IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

VATAP No. 78 of 2014 (O&M)

Date of Decision: 12.10.2015

Central Phoenix Club, Ambala Cantt.

....Appellant.

Versus

The State of Haryana

...Respondent.

1. Whether the Reporters of the local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MR. JUSTICE RAMENDRA JAIN.

PRESENT: Mr. Avneesh Jhingan, Advocate for the appellant.

Ms. Mamta Singla Talwar, DAG, Haryana with
Mr. Saurabh Mago, AAG, Haryana.

AJAY KUMAR MITTAL, J.

1. This order shall dispose of three appeals bearing VATAP Nos. 78 to 80 of 2014 as according to the learned counsel for the parties, the factual and legal issues involved therein are identical. For brevity, the facts are being extracted from VATAP No. 78 of 2014.

2. VATAP No. 78 of 2014 has been filed by the assessee under Section 36 of the Haryana Value Added Tax Act, 2003 (in short “the Act”) against the order dated 11.12.2012 (Annexure A-3) passed by the Haryana Tax Tribunal, Haryana, Chandigarh (hereinafter referred to as “the Tribunal”) claiming the following substantial questions of law:-

(i) Whether in the facts and circumstances of the case, the assessing authority had jurisdiction to frame assessment in absence of any transfer order communicated to the appellant as per Rule 7(5) of HVAT Rules?

(ii) Whether in the facts and circumstances of the case, the appellant being a member's club fall within the ambit of definition of dealer under the HVAT Act?

(iii) Whether in the facts and circumstances of the case, the appellant club is liable to be registered under HVAT Act and it supply of food, drinks etc. to its members can be taxed?

(iv) Whether in the facts and circumstances of the case, the Tribunal in not following the decisions of various Courts including the Apex Court has not acted in contravention of judicial indiscipline?

(v) Whether in the facts and circumstances of the case, the order of assessment which is based upon a wrong fact and over ruled judgment the same can be upheld?

(vi) Whether in the facts and circumstances of the case, the finding of the Tribunal holding that there is no principle of mutuality in case of the appellant is not perverse?

3. Briefly stated, the facts necessary for adjudication of the instant appeal as narrated therein may be noticed. The revenue initiated

assessment proceedings against the dealer for the years 2003-04, 2004-05 and 2005-06 to which the appellant filed reply. The assessing authority vide assessment order dated 23.8.2006 (Annexure A-1) levied tax and created demand of ₹ 6,50,528/-. Feeling aggrieved, the assessee filed an appeal before the Commissioner (Appeals) who vide order dated 3.1.2008 (Annexure A-2) dismissed the appeal. Still dissatisfied, the assessee filed an appeal before the Tribunal. The Tribunal vide order dated 11.12.2012 (Annexure A-3) upheld the findings of the Commissioner (Appeals) and dismissed the appeal. Hence, the present appeal.

4. We have heard learned counsel for the parties and perused the record.

5. Learned counsel for the appellant-dealer submitted that the authorities below were in error in deciding the issue against the appellant. It was urged that the Rules and Memorandum of Association of the club shows that it is only the members and their dependents who are permitted to visit the club and use the facilities. It was argued that the onus was upon the Department to produce instances of supply of food etc. to non-members so as to bring the appellant-club within the ambit of the Act which it had failed to do so. It was not disputed that tax could be levied if facility was provided to the non-members or their dependents, guests etc. On the aforesaid premises, the orders of the authorities below were assailed. Learned counsel for the appellant contended that the assessing authority while passing the assessment order had relied upon the decision of Tamil Nadu Taxation Tribunal in **Cosmopolitan Club v. State of Tamil Nadu and others (1999) 115 STC 183 (TNTST)** which was upheld by the Madras High Court in **(2002)**

127 STC 475 (Mad). However, the Apex Court in **Cosmopolitan Club v. State of Tamil Nadu and others (2009) 19 VST 456 (SC)** had set aside the said decision of Madras High Court while considering the identical issue as to whether supplies of food and drinks to its members involved any element of sale. Further, under similar circumstances the Supreme Court had remanded the case for reconsidering finding of fact regarding the relationship between the club and its members in the matter of supplying food and drinks viz., whether the club was acting as an agent of the members or whether the property in the food and drinks passed from the club to its members. Learned counsel for the appellant argued that in such circumstances, the matter requires to be remanded to the Assessing Officer to re-adjudicate the issue by recording a definite finding relating to the items provided to the members and non-members separately and thereafter, in case it is found that the entire facilities were provided to the members only no amount was exigible to tax and in case the Assessing Officer on the basis of the material records a finding that the appellant had been entertaining the non-member as well, it could levy tax only on that amount which was provided to the non-members.

6. Learned State counsel could not refute the aforesaid submissions.

7. After hearing learned counsel for the parties and in view of the above, we find force in the submission of learned counsel for the appellant. Accordingly, we set aside the orders passed by the authorities below and remand the matter to the Assessing Officer to re-adjudicate the matter to examine the issue and record a definite finding relating to the items provided to the members and non-members and their exigibility to tax. The Assessing Officer shall pass fresh order in

accordance with law after affording an opportunity of hearing to the appellant-dealer or its representative. The substantial questions of law stand answered accordingly.

8. As a result, the appeals are disposed of.

(AJAY KUMAR MITTAL)
JUDGE

October 12, 2015
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(RAMENDRA JAIN)
JUDGE