doctors/staff. Besides providing legal aid to the member institutions of the scheme, the scheme also aims to undertake social services activities as mentioned in the Professional Protection Scheme above.

ii) Payment: Membership fee ranges from Rs.5,000/- to Rs.75,000/- per year depending upon the bed strength of the member institution.

iii) Benefit: 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. As with the PPS Scheme above, the petitioner would also engage advocates to act on behalf of member institutions and pay the related legal fees to such advocates.

Kerala Health Scheme

i) Object: The object of the Scheme is to provide financial assistance to members of the scheme and his/her spouse, parents and children in the event of any person being diagnosed with specified diseases.

ii) Payment: 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.

iii) Benefit: Upon diagnosis/hospitalisation for specified diseases, compensation ranging from Rs.5,000/- to Rs.5 lakhs is paid.

Pension Scheme

i) Object: The object of this scheme is to provide pension to life members of the petitioner.

ii) Payment: Admission fee is Rs.3,000/- to 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/-.

iii) Benefit: The pension is paid when a member of the scheme requests payment after she or he 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 from 30% of the corpus. Full maturity amount is paid to the nominee if pension for spouse is not opted for. If death occurs before the age off 60, the scheme provides for stated pay-outs.

Mutual Benefit Scheme

i) Object: The object of the scheme is to provide financial support, encourage the habit of thrift amongst the members, encourage financial planning amongst the members, etc.

ii) There were Schemes A, B and C wherein the monthly payment to be made by the member of such schemes was Rs.5,000/-, Rs.10,000/- and Rs.25,000/- respectively. The monthly instalment is payable by the 20th of every English calendar month, upon default of which interest @) 2% per month is payable. Each of the above 3 schemes runs for 20 months.

iii) Beginning from 'the second month "beneficiary amount" was payable by the scheme and increases every month. The member to whom the beneficiary amount for each month was payable was decided by lots among the members who request to be such beneficiaries. Defaulters were not included in the monthly lot. In the event of consecutive default of monthly instalments, the member would be removed from the scheme and the amount already paid would be vested with the funds of the scheme. The Managing Committee decided what amount was to be deducted as services charges and the balance amount was disbursed to members at the end of the scheme.

Patient Care Scheme

i) Object: The object of the scheme is to institute a corpus fund to provide assistance to deserving patients who seek care in modern medicine, to establish information/assistance centre for patients seeking medical services, to create a network of health care facilities across Kerala to assist poor patients and patients in emergency situation, etc.

ii) Payment: Any member of the petitioner may join as a member of the scheme for a period of 3 years on payment of a membership fee of Rs.1,000/-. Members of the scheme are entitled to participate in the general body of this scheme and are eligible to cast their votes.

iii) Benefit: The criteria and expenditure of the patient care fund is decided by the managing committee of the scheme from time to time. The payment to deserving patients are made from the corpus of this fund/scheme."

4. The writ petitioner *bona fide* believed that it was not liable to pay GST on services rendered by it to its members under the aforesaid Schemes since it was well settled through a line of precedents that the principle of mutuality would insulate services rendered by a Club/Association to its members from the levy of GST on supply of

services. The underlying basis for the non-taxability of such services was the concept that when a Club/Association provides services to its members, there is no separate recipient of the services provided by the Club/Association and that the services were effectively provided by the members of the Club/Association to themselves. The said basis of non-taxability was, however, removed by an amendment of the provisions of Section 2(17)(e) and Section 7(1)(aa) read with the Explanation thereto of the Central Goods and Services Tax Act, 2017 [CGST Act] and the Kerala Goods and Services Tax Act, 2017 [KGST Act] that introduced deeming provisions making the supply of services by a Club/Association to its members a taxable supply for the purposes of the levy of tax. The amendment that was introduced through the Finance Act, 2021 was also made retroactive with effect from 01.07.2017, thereby adding to the financial woes of the petitioner.

5. In the writ petition preferred by the petitioner, the petitioner sought the following reliefs:

> 1. declare that the provisions of Section 2(17)(e) and Section 7(1)(aa) and the Explanation thereto, of the Central Goods and Services Tax Act, 2017 and the provisions of Section 2(17)(e) and Section 7(1)(aa) and the Explanation thereto, of the Kerala Goods and Services Tax Act, 2017 are unconstitutional and void being ultra vires the provisions of Article 246A read with Article 366(12A), and violative of Articles 14, 19(1)(g), 265 and 300A, of the Constitution of India;
>
> 2. in the alternative; issue a declaration that the phrase “shall be deemed to have been inserted with effect from the 1st day of July 2017”, in S.108 of the Finance Act, 2021 is unconstitutional and void being violative of Articles 14, 19(1)(g), 265 and 300A of the Constitution of India;
>
> 3. issue a writ in nature of a writ of prohibition restraining the respondents, their men and agents from provisionally attaching the properties of the petitioner under Section 83 or any other provision of the CGST or KGST Acts, 2017;

4. The petitioner also prays that this Honourable Court may be pleased to dispense with the translation of the documents produced in the vernacular language;

5. issue such other writ, direction or order as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case, and thus render justice.

The findings of the Single Judge:

6. The learned Single Judge, who heard the matter, found that insofar as the amendment to the CGST/SGST Act through Finance Act, 2021 had the effect of removing the basis of the immunity that was hitherto granted to the petitioner on the principle of mutuality, and there was no merit in the contentions of the petitioner as regards manifest arbitrariness of the statutory provisions, the declaration sought for in the writ petition could not be granted. The learned Judge, however, found that the retroactive operation given to the amendment could not be legally sustained on the principles of fairness and set aside the retroactivity envisaged for the amendment. It is therefore that the writ petitioner is before us impugning that portion of the judgment of the learned Single Judge that dismissed its writ petition, while the Union and the State are before us impugning the latter portion of the judgment that set aside the retroactive operation of the amendment.

The submissions of the learned counsel:

7. We have heard Sri. Arvind P. Datar, the learned senior counsel, duly assisted by Sri. P.R.Renganath, the learned counsel for the appellant in W.A.No.1659 of 2024, Sri. AR. L. Sundaresan, the learned

Additional Solicitor General in W.A.No.1487 of 2024 and Sri.Mohammed Rafiq, the learned Special Government Pleader (Taxes) for the appellant in W.A.No.468 of 2025.

8. The submissions of Sri. Arvind P. Datar, the learned senior counsel, duly assisted by Sri. P.R.Renganath, the learned counsel for the appellant in W.A.No.1659 of 2024, on the unconstitutionality of levy of GST on activities/transactions between a Club and its members are as follows:

A. On the aspect of mutuality, the learned senior counsel would submit as follows:

- Identity between club and members: It is long established common law that there is identity between a club/association and its members, under the principle of mutuality. Consequently, there can be no sale/service by a club to its members. This position in law was recognised even in the 19th century in ***Graff v. Evans*** **– [(1882) 8 QBD 373]**.

- Principle applies even to incorporated clubs: That clubs/associations have long acted upon the faith of this position in law, and that this principle applies even to incorporated clubs, was recognised in ***Trebanong Working Men's Club and Institute Ltd. v. Macdonald*** **– [(1940) 1 All ER 454]**.

- Principle applies even to tax law: Even in taxation laws, the position of a members' club, though incorporated, has been recognised to be quite different i.e., that the members' club was only structurally a company and that it did not carry on trade or business so as to attract the Corporation Profits Tax **[*Inland Revenue Commissioners v. Westleigh Estates Co. Ltd* – 1924 (1) KB 390].**

● Principle well recognised in India: This position has all along been recognised, and applied, in India by various High Courts, as has been acknowledged even by the Supreme Court. In the manner of stating a well-settled position in law in respect of which no detailed analysis was required, the Supreme Court recognised that in the case of a club the services were to the members themselves, that it was a self-serving institution (even where guests are admitted), that a club was identified with its members, and that it could not be said that a club had an existence apart from the members **[*Secretary, Madras Gymkhana Club Employees Union v. The Management of the Gymkhana Club* - [1967 SCC OnLine SC 51]**, paras 30-32 : **AIR 1968 SC 554]]**.

● Incorporation irrelevant: It has been clarified by the Supreme Court that services provided by a 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, and that it was "*clear that the Club cannot be treated as a separate legal entity of the nature of a limited company carrying on business*" **[*Cricket Club of India Ltd v. Bombay Labour Union* - [AIR 1969 SC 276**, para 14**]**.

● No transfer between a club and its members: It is based on this principle – that there could be no sale or transfer between a club and its members – that the Supreme Court stuck down levy of sales tax on supply of food/beverages made by a club to its members, in ***JCTO, Madras v. The Young Men's Indian Association (Regd.)* - [(1970) 1 SCC 462]**.

● 46th Amendment attempts to bring clubs to tax: In an attempt to legitimise levy of sales tax on a club/association, the Constitution 46th Amendment (1981) had sought to define *"tax on sale or purchase of goods"* as including 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.

● Mutuality survives 46th Amendment:
Even the 46th Amendment did not do away with the basis of the principle that the club/association and its members are one and the same,

further, even on its terms, the 46th Amendment extended only to supply of goods (and not to provision of services).

- The Supreme Court in ***State of West Bengal & Ors. v. Calcutta Club Ltd.*** **- [2019 (29) GSTL 545 (SC)]** emphatically held that the principle of mutuality continued even after the 46th Amendment. The said decision also recognises that the law has always been that the principle of mutuality extends even to incorporated clubs and not just to unincorporated clubs and that the 61st Law Commission Report which preceded the 46th amendment had not appreciated this.

- No service between club/association and its members: *Calcutta Club* (para 76) also recognised that the position in law was that there could be no service between a club and its members, confirming the decision in ***Ranchi Club v. Chief Commr. of Central Excise & Service Tax*** **- [2012 SCC OnLine 306 : (2012) 51 VST 369]**. *Ranchi Club* had laid down that the basic feature common in sale and services was that both required the existence of two parties, that since the issue whether there were two persons or two legal entities in the activities of the members' club had been already considered and decided by the Supreme Court [*in Young Men's Indian Association*], it had to be held that in view of mutuality and in view of activities of the club, if the club provided any service to its members, it was not a service by one to another as the foundational facts of existence of two legal entities in such transaction was missing.

- Legal position at the time of the constitutional amendment: Thus, the position of law prevailing at the time of the Constitution 101st Amendment – empowering the Parliament and the State legislatures to levy a goods and services tax under Article 246A – was that there was identity between a club/association and its members. The name of the club/association was but a tool used to compendiously refer to the members. Therefore, Article 246A and 366(12A) have been enacted only on the understanding that this was the law.

B. On the aspect of GST being on "supply", the learned senior counsel would submit as follows:

- The Constitution 101st Amendment defined goods and services tax as a "*tax on supply of goods or services or both*", per Article 366(12A).

- The plain meaning of "s*upply of goods or services*" is supply by one person to another. In other words, it is evident that "supply", by its very nature, requires two persons. There can be no supply to oneself.

- Thus, the scope of the legislative power granted by the Constitution to levy GST is that such a tax can be levied only where there is supply of goods/service by one person to another.

- While so, by the Finance Act, 2021, Parliament introduced Section 7(1)(aa) retrospectively w.e.f. the date of commencement of the GST regime (01-Jul-17) thereby inserting a legal fiction and artificially deeming a club/association and its members to be two separate persons. Further, the taxable event was also artificially enlarged to include "activities or transactions" between a club/association and its members.

- It is in this context that the ratio laid down in ***State of Madras v. Gannon Dunkerley & Co.* - [AIR 1958 SC 560]**, and a long line of cases, becomes relevant. While the constitutional power was to levy only a "tax on sale or purchase of goods", the State legislatures sought to expand this power by inserting an artificial definition in the sales tax legislations to the effect that "sale" would include a "works contract". This was struck down in *Gannon Dunkerly* ibid on the ground that the accepted meaning of a term in a constitutional phrase could not be statutorily expanded.

- What a constitutional provision is aimed at is to be construed based on the state of the law then in force. To expand the scope of such a provision by a statute would be to overreach the Constitution. In short, a phrase in the Constitution granting legislative power should be construed according to "*known legal connotations*" [see para 43 of *BSNL*, cited in para 16 of *Calcutta Club*].

- When similar situations arose – in fact six different situations – where various States legislatures attempted to broaden the tax net by statutorily expanding the definition of "sale", the Supreme Court struck down each such amendment as being beyond the meaning of the word "sale" in the legislative entry in the Constitution (entry 54 of List II - "*tax on sale or purchase of goods*") were then added to the Constitution through six sub-clauses [(a) to (f)] of a newly inserted Article 366(29A) of the Constitution. **[*New India Sugar Mills Ltd v. CST* - [(1963) 14 STC 316]; *State of Madras v. Gannon Dunkerley & Co.* - [AIR 1958 SC 560]; *K.L. Johar and Co. v. CTO* - [AIR 1965 SC 1082]; *A.V. Meiyappan v. CCT* - [(1967) 20 STC 115 (Mad.)]; *CTO v. Young Men's India Assn. (Regd)* – [(1970) 1 SCC 462] & Northern India Caterers (India) Ltd v. Lt. Governor of Delhi - [(1980) 2 SCC 167]].**

C. On the aspect of Enlarging scope of "supply" by amending Section 7 of CGST Act without amending the Constitution – impermissible and unconstitutional, the learned senior counsel would submit as follows:

- The Supreme Court has recognised the well-established concept of mutuality, and that a club/association is a self-serving institution, and that there could be no "sale"/"service" between a club and its members, and has further held [*Calcutta Club*] that even the 46th Amendment did not do away with mutuality. Thus, this was the position in law at the time of the 101st Amendment.

- In this legal landscape, a power given to tax "supply of goods and services" can only be construed as applying to sale/service by one person to another, and not to sale/service to oneself (which is the case with respect to clubs/associations, since the club/association and its members are one and the same). After all, the very fact that the CGST amendment [Explanation to Section 7(1)(aa)] states that "*notwithstanding any law in force*" reaffirms that law in force was mutuality. Further, in this regard,

the "*such as*" in Section 7(1) is telling. It reveals the extent of the scope of the phrase "supply" as originally understood. It is trite that any new item, anything left unsaid (if at all) should be considered in line with the character/principle underlying the enumerated cases. It would be seen that all enumerated cases contemplate the involvement of two parties.

- Only the Constitution can expand what the Constitution has given: If this legislative power granted by the Constitution is to be expanded beyond the known legal connotations, it can be done only by a constitutional amendment doing away with the long-established and well-recognised concept of mutuality i.e., by a 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. A statutory amendment, howsoever creatively worded, and ingeniously couched as a clarification, would not suffice.

- Why a validating statute will not suffice: If judgments [*e.g. YMIA, Ranchi Club, Calcutta Club*] merely state a position of statutory law, it could be undone by a validating statute. But where the judgments recognise a long-standing principle of law, which has a bearing on the extent of a power bestowed by the Constitution to legislatures, then, that power can be enlarged only by a constitutional amendment and not by the legislatures through a statutory amendment.

- What could be done only by constitutional amendment earlier cannot be done by statutory amendment now:

  a) Indeed, the very fact that a constitutional amendment was required [46th Amendment] and that statutory definitions did not suffice [struck down in *Young Men's Indian Association*] its testimony that Section 71(1)(aa) is insufficient for its intended purpose.

  b) In fact, the 61st Law Commission expressly recognised that expanding the concept of "sale" for the purpose of legislative power of the States, could "*be achieved only by amending the Constitution*".

c) In other words, it would not suffice for statutes to state that club/associations would be deemed to be doing business, or that they and their members were deemed to be two different persons.

- In any case, 46th Amendment does not cover services: Even assuming, but not for a moment admitting, that the 46th Amendment has done away with mutuality and would stand in aid of the impugned statutory provisions, it has done so only with respect to goods. Thus, as regards services, the position would continue to be governed by the known legal connotations of mutuality. Consequently, there could be no levy of GST on "service" by a club/association to its members.

- "*Supply of goods and services*" cannot cover all activities/transactions: Moreover, Article 246A speaks only of "*supply of goods and services*". Section 7(1)(aa) though expands it to mean "activities or transactions". If indeed, supply naturally meant activities or transactions there would have been no need for such an artificial definition. This artificiality in itself betrays its reach beyond the scope of the constitutional phrase, and is self-defeating.

- In fine, the effect of judgments may be nullified by legislative act removing the basis of the judgment. However, where a judgment recognises a position of law – especially a well-entrenched position in vogue for ages – which position in turn is determinative of the scope of power conferred on a legislature by a constitutional provision, then any amendment to that position of law can be made only by a constitutional amendment and not by a statute by the legislature.

D. On the aspect of retrospectivity, the learned senior counsel would submit as follows:

- Retrospective law cannot be unreasonable/confiscatory: It has been recognised that legislatures have the power to pass retrospective laws. However, such laws cannot be unreasonable or arbitrary. Where the retrospective law is confiscatory, it would unreasonable and thereby unconstitutional **[*Jayam & Co. v. Asst Commr* - (2016) 15 SCC 125]**.

- New levy by overturning long-established position: In the instant case, given, *inter alia,* the ratio in *Calcutta Club,* there could have been no levy of GST on clubs and associations prior to the insertion of Section 7(1)(aa) and Explanation thereto. The said insertions thus created a new levy. This is done by overturning a long-held position of law i.e., the mutuality of clubs and association. *Jayam & Co.* cited above [see para 19 of the SCC report], held that a new provision inserted for determining input tax credit could not be retrospective.

- Substantial unforeseen prejudice: The new levy is made effective from the year 2017. Consequently, SCN no.58/2024-25 (GST) dt. 02-Aug-24 has been issued by the DRI (the 1st appellant herein) seeking to demand a huge sum of money from the appellant association for transactions done over the last 6 years. The appellant could have had no notion about such a levy and consequently no amounts were collected from the members towards the tax. The demands proposed in the said SCN are for GST on the admission fee, annual subscription fee, renewal fees, fraternity contribution, etc, and are as follows:

a) Rs.45.32 crores towards GST under Section 74(1), alleging suppression;

b) interest from 01-Jul-17 onwards;

c) penalty under Section 122(1) read with Section 74(1) of the CGST Act, 2017;

d) personal penalty on three past Secretaries (i.e., Secretaries during the period from 2017-2023) of the respondent under Section 122(3).

The above SCN is in addition to an earlier SCN no.17/2023-24 dt. 18-Aug-23 seeking to demand Rs.2.71 crores, plus interest and penalty thereon on the membership fees. A heavy, unforeseen burden is thus cast on the appellant. The appellant would also not be in a position to collect the same from its members. The appellant's vested right to its funds thus stands affected. Indeed, the appellant's activities are liable to be gravely affected. The retroactive levy thus also violates Article 19(1). In this regard, it may be noted that it has been held that a statute whose retrospective operation covers a comparatively short period may yet, given the nature of the restriction imposed by it, be of such a character

as to introduce a serious infirmity in the retrospective operation **[*Rai Ramakrishna v. State of Bihar* - 1963 SCC OnLine SC 31 : AIR 1963 SC 1667** (para 17)**]**. Indeed, in *Jayam & Co.* cited above, an amendment stretching back to just three-and-a half years was struck down.

- Undoing of settled law passed off as a clarification:

a) Though the amendment seeks to overturn a well-settled position in law, it is unfortunately couched in the language of clarification (i.e., "*it is hereby clarified that*") in a vain attempt to pass muster in the event of a constitutional challenge.

b) While so, the mere legislative assertion that an amendment is a clarification is not conclusive, and whether a change is clarificatory or whether it is a substantive change (and therefore not retrospective) is a matter of statutory interpretation and therefore for the courts to adjudicate **[*Union of India v. Martin Lottery Agencies Ltd* (2009) 12 SCC 209**, para 52**]**.

c) Further, the very fact that Section 7(1)(aa) itself states employs "*deemed*" twice amply demonstrates that the pre-amendment position was different from the post-amendment position, and that the use of "*it is clarified*" is but a vain smokescreen.

d) Even assuming the two phrases are equally balanced, the interpretation in favour of the assessee is to be adopted.

- No interest: No GST was payable prior to the Finance Act, 2021 amendment, which was notified on 01-Jan-22. The impugned amendments were inserted by Section 108 of Finance Act, 2021. Under Section 1(2) of Finance Act, 2021, the Government was empowered to specify the date of commencement of any provision thereof. In exercise of the said power under Section (2), the Government issued notf. no.39/2021 dt. 21-Dec-21 specifying 01-Jan-22 as the date on which the aforesaid Section 108 comes into force. However, the said 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-Jul-17. Thus,

prior to 01-Jan-22 (or in any case 21-Dec-21) it could not have been known that GST ought to be paid by clubs/associations. Interest is merely compensation for belated payment of what ought to have been paid earlier. But, the question of payment earlier did not arise i.e., it was impossible to know, or to pay, earlier. It is trite that the law does not expect the impossible [*lex non cognit ad impossibilia*]. Thus, there can be no levy of interest for any period prior to 01-Jan-22. [see ***Star India (P) Ltd v. CCE*** **- [(2005) 7 SCC 203]**, para 8]

- No penalty: There can be no retrospective imposition of penalty or confiscation of goods **[*JK Spinning & Wvg. Mills Ltd. v. UOI* - [1988 SCR (1) 700]].**

- Retrospectivity falls foul of govt-constituted committee report #1 – manifestly arbitrary/unreasonable: Pursuant to the *Vodafone* saga, the Standing Committee on Finance presented its report on Current Economic Situation and Policy Options to Parliament on August 30, 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 July 13, 2012. After examining the matter in some detail, the relevant conclusion of the Committee was 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.*]
>
> [Emphasis added]

● Retrospectivity falls foul of govt-constituted committee report #2 – manifestly arbitrary / unreasonable: In 2013, the World Bank published a report downgrading India in the index of investment friendliness-from its position of 131 in 2011, India was moved to 134. India's position remained below countries like Uganda, Ethiopia, Yemen etc. while its smaller neighbours like Sri Lanka fared better. To address this fall in confidence, the government appointed a committee headed by another eminent Indian Mr. Damodaran. The remit of this committee was generally to examine issues which contributed to this decline, the committee squarely addressed the question of retrospective taxation and had the following to say:

> *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 ….*
>
> [Emphasis added]

● Not “small repairs” or “play in the joints” or “greater leeway”: It cannot be contended that the impugned amendment makes only “small repairs” or that the legislature is entitled to “play in the joints” or to “greater leeway in tax legislation”, at least in the present case. Clearly, it is not “small repairs”, “play in the joints”, etc. when the well-established law of mutuality is sought to be abolished, or when a Supreme Court judgment is sought to be reversed, or when a liability of enormous proportions is sought to be imposed.

● Department’s arguments invalid: The above being so, the Department’s arguments for back dating are dealt with below:

a) Existence of Section 7(1)(a) and Section 2(17)(e) of no matter: The Department contends that Section 7(1)(a) and Section 2(17)(e) existed effective 01-Jul-17 and that by itself made supplies of goods/services by clubs/associations to its members taxable effective 01-Jul-17 irrespective of the newly introduced Section 7(1)(aa) notified on 01-Jan-22. The argument is manifestly incorrect since a plain reading of the Section 7(1)(a) & Section 2(17)(e) on the one hand, and of the new Section 7(1)(aa) and Explanation on the other, would make it clear that the

latter are plainly wider in scope. It is the latter which seek to nullify the long-established principle of mutuality. Verily this scenario was considered in *Calcutta Club* where Article 366(29A)(f) akin to Section 7(1)(a) and Section 2(17)(e) was held insufficient to nullify mutuality. It is recognising this that Parliament itself has sought to introduce an expansive 7(1)(aa) and Explanation. [Incidentally, in this context, it may be mentioned that it is submission of the respondent herein (IMA KSB) that such a specific provision as Section 7(1)(aa) & Explanation ought to have been brought in through a constitutional amendment. This has been argued in detail in W.A. 1659 of 2024.]

b) No demand raised earlier: The contention that the levy was always in existence from 01-Jul-14, even when Section 7(1)(aa) was absent, is also incorrect. Till 2022, no demand was raised as the Department was fully aware that these transactions are not taxable. The amendment is attempted to apply GST to medical associations for the first time through Section 7(1)(aa) and the Explanation thereto. Further, the present appeal involves welfare schemes for doctors where neither supply of goods nor supply of services is made.

c) Other assessee's acts cannot/do not determine constitutionality/statutory meaning: The Department contends that most clubs/associations in the country had taken registration and started paying GST even before the insertion of Section 7(1)(aa) without any doubt as to the liability to pay GST even going by Section 7(1)(a). Such an argument needs to be stated only to be rejected. The action of assessees cannot determine the interpretation of taxation provisions. Indeed such a dare is dangerous even for the broader interests of the Revenue, for, if this proposition were to be accepted, it would, simply put, mean that henceforth all batch tax litigations *ipso facto* ought to be ruled in favour of the assessees.

d) Income Tax PAN in the name of the respondent does not nullify mutuality: The contention of the Department that the respondent and its members have all along been different persons since the respondent association had obtained an income-tax PAN is bewildering. The reference to income-tax is – thankfully for IMA KSB – self-defeating for the Revenue. Indeed, income tax law has always recognised mutuality and continues to do so till date. PAN is obtained by clubs/associations only because there is non-mutual income such as interest on deposits, consideration paid by non- members, etc.

- In fine, looked at from the point of view of law or economics, the retrospective amendment unsettling well-established law, is unreasonable and arbitrary. It militates starkly against fairness in taxation and the rule of law. This is all the more when, as in the present case, the provision is retroactive. It is also disproportionate inasmuch as, whatever be the merits of the amendment, the retroactivity is uncalled for, without any determining principle, and capricious. What is more, passing off what earlier required a constitutional amendment (46th Amendment) in the language of a clarification through a statutory amendment is a colourable exercise.

9. The submissions of Sri. AR. L. Sundaresan, the learned Additional Solicitor General in W.A.No.1487 of 2024, briefly stated, are as follows:

- The thrust of the argument of the appellant is that IMA is an incorporated association and its members are considered to be one and the same and hence there is no question of supply of goods or supply of services by IMA to its members and law in this regard has been settled by Hon'ble Supreme Court in **State of West Bengal and Others v. *Calcutta Club Ltd.* reported in (2019) 19 SCC 107** wherein the Hon'ble Supreme Court has held that the doctrine of mutuality survives even after amendment to the Constitution under 46th amendment by which Article 366(29A) was introduced.

- The respondents respectfully submit that the said argument deserves to be rejected for the following reasons:-

  a) The judgment in *Calcutta Club* case cannot come to the aid of the appellant as it was on the interpretation on the WB Sales Tax Act and imposition of service tax which are traceable to entry 54 of List 2 and entry 97 of List 1 which in turn are traceable Article 246 of Constitution of India.

b) The source of power for enacting the Central Goods and Services Tax Act and Kerala Goods and Services Tax Act is from **Article 246A and Article 366(12A)**. As extracted above in Articles 246 and 254, Parliament and Legislature of every State shall have power to make laws with respect to Goods and Services Tax. Article 366(12A) provides that Goods and Services Tax means tax on any supply of goods or services or both, except taxes on supply of alcoholic liquor for human consumption.

c) As such nothing in Articles 246 or 254 or any judgment interpreting a law under the said Articles and referable to List 1 entry 97 and entry 54 of List 2 would be applicable, as Article 246A is an enabling provision notwithstanding Articles 246 and 254 of the Constitution.

d) Neither in Article 246A nor 366(12A) there are any limitations imposed on the Parliament or State Legislature with regard to imposition of such tax.

e) When there are no limitations or restrictions imposed by the Constitution, no such limitations or restrictions can be read into such power.

f) When no limitation or restriction with regard to the term supply or person has been provided for in the Constitution, the field is wide open for the Parliament and the Legislature to identify the person to be taxed and to define what would be supply and to define what would be referable to the term person. Accordingly Section 7 of the Act as it was rad with Section 2(17) and amendment 7(1)(aa) which defines supply and thereby providing that supply of goods and services by an Association to its member will be deemed to be supplies for the purposes of this Act is well within the power of the Parliament and the Legislature.

g) The following judgments are relied for the proposition that no restrictions can be placed on the power of the Parliament or the State Legislature to impose a tax and make necessary provisions to achieve the end of maximisation of collection of tax:

(i) ***(2008) 2 SCC page 254 Karnataka Bank v. State of Andhra Pradesh*** *Para 21, 22, 30, 33, 34, 35, 36, 37, 42, 43 and 50.*

(ii) ***(2012) 6 SCC 312 State of Madhya Pradesh v. Rakesh Kohli*** *para 9, 15, 17, 20, 30.*
(iii) ***(2001) 3 SCC 654 Municipal Council Kota Rajasthan v. Delhi Cloth and General Mills Company Limited para*** *16, 18, 22*
(iv) ***(2008) 5 SCC 449 Ramanalbailal Patel v. Government of Gujarat*** *para 15, 22 to 26*
(v) ***(2022) Vol. 15 SCC 364 Parmar Samantsinh Umedsinh v. State of Gujarat*** *para 54, 62 to 65.*

- **TEST OF VIRES OF TAXATION LAW:**

(i) There is always a presumption in favour of Constitutionality of a law made by the Parliament or the State Legislature.

(ii) No enactment can be struck down by saying that it is arbitrary or unreasonable or irrational but some Constitutional infirmity has to be found.

(iii) The Court is not concerned within the wisdom or unwisdom, the justice or injustice of the law as Parliament and 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 come into existence.

(iv) Hardship is not relevant in pronouncing on the Constitutional validity of a fiscal stature or economic law, and

(v) In the field of taxation, the legislature enjoys a greater latitude for classification.

- **SETTLED PRINCIPLES in Challenge to Constitutionality of any Law**:

(a) In a challenge to the vires of a Statute, there is always presumption in favour of the Constitutionality.

(b) The Court while examining the constitutional validity of a statute is not concerned with the wisdom or un-wisdom of the Legislature and would not substitute its wisdom for that of the Legislature. Law enacted by the Legislature can be struck down by the courts only if:

(i) It lacks legislative competence.
(ii) It offends any of the fundamental rights guaranteed under Part III of the Constitution and;
(iii) Later the third ground was also conceived by the Hon'ble Supreme Court, namely, that the law is so manifestly arbitrary and capricious. The present Section 7(1)(aa) does not come within anyone of the above vice to be declared as unconstitutional.

● Without prejudice to the above submissions, if at all it is considered that the judgment in Calcutta Club case would be applicable even after Articles 246A and 366A introduced by the 101st amendment, it is always open to the Legislature to amend the law to remove the basis of the judgment. The judgment in Calcutta Club case was on the basis of the words used in Article 366(29A) and the relevant provisions of the Finance Act and the West Bengal Sales Tax Act which did not provide that an Association and its members can be considered as two different persons. The phrase used in Article 366A(29A) was only **unincorporated association or body of persons**. That basis is sought to be undone by introducing the amendment by way of Section 7(1)(aa) and the explanation thereto. It is settled law that the Legislature has the power to amend the law and thereby remove the basis of an earlier judgment. On that ground also the attack to Section 7(1)(aa) and the explanation thereto and Section 2(27)(e) deserves to be rejected. The respondents rely upon the judgment in ***(2020) 5 SCC 274 - Union of India and Others v. Exide Industries and another*** **para 7, 15, 16, 21, 25 to 27, 47**.

● While amending Section 7(1) by introduction of 7(1)(aa) amendment has been introduced to the word 'supply' but not to the word 'service'. However there is no flaw in the same since under Section 9 **the taxable event is supply of goods or services or both.** Since it is the supply of goods and services which is a taxable event, the definition of supply and amending the said definition of supply to include an association and its members as two different persons would be sufficient and there is no necessity to define service in such way that service by an association to its member would be a taxable service. There is no flaw in the amendment and the amendment as it is would serve the purpose and object to be achieved.

● Assuming for the purpose of argument without admitting there is a flaw in not having amended the definition of service, the respondent respectfully submits that while interpreting any law, the courts will have to harmoniously read the provision keeping in mind the objects that is sought to be achieved by the Legislation. If while

interpreting the provision of law, the Court comes to the conclusion that something is missing and ought to have been introduced for the purpose of giving life to the Section, the Courts would supply the words to give effect and life to the provision. Reliance is placed on the decisions in (**1988) 2 SCC 513 – *Hamidia Hardwar Stores v. Mohanlal Sowcar*** where words which were absent in Section 10 (3) (a) sub clause (iii) but were available in Section 10 (3) (a) (I) were read into Section 10 (3) (a) (iii) by the Court, for the purpose of giving life to the section and to ensure that the objection of the Act namely protection against unreasonable eviction of the tenant is achieved. Reliance is also placed on **(1991) 2 SCC 87 - *Surjit Singh Kalra v. Union of India and Anr.*** para 19.

- The respondent respectfully submits that the purport of the definition of the word 'supply' so as to include supply made by an association to its members should be read as referable both to goods as well as services as it was never the intention of the Legislature and could not have been the intention of the Legislature to treat supply of goods by the association to its members as taxable and supply of service by the association to its members as not taxable. If such an interpretation is given it would be absurd and defeat the object of taxation and hence such an interpretation ought not to be given and the Court should liberally interpret the provision in a harmonious way to give life to the Section.

- The appellant is a registered Society under the Travancore-Cochin Literary Scientific and Charitable Societies Registration ct, 1955. It is an admitted position that in the event of termination of a member and even dissolution of the society, property of the association is not allowed to be distributed among the members, but is to be given to any other non-profitable organisation having the same objects in view of the provisions contained in the above said Act. It is legal entity which can sue and can be sued in its own name. Even in case of any dispute between the society and its members, the society is entitled to initiate proceedings against its members in the court of law. As such the concept of mutuality and that the association and the members are

one and the same would not arise. As there is no concept of mutuality, there is no locus for the IMA to challenge the impugned provisions on the ground of mutuality.

- IMA Kerala is engaged in diverse business ventures encompasing the provision of hotels, bar and guest houses, bio-medical waste treatment plant, construction of residential complexes, as well as the facilitation of health insurance for its members and their families. Some of the schemes floated by IMA, Kerala are as follows:
  - IMA Kerala floated an entity named IMAGE, acronym for IMA Goes Ecofriendly, which has an annual turnover of around Rs.50 Crore per annum. This business venture collects bio-medical wastes from hospitals for treatment at their plant. The profits are periodically transferred to the accounts of IMA, Kerala.
  - IMA Kerala actively manages a Professional equipment and employment protection scheme, wherein special rates for equipment procurement are negotiated on behalf of its members; Also this scheme supplies colour coded bags to various hospitals for the collection of waste by IMAGE, an entity floated by IMA Kerala.
  - Indian Medical Association also undertakes brand endorsements of big Scorporates and accrues income out of it. Major brands like Pepsico, Asian Paints, Kent water purifier etc. are their clients.
  - IMA Kochi runs a bar attached hotel by name 'IMA House' which provides rooms to public on payment. The property is advertised in e-commerce platforms also.

- The membership fee for IMA is collected by the local branch of IMA and the due shares are transferred to State and HQ as per the bylaw of the national body. Though state units of IMA are functioning independently with separate PAN and registration, an average member is investing for the services of the association due to the vast assets and income earned by the body through various business activities and thus the association cannot claim the benefits of mutuality of a membership association.

- The accounts of IMA Kerala including various schemes was audited by as many as seven different Chartered Accountants but they never informed the department about their activities except that of IMAGE which was functioning after obtaining another PAN. Only after the inspection proceedings by the department, the association started paying GST on various schemes floated by IMA.

- **Retrospective effect**

a) In so far as Section 7(1)(aa) is concerned, it comes to effect from 01.07.2017.

Such retrospectivity is valid and the contention agaisnt the same deserves to be rejected for the following reasons:-

(i) The Legislature has power to make laws prospectively and retrospectively.
(ii) Clarificatory amendments are always retrospective in operation.
(iii) The present amendment introducing Section 7(1)(aa) and the explanation are clarificatory. The liability was always there even under Section 7(1)(a).

(b) So far as the arguments of the appellant that the amendments cannot given retrospective effect, the same is untenable and deserves to be rejected. It is settled law that the Parliament has got the authority to make laws prospectively and retrospectively. Only limitation can be that a vested right cannot be taken away by the retrospective enactment in the present case. The appellant relied upon the judgment in ***Jayam & Co. v. State of Tamil Nadu*** **- [(2016) 15 SCC 125]** wherein the entitlement of input tax was reduced to the extent tax collected at the time of sale of the goods if the goods are sold at a discount. It was contended that such a reduction of the entitlement of availing in the tax credit cannot be given retrospective effect. That was on the basis of the principle of law that a vested right cannot be taken away by retrospective amendment. That is when the assessee had the right to adjust the entire tax credit in full, by an amendment it cannot be retrospectively reduced and that a vested right was sough to be curtailed. The said ratio will not apply since there is no vested right of the appellant association which is being taken away. It is only the liability which was always on them is sought to be enforced by way of the amendment.

(c) In the alternative, the respondents submit that after the **(2019) 19 SCC page 107** judgment of the Hon'ble Supreme Court in ***State of West Bengal & Ors. v. Calcutta Club Ltd.***, a doubt arose with regard to the correct position and hence the amendment was made by the Parliament to remove any such doubt on the basis of the judgment in *Calcutta Club* was corrected and hence it was made with retrospective effect and the respondents are entitled to make it with retrospective effect.

(d) Retrospectivity cannot be a ground of attack if it is within the power of Legislature and such retrospective law is not manifestly arbitrary and confiscatory in nature.

(e) In the present case, the entire community has understood the fact and purpose of Section 7(1)(a) and almost all the Associations/Clubs/Incorporated Bodies and un-Incorporated Bodies have been collecting and paying service tax for the supply of goods and services to their members. Hence, appellant cannot contend that they are taken by surprise or that the imposition was unforeseen and could not have been anticipated by them.

Respondents rely upon the following judgments to justify the retrospective effect:-

1. 1965 SCC Online SC 39 – Para 18 and 25 (Jawaharlal v. State of Rajasthan)
2. (1985) 2 SCC 197 – Para 28 nd 29 (Lohia Machines Ltd. v. Union of India
3. (1989) 3 SCC 488 – Para 65, 66 (Ujar Prints and Others v. Union of India)
4. (2005) 7 SCC 725 – (RC Tobacco Pvt. Ltd. v. Union of India)
5. (2020) 20 SCC 57 – Para 21. & 24 (Union of India v. Exide Industries Ltd.)
6. (2020) 5 SCC 274 – Para 44 (Union of India v. Exide Industires Ltd.)
7. (2020) 14 SCC 785 – Para 30 (Prashanti Medical Services and Research Foundation v. Union of India and Others).

So far as retrospective effect is concerned, respondents submit that the provisions as they stood even prior to the amendment enabled levy of tax on supply of goods and services from an association to its members. The amendment was only clarificatory in nature. Other clubs and associations have subjected themselves to GST regime in respect of supply of goods and services to its members. Hence IMA is not taken by surprise and the demand of GST are not unconscionable and they could have well been contemplated. Under such circumstances the judgment of the Ld. Single Judge holding that the provisions will only have prospective effect is incorrect and that part of he judgment deserves to be set aside and W.A.No.1487/2024 deserves to be allowed.

10. The submissions of Sri.Mohammed Rafiq, the learned Special Government Pleader (Taxes) for the appellant in W.A.No.468 of

2025, briefly stated, are as follows:

- The source of power to enact laws with respect to '*Goods and Services Tax*', both intra-state and inter-state, is Article 246A of the Constitution of India.

- Clause (12A) of Article 366 of the Constitution defines '*goods and services tax*' exhaustively as any tax on *supply* of goods, or services or both except taxes on supply of alcoholic liquor for human consumption.

- As per the inclusive definition provided in Clause (12) of Article 366, '*goods*' includes all materials, commodities and articles.

- Clause (26A) of Article 366 provides a broad definition of '*services*' as anything other than goods.

- The expression '*supply*' appearing in Article 366(12A) must not be interpreted in a narrow or pedantic sense; instead, the construction that is most beneficial to the broadest possible scope of the power to enact laws '*with respect to*' Goods and Services Tax should be adopted.
  - A nine judge Constitution Bench in ***State of U.P. and Others v. Lalta Prasad Vaish and sons* – [2024 SCC OnLine SC 3029]** held that the primary principle of interpreting entries in the legislative lists is to provide a wide meaning to them. A narrow interpretation must only be adopted when either (a) the scope of the Entry is limited by the use of language devices; or (b) a wide interpretation creates an overlap between entries within the same list or different lists.
  - In ***Lalta Prasad*** (supra) it was further held that, the legislative entries must be given a wide meaning. All incidental and ancilliary matters which can be fairly and reasonable comprehended must be brought within them.
  - In ***Lalta Prasad*** (supra) it was also held that "the legislative meaning cannot be used to artificially narrow legislative entries. We also deem it necessary to note that we must be cognizant that the standard of 'legislative meaning' is employed to identify the 'intent' of the framers of the Constitution and belongs to the originalist school of thought, which has

been consistently opposed by this Court over the years. For these reasons, the principle of interpretation elucidated in ***State of Madras v. Gannon Dunkerley & Co.*** – **[AIR 1958 SC 560]** must be used cautiously by Courts.

- The definition provided in sub clause (e) of clause 29A of Article 366 is not applicable in the context of a levy of tax under Article 246A.
  - Article 366(29A) defines the specific expression "tax on sale or purchase of goods," which relates only to the legislative field under Entry 92A of List I of the Seventh Schedule and the assignment of taxes levied thereunder to the States as provided in Article 269(1).
  - The power conferred to the Parliament and the State legislatures under Article 246A is to make laws with respect to "*goods and services tax*," and the expression "*tax on sale or purchase of goods*" defined under Article 366(29A)(e) is absent in Article 246A.
  - The definitions provided in Article 366(29A) would apply to the specific expressions defined thereunder wherever such expressions are used in the Constitution, that too if the context demands [See ***Geo Miller & Co. (P) Ltd. v. State of M.P.*** - **[(2004) 5 SCC 209**].
  - By virtue of the non-obstante clause, Article 246A prevails over the provisions of Articles 246 and 254 of the Constitution and thus prevails over the Seventh Schedule and the expressions defined in Article 366(29A).

- Tax on Goods and Services under the Central/State Goods and Services Tax Act, 2017 and scope for its levy on the provision of facilities or benefits by clubs, associations, societies, etc., to their members.

- The common law doctrine of mutuality cannot pose a limitation on the plenary power of the Union and the States to enact laws with respect to Goods and Services Tax, as conferred under Article 246A of the Constitution, including imposing the levy on clubs, associations, societies, or similar bodies incorporated or not providing facilities or benefits to their members.
  - The power to make laws with respect to goods and services tax conferred on the Union or States under Article 246A is unconditional.
  - A five-judge Constitution Bench in ***Union of India v. Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd*** – **[(1964) 53 ITR 466]** held that the

legislative competence of the Union legislature or even of the State Legislature could only be circumscribed by express prohibition contained in the Constitution itself and unless and until there was any provision in the Constitution expressly prohibiting legislation on the subject either absolutely or conditionally, there would be no fetter or limitation on the plenary powers which the legislature enjoyed to legislate on the topics assigned to them.

- A nine-judge Constitution Bench in ***Jindal Stainless Ltd. v. State of Haryana*** **– [(2017) 12 SCC 1]**, held that taxation is an incident of sovereignty, which cannot be curtailed by any implied limitations.
- A nine-judge Constitution Bench in ***Mineral Area Development Authority v. SAIL*** **– [(2024) 10 SCC 1]** held that any limitation on the plenary legislative powers of either the Union or the States with respect to a subject must be express and specified by the Constitution.
- No express restrictions are specified in the Constitution on the power conferred on the Union and the States to make law with respect to Goods and Services Tax.

- Application of the common law doctrine of mutuality in the context of Central/State Goods and Service Tax, 2017.
  - The doctrine of mutuality relates to the notion that a person cannot make a profit from himself, and it has its origin in common law. **[*Bangalore Club v. CIT* – [(2013) 5 SCC 509]**.
  - Quoting with approval the decisions in ***Rana Girders Ltd. v. Union of India*** **– [(2013) 10 SCC 746]** and ***Union of India v. SICOM Ltd*** **– [(2009) 2 SCC 121]** a five-judge Constitution Bench in ***Indore Development Authority v. Manoharla*** **– [(2020) 8 SCC 129]** observed that, there is no doubt that common law principles have to be weighed upon the statutory provision and latter has to prevail.
  - By Section 9(1) read with clauses (a) and (aa) of Section 7(1), 2(84)(f) and 2(17)(e) of the Central/State Goods and Service Tax Acts, clubs, associations, societies, any such bodies etc. are subjected to goods and service tax in respect of facilities or benefits provided to its members, and thus the common law doctrine of mutuality has no application in so far as the levy in question.

- Application of English Common Law beyond the limits of erstwhile Presidency Towns is a question of fact.

- A nine-judge Constitution Bench in *Superintendent and* ***Remembrancer of Legal Affairs v. Corpn. Of Calcutta*** **– [(1967) 2 SCR 170]** held that:

> *"some of the doctrines of common law of England were administered as the law in the Presidency towns of Calcutta, Bombay and Madras. The Common Law of England was not adopted in the rest of India. Doubtless, Some of its principles were embodied in the statute law of our country. That apart, in the mofussil, some principles of Common Law were invoked by courts on the grounds of justice, equity and good conscience. It is, therefore, a question of fact in each case whether any particular branch of the Common Law became a part of the law of India or in any particular part thereof"*

Therefore, the applicability of the English common law doctrine of mutuality in the state of Kerala, an erstwhile Part-B State, is a question of fact. All along, no evidence has been produced by the IMA to prove the said fact.

- IMA is an incorporated society registered under the Travancore-Cochin Literary, Scientific and Charitable Societies Registration Act of 1955, which recognises the society as a distinct entity separate from its members.
- The common law, if at all can be termed as a law in force at the commencement of the Constitution, must yield to the legislation by a competent legislature in view of Article 372(1).

- Scope of amendments made to Section 7 in the year 2021.

- By Section 108 of the Finance Act, 2021, a new clause as (aa) followed by an Explanation was added to Section 7 of the Central Goods and Services Tax Act, 2017, with effect from 01.07.2017. Corresponding amendments were also made to the Kerala State Goods and Services Tax Act, 2017.
- In addition to individuals, the definition of 'person' in 2(84) includes Hindu undivided families, companies, firms, Limited Liability Partnerships, associations of persons, or a body of individuals, whether incorporated or not. The provision of facilities or benefits by these persons to their members is defined as a business under Section 2(17)(e), and thus such provision of facilities or benefits falls within the scope of *supply* by a *person* in the course or furtherance of *business* as defined in clause (a) of Section 7. The newly incorporated clause (aa) clarifies that supply includes activities or transactions by such persons, to their members, or constituents, or vice versa, for cash, deferred payment, or other valuable consideration.
- The Explanation newly added along with clause (aa) to Section 7 further clarifies that the person and its members or constituents shall be deemed to

be two separate persons, and the supply inter se shall be deemed to take place from one such person to another.

- Furthermore, by the non-obstante clause and the legal fiction couched in the Explanation, the doctrine of mutuality either as a law in force or a principle recognised by any judgment to govern the provision of facilities or benefits by the incorporated or un-incorporated bodies to their members has been expressly prevailed over.

- Retrospective operation of the amendments made to Section 7 vide the Finance Act, 2021.

- The question of whether provisions operate retrospectively or not does not arise at all since retrospective operation with effect from 01.07.2017 in express terms has been given to the provisions by the Amendment Act.
- From the point of view of the economist and as an economic theory, a sales tax may be an indirect tax on the consumers, but legally, it need not be so. The permission given to the seller to collect the sales tax as a tax from the purchaser does not do away with the primary liability of the seller to pay the sale tax. That being the true view of sales tax, a state legislature acting within its legislative field has the power of a sovereign legislature and could make its law prospectively as well as retrospectively. The principles so laid down by a five-judge Constitution Bench in *The Tata Iron & Steel Co. Lid. v. The State of Bihar – [(1958) 9 STC 267]* in the context of sales tax would squarely apply in the context of levy under the goods and services tax regime also.
- In ***R.C. Tobacco (P) Ltd. and another v. Union of India*** **– [(2005) 7 SCC 725]** it was held that a law cannot be held to be unreasonable merely because it operates retrospectively. The unreasonability must lie in some other additional factors. It was also held that the retrospective operation of a fiscal statute would have to be found to be unduly oppressive and confiscatory before it can be held to be so unreasonable as violative of constitutional norms. In the instant case, there is no finding that the retrospective operation given to subclause (aa) of Section 7(1) is unduly oppressive, confiscatory or unreasonable.

- Applicability of dictum laid down in ***State of W.B. & Ors. v. Calcutta Club Ltd.*** **- [(2019) 19 SCC 107]**, in the context of the present case.

- The issues involved in the instant case have boiled down to the aspect of tax on the *supply of services* by the association to its members. Therefore, the application of the dictum laid down in ***Calcutta Club*** (supra)

with reference to the erstwhile service tax levied under the Finance Act, 1994 alone is relevant for the present.

- The findings in ***Calcutta Club*** (supra) on the issue of levy of service tax on services rendered by incorporated clubs to its members are based not on any constitutional provision but on the interpretation of the various provisions of the Finance Act, 1994 before and after the major amendments carried out in the year, 2012.
- The only factor that weighed with the Bench to hold against the revenue on this point is that the Explanation-3, clause (a) to the definition of Service provided in Section 65B(44) of the Finance Act, 1994 expressly recognises only members of an '*unincorporated association or a body of persons*' as distinct persons. The Court ruled that the expression body of persons cannot take in incorporated bodies, and hence, the principle of mutuality is not ousted so far as incorporated bodies and their members are concerned.
- Whereas by Section 9(1) read with Section 7(1)(a), 2(84)(f) and 2(17)(e), clubs, associations, societies, any such bodies, etc., are subjected to goods and service tax in respect of facilities or benefits to its members, notwithstanding the status of such bodies as incorporated or unincorporated. Further, the sub-clause (aa) and the Explanation loaded with a non-obstante clause and legal fiction incorporated in Section 7(1) with express retrospective effect from 01.017.2017 in clear terms clarifies that dictum to the contrary laid down in any judgment has no application. Therefore, the dictum laid down in ***Calcutta Club*** (supra) cannot be pressed into service to hold that the common law doctrine of Mutuality survives in the GST regime as well.

Discussion and Findings:

(i) On the constitutionality of the impugned amendments.

11. We have considered the rival submissions and have gone through the pleadings as well as the precedents cited across the bar. At the very outset we might observe that considerable time was spent by the learned counsel for the Union and the State to argue that it was well within the powers of the Parliament and the State legislatures to

overcome the basis of earlier judgments of the Supreme Court on the aspect of mutuality, by introducing a new definition of supply through a legislative exercise and clarifying that a supply would also include a supply from a club to its members. Under ordinary circumstances, we would have had no reservations to the said settled position in law. Indeed the legislature has the power to enact validating laws that remove the basis of invalidity pointed out by the courts in relation to the earlier unamended law. However, we are in these proceedings concerned with a slightly different issue viz. whether it would be competent for a legislature to levy tax on a transaction when the taxable event in relation to the subject of taxation has not been recognised as such by the Constitution ? In other words, when the Constitution has understood a taxable transaction as necessarily involving two persons, can a legislature deem a transaction that does not involve two persons as a taxable transaction ? This is the limited point on which we find ourselves at variance with the views of the learned Single Judge in the impugned judgment, who found no merit in the argument of the writ petitioner that the amendments had to be invalidated for the reason that it was *ultra vires* the Constitutional provisions.

12. The thrust of the arguments of Sri. Datar, the learned senior counsel appearing for the appellant in W.A.No.1659 of 2024 is that notwithstanding the amendments effected to Sections 2(17) and Section 7(1) of the CGST Act, it’s activities in relation to those Schemes

that it runs as a self help group, where the members help each other and their families to tide over difficulties such as disabilities, death, legal action etc, will not be liable to tax under the GST Act. The contention, in other words, is that on account of the principle of mutuality that informs the actions of the Club/Association towards its members, the mere fact that statutory amendments have been made to the concept of "supply" under the GST Acts will not suffice to make their activities liable to the levy of GST; that their activities cannot be treated as 'service' since the concept of service under the GST law itself contemplates the existence of two entities viz. a service provider and a service recipient, and excludes the concept of self service for the purposes of the levy.

13. When we analyse the Scheme of levy of GST under the Constitution, we find that GST is envisaged as a levy of tax on the "supply" of "goods or services or both". The words "goods", "supply" and "services" are understood in a particular sense under the Constitution. When the words used in the Constitutional text have acquired a meaning through judicial interpretation over the years, one must assume that that is the same sense in which the word is used when inserted into the Constitution through a later amendment. While "goods" is a standalone concept, meaning thereby that it is not something that requires a plurality of persons to infer its existence, the concepts of "supply" and "service" do require a plurality of persons to infer their existence. This aspect was recognised in ***Ranchi Club v.***

Chief Commissioner of Central Excise & Service Tax **- [2012 SCC Online SC 306],** where it was laid down that the basic feature common in sale and services was that both required the existence of two parties. The decision in ***Ranchi Club*** [supra] was quoted with approval by the Supreme Court in ***Calcutta Club*** also. Therefore, it can be safely assumed that the Scheme of GST under the Constitution also contemplates the existence of at least two persons - a provider and a recipient before one can infer either a “supply” or a “service” for the purposes of the levy. In other words, the concepts of self-supply or self-service are not envisioned under the Constitution for the purposes of the levy.

14. Article 246A of the Constitution, that confers simultaneous legislative powers on the Union and the States to make laws with respect to goods and service tax, uses the word “supply” without giving it an artificial meaning that would take in even a “deemed supply”. In fact, even by the Constitution [46th Amendment] Act, 1982 when a deeming provision was introduced to bring transactions, that did not fit into the traditional concept of sale of goods, to sales tax, the exercise that was done was to amend the Constitution to deem those transactions as “Sales” or “Purchases”. Thus, under Article 366(29A), a tax on the “supply of goods” by an incorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration, was deemed to be a “tax on the sale or purchase

of goods". In contrast to the above, what has been done through the present amendment to the CGST/SGST Act is merely to amend the definition of "supply" to include "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". Significantly, such supply has not been deemed to be a "service", and the concept of "service" itself has not undergone a change, to include within its fold such activities or transactions.

15. We cannot therefore find it in ourselves to accept the contention of the learned Additional Solicitor General Sri. AR. L. Sundaresan, appearing on behalf of the Union of India, and relying on the decisions in ***Karnataka Bank v. State of Andhra Pradesh*** **– [(2008) 2 SCC 254]** and ***Ramanlal Bhailal Patel v. State of Gujarat*** **– [(2008) 5 SCC 449]** that it is always open to the legislature to provide an artificial meaning to a word for the purposes of the Statute, and that the mere fact that the said meaning of the word in the Statute differs from its popular meaning can be of no avail. While we do not doubt the correctness of the proposition laid down in the aforecited precedents, the factual situation that obtains in the instant case, as already noticed, is slightly different. We are not presently considering the legality of a legislative exercise that gives an artificial definition to a word/concept that differs from it's accepted or popular meaning. What we are confronted with in these proceedings is a situation where the

statutory exercise undertaken by the legislative body has given a meaning to a word/concept therein that differs from the accepted meaning of the same word/concept under the Constitution. We are of the view that when a word/concept in the Constitution has been interpreted by the Supreme Court in a particular manner, a legislative body, that derives its legislative competence to enact a Statute from the Constitution, cannot give to the word/concept a meaning that goes against the meaning assigned to the same word/concept by the Supreme Court in the context of its setting under the Constitution. This is especially so because, when used in the Constitution in a particular sense, it is that sense of the word/concept that determines the very competence of the legislature to enact a law in relation to the subject represented by that word/concept.

16. The levy of GST is on the “supply” of taxable “goods” or “services” or both for a consideration. The concept of “supply” and “service” as understood under the Constitution and the CGST/SGST Acts (before their amendment) both excluded transactions informed by the principle of mutuality ie. a supply/service from one entity to itself (self supply/self service). Thus, even if there is now a deemed “supply”, based on the amendments effected to the CGST/SGST Acts, there is no deemed “service” in circumstances where the service is rendered by a club or association to its members, since the definition of service has not been amended.

17. It is also significant, as pointed out by the learned senior counsel Sri. Datar, that the Constitution has not been amended to deem a supply of service by a club or association to its members as a taxable service for the purposes of GST. The decision of the Supreme Court in ***State of West Bengal and Others v. Calcutta Club Ltd.*** **– [(2019) 19 SCC 107]** is authority for the proposition that the principle of mutuality has survived under the Constitution even after the 46th Amendment. If that be so, then the amendment exercise carried out by the Parliament would itself have to be seen as unconstitutional since it incorporates a definition of supply that militates against the constitutional understanding of the term. For reasons that we have already stated while considering the arguments of Sri. Sundaresan on behalf of the Union of India, we find ourselves in agreement with the argument of Sri. Datar that a phrase as understood under the Constitution cannot be statutorily expanded by any legislature since the power to legislate is itself one that is conferred by the Constitution.

18. It is worth recalling that when similar situations arose in the past where various State legislatures attempted to broaden the tax net by statutorily expanding the definition of “sale”, the Supreme Court struck down such amendments as being beyond the meaning of the word ‘sale’ in Entry 54 of List II of the Seventh Schedule to the Constitution. To get over the said decisions of the Supreme Court, the Constitution

had to be amended to add six sub-clauses [(a) to (f)] to the newly inserted Article 366 (29A) of the Constitution. Accordingly:

i. Article 366(29A)(a) was inserted to get over the decision in **New India Sugar Mills Ltd v. CST - [1963 (14) STC 316]** that held that a compulsory sale through Control Orders was not a sale;

ii. Article 366(29A)(b) was inserted to get over the decision in **State of Madras v. Gannon Dunkerley & Co. - [AIR 1958 SC 560]** that held that a works contract is not a sale;

iii. Article 366(29A)(c) was inserted to get over the decision in **K.L.Johar and Co. v. CTO - [AIR 1965 SC 1082]** that held that a hire-purchase was not a sale;

iv. Article 366(29A)(d) was inserted to get over the decision in **A.V.Meiyappan v. CCT - [1967 (20) STC 115 (Mad)]** that held that a transfer of the right to use goods was not a sale;

v. Article 366(29A)(e) was inserted to get over the decision in **CTO v. Young Men's India Association (Regd) – [(1970) 1 SCC 462]** that held that there could be no sale between a club/association and its members; and

vi. Article 366(29A)(f) was inserted to get over the decision in **Northern India Caterers (I) Ltd v. Lt. Governor of Delhi – [(1980) 2 SCC 167]** that held that supply of food and beverages in restaurants was not a sale.

19. We might also refer to the decisions in **[(1965) 56 ITR 198 (SC)] – *Navnit Lal C. Javeri v. K.K. Sen, Appellate Assistant***

Commissioner of Income-Tax, Bombay and **[(2021) 15 SCC 667] - *Skill Lotto Solutions Pvt. Ltd. v. Union of India and Others*** – relied upon by Sri.Mohammed Rafiq, the learned Special Government Pleader for the State, to contend that it is open to a legislature to define a word in a taxing Statute in a sense different from its popular meaning or a meaning that is given to it through judicial interpretation of the same word as used in the constitutional text. In ***Navnit Lal C. Javeri*** [supra], a Constitution Bench of the Supreme Court considered a challenge to the validity of Section 12(1B) read with Section 2(6A)(e) of the Indian Income-Tax Act, 1922. The appellant before the Court was a shareholder in a Private Limited Company and he impugned the statutory provisions that treated a loan advanced to him by the Company as a dividend for the purposes of taxation. His contention that Entry 82 in List I of the VIIth Schedule to the Constitution that dealt with "taxes on income other than agricultural income" did not justify the impugned provision because a loan advanced to a shareholder by a company cannot be treated as an 'income' in any legitimate sense, was rejected by the Supreme Court. The Court held that entries in the List had to be construed widely and when so construed the word 'income' could be interpreted to include within its ambit even a loan advanced to a shareholder. The Court went on to find as follows @ p. 208 as follows:

> "The question which now arises is, if the impugned section treats the loan received by a shareholder as a dividend paid to him by the company, has the legislature in enacting the section exceeded the limits of the legislative field prescribed by the present entry 82 in List I ? As we have already noticed, the word "income" in the context must receive a wide

> interpretation; how wide it should be it is unnecessary to consider, because such an enquiry would be hypothetical. The question must be decided on the facts of each case. There must no doubt be some rational connection between the item taxed and the concept of income liberally construed. If the legislature realises that the private controlled companies generally adopt the device of making advances or giving loans to their shareholders with the object of evading the payment of tax, it can step in to meet this mischief, and in that connection, it has created a fiction by which the amount ostensibly and nominally advanced to a shareholder as a loan is treated in reality for tax purposes as the payment of dividend to him. We have already explained how a small number of shareholders controlling a private company adopt this device. Having regard to the fact that the legislature was aware of such devices, would it not be competent to the legislature to device a fiction for treating the ostensible loan as the receipt of dividend ? In our opinion, it would be difficult to hold that in making the fiction, the legislature has travelled beyond the legislative field assigned to it by entry 82 in List I."

20. What is significant is that the interpretation of the word 'income' as contained in earlier precedents was in the context of the Income Tax Act and not in the context of the Constitution itself. The Court held that the use of the word 'income' in the Entry in List I was sufficiently wide to take in loans advanced to a shareholder by a Company. The Court did not have to deal with a situation where the words in the Entry itself had acquired a definite meaning through judicial interpretation. Interestingly, the Court did observe that there had to be some rational connection between the items taxed and the concept liberally construed.

21. Similarly in ***Skill Lotto Solutions Private Limited*** [supra], the Court considered the validity of Section 2(52) of the CGST Act that defined "goods" to include actionable claims. The contention that an artificial definition of goods to include actionable claims could not withstand the test of constitutionality when the word "goods" was

defined differently under the Constitution, was rejected by holding that "The Constitution-framers were well aware of the definition of goods as occurring in the Sale of Goods Act, 1930 when the Constitution was enforced. By providing an inclusive definition of goods in Article 366(12), the Constitution-framers never intended to give any restrictive meaning of goods." Thus, the Court did not find any contradiction between the meaning of the word as used in the Constitution and the meaning given to it under the Statute concerned.

22. The issues considered in the aforesaid judgments are clearly distinguishable from the issue that confronts us in these proceedings. The concepts of "supply" and "service" having been judicially interpreted as requiring at least two persons – a provider and a recipient, for inferring their existence, and the Supreme Court having held in ***Calcutta Club*** [supra] that the principle of mutuality has survived the 46th amendment to the Constitution, so long as the said judgment holds sway as a binding precedent and/or the Constitution is not amended suitably to remove the concept of mutuality from the concepts of supply and service thereunder, the impugned amendment to the CGST/SGST Acts must necessarily fail the test of constitutionality.

23. We are also conscious of the decisions in ***State of Madhya Pradesh v. Rakesh Kohli*** **– [(2012) 6 SCC 312]** and ***Parmar Samanthsingh Umedsingh v. State of Gujarat & Others*** **–**

[(2022) 15 SCC 364] that postulate that a legislature has to be accorded a greater degree of latitude in laws relating to economic activities, and that no statute should be struck down unless it is vitiated by a constitutional infirmity. We do however find that the statutory provisions impugned in these proceedings suffer from a definitive lack of legislative competence. Accordingly the provisions of Section 2(17)(e) and Section 7(1)(aa) and the Explanation thereto of the CGST Act, 2017 and the provisions of Section 2(17)(e) and Section 7(1)(aa) and the Explanation thereto of the KGST Act are declared as unconstitutional and void being *ultra vires* the provisions of Article 246A read with Article 366 (12A) and Article 265 of the Constitution of India.

(ii) <u>On the validity of retrospective/retroactive operation of the impugned amendments:</u>

24. In the light of our above finding with regard to the unconstitutionality of the impugned statutory provisions, it is unnecessary for us to go into the validity of the retrospective/retroactive operation given to the said provisions. However, we might record our agreement with the findings of the learned Single Judge that held the said retrospective operation to be illegal. The principle of fairness is one that must inform all actions of a State, including legislation, since it is an essential aspect of the Rule of Law that is recognised as a basic feature of the Constitution. The insertion of a statutory provision that alters the basis of indirect taxation with retrospective effect, so as to tax persons for a prior period when they had not anticipated such a levy

and, consequently, had not obtained an opportunity to collect the tax from the recipient of their services, militates against the concept of Rule of Law. On its part, the State too would be found wanting in offering a valid justification for it's legislative action. Over the last seven decades since the adoption of our Constitution the guarantees therein have been ensured to our citizenry through progression from a culture of authority to a culture of justification. Accordingly, in modern times the State is obliged to offer justification for all its actions that touch upon the constitutional rights, fundamental and otherwise, of its citizens. We do not find any such justification for the retrospective operation of the impugned statutory provisions.

The upshot of the above discussion is that W.A.No.1659 of 2024 is allowed with consequential reliefs to the appellant therein, and W.A.No.1487 of 2024 and W.A.No.468 of 2025 are dismissed. No Costs.

Sd/-
DR. A.K.JAYASANKARAN NAMBIAR
JUDGE

Sd/-
EASWARAN S.
JUDGE

prp/