* IN THE HIGH COURT OF DELHI AT NEW DELHI

% **Judgment reserved on: 06 November 2023**
Judgment pronounced on: 17 November 2023

\+ **W.P.(C) 4382/2014**

DELHI GYMKHANA CLUB ..... Petitioner
Through: Mr. Ayush A Mehrotra, Mr. Upkar Agrawal, Mr. Laksh Manocha, Advs.

versus

COMMISSIONER (LUXURY TAX), NEW DELHI & ORS. ..... Respondents
Through: Mr. Rajeev Aggarwal, ASC with Ms. Shagufta, Ms. Sheenu Priya, Mr. Sudhir Kumar, Mr. Sudhir, Mr. Sumit Chaudhary, Mr. Adish Jain, Advs. for GNCTD.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J.

1. The petitioner questions the validity of the order dated 01 July 2014 passed by the **Commissioner, (Entertainment and Luxury Tax)**[1], the first respondent herein and which has in turn

[1] Commissioner

affirmed the orders of assessment made for **Financial Years**[2] 2009-10, 2010-11

[2] FYs

and 2011-12, holding it to be exigible to tax under the **Delhi Tax on Luxuries Act, 1996**[3].

2. Undisputedly, the petitioner, which claims to be a "*Club*", constituted as a not-for-profit company as contemplated under Section 25 of the erstwhile **Companies Act, 1956**[4], had neither obtained registration under the Act nor had it paid any tax thereunder. The view as taken by the Assessing Authority as embodied in its order of assessment dated 19 March 2013 was affirmed by the First Appellate Authority on 21 May 2014. It is in that backdrop that the matter came to be laid before the Commissioner.

3. The petitioner asserts that it is a social club, governed by the principle of mutuality and it stood duly incorporated as such in terms of Section 25 of the 1956 Act. It is the case of the petitioner that it is a mutual benefit association and its various activities are confined to its members. Resting the challenge to the order passed by the first respondent on the principles of mutuality as enunciated in respect of such clubs and associations, it is contended that the respondent has clearly erred in holding it liable to pay luxury tax.

4. As was noticed by us hereinabove, the period of assessment with which we are concerned are FYs 2009-10, 2010-11 and 2011-

[3] the Act
[4] the 1956 Act

12. However, the order impugned before us appears to have proceeded on the basis of the provisions of the Act, as they stood post its amendment in terms of the **Delhi Tax on Luxuries (Amendment) Act, 2012**[5]. This will be evident from the discussion which follows.

5. The Act initially came to be promulgated and enforced in terms of a Notification dated 30 October 1996. The original Act defined the expression "*business*" in Section 2(b) as follows:-

> "**2. Definition**.—In this Act, unless the context requires otherwise:—
>
> xxx xxx xxx
>
> **b)** "business" includes the activity of providing residential accommodation and any other service in connection with, or incidental or ancillary to such activity of providing residential accommodation, by a hotelier for monetary consideration;"

6. It also defined the words "*club", "establishment", "hotelier", "luxury provided in a hotel"* in the following terms:-

> "**2. Definition**.—In this Act, unless the context requires otherwise:—
>
> xxx xxx xxx
>
> **(c)** "club" includes both an incorporated and unincorporated association of persons, by whatever name called;
>
> xxx xxx xxx
>
> **(g)** "establishment" includes a residential accommodation, a lodging house, an inn, a club, a resort, a farm house, a public house or a building or part of a building, where a residential accommodation is provided by way of business;
>
> xxx xxx xxx

[5] the 2012 Amendment Act

(h) "hotelier" means the owner of the establishment and includes the person who for the time being is in charge of the management of the establishment;

xxx xxx xxx

(i)"luxury provided in a hotel" means accommodation and other services provided in a hotel, the rate or charges for which including the charges for air-conditioning, telephone, radio, music, extra beds and the like, is five hundred rupees per room per day or more: but does not include the supply of food, drinks or other services which is separately charged for;"

7. The expression *"turnover of receipts"* was defined in Section 2(r) in the following terms:-

"**2. Definition**.—In this Act, unless the context requires otherwise:—

xxx xxx xxx

r) "turnover of receipts" means the aggregate of the amounts of valuable consideration received or receivable by a hotelier or by his agent in respect of the luxuries provided in a hotel during a given period;"

8. Section 3 of the Act, which constitutes the charging provision reads as follows:-

"**Incidence and levy of tax**

3. (1) Subject to the provisions of this Act and the rules made thereunder there shall be levied a tax on the turnover of receipts of a hotelier.

(2) There shall be levied a tax on the turnover of receipts of a hotelier at a rate not exceeding fifteen per cent to be notified by the Government from time to time and different rates may be notified for different classes of hotels as charges of luxury provided in a hotel:

Provided that, where the charges are levied otherwise than on daily basis or per room then the charges for determining the tax liability under. this section shall be computed proportionately for a day and per room based on the total period of occupation of the

accommodation for which the charges are made according to the rules or practice of the hotel.

> (3) Where, in addition to the charges for luxury provided in a hotel, service charges are levied and appropriated by the hotelier and not paid to the staff, then such charges shall be deemed to be part of the charges for luxury provided in the hotel.
>
> (4) Where luxury provided in a hotel to any person (not being an employee of the hotel) is not charged at all, or is charged at a concessional rate, nevertheless there shall be levied and collected the tax on such luxury, at the rate specified in sub-section (2), as if full charges for such luxury were paid to the hotelier.
>
> (5) The tax shall not be levied and payable in respect of the turnover of receipts for supply of food and drinks, on the sale of which the hotelier is liable to pay sales tax under the Delhi Sales Tax Act, 1975 (No. 43 of 1975).
>
> (6) For the purposes of this Act. tax collected separately by the hotelier shall not be considered to be part of the receipt or the turnover of receipts of the hotelier"

9. As would be manifest from the aforesaid provisions enshrined in the Act and as it stood in its unamended avatar, the statute appears to have concentrated the levy of a luxury tax on the activity of providing residential accommodation by a hotelier for monetary consideration. Undisputedly, the petitioner would fall within the ambit of Section 2(c) of the Act by virtue of being an incorporated club. The word "*establishment*" as defined in Section 2(g) puts in place an inclusive definition and which extended to a residential accommodation, an inn, a lodging house, a club, a resort, a farm house, a public house or a building or a part thereof, where residential accommodation has been provided in the course of business.

10. The expression "*hotelier*" was defined to mean the owner of an establishment, and which would by extension have to be read alongside Section 2(g), which included a "*club*" within the meaning of an establishment. Section 3 envisaged the levy of tax on the turnover of receipts of a hotelier. Section 3(4) of the Act extended the levy of tax, even to a contingency where a room may have been provided in a hotel to a person other than an employee of the former, either gratis or at a concessional rate.

11. Once it is found that the petitioner club would fall within the ambit of Section 2(g) and answers to the description of an "*establishment*" as defined thereunder, it would undisputedly fall within the ambit of a "*hotelier*", and thus be liable to the payment of tax in terms of Section 3 of the Act.

12. It however becomes pertinent to note that when the Act was originally enforced, it did not carry a defining clause with respect to the word "*luxury*". Further, post amendment, the definition of the term "*establishment*" was set out in two sub-clauses, namely sub-clauses

(eb) and (g). The definition of the term "*establishment*", as amended vide the 2012 Amendment Act and explained in the said two said subclauses is reproduced hereinbelow: -

> "**2. Definition**.—In this Act, unless the context requires otherwise:—
>
> xxx xxx xxx

(eb) "establishment" means a banquet hall or a gymnasium/health club or a hotel or a spa where luxury is provided to a customer by way of business;

xxx xxx xxx

(g) "establishment" includes a residential accommodation, a lodging house, an inn, a club, a resort, a farm house, a public house or a building or part of a building, where a residential accommodation is provided by way of business;"

For some inexplicable reason, the word establishment has been defined twice over by virtue of the aforesaid clauses (eb) and (g), post the 2012 Amendment Act. However, and since not much would turn on that, we refrain from observing anything further in that respect.

13. The expression "*luxury*" came to be inserted in the Act in terms of the aforesaid amendment and stands defined as follows:-

"**2. Definition**.—In this Act, unless the context requires otherwise:—

xxx xxx xxx

(*i*) "luxury" means use of goods, services, property, facilities, etc. for enjoyment or comfort or pleasure or consumption by any customer extraordinary to the necessity of life, that is to say:—

(i) Accommodation or space provided in a banquet hall which includes air cooling, air conditioning, chairs, tables, linen, utensils and vessels, shamiyana, tent, pavilion, electricity, water, fuel, interior or exterior decoration, music, orchestra, live telecast and the like;

(ii) Services provided in a gymnasium or health club, which includes services of trainer or personal trainer, steam, sauna and the like;

(iii) Accommodation and other services provided in a hotel, the rate or charges for which, including the charges for air cooling, air conditioning, radio, music, extra beds, television and the like, is seven hundred fifty rupees per room per day or more whether such charges are received collectively or separately per room per day;

(iv) Facilities or services provided in a spa which includes beauty treatment, manicure, pedicure, facial, laser treatment, massage shower, hydrotherapy, steam bath, saunas or cuisine, medispa and the like;"

14. The word "*receipt*" as defined in Section 2(m) and as amended vide the 2012 Amendment Act is reproduced hereinbelow:-

"**2. Definition**.—In this Act, unless the context requires otherwise:—

xxx xxx xxx

(*m*) "receipt" means the amount of monetary consideration received or receivable by a proprietor or by his agent for any luxury provided in the establishment;"

15. Section 3 and which speaks of the incidence and levy of tax also came to be amended and presently reads as under:-

"**Incidence and levy of Tax**

3. *Incidence and levy of tax*.—(1) Subject to other provisions of this Act, every proprietor,— (*a*) registered under this Act; or

(*b*) required to be registered under this Act; shall be liable to pay tax on his turnover of receipts calculated in accordance with this Act, at the time and in the manner provided in this Act.

(2) There shall be levied a tax on the turnover of the receipts of a proprietor at a rate not exceeding fifteen percent to be notified by the Government from time to time and different rates may be notified for different class of luxuries:

PROVIDED that, where the charges are levied otherwise than on daily basis or per room then the charges for determining the tax liability under this section shall be computed proportionately for a day and per room based on the total period of occupation of the accommodation for which the charges are made according to rules or practice of the hotel.

(3) In case, in addition to the charges for providing luxury, service charges are levied and appropriated by the proprietor and not paid to the staff, then, such charges shall be deemed to be part of the turnover of receipts for the purpose of levy of tax under this Act.

(4) In case luxury provided in a hotel to any person (not being an employee of the proprietor) is not charged at all, or is charged at a concessional rate, nevertheless there shall be levied and collected the tax on such luxury, at the rate specified in sub-section (2), as if full charges for such luxury were paid to the proprietor.

(5) The tax shall not be levied and payable in respect of turnover of receipts for supply of food, drinks and goods such as cosmetics, medicines, nutritional supplements etc, on the sale of which the proprietor is liable to pay tax under the Delhi Value Added Tax Act, 2005.

(6) For the purposes of this Act, tax collected separately by the proprietor shall not be considered to be part of the receipt or the turnover of receipts of the proprietor."

16. The 2012 Amendment Act thus sought to expand the levy of tax from just an "*establishment*" as defined in S.2(g) of the Act to activities as defined under both Sections 2 (eb) and 2(g). The tax thus became leviable upon a banquet hall, gymnasium/ health club, hotel or spa as well. Further, and in terms of Section 2(g), the word "*establishment*" was defined to extend to residential accommodation, lodging house, an inn, a club, resort, farm house, public house or a building or a part thereof, where residential accommodation is provided by way of a business.

17. However, when we turn our gaze to the word "*luxury*" as defined, we find that the same brought within its ambit accommodation or space provided in a banquet hall, services provided in a gymnasium or health club or accommodation and other services provided in a hotel or facilities and services provided in a spa. Undisputedly, the petitioner association would not fall within either of those clauses as set out in Section 2(i).

18. It becomes pertinent to note that while the petitioner may be said to fall within the meaning of the expression "*establishment*" as defined in Section 2(g), the receipts generated from its activities would not perhaps fall within the scope of Section 2(m), since that provision ties the monetary consideration received or receivable by a proprietor on the provision of any "*luxury*" provided in that

establishment. The word "*receipt*" has been defined in that provision as monetary consideration received from any luxury provided in the establishment. For the purposes of levy of tax, therefore, the assessee would have to be found to be one which is not merely an establishment as defined but additionally its income or receipts having been generated from the provision of a luxury.

19. While learned counsel for the petitioner sought to draw sustenance from the principles of mutuality as enunciated by the Supreme Court in the **State of West Bengal & Ors v. Calcutta Club Limited**[6] as also a recent decision of the Kerala High Court in **Madhavaraja Club v. Commercial Tax Officer (Luxury Tax) & Ors**[7], we find that those submissions are addressed oblivious of the statutory position of the Act as it prevailed prior to 2012. This aspect also clearly appears to have been overlooked by the Commissioner who has also rested his decision on the amended provisions of the Act. However, and bearing in mind the assessment years with which we are concerned, it is evident that it would be the Act as it stood prior to its amendment in 2012 which would be applicable.

20. While we find no ground to doubt the principles of mutuality as were explained in *Calcutta Club* and which constitutes the foundation for the decision handed down by the Kerala High Court in *Madhavaraja Club*, we find that the petitioner did not question the validity of the provisions of the Act as it originally stood and which

[6] (2019) 19 SCC 107
[7] 2023 SCC Online Ker 1447

extended the incidence of tax to the provision of residential accommodation in a club.

21. If it were the contention of the petitioner that the tax on the provision of such residential accommodation could not be levied, it was incumbent upon it to question the validity of the provisions of the Act as they originally stood. However, and in the absence of such a challenge having been mounted and bearing in mind the statutory position which prevailed, we find ourselves unable to hold in favour of the petitioner on this score.

22. We note that the Supreme Court in *Calcutta Club* was principally concerned with the levy of a tax per se in respect of activities to which the mutuality principles applied. It becomes pertinent to note that the decision in *Calcutta Club* was rendered in the context of the stand of the Revenue that notwithstanding the activities of clubs and associations resting on the principles of mutuality, a tax would be leviable by virtue of the provisions of Articles 366(29-A)(f) of the Constitution. It was this argument which came to be negatived with the Supreme Court observing as follows:-

> "**41.** This is further reinforced by the last part of Article 366(29-A), as under this part, the supply of such goods shall be deemed to be sale of those goods *by the person* making the supply, and the purchase of those goods *by the person* to whom such supply is made. As *Young Men's Indian Assn. case* [*CTO* v. *Young Men's Indian Assn.*, (1970) 1 SCC 462] and the doctrine of mutuality state, there is no sale transaction between a club and its members. As has been

2023:DHC:8223-DB

pointed out above, there cannot be a sale of goods to oneself. Here again, it is clear that the ratio of *Young Men's Indian Assn.* [*CTO* v. *Young Men's Indian Assn.*, (1970) 1 SCC 462] has not been done away with by the limited fiction introduced by Article 366(29-A)(*e*).

xxxx xxxx xxxx

49. A reading of the aforesaid provisions makes it clear that when profits and gains of a mutual insurance company are sought to be brought to tax, they are so done by express reference to the fact that the business of insurance is carried on by a *mutual* insurance company. The absence of any such language in sub-clause (*e*) of Article 366(29-A) is also an important pointer to the fact that the doctrine of mutuality cannot be said to have been done away with by the said 46th Amendment.

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51. Also, Section 45(2) of the Income Tax Act, 1961 is an example of a provision by which a deemed transfer by a person to himself gets taxed. Section 45(2) reads as follows:

"**45.** ***Capital gains***.—(1) * * *

(2) Notwithstanding anything contained in sub-section (1), the profits and gains arising from the transfer by way of conversion by the owner of a capital asset into, or its treatment by him as, stockin-trade of a business carried on by him shall be chargeable to income tax as his income of the previous year in which such stockin-trade is sold or otherwise transferred by him and, for the purposes of Section 48, the fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset."

It can be seen from this provision that profits or gains arising from a transfer by way of conversion by the owner of a capital asset into, or its treatment by him as stock-in-trade of a business, is by a deeming fiction brought to tax, despite the fact that there is no transfer in law by the owner of a capital asset to another person. Modalities such as these to bring to tax amounts that would do away with any doctrine of mutuality are conspicuous by their absence in the language of Article 366(29-A)(*e*).

xxxx xxxx xxxx

52.1. The doctrine of mutuality continues to be applicable to incorporated and unincorporated members' clubs after the 46th Amendment adding Article 366(29-A) to the Constitution of India."

23. The decision in *Madhavaraja Club* was rendered in the context of the **Kerala Tax on Luxuries Act, 1976**[6]. As would be evident from a reading of Section 4 of that statute, a luxury tax was envisaged to be levied upon any luxury provided in various establishments defined and spelt out therein including clubs. It was in the aforesaid context that the Kerala High Court observed as under:-

"**13.** In the light of the aforesaid discussion, we must now deal with the specific contentions of the learned Government Pleader, relying on the decisions of the division bench of this court in *Lotus Club* v. *State of Kerala* - [Neutral Citation Number :2018/KER/40520] and *Madhavaraja Club* v. *The Commercial Tax Officer (Luxury Tax)* - [Neutral Citation Number : 2013/KER/9816], that in the former judgment, this court has clearly held that the incidence of tax is on the person enjoying the luxury and hence, although the luxury is provided to a member of the club by the club itself, the doctrine of mutuality will have no application, and that in the latter judgment, another division bench of this court has, in the appellant's own case under the KTL Act for an earlier assessment year, clearly held that the doctrine of mutuality is not apposite in the context of the KTL Act. We have gone through the said judgments cited by the learned government pleader. In *Lotus Club*, the Division Bench essentially followed an earlier division bench judgment of this Court in *Trivandrum Club* v. *Sales Tax Officer (Luxury Tax)* - [(2012) 3 KLT 682] that unambiguously held that under the KTL Act, the charging section recognised the club as the person liable to luxury tax. The Division Bench therefore recognised the club as the person on whom the incidence of tax fell. Since the later division bench in *Lotus Club* did not find any cause for doubting the propositions laid down in *Trivandrum Club* and dismissed the appeal

[6] KTL Act

preferred by Lotus Club by following the decision in *Trivandrum Club*, we cannot read the observations of the Division Bench in *Lotus Club* as having laid down the proposition that the incidence of tax under the KTL Act is on the person enjoying the luxury and not on the „proprietor" who provides the luxury.

14. The reliance placed by the learned Government Pleader on the decisions in *Godfrey Philips India Limited* v. *State of UP* - [(2005) 2 SCC 515] and *State of Karnataka* v. *Drive-in Enterprises* - [(2001) 4 SCC 60] in support of his contention that the incidence of luxury tax is on the enjoyment of luxury and not on the providing of luxury is also misplaced. The said decisions considered the issue of legislative competence of the respective legislatures while imposing the levy of luxury tax. It was in that context that the Supreme Court found that the levy of luxury tax was on the enjoyment of the luxury and hence, even if the incidence of tax was on the „turnover of stock of luxuries" or on the „admission of cars/motor vehicles inside the drive in theatre", as the case may be, in pith and substance, the levy of tax was on a luxury and therefore within the competence of the respective legislatures to levy, as Entry 62 of List II under the Seventh Schedule to the Constitution authorised the levy of "*Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling*". To the same effect is the judgment of the Division Bench of this court in *Asianet Satellite Communications Ltd.* v. *State of Kerala* - [(2010) 3 KLT (SN 22) 29] as also the judgments of the Supreme Court in *Express Hotels and Purvi Communication* [supra]. The observations of the court in the said judgments cannot have the effect of altering the taxable event under the Kerala Tax on Luxuries Act, the charging provision of which is specific when it states that the levy of tax is on „luxury provided" meaning thereby that it is levied when the luxury is provided.

15. Similarly, the observation of the division bench of this court in *M/s. Madhavaraja Club* that the doctrine of mutuality is relevant only for the purposes of the Income Tax Act and is not apposite in the context of the KTL Act cannot be seen as laying down the correct law in the light of the subsequent judgment of the Supreme Court in *Calcutta Club Ltd.* where the doctrine of mutuality was held applicable in the context of legislations regulating the levy of indirect taxes such as VAT and Service Tax. We are of the view that the principle recognised in *Calcutta Club Ltd.*, that the absence of two distinct persons to a transaction viz. a supplier/provider of goods/services/amenities/luxuries and a recipient thereof, makes the

transaction a supply to oneself, which cannot be taxed under the statute, applies equally to the KTL Act which contemplates the levy of tax whenever a luxury is provided by one specified person to another.

16. We therefore find that the mutuality principle will apply to insulate the petitioner club from the levy of tax under the KTL Act, save under Section 4(2A) thereunder, on charges collected from its members for amenities provided to them. Since it is not in dispute that the petitioner club has paid the tax in terms of Section 4(2A) during the assessment years in question, we allow O.P. (Tax). No. 9 of 2016 and O.P. (Tax). No. 23 of 2016 by setting aside the orders of the Appellate Tribunal impugned therein and the orders of penalty passed against the petitioner under the KTL Act for the assessment years 2008-2009, 2009-2010, 2010-2011 and 20112012. We also allow W.A. No. 601 of 2021 by setting aside the judgment of the learned Single Judge in W.P(C). No. 2942/2021 and allowing the writ petition by quashing the assessment orders and first appellate orders passed against the appellant under the KTL Act for the assessment years 2014-2015, 2015-2016, 20162017 and 2017-2018. The assessing authority shall proceed to complete the assessment of the appellant club under the KTL Act for the aforesaid assessment years afresh by excluding that part of the turnover for the said years, as is covered by the mutuality principle discussed above. The assessing authority shall complete the said exercise within a period of three months from the date of receipt of a copy of this judgment."

24. We further note that in the said decision, it was the admitted position that Madhavaraja Club had deposited the tax as contemplated under Section 4 (2A) of the KTL Act and the challenge was to the demand of tax over and above the tax liability so created which it was called upon to deposit. The KTL Act in terms of Section 4 (2A) also envisaged a levy of a tax notwithstanding the principles of mutuality underlying the activities and facilities provided by a club.

25. However, and when one reverts to the facts of our case, it is evident that the Act as it stood during the assessment period in question extended its application also to the providing of residential

accommodation in a club and in any case did not at the relevant time exclude the provisioning of accommodation to members of a club from the expression "*luxury*". In fact, the word "*luxury*" did not even exist on the statute book prior to its insertion by virtue of the 2012 Amendment Act. In view of the above and bearing in mind the statutory position which prevailed at the time when the assessment orders came to be passed, we find no justification or ground to interfere with the ultimate conclusion arrived at by the first respondent.

26. Accordingly, while we uphold the impugned order and negative the challenge raised, we only observe that the decision of the Commissioner assailed before us shall not be liable to be treated as a precedent for any assessment period post the promulgation of the 2012 Amendment Act. Any assessments made or proceedings pending would have to be considered bearing in mind the observations rendered hereinabove.

YASHWANT

VARMA, J.

RAVINDER DUDEJA, J.

NOVEMBER 17, 2023
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