

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Junaid Ghaffar, J.
Agha Faisal, J.

CP D 7042 of 2018 : Karachi Golf Club (Private) Limited
vs. Province of Sindh & Others

CP D 7409 of 2018 : Karachi Club & Others vs.
Province of Sindh & Another

CP D 8302 of 2019 : Southend Club (Private) Limited
vs. Province of Sindh & Others

For the Petitioner/s : Mr. Jawaid Farooqui, Advocate
Mr. Omer Akhund, Advocate
Mr. Uzair Shoro, Advocate

For the Respondent/s : Mr. Saulat Rizvi
Assistant Advocate General

Mr. Uzair Karamat Bhandari, Advocate
Mr. Ghulam Murtaza Korai, Advocate

Mr. Zamir Khalid, Commissioner
S. Zain-ul-Abidin, Deputy Commissioner
Sindh Revenue Board

Date/s of hearing : 14.01.2021 & 28.01.2021

Date of announcement : 10.03.2021

JUDGMENT

Agha Faisal, J. The crux of this determination is whether membership / entrance fees and subscription charges (monthly and / or annual), received by *members' clubs*, from their members, fall within the purview of sales tax, per a synchronized reading of the Sindh Sales Tax on Services Act 2011 ("Act") with the *Doctrine of Mutuality*. The respective petitions were heard and reserved conjunctively and shall be determined vide this common judgment.

Factual context

2. The Act was promulgated post the Eighteenth Amendment to the Constitution and pursuant thereto clubs were required to collect / pay sales tax in respect of services being rendered to their members. It was *inter alia* pleaded¹ that private members' clubs, engaged in private recreational activity,

¹ Per the prayer clause in CP D 7409 of 2018.

fell outside the scope and ambit of the Act, read in conjunction with the *doctrine of mutuality*; hence, membership fees and subscription charges could not be considered taxable services.

Judicial history

3. A similar issue² was escalated before this Court, prior to the promulgation of the Act, in the *DA Club case*³, wherein it was held that clubs are not liable to pay sales tax on services in respect of fixed charges received by them on account of entrance fee, annual subscription, monthly subscription, staff bonus and gratuity.

4. The judgment in the *DA case* was challenged before the honorable Supreme Court⁴ wherein the respondents were granted permission⁵ to withdraw the very petitions, with permission to file afresh, in respect whereof the judgment in the *DA Club case* was delivered, in view of the fact that the said petitions had been instituted by the clubs themselves and not by the persons concerned recognized by law. In consequence of the foregoing, the august Court observed that the judgment in the *DA Club case* ceases to remain in the field.

5. The Sindh Revenue Board's ("Board") initial demand, raised in the year 2013, for tax was assailed⁶ before this Court and interim orders were rendered; however, the Suits were withdrawn in 2018. These petitions are articulated to have been actuated upon a fresh cause of action arising from demands made upon clubs in 2018, wherein sales tax has *inter alia* been levied upon subscription charges and entrance / membership fees.

Arguments of the learned counsel

6. It was articulated on behalf of the petitioners that clubs, qualifying within the domain of the *doctrine of mutuality*⁷, could not be encumbered with sales tax in respect of provision of services to their members. It was further contended that in any event subscription charges and memberships fees had

² Albeit in the somewhat analogous context of *Sindh Sales Tax Ordinance 2000*.

³ *Defence Authority Club Karachi & Others vs. Federation of Pakistan & Others* reported as 2007 PTD 398 ("*DA Club case*").

⁴ In Civil Appeals 1975 to 1980 of 2007.

⁵ Vide Order dated 28.10.2009.

⁶ *Inter alia* in Suits 166 of 2013 and 1325 of 2013 ("*Suits*").

⁷ Reliance was placed upon Division Bench judgment of this Court dated 02.03. 2016 in *ITR 455 of 1990 Sind Club vs. Commissioner Income Tax ("Sind Club")*, *Bangalore Club vs. Commissioner Income Tax & Another* reported as (2013) 5 Supreme Court Cases 509 ("*Bangalore Club*") and *The Joint Commercial Tax Officer Harbour Division-II Madras vs. The Young Men's Indian Association Madras & Others ("YMCA")*.

no nexus with the provision of any distinct services; hence, any demand of the Board in such regard was unsanctioned in law.

7. The case of the respondents⁸ was that the petitioners have merely assailed the valuation process and not the charging provision, hence, no case was made out to eschew the statutory adjudication process⁹. It was submitted that a club provides services, irrespective of whether they are packaged or distinct, therefore, no case was made out to exclude any packaged services from the ambit of the Act. It was stressed that even membership / entrance fee was charged to confer the privilege to avail the services of a club, hence, the same could not be immune from the purview of sales tax¹⁰.

8. We have appreciated the submissions of the learned counsel and considered the documentation and authority to which our surveillance was solicited. The scope of this determination is condensed¹¹ to consider whether membership / entrance fee and subscription charges (monthly and / or annual), received by *members' clubs* from their members, fall within the purview of sales tax, per a reading of the Act synchronized with the *doctrine of mutuality*.

Issue of maintainability

9. It is imperative to reiterate at this juncture that an earlier Division Bench of this Court had held in the *DA Club case*¹² that clubs could not be encumbered with sales tax on services; in respect of fixed charges received by them on account of entrance fee, annual subscription, monthly subscription, staff bonus and gratuity. The *lis* was deemed maintainable, hence, the findings were rendered on merit and the judgment was vitiated solely on account of the petitions not having been preferred by the appropriate persons; and not otherwise.

⁸ Articulated by Mr. Uzair Karamat Bhandari Advocate and adopted by the learned Assistant Advocate General.

⁹ *PLD 1961 Supreme Court 119; 2010 PTD 2018; 2018 PTD 1869.*

¹⁰ Reliance was placed upon *Trewby vs. Customs & Excise Commissioners* reported as [1976] 2 All ER 199; *Customs & Excise Commissioners vs. British Field Sports Society* reported as [1998] 2 All ER 1003; *Eastborne Town Radio Cars Association vs. Customs & Excise Commissioners* reported as [2001] 2 All ER 597 (HL); *Kennemer Golf & Country Club vs. Staatssecretaris van Financien* reported as [2002] 2 All ER (EC) 480; *v Tumble Tots (UK) Limited vs. Revenue Commissioners* reported as [2007] 2 EWHC 103 (Ch); *Revenue & Customs Commissioners vs. Esporta Limited* reported as [2007] EWCA Civ 155; *Halle Concert Society vs. Revenue & Customs Commissioners* reported as [2016] UKFTT 294 (TC); *Shanklin Conservative & Unionist Club vs. Revenue & Customs Commissioners* reported as [2016] UKFTT 135 (TC).

¹¹ Per *Saqib Nisar J as he then was* in *LDA & Others vs. Imrana Tiwana & Others* reported as 2015 SCMR 1739 – “Court should abstain from deciding a Constitutional question, if a case could be decided on other or narrower grounds; Court should not decide a larger Constitutional question than was necessary for the determination of the case”.

¹² *Defence Authority Club Karachi & Others vs. Federation of Pakistan & Others* reported as 2007 PTD 398 (“DA Club case”).

10. It is settled law that a petition is maintainable where important questions of interpretation of law are raised¹³; more so if the highest authority has expressed its opinion, so resort to statutory remedies is illusory¹⁴. In the present facts and circumstances there appears to be an important question of law, as deemed so in the *DA Club* case, and even otherwise the highest authority, being the Board, has already expressed its opinion¹⁵, supporting the levy of tax in respect of membership fee and subscription charges *inter alia* in respect of *members' clubs*.

11. It is, thus, apparent that since the revenue authority has already interpreted the issue under consideration; therefore, the reliance upon authority, deeming resort to statutory remedies as illusory, is merited and duly found to be applicable to the present facts and circumstances. In view of the foregoing, it is observed that the present petitions are maintainable and warrant determination upon their respective merits.

*Club*¹⁶

12. The term *club* denotes an association of individuals in a manner that involves the factors of free choice (which connotes a power of exclusion), permanence, corporate identity and the pursuit as a common aim of some joint interest; other than the acquisition of gain. Historically, there has been a tendency for individuals, of the same tastes or cultural or sporting interests, to join together for the enjoyment of one another's company, or to facilitate the pursuit of their mutual interests. The same people may associate with regularity to display the characteristics of permanence and corporate identity, as well as a common interest and the power of exclusion; however, it is imperative to analyze the nature of such associations in order to classify them as *clubs*, as the nature of a *club* is to be governed by such classification. Broadly speaking a *club* may be classified as a *members' club* or a *proprietary club*. The basic variance *inter se* is that clubs wherein the ownership and management vests in the hands of the members themselves are termed as *members' clubs* and those owned / controlled, to a greater or lesser degree, by a proprietor, are called *proprietary clubs*.

¹³ *Usmani Glass v. STO*, reported as *PLD 1971 SC 205*; *Dewan Cement v. Pakistan*, reported as *2010 PTD 1717*; *Filters Pakistan v. FBR*, reported as *2010 PTD 2036*; *Shahnawaz Ltd. V. Pakistan*, reported as *2011 PTD 1558*; *Engro Vopak v. Pakistan*, reported as *2012 PTD 130*; and *Association of Builders v. Sindh*, reported as *2018 PTD 1487*

¹⁴ *Julian Hoshang Dinshaw Trust v. ITO*, reported as *1992 SCMR 250*; *Khyber Electronic Lamps v. Collector*, reported as *1996 CLC 1365*; *Collector v. SH Ahmed*, reported as *1999 SCMR 138*; *Attock Cement v. Collector*, reported as *1999 PTD 1892*; *Pak Land Cement v. CBR*, reported as *2007 PTD 1524*; and *Iqbal Hussain v. Pakistan*, reported as *2010 PTD 2338*

¹⁵ Circular no. 1 of 2012 dated 14.02.2012, issued by the Sindh Revenue Board and referenced SRB.COM-II/Clubs/1/3033/2012; particular reference is made to the recital and clause iv thereof.

¹⁶ *Daly's Club Law* by J. N. Martin, O.B.E.; Seventh Edition.

Members' Club

13. The salient feature of a *members' club* is that the association undertaken creates rights and liabilities between one member and another. Such rights and liabilities are based primarily on the law of contract; and to a lesser degree on the law of tort. Rights and liabilities affecting the relationships and behavior of club members *inter se*, so far as they depend on contract, appear to be inseparable from joint rights to the enjoyment of property, and to arise immediately a jointly owned fund is established by the payment of subscriptions or when a new member adds his contribution to that fund. The subscription of each member to this joint fund is the consideration in a contract made with all the other members. In return for the consideration the member becomes entitled to whatever rights are agreed upon at the time the contract is ventured into.

14. A *members' club* is usually established by virtue of a resolution, by persons wishing to establish a club, embodying the decision to bring the club into being. Pursuant thereto arises the necessity to deal with certain subsidiary matters; being the scope of the activities of the club, arrangements for its management, eligibility for membership and rights, duties and liabilities of members. In view of the contractual relationship between members, it is desirable for the intentions of the club in these matters to be embodied in written rules.

15. The rules usually provide for the constitution of a committee of management and the election of officers for the functioning of the club, and for that purpose should deal with such ancillary matters as procedure for nomination and election, terms of office, filling of vacancies and anything else that appears necessary. There may be more than one committee, each charged with different functions, and each elected by the club in general meeting, or the management committee may be empowered to set up sub-committees. The rules define the functions and responsibility of each committee, or, in the case of sub-committees, set whatever limits may be appropriate upon the main committee's power of delegation. The extent of these rules will vary, but they ought to provide for the determination of any conflict that could arise between members and for the authorization of any action that any member or servant of the club may need to take on its behalf. It is considered paramount for such rules to contain a mechanism for their variation from time to time.

16. The *inter se* dispute resolution mechanism of a members' club is essentially a domestic matter and it has been held¹⁷ that Courts would not interfere unless it is demonstrated that the rules were opposed to natural justice and / or were not followed; there was manifest malice or *mala fides* in arriving at a decision; and / or the principles of natural justice were ignored. *Wahiduddin Ahmed J (as he then was)* maintained that barring the presence of the aforesaid ingredients, no jurisdiction could be assumed by a civil court in disciplinary matters of a club. The aforementioned *ratio* was maintained in a subsequent pronouncement of this Court, being *Jahangir Moghul*¹⁸, however, jurisdiction was assumed by the court as an ultimate arbiter of questions of law¹⁹, predicated upon a substantiated assertion that interpretation of the relevant rules was being undertaken in a manner dissonant with the law.

Proprietary Club

17. A proprietary club is also rested on a contractual relationship; however, the same is between a proprietor and each individual member. There are many variations in the nature of proprietary clubs; some being manifestly similar to *members' clubs* and others being purely commercial enterprises, in which the members are customers of the proprietor. In either case the management of the club is a business activity carried on by the proprietor, irrespective of any rules enabling the members themselves to exercise some degree of control in such regard. The rights and liabilities in such clubs are a matter of contract; however, such a contract is not between the members *inter se*, but between each individual member and the proprietor.

18. The only requisite for the establishment of a proprietary club is the enrolment by a proprietor of those who accept the conditions of membership offered to them. These conditions may include an agreement by the proprietor to allow some degree of control by the members of the running of the club. However, irrespective of the powers delegated / divested by a proprietor to members, the essential difference in character between such a club and a *members' club* remains unaffected; i.e. the legal rights and obligations are matters between the proprietor and each individual member and not between the members *inter se*. In such clubs a proprietor usually retains the power to make or vary rules, or at least a power of veto over any rules proposed by members in exercise of such authority as he may have delegated to them; regardless of whether this is an overt and declared right of the proprietor or

¹⁷ Per *Wahiduddin Ahmed J (as he then was)* in *D M Malik vs. Jockey Club of Pakistan & Others* reported as *PLD 1960 (West Pakistan) Karachi 325*; cited with approval.

¹⁸ Per *Munib Akhtar J* in *Jahangir Moghul & Others vs. Karachi Gymkhana* reported as *2012 CLC 1829*.

¹⁹ Reliance was placed upon *Baker vs. Jones* reported as *[1954] 2 All ER 533* and *Lee vs. Showmen's Guild of Britain* reported as *(2) [1952] 1 All ER 1181*; authored by *Denning L.J. (as he then was)*.

one ensured by a power retained by him to appoint his own nominees to the majority of seats on the committee.

19. In summation, the basic difference between a *members' club* and a *proprietary club* is that the former is characterized by a contractual relationship between the members *inter se*, whereas the latter is characterized by a contractual relationship between each member and the proprietor.

Doctrine of mutuality

20. The *doctrine of mutuality* is the principle which obligates an association of persons who are agreed *inter se*, not to derive profits or gains but to achieve, through their mutual contributions, a purpose or benefit in which all members should participate or would be entitled to do so. Its cardinal requirement is that all the contributors to the common fund must be entitled to participate in the surplus and that all the participants in the surplus must be contributors to the common fund; in other words, there must be complete identity between the contributors and the participators.²⁰

21. The concept is based on the fact that there must be the existence of an association of persons joined together to achieve a common objective by mutually contributing to the same with an absolute and clear mind not to earn any profits or gains. Its essential elements are required to be: an association of people / members; a common cause; every member makes his contribution, and all the contributors to the common fund must be entitled to participate in the surplus and that all the participators in the surplus are contributors to the common fund; the aim is not to earn profits; and there must be complete identity between the contributors and the participators.²¹

22. In contemporary law, the United Kingdom recognizes this doctrine not as a judicial theory but regulated by command of the constitution and statutory provisions of the Law Reports Act, 1875; with the force of the principles of *stare decisis* under constitutional command.²² While the United Kingdom, where the doctrine was first established by the courts, still relies significantly on common law; the United States, New Zealand and Canada have incorporated the doctrine in their regulatory framework. The approach adopted in the United States and Canada has been to remove the complexity of the mutuality principle by considerably reducing its application through the

²⁰ *Commissioner of Income-Tax Punjab And N.-W. F. Provinces v. (Messrs) The Lyallpur Central Co-Operative Bank Ltd.* reported as PLD 1959 (W. P.) Lahore 627; *B. Z. Kaikaus & Muhammad Yaquab Ali, JJ.*

²¹ *Glasgow Corporation Waterworks Acts v. IRC (1875) ITC 28*

²² Dr Ikramul Haq | Huzaima Bukhari, *Taxation: Doctrine of mutuality*, 27 Nov 2020, available at: <https://www.brecorder.com/news/40035720>.

introduction of threshold requirements; that must be satisfied before the principle can apply.

23. Australia still relies on the common law application of this doctrine; however, there appears to be progression towards statutory codification predicated *inter alia* upon the following principles: the members must share a common purpose; the common fund gives effect to the common purpose; the members have ownership and control of the common fund at all times; the contributors to the common fund are the only participants in the fund; the membership interests in the common fund may consist of different classes; the mutual relationship is for the collective benefit of all the members; the members may receive ancillary benefits; the membership interests in the common fund cannot be sold or transferred; surplus funds may be distributable to the members on a proportional basis; and that the constitution of the mutual entity may include non-profit clauses.

24. The applicability of this doctrine in taxation matters is a prominent common law (and statutory in some jurisdictions) concept based on the maxim that a person's income consists of funds derived from external sources and taxability is impermissible if the funds are derived from internal sources or collected for the benefit and concern of the contributors of funds. This is often applied fully or in part to the activities of *members' clubs*, associations, sporting and pastime organizations, as well as cooperatives.²³ The essence of this doctrine, in nexus with taxation matters, denotes that receipts that fall within the purview thereof are exempt from taxation since monies derived from oneself cannot be subjected to taxation.²⁴

25. There is ample commonwealth authority on the nexus of the *doctrine of mutuality* with taxation, some of which has been collated and delineated herein below:

- i. In the *Chelmsford Club case*²⁵, the Supreme Court of India ruled that the club provides services to its members and their guests exclusively for recreation and refreshment, not to non-members. What the members pay so they get services in return with no profit or loss and surplus, if any, is used for maintenance and development of the Club. The principle of mutuality applies in such circumstances.

²³ Love, Natalie. (in press) The Relevance of the Mutuality Principle within the Non-profit Sector, Third Sector Review, Vol 13 (1) 2007; accessed from <http://eprints.qut.edu.au> and also available at <https://eprints.qut.edu.au/6114/1/6114.pdf> accessed on 22-02-2021.

²⁴ Abhirup Ghosh, Principle of Mutuality - A Study, KIIT University - KIIT School Of Law, April 26, 2011, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1823644.

²⁵ *Chelmsford Club vs. Commissioner of Income-tax*, reported as [2000] 109 TAXMAN 215 (SC).

ii. In the *Bankipur Club Case*²⁶, the Supreme Court of India held that the club only provides refreshments to its members; outsiders were not allowed; the undertaking is not conducted with the motive of earning profit, hence, not tainted with commerciality. The members pay the monthly subscription and besides, they enjoy the benefit of this privilege of supply of refreshments to them on additional payment and so, there is no profit-earning motive. The Principle of Mutuality was applicable.

iii. In the *Delhi Race Club case*²⁷, the court ruled that members were entitled to free entrance to the enclosure, by membership, enjoying club amenities and facilities. That free admission in the enclosures enjoyed by the members was nothing more than a mere privilege referable to their membership without there being a profit-earning motive. The entrance fees and periodical subscriptions paid by the members for obtaining membership of the club, which remained payable even if the racing was stopped or suspended, could not be said to be received out of any profit motive, there was complete identity between the contributors and the participators; hence, the doctrine of mutuality was attracted.

iv. In the *case of J.K. Organization*²⁸, the Allahabad High Court held that the entity had been formed to promote and protect the interest of its members and it also provided that upon dissolution the surplus shall be distributed amongst the members of the organization; based on their contribution. There was no finding that the organization was catering to the need of any outsider. Principle of mutuality was fully applicable.

v. In the *Merchant Navy Club case*²⁹, the High Court of Andhra Pradesh held that supplies made by a club to its members for a price was not a sale for profit and that the club in such cases is only acting as an agent of the members for making supplies thereto.

vi. In the *Presidency Club case*³⁰, the High Court of Madras held that the functioning of a club did not constitute a trade or business but amounted merely to organizing a social activity confined to its members.

²⁶ *Commissioner of Income-tax vs. Bankipur Club Ltd* reported as [1997] 092 TAXMAN 278 (SC).

²⁷ *Commissioner Of Income-Tax, Delhi And Rajasthan v. Delhi Race Club* reported as (1940) LTD.1973 PTD 11 [Delhi (India)]; S. K. Kapur and P. N. Khanna, JJ.

²⁸ *Commissioner of Income-tax v. J.K. Organization* reported as [2005] 144 TAXMAN 560 (ALL.)

²⁹ *Commissioner of Income Tax A.P. vs. Merchant Navy Club* reported as (1974) 96 ITR 261.

³⁰ *The Presidency Club Limited vs. Commissioner of Income Tax Madras* reported as (1981) 127 ITR 264.

26. The development of this facet of law in Pakistan remains fractional because of the intermittent nature of cases and unique factual situations, as is usual with common law development. The concepts that underlie the application of the mutuality principle have been addressed in isolation, based on the specific legal arguments raised in particular court cases. A pioneering pronouncement of Pakistan's jurisprudence in this arena was the Division Bench judgment of this Court in the *Sind Club case*³¹, wherein it was maintained, after sifting through a plethora of commonwealth authority, that nobody could make profit out of oneself, therefore, the doctrine of mutuality precluded the qualifying receipts of the club from the ambit of taxation. The pronouncement in the *Chelmsford Club case*³² was cited with approval.

27. It is, therefore, observed that the *doctrine of mutuality* is a judicially recognized set of principles applicable in taxation matters of *members' clubs*.

Synchronization with the Act

28. Section 3³³ of the Act defines taxable services *inter alia* as services provided in the course of an economic activity. Economic activity has been defined in Section 4³⁴ of the Act and specifically excludes private recreational pursuits. It is thus to be deliberated whether services rendered to its members by a *members' club* falls within the remit of economic activity and consequently taxable services.

29. The commonwealth authority cited supra primarily relates to the apportionment / assessment of income tax in respect of *members' clubs*; however, the applicability of the *doctrine of mutuality* in such regard is not borne of statute. On the contrary the *doctrine of mutuality* has been held to apply to *members' clubs* and the application thereof has been manifest in income tax matters seized in the respective jurisdictions. We have not been assisted with any law that circumscribes the application of the *doctrine of mutuality*, in respect of *members' clubs*, solely to matters of income tax.

30. The proposition to deliberate is that if monies generated from members, by a *members' club*, are entitled to exclusionary treatment for the purposes of income tax then would the same principle be attracted to services rendered by

³¹ *Sind Club vs. CIT South Zone Karachi (ITR 455 of 1990)*; judgment dated 02.03.2016.

³² *Chelmsford Club vs. Commissioner of Income-tax*, reported as [2000] 109 TAXMAN 215 (SC).

³³ Taxable Service. (1) A taxable service is a service listed in the Second Schedule to this Act, which is provided: (a) by a registered person from his registered office or place of business in Sindh; (b) in the course of an economic activity, including in the commencement or termination of the activity...

³⁴ Economic activity.-- (1) An economic activity means any activity carried on by a person that involves or is intended to involve the provision of services to another person ... (3) An economic activity does not include...(b) a private recreational pursuit or hobby of an individual...

a *members' club*, to its members, pursuant whereof the very revenue is generated to which exclusionary status is granted for purposes of income tax.

31. The structure of the doctrine rests upon three primary pillars, in the light of judicial interpretation from time to time³⁵, being: the absence of commerciality; presence of complete identity between the contributor and the participant; and impossibility for the contributors to derive profit from activity, where they are the contributors as well as the recipients of the funds. The satisfaction of such criteria leads to exclusionary treatment of income, for the purposes of income tax, and in our considered opinion the application of the doctrine would extend to the very services rendered for generating of such income.

32. It has already been discussed supra that supplies made by a *members' club* to its members do not qualify as economic activity as the club is merely acting as an agent of the members for making supplies thereto³⁶. This judicially recognized application of the *doctrine of mutuality* squarely precludes services provided by a *members' club*, to its members, from the ambit of economic activity, and consequently taxable services, as envisaged per the Act.

33. It has also been discussed that the generic nature of functioning of a *members' club* amounts to organizing a social activity confined to its members³⁷. This is synonymous with the exclusion contained in the Act, per section 4(3)(b)³⁸ thereof, which exempts private recreational pursuits from the ambit of economic activity, taxable per the Act.

34. In order to reconcile the *doctrine of mutuality* with the Act, it is observed that a service may only be considered taxable if it is rendered in the course of economic activity and the statutory definition of economic activity does not encompass rendering of services to oneself. In the context of income tax the doctrine is *inter alia* applied when there is complete identity between the contributor and the participant; whereas, in the analogous context of sales tax on services the doctrine may apply when there is a confluence of identity between the provider and the recipient of the service; generating the very income that is excluded from the purview of tax pursuant to the *doctrine of mutuality*.

³⁵ Abhirup Ghosh, Principle of Mutuality - A Study, KIIT University - KIIT School Of Law, April 26, 2011, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1823644.

³⁶ *Commissioner of Income Tax A.P. vs. Merchant Navy Club* reported as (1974) 96 ITR 261.

³⁷ *The Presidency Club Limited vs. Commissioner of Income Tax Madras* reported as (1981) 127 ITR 264.

³⁸ An economic activity does not include... (b) a private recreational pursuit or hobby of an individual...

35. In view of the mutualized reading of the *doctrine of mutuality* with the Act, as observed supra, it would be pertinent to read tariff heading 9801.4000³⁹ of the First Schedule to the Act as excluding the services rendered by *members' clubs* to its members.

Even otherwise the First Schedule of the Act has its genesis in section 2(79) of the Act, the definition clause wherein services are defined. After having observed that the charging section of the Act, read with the *doctrine of mutuality*, does not encumber services, rendered by a *members' club* to its members, within the ambit of taxable services, hence, a tariff heading, originating per the definition clause, could not override the charging section of the Act itself.

36. It is in the same context that the definition of club, per section 2(22)⁴⁰ of the Act has to be considered. While the said definition is phrased to include membership fee and subscription charges etc., the mere definition cannot be read to override the charging section of the Act, read supra in conjunction with the *doctrine of mutuality*. It is trite law that a definition given in a statute should be so construed as not to be repugnant to the context⁴¹ and any definition by itself does not create any charge or liability⁴².

37. Rule 42(2)(a) of the Sindh Sales Tax on Services Rules 2011 ("Rules") also envisages the inclusion of membership fee and subscription charges within the ambit of taxable services; however, in the light of the discussion supra that said rule has to be read to exclude the same in the instance that the same are received by *members' clubs* from their members. Since the Act in itself has been interpreted to exclude the taxability of membership fee and subscription charges, in the context of *members' clubs*, therefore, no interpretation can be given to the subordinate rules exceeding the remit of the statute itself.

³⁹ Services provided or rendered by clubs.

⁴⁰ "club" includes a membership club and a proprietary club and means a person, a body of persons, an establishment, an organization or a place, the membership of which is restricted to a particular class of people or which is run on the basis of mutuality or otherwise and provides various services, facilities, utilities or advantages for an amount of fee, consideration, subscription or charges, including those for initial membership, whether or not it provides food or drinks or has any arrangement for boarding or lodging or games.

⁴¹ Per *Mian Saqib Nisar J (as he then was) Chairman Federal Board of Revenue vs. Al Technique Corporation of Pakistan Limited* reported as *PLD 2017 Supreme Court 99* – "It is settled that a definition clause is foundational when construing provisions of law. The definition given in the Act should be so construed as not to be repugnant to the context and would not defeat or enable the defeating of the purpose of the Act. It must be read in its context and the background of the scheme of the statute and the remedy intended by it."

⁴² *Suresh Kumar v Fed of Pakistan* reported as *PLD 2020 Sindh 62* – "It may be observed that the definition clause in any enactment or Ordinance by itself does not create any charge or liability nor does it provide for any exemption or concession against such charge or liability, whereas, it only defines or explains the various legal terms for the purposes of ease and reference to other provisions of such enactment."

Membership / entrance fee

38. It is in the milieu of this deliberation that we now proceed to consider the taxability of membership / entrance fee. The said fee is paid at the time that a person is inducted as a member of a club. Notwithstanding the discussion supra, the said fee is in any event exclusive of any services that may be rendered as a consequence of membership. In terms of bookkeeping entries, the monies are treated as equity, not as revenue, and are shown in the capital account. It was articulated before us that in so far as *members' clubs* are concerned the fund so collected is expended on development and capital expenditures and the surplus remains in the capital account of the club. The respondents' counsel⁴³ had accepted the distinct nature of this fee and admitted that the same merely entitles a member to the privilege of membership.

39. Therefore, the very nature of this fee *prima facie* excludes it from the purview of fees for services, in so far as *members' clubs* are concerned. This observation is supplemented by application of the *doctrine of mutuality* and it has been held⁴⁴ that entrance fees paid by the members for obtaining membership of a members' club could not be said to be received out of any profit motive; hence, the *doctrine of mutuality* was attracted. Therefore, this fee cannot be considered taxable within meaning of the Act.

Subscription charges (monthly and / or annual)

40. The subscription charge, monthly or annual, is an aggregate fee paid periodically to encompass entitlement to the facility of indistinct benefits. This amount is payable irrespective of whether the respective facilities are availed or otherwise. In the context of *members' clubs* this charge remains in respect of entitlement to benefits envisaged to be rendered to oneself; as there is a confluence of identity between the provider and the recipient of the benefit. Therefore, these charges as well can also not be considered taxable within meaning of the Act.

Conclusion

41. It is the considered view of this Court that membership / entrance fees and subscription charges, obtained by *members' clubs* from their members, do not constitute monies generated from economic activity and do not accrue out

⁴³ Mr. Uzair Karamat Bhandari Advocate.

⁴⁴ *Commissioner Of Income-Tax, Delhi And Rajasthan v. Delhi Race Club* reported as (1940) LTD.1973 PTD 11 [Delhi (India)]; *S. K. Kapur and P. N. Khanna, JJ.*

of rendering of any taxable service, per the interpretation of the relevant provisions of the Act; hence, fall outside the purview of the Act.

42. The Circular⁴⁵ issued by the Board, encumbering clubs covered by the *doctrine of mutuality* with the burden of taxability per the Act, is dissonant with the law, to the extent of *members' clubs*.

43. Rule 42(2)(a) of the Rules cannot be read to impose tax liability upon *members' clubs*, since the same is not borne out from reading of the Act and in any event no rules can be interpreted to exceed the mandate of the parent statute.

44. While the ambit hereof is confined to relevance of the Act to *members' clubs*, it appears that the petitioner in CP D 8302 of 2019 falls within the definition of a proprietary club⁴⁶. The petitioner⁴⁷ in CP D 7042 of 2018 and the petitioner numbers 6⁴⁸ and 7⁴⁹ in CP D 7409 of 2018 also seem to fall in the same category. While this would essentially be a question of fact, resolution whereof is unmerited in writ jurisdiction, such persons would remain at liberty to seek adjudication in such regard by the Sindh Revenue Board in proceedings initiated vide the respective show cause notices issued thereto, or otherwise. However, for the present purposes the relief granted herein would not extend to the said persons.

45. In view of the reasoning and rationale herein contained, the present petitions are disposed of in terms delineated herein below:

- a. It is hereby declared that membership / entrance fees and subscriptions charges (monthly and / or annual), obtained by *members' clubs* from their members, do not fall within the purview of sales tax, per a reading of the Act synchronized with the *doctrine of mutuality*.
- b. The Sindh Revenue Board does not have the legal sanction to recover any amounts from *members' clubs*, in respect of activities covered by the *doctrine of mutuality*, and any show cause / demand

⁴⁵ Circular no. 1 of 2012 dated 14.02.2012, issued by the Sindh Revenue Board and referenced SRB.COM-II/Clubs/1/3033/2012.

⁴⁶ As denoted from paragraph 1 of the relevant memorandum of petition.

⁴⁷ Stated to be a private limited company with nothing pleaded and / or articulated to demonstrate its qualification as a *members' club*.

⁴⁸ Stated to be a private limited company with nothing pleaded and / or articulated to demonstrate its qualification as a *members' club*.

⁴⁹ Even though the said petitioner is an authority, and not a club, however, ostensibly seeks relief for the clubs under its ownership, management and control.

notices⁵⁰, or constituents⁵¹ thereof, issued to *members' clubs* in such regard are hereby set aside.

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⁵⁰ *Usmani Glass v. STO*, reported as *PLD 1971 SC 205*; *Dewan Cement v. Pakistan*, reported as *2010 PTD 1717*; *Filters Pakistan v. FBR*, reported as *2010 PTD 2036*; *Shahnawaz Ltd. V. Pakistan*, reported as *2011 PTD 1558*; *Engro Vopak v. Pakistan*, reported as *2012 PTD 130*; and *Association of Builders v. Sindh*, reported as *2018 PTD 1487*.

⁵¹ *Engro Vopak v. Pakistan*, reported as *2012 PTD 130*; *Standard Chartered Bank v. Pakistan*, reported as *2017 PTD 1585*; and *Asia Petroleum v. Pakistan*, Unreported (*CP D 2559 of 2009 & Others*).