

**IN THE INCOME TAX APPELLATE TRIBUNAL DELHI**

**(DELHI BENCH 'D' : NEW DELHI)**

**BEFORE SH. R. K. PANDA, ACCOUNTANT MEMBER**

**AND**

**SH. ANUBHAV SHARMA, JUDICIAL MEMBER**

**ITA No.6703/Del/2015, A.Y. 2008-09**

**ITA No.5760/Del/2015, A.Y. 2009-10**

**ITA No.5759/Del/2015, A.Y. 2010-11**

**ITA No.530/Del/2016, A.Y. 2011-12**

Dy. Commissioner of Income Tax, Circle – 1(2)(2), (Intl. Tax.) New Delhi	Vs.	M/s. Deloitte Touche Tohmastu 7 <sup>th</sup> Floor, Building No. 10 Tower-B, DLF Cyber City Complex, DLF-Ph-II, Gurgaon, Haryana-122002 PAN : AADCD2358N
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

**Cross Objection no. 182/Del/2016 , A.Y. 2011-12**

**(Arising Appeal No. 530/Del/2016)**

M/s. Deloitte Touche Tohmastu 7 <sup>th</sup> Floor, Building No. 10 Tower-B, DLF Cyber City Complex, DLF-Ph-II, Gurgaon, Haryana-122002 PAN : AADCD2358N	Vs.	Dy. Commissioner of Income Tax, Circle – 1(2)(2), (Intl. Tax.) New Delhi
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

Revenue by	Ms. Anupama Anand, CIT-DR
Assessee by	Shri Percy Pardiwalla, Sr. Adv. , Ketan Ved, Adv. Mayur Kapoor, CA, Ms. Ekta Chopra, Ca & Ashish R. Safi, CA

Date of hearing :	23 .03.2022
Date of Pronouncement :	11 .04.2022

## **ORDER**

### **PER ANUBHAV SHARMA, JM:**

The revenue has filed the four appeals, in hand, for the assessment years 2008-09, 2009-10, 2010-11 & 2011-12 while cross objections have been filed by the assessee in response to appeal of the revenue for the assessment year 2011-12. The revenue has challenged the orders of Ld. CIT(A)-42, New Delhi ( hereinafter also referred as Ld. FAA) whereby the appeals of the assessee were allowed.

1.1 The facts in brief are that, the case of the assessee was selected for scrutiny. The assessee had challenged jurisdiction of AO during the assessment year 2008-09 on the ground that jurisdiction for assessment in its case lies in Mumbai. However, the AO had passed the assessment order by holding that jurisdiction of the AO was applicable as assessee had not contended that no source of income was in Delhi. Same was followed in subsequent years. Before the Ld. FAA, the assessee had submitted that it may not press on the ground of jurisdiction if due justice is extended to it.

1.2 In regard to merits of assessment it can be observed that during the relevant assessment years, Ld. AOs for the relevant years, observed that assessee had received subscription fee, technical subscription fee and other recoveries from its member firms located in India and when asked to explain, the assessee had submitted that it is an Association set up for non-commercial objective to which its members may contributions in order to meet its operating and management expenses, which are proportionate to their revenues. Thus,

pleading for applicability of principle of mutuality it was submitted before the Ld. AO that receipts from members are exempted.

1.3 However, the Ld. AO did not accept the submission primarily first holding that relevant information / documents showing assessee to be non-profit organization have not been filed. Ld. AO also held that if assessee is an association not taxable under the laws of Switzerland provisions of DTAA should not apply to its case.

1.4 As with regard to applicability of concept of mutuality to the subscription paid by the members. The Ld. AO held that the activity of mutual concern of the assessee was in the nature of trade with its members in lieu of which it was receiving income from its members. The Ld. AO accordingly treated the subscriptions to be income, as fee from technical services. The claim of assessee that the payments were in the nature of reimbursement was also not accepted while holding that such payments represent actual revenues against the services rendered by the appellant to its members.

1.5 The ld. AO also mentioned in its order that there were news reports that the Verein (Association) got converted into the Private Limited UK Company as limited by guarantee and thus the ld. AO taxed all receipts in the hands of assessee on gross basis as fee for technical services.

2. Assessee challenged the same before Ld. F.A.A. on various grounds which were sustained by the ld. F.A.A. who considered the payments made to the assessee being in the nature of reimbursement and covered by the principle of mutuality.

3. Now before the Tribunal revenue has raised following grounds of appeal :-

*“1. Whether the CIT(A) was justified in holding that the receipts of assessee were not in nature ‘FTS’ ?*

*2. Whether the CIT(A) is correct in holding that the receipts of the assessee were exempt from tax on the principle of mutuality, without appreciating that the assessee was rendering specific services to its member ?*

*3. The appellant craves to add, amend, modify or alter any grounds of appeal at the time or before the hearing of the appeal.*

4. On behalf of the assessee following cross objections are raised:-

*“The appellant objects to the order dated 16 November, 2015 passed by the Commissioner of Income-tax (Appeals) – 42, New Delhi for the assessment year 2011-12 on the following among other grounds ;*

*1. The Commissioner of Income-tax (Appeals) erred in not deciding the following grounds in the appeal:*

*“Jurisdiction*

*1. The learned ADIT of Income-tax erred in passing assessment order dated 23 May 2014 without jurisdiction. The appellant therefore submits that assessment order dated 23 May, 2014 without jurisdiction ought to be quashed.*

*Tax Treaty*

*6. The learned ADIT erred in not allowing benefits under the Tax Treaty between India and Switzerland.*

*Erroneous rate applied in computation of tax*

*7. The learned ADIT erred in charging all the receipts of Rs. 13,70,59,258 at 40 percent (plus surcharge & cess) in Income Tax Computation Sheet instead of 20 percent (plus surcharge & cess) as stated in the assessment order.*

*8. Without prejudice that entire receipts are not taxable, the learned ADIT ought to have appreciated that as the Verein is dated 12 June, 2009, tax at the rate of 10 percent may be charged u/s 115A(1)(b)(BB) of the Act.”*

2. *Without prejudice, the Commissioner of Income-tax (Appeals) ought to have directed the Assessing Officer to allow deduction for expenses in the event the payment is subject to tax in India.*

3. *Each one of the above grounds of appeal is without prejudice to the other.*

4. *The appellant reserves the right to add, alter or amend to the grounds of appeal.”*

5. Arguments were heard for the Appellant Revenue represented by Ms. Anupama Anand, CIT-DR and on behalf of Respondent Assessee of Shri Percy Pardiwalla, Sr. Adv.

### 5.1 Arguments on behalf of the revenue

5.1.1 The foremost argument of the Ld. DR was that all the relevant information and documents like agreement of assessee with its Indian Firms or registration documents with Swiss Authorities to show case that assessee is a non-profit organization and is not subject to tax in Switzerland were not filed before the Ld AO. In this context, it was submitted that if assessee is not taxable in Switzerland than it is also not eligible to take benefit of DTAA, specially with reference to Article 3 of the treaty.

5.1.2 Ld. DR submitted that the subscription fee charged by the assessee for service is not the contribution rather it is a case of trading with members as against trading within itself. Members make payments against the services based on their uses. The nature of activity is purely in the nature of business/ profession. Such business cannot be associated with mutual concern. It was also pointed out that the assessee has not furnished the basis of allocation of expenses which is undertaken by the Board of Directors. Raising the issue of finding by Ld. FAA, that subscription is in the nature of reimbursement it was submitted that the reimbursement is part and parcel of the technical services

rendered by the assessee. The taxability of FTS is on gross basis so the argument of reimbursement does not hold good as a gross payment is taxable as against the net profit and in that context the Hon'ble Kerala High Court judgement in Cochin Refineries Ltd. (222) ITR 534 and Hon'ble AAR decision in case of Danfoss Industries P. Ltd. (268 ITR 1) and Timken India Ltd. 273 ITR 67 were relied.

5.1.3 Ld. DR also submitted that Ld. F.A.A. erred to give findings on the basis of invoices filed by assessee. It was submitted in this context that based on perusal of invoices, Ld. F.A.A. has erred to observe that the recoveries made by the appellant from it, members were in the ratio of their turnover and the invoices does not reflect the extent of services rendered by the assessee.

5.1.4 It was also submitted that Ld. F.A.A. has wrongly relied the judgement of Hon'ble Supreme Court of India in Bankipur Club and Chelmspord Club.

5.1.5 Ld. DR pointed out contradictory observation being made by the Ld. F.A.A. in its order in para no. 6.3 for assessment year 2009-10, 2010-11 and 2011-12 wherein after observing in para no. 6.2 that no services whatever have been specifically provided by the assessee the action of AO of treating the subscription fee and recoveries and fee for technical services was held "without" any cogent basis.

## **5.2 Arguments on behalf of Assessee.**

5.2.1. Defending the order of Ld. F.A.A. it was submitted that the assessee is a Verein (association) of members which is owned and managed by its members. Its activities are for its members. He relied the various articles of Verein dated 12.06.2003 and supplementary regulation dated 22.06.2007 to bring before the Bench the objectives for which Verein has been established, the

nature of activity it carries, how obligation between Verein and its member's firm or inter se between the member firms to each other arise. Articles of the Verein in regard to how the funds are collected, used and have to be ultimately distributed on dissolution were relied to claim that these all indicate that Verein was working on the principles of mutuality.

5.2.2. It was submitted by referring to the order of Ld. Assessing Officer that all the desired information were submitted to the Ld. AO and observations of the Ld. AO of not furnishing copies of agreement between the assessee and its members or other relevant documents like registration document with Swiss Authorities in order to prove that assessee has been formed not for earning any profit but is a non-profit organization which is not subject to tax in Switzerland are factually incorrect. It was submitted that Ld. F.A.A. has rightly observed in its order that necessary information / documents were provided but Ld. AO did not pay credence to them.

5.2.3. It was submitted that the error in the order of Ld. F.A.A., that Ld. DR points out to be contradictory finding for appeals in assessment year 2009-10, 2010-11 and 2011-12, is outcome of practice of copy and paste in computer generated orders, as in the assessment order for year 2008-09 there is no such ambiguity or so-called contradiction.

5.2.4. Ld. Counsel for the assessee relied on following judgments to bring before the Bench the concept and principles upon which rule of mutuality has to be ascertained.

- i. International Zinc Association [2018] 94 taxmann.com 27 (AAR- New Delhi)
- ii. CIT v. Bankipur Club Limited 226 ITR 97 (SC)
- iii. Chelmsford Club v. C.I.T. 243 ITR 89 (SC)

- iv. Canara Bank Golden Jubilee Staff Welfare Fund v. DCIT 308 ITR 202 (Kar)
- v. Bangalore Club 350 ITR 509 (SC)
- vi. A P Moller Maersk AS vs. DIT (IT) [2017] 392 ITR 186
- vii. CIT vs. Kotak Securities Ltd. [2016] 67 taxmann.com 356 (SC)]
- viii. KPMG 8] taxmann.com 118 [2017] 81 taxmann.com 118 (Mumbai Tribunal).
- ix. ITAT Delhi Bench 'C' in Assistant Director of Income Tax (E), Trust Circle II, vs. Hologram Manufacturers Association in Appeal No. 3383/Del/2009
- x. ITAT Kolkata Bench 'A' Belvedere Estates Tenants Association vs. Income-tax Officer in ITA no. 1156/Kol./2011 (c)

5.2.5 Ld. Counsel for the assessee submitted that the Revenue has filed the appeals challenging the order of Ld. F.A.A. on the basis of Ld. F.A.A. holding the receipts to be of the nature of FTS and application of principle of mutuality. However, there was third reason for allowing the appeal of assessee that the subscription's fee were held to be in the nature of reimbursement and the same has not been challenged before this Tribunal so on that ground alone the revenue appeals deserve to be disallowed.

6. The Bench has given its thoughtful consideration to the submission and matter on record.

6.1 The first and foremost thing that Bench needs to address is the objection of Ld. DR that assessee had not furnished all the relevant information / documents before the Ld. AO. In this context, it can be observed that the Ld. AO in its order for the assessment year 2007-08 has referred in para no. 1.5 about a letter dated 14.12.2010 of the assessee. Based upon this letter of 14.12.2010, the Ld. AO had reproduced various Articles of the Verein and also the relevant judicial precedents which were cited by the Ld. assessee.

6.1.1. In this context it can be observed that in regard to assessment year 2009-10, the Ld. AO has observed in para no. 1.1 at page no. 2 that notice u/s 142(1) dated 09.12.2010 was issued to the assessee requesting to provide certain details and in response to the notice the representative of assessee have appeared from time to time and filed required details as recorded in the order. However, no specific mention was made as to what information / documents were called for or not submitted. But then following order of AY 2008-2009, in para no. 4.1, the Ld. AO observed that assessee has not furnished copies of any agreement between the assessee and its members to substantiate its claim of existence of mutuality. It was also mentioned that assessee has also not furnished any registration documents from Swiss Authorities in order to prove that it has been formed not for earning any profit but is a non-profit organization which is not subject to tax in Switzerland. In para no 4.4, the Ld. AO for the assessment year 2009-10, mentions that assessee has not provided any evidence authenticated by Swiss Tax Authorities to prove that it does not pay taxes in Switzerland.

6.1.2. In the assessment year 2010-11, the Ld. AO has referred to the assessee's letter dated 08.02.2013 and reproduced a substantial part of its order. In this assessment order for the year 2010-11 at page no. 9 of 15 in regard to previous assessments of 2008-09 and 2009-10 it is submitted on behalf of the assessee that :-

*“The learned Assessing Officer rejected our claim on the principle of mutuality on the ground that we have not furnished copies of any agreement between Verein and its member firms. Further, it was rejected also on the ground that we have not furnished any registration documents from Swiss Authorities in order to prove that it has been formed not for earning any profit but is a non profit organization which is not subject to tax in Switzerland (para 2.3 of the assessment order).*

*In this connection, we submit that all members of the Verein are governed by Articles of Verein and Supplementary Regulations as modified from time to time. The Indian firm has become member firm of the Verein by signing the*

*agreement on 8 June 2000. A copy of aforesaid agreement is attached at page 175 of the Compilation. During the course of the assessment proceeding for the assessment years 2008-09 and 2009-10, we had submitted Articles of Verein and Supplementary Regulations as applicable for those assessment years. During the current year proceedings, we have attached Articles of Verein dated 11 June 2009 at pages 2 to 17 of the Compilation enclosed with letter dated 19 December 2012 and Supplementary Regulations dated 11 June 2009 at pages 18 to 36 of the Compilation enclosed with letter dated 19 December 2012.*

***We are further to submit that during the course of the assessment proceedings for the assessment year 2008-09, the learned Assessing Officer did not require us to furnish any registration documents from Swiss Authorities. During the course of the assessment proceedings for the assessment year 2009-10, we have submitted the registration documents from Swiss Authorities. We are to submit that we are registered with the Commercial Register of the Canton of Zurich, Switzerland. The aforesaid Register shows various purposes for which Verein is established. Extract of entry made in the Commercial Register of Canton of Zurich, Switzerland is attached at pages 176 to 178 of the Compilation.***

*During the year under assessment the required documents have been placed on record. The documents support out contention of applicability of the principle of mutuality. We are therefore to request your goodself to kindly reconsider our claim on the principle of mutuality.”*

6.1.3. Then in regard to assessment year 2011-12 the Assessing Officer observed in para no 4 that vide order sheet entry dated 27.02.2014, the assessee was requested to explain whether the facts of the case are similar to that of earlier years and if yes then the assessee was asked to show cause as to why the assessment year 2011-12 should not be completed as per the assessment order of A.Y. 2010-11 treating the receipts as FTS. The submissions filed by the assessee were not found satisfactory, therefore, the assessment was completed by the Ld. AO as per the assessment done for A.Y. 2010-11.

6.1.4. Ld. F.A.A. in para no. 6.2 of its order for AY 2008-09, observed that relevant certificate from Swiss Tax Authorities was filed before the AO vide letter dated 14.12.2010. A copy of the same was filed before him, as well.

On perusal of the same Ld. F.A.A. confirmed that the appellant Association has been held as not for profit entity by the Swiss Tax Authorities. In the order of the FY 2009-10, the Ld. FAA mentions that relevant certificate from Swiss Tax Authorities was filed before the AO as well as before Ld. F.A.A. and reference was made to letter dated 28.11.2011 in that regard. In regard to assessment year 2010-11, Ld. F.A.A. made similar observations observing that appellant had filed letter dated 08.02.2013

6.1.5. Based on aforesaid if for assessment year 2009-10 matter is considered there is a copy of notice u/s 143(2) on record at page no. 80 of the paper book by which the Ld. AO had called following details / evidence / explanation :-

1. Give the details note regarding nature of your business activities furnish details regarding the projects executed in India during the year.
2. Furnish the details regarding the share holding of your company alongwith the name and address of its directors.
3. Explain the method of accounting employed in your case.
4. Copy of agreement/Contracts with India customers/income received.
5. Details of invoices raised to the Indian customers/income received.
6. Copy of all order u/s 197 obtained from the assessing officers relevant to the assessment year in question.
7. Copy of all orders u/s 195(2) which assessee might have received from payers relevant to the assessment year in question.
8. Whether the assessee received any payment from non-resident in connection with business of non-resident in India.
9. Explain in details whether you have permanent establishment in India.
10. Whether technical services were/provided to the Indian customer during the year? If yes, Please submit the names of employees and

other persons who visited India in this regard stating their period of stay, purpose and for which project their services were provided and whether in these projects the assessee has supplied any products. The information must be provided invoice wise.

11. Furnish the details of all expatriates whose remuneration is charged to the expenses in India who visited India during the year.
12. Furnish the details of salary paid during the year along with name and address of the persons to whom the salary was paid exceeding Rs. 5 Lakhs.
13. Please submit the name and address of sub contacts of assessee, in connection with the India projects with their PAN nos.
14. Copy of last assessment orders.
15. Furnish the brief summary of the expenses incurred during the years.
16. Give the list of your AEs in India, if any, and also give the details of transactions entered with them.
17. Please give names of your employees who visited India during the A.Y. propose of their visit and duration of stay in India (supported with documentary evidences).
18. Please furnish the above details at Sr No. 17 with respect of the employees of your associated enterprises (AEs).
19. Please give the names and address of the employees - resident and non-resident, who were working for each project. Also, give the duration of their stay at each project site. This should be supported with documentary evidences. Also give the details of salary of such employees. All these details should be project wise.
20. Bank statement for each site, if maintained separately.
21. Details of the expenses incurred and income received by you in foreign currencies. Please support it with documentary evidences.

22. Copy of the tax residency certificate relevant assessment year.
23. Please confirm whether you have maintained books of accounts for your Indian operation as required u/s 44AB of the Act. If yes, please confirm whether they have been audited as required u/s 44AB of the Act. And furnish the same. If no, give your explanation for not complying with provisions u/s 44AA and u/s 44AB of the Act.
24. Please furnish the hard copy of return of income, complete audited balance sheet, P & L account including all the schedules, Form 3CD, Form CEB.

6.1.6. Then on record, there is reply dated 28.10.2011 to this notice dated 20.08.2010, filed by the assessee in the paper book for assessment year 2009-10.

7. Appreciating aforesaid discussion firmly establishes that the Assessing Officer for the year 2008-09 had specifically and only asked for copy of agreement / contract with Indian customers against which the assessee provided Articles of Verein dated 12.06.2003 and supplementary regulation dated 22.06.2007. No specific direction was given to the assessee for placing on record, any evidence to be authenticated by Swiss Tax Authorities to prove that it does not pay taxes in Switzerland. At the same time, on behalf of the assessee by letter dated 14.12.2010 the Articles of Verein were submitted which had all the relevant description about nature of activities of the Verein, its composition, obligation of Verein to member firms, member firm's to Verein and obligations of member firms to each other, the process of dissolution and distribution of funds and collection of funds in the form of contribution to budgeted operating expenses. Which were considered by the Assessing Officer and even reproduced in the assessment order.

7.1. In the subsequent assessment of 2009-10, the Ld. Assessing Officer has merely reproduced the content and findings of the previous year 2008-09.

7.2. In the Assessment Year 2010-11, very specific plea was taken by the assessee vide its letter dated 08.02.2013 which is also on record in paper book for the assessment year 2010-11, at page no. 17 to 25, that in the previous assessment year 2008-09 the assessing officer had not required the assessee to furnish any registration document from Swiss Authorities while in for assessment year 2009-10 the registration documents were submitted and in the relevant assessment year 2010-11 also the required document were submitted. However, the Id. AO has again reproduced the assessment order findings as recorded in the previous years not even bothering to deal with these specific averments of the assessee.

7.3. In the assessment year 2011-12 the Assessing Officer, proposed to make assessment following the previous years and as such whatever was submitted on behalf of the assessee was not considered on the principle of consistency.

7.4. The Bench can also observe that vide its letter dated 19.12.2012 ( page no. 30 to 34 of the paper book) for assessment year 2010-11 and vide letter dated 08.02.2013 ( page no. 17 to 25 of the paper book) also for assessment year 2010-11, all the relevant facts were disclosed. The Articles of Verein dated 11.06.2009 and supplementary regulation dated 11.06.2009, invoices for the relevant years, tax residency certificate of M/s. Deloitte Touche Tohmastu (DTT) issued by Zurich Cantonal Tax office for assessment year 2009-10 were furnished to the Tax Authorities and the same establish the nature of the assessee being a Verein and dependant for income on subscription and having purpose of establishment as narrated in the Articles of Verein itself.

7.5. It is pertinent to observe that Assessing Officers for four different years were different persons but the Ld. F.A.A. deciding the four appeals was the

same persons who went through all the records while observing that all necessary documents and information as sought were produced before the Ld. AO. Appreciating the order of ld. Assessing Officers it can be observed that four different Assessing officers have passed orders which are verbatim same. There appears to have been complete non-application of mind on the specific averments as raised in each assessment year separately. Thus, the findings of Ld. F.A.A. to the extent that Ld. AO of the respective years of assessment did not pay credence to the information / documents has no infirmity but is rather factually correct.

7.6. Even otherwise there should have been a specific ground of appeal before this Tribunal that Ld. FAA has fallen in error in giving findings on basis of information or documents not produced before the Ld AOs nor allowed in additional evidence before Ld. FAA. Thus there is no force in the objection of Ld. DR that assessee had not furnished all the relevant information / documents before the Ld. AO for which the matter be remitted back to the files of Ld AO.

8. Now coming to the merit of submissions about applicability of Principles of Mutuality in composition and functionality of the Verein some relevant Articles of the Vereian, relevant to understand the functioning of the Vereian need to be highlighted from the Articles of Verein originally dated 12/6/2003 as updated on 11/6/2009 and Supplementary Regulations dated 11/6/2009 (Available at pages 36 to 70 of the PB) for AY 2010-11 :-

***“Article 1.2. Purposes. The purposes of the Verein are:***

*(a) to further international alignment, cooperation, and cohesion among the Member Firms;*

*(b) to assist Member Firms to conform to professional standards of then highest quality;*

*(c) to advance the international and national leadership of the Member Firms in rendering Professional Services’*

*(d) to foster the shared beliefs, mission, and common vision of the Member Firms;*

*(e) to perform those functions of the Verein specified in or pursuant to these Articles or the Supplemental Regulation; and*

*(f) to perform all other functions incidental to the above purposes.”*

**1.1 International Name.** ( *Supplementary Regulations dated 22/6/2007*)

*“International Name” shall mean the name “Deloitte Touche Tohmatsu”, or any other name designated by the Verein, including any logos designated by the Verein for use in connection therewith.*

**1.2 International Practice Name.** ( *Supplementary Regulations dated*

*22/6/2007) “International Practice Name” shall mean each of “Deloitte”, “Deloitte & Touche” and “Deloitte Touche Tohmatsu”.*

**2.1 Related Names.** ( *Supplementary Regulations dated 22/6/2007*) *“Related Names” shall mean the names “Deloitte”, “Touche” and “Tohmatsu”, including all combinations and acronyms thereof, all similar or derivative names, and all logos used in connection therewith.*

**2.2 Right sand Use.** ( *Supplementary Regulations dated 22/6/2007*) (a) *Vesting of Names in Verein. Each Member Firm shall assign and transfer to the Verein all of its rights of ownership and use, if any, in the International Name, the Related Names, and the International Practice Name. This obligation shall apply as well to rights of the Member Firm’s current or former partners, shareholders, other principals or employees, or any other person or entity claiming through them or the Member Firm. Each Member Firm shall inform the Verein of any Registrations of the International Name, the Related Names, or the International Practice Name: (i) in its jurisdiction; and (ii) if made or filed by, in the name of or for the benefit of, such Member Firm, in any other jurisdiction.*

(b) **Use of International Practice Name.** ( *Supplementary Regulations dated 22/6/2007*)

(i) *Each Member Firm shall adopt the International Practice Name and use the International Practice Name for the totality of its activities, to the extent permitted by Local Laws, all as approved by the Verein.*

(ii) *The Verein shall license each Member Firm to use the International Practice Name, as well as the Related Names. The license shall determine the additional terms and conditions of use of the International Practice Name and the Related Names, including mandatory or permissive use in connection with: office and other display, audit and other opinions, logos, stationery, business forms and*

*cards, national and regional directories, professional and business publications, promotional materials, professional listings, registers and yearbooks, and telephone listings.*

- (iii) Each Member Firm shall permit the inclusion of the International Practice Name and any other names by which it or any part of its practice is identified, and any other pertinent information, in any directories or other publications of the Verein.*
- (iv) A Member Firm's license to use the International Practice Name shall be co-terminus with the Member Firm's continued membership in the Verein, subject to any extension under Section 11.1 (a)(i) or (ii) hereof. Upon becoming a Member Firm, a Member Firm's entire right to use the International Practice Name shall be considered to derive solely from its license under Section 2.1 (b)(ii) hereof.*
- (c) Alternative Requirements. The Verein may approve the use of an alternative international practice name by a Member Firm, which shall include one or more of the Related Names, where local laws or other circumstances require. Any such alternative international practice name approved by the Verein shall be that Member Firm's International Practice Name for the purposes of this Supplemental Regulation.*

## **2.2 Certain Responsibilities.** ( Supplementary Regulations dated 22/6/2007)

- (a) Name Registration. Registrations of the International Name, the Related Names, and the International Practice Name are to be applied for and held by and in the name of the Verein. No such Registrations shall be made by a Member Firm except where, in the judgment of the Verein, Registration by the Verein is not practicable. In a jurisdiction where Registration by the Verein is not practicable, the Member Firm there shall, in accordance with the instructions of the Verein, take steps to obtain Registrations.*
- (b) Use by Others. Name use rights under this Supplemental Regulation extend only to the Member Firms and no other entities or persons. Except upon prior approval by the Verein, no Member Firm may authorize or permit any other use of the International Name, the Related Names or the International Practice Name. The Verein may impose conditions upon any permitted use by affiliates of a Member Firm, including execution of a license between the Verein and the affiliate. Each Member Firm shall promptly notify the Verein of any unauthorized use that comes to the Member Firm's attention. Each Member Firm shall cooperate with the Verein in dealing with unauthorized use, and no action shall be taken by a Member Firm in connection with unauthorized use without approval of the Verein.*
- (c) Competing Names. Except upon approval of the Verein, no Member Firm shall use the name of, or be a member, associate firm, or correspondent of, any other multinational professional services firm or group.*

**Article 7.1. Budget and Expense Contributions.** *Each Member Firm shall contribute toward the **budgeted operating expenses** of the Verein for each Fiscal Year in such proportions as shall be allocated by the Board of Directors. Should no such allocation have been effected, then the maximum yearly contribution of each Member Firm shall be 5,000 Swiss francs..*

**7.4 Exclusion of Personal Liability.** *The liabilities and obligations of the Verein may be enforced against its assets only, and no Member Firm shall have any personal liability for any liabilities or obligations of the Verein. The liabilities and obligations of a Member Firm to the Verein or to another Member Firm arising out of or related to these Articles, the Supplemental Regulation, or the other obligations undertaken in connection with membership in the Verein may be enforced against the Member Firm's assets only, and no proprietor, shareholder, partner, member, principal, or other owner of the Member Firm shall have any personal liability for any of such liabilities or obligations of the Member Firm. Except as otherwise expressly provided in or pursuant to these Articles, the Supplemental Regulation or any other agreement or document to which a Member Firm is a party, **the financial obligations of the Member Firms to the Verein are limited to the annual contributions toward budgeted operating expenses as determined and approved pursuant to Article 7.1 hereof.***

**Article 7.5** *The Verein shall not provide services to clients, or direct or control the manner in which each Member Firm provides audit or other services to its clients. The Verein shall not share in the profits and losses of the Member Firms.*

**Article 7.6** *The Verein shall not have the authority to and shall not bind or make obligations on behalf of the Member Firms, and no Member Firm shall have the authority to or shall bind or make obligations on behalf of any other Member Firm or the Verein. The Member Firms shall not be and they and their shareholders, partners and employees shall not hold themselves out to be agents, representatives, alter egos, partners, joint venturers or joint employers of or with other Member Firms or the Verein (except that the Member Firms may expressly agree among themselves in writing to be joint venturers or joint employers in specific instances, and shareholders, partners or employees of Member Firms may hold positions in Verein or other Member Firms under the conditions set forth in subparagraph (d) below). These Articles and the other Verein Agreements are not intended and shall not be interpreted to make the Verein liable for the debts, obligations, acts or omissions of the Member Firms, or any Member Firm liable for the debts, obligations, acts or omissions of the Verein or any other Member Firm. Each Member Firm shall be liable only for its own debts, obligations, acts or omissions, and not those of the Verein or any other Member Firm.*

**11.2 ( Articles of Verein dated 12/6/2003) Distributions, Upon dissolution of the Verein, any liquidation proceeds shall be applied in the following order ;**

*(a) payment or discharge of all liabilities of the Verein, including any unpaid principal of and accrued interest on any loans and advances made by the Member Firms to the Verein; and*

*(b) payment of any remaining balance to each Member Firm in the proportion that its allocated contributions to budgeted operating expenses of the Verein bear to the total budgeted operating expenses of the Verein for the then current Fiscal Year, less any unpaid amounts payable by the Member Firm to the Verein on the date of dissolution.*

**11.2 ( Supplementary Regulations dated 22/6/2007) Distributions ; Financial Statements.**

*(a) Amounts Payable by Verein. Upon the withdrawal or expulsion of a Member Firm from the Verein, it shall be entitled to receive from the Verein only the sum of; (i) the credit balance in its account for contributions toward budgeted operating expenses; and (ii) the unpaid balance of and accrued interest on any loans and advances made by it to the Verein. Amounts payable to the withdrawing or expelled Member Firm shall be reduced by any amounts it owes to the Verein.*

*(b) Breach by Member Firm. If a Member Firm withdraws from the Verein in breach of the provisions of the Articles, this Supplemental Regulation, or any other obligations, the Verein may retain amounts otherwise payable to the Member Firm, without reduction in amounts payable under Section 11.3 hereof.*

*(c) Financial Statements. The withdrawing or expelled Member Firm shall be entitled to receive the normal financial statement of the Verein for the Fiscal Year in which withdrawal or expulsion occurs, and hereby waives any right to a formal accounting of the financial affairs of the Verein.”*

**9.** Apart from giving due weightage to the judgments relied by the Ld. Senior Counsel for the assessee certain part of the judgment of Hon’ble Supreme Court of India in **Yum Restaurants (Market.) vs C.I.T.,New Delhi CIVIL APPEAL NO. 2847 OF 2010 decided on 24 April, 2020, 2020(4) TMI 827 (SC)**, where Hon’ble Apex Court has almost codified the concept and principles of mutuality as applicable under Direct Tax, are reproduced below.

“14. The doctrine of mutuality traces its origin from the basic principle that a man cannot engage into a business with himself. For that reason, it is deemed in law that if the identity of the seller and the buyer; or the vendor and the consumer; or the contributor and the participator is marked by oneness, then a profit motive cannot be attached to such a venture. Thus, for the lack of a profit motive, the excess of income over the expenditure or the “surplus” remaining in the hands of such a venture cannot be regarded as “income” taxable under the Income Tax Act, 1961 (for short, “the 1961 Act”). What is taxable under the 1961 Act is “income” or “profits” or “gains” as they accrue to a person in his dealings with other party or parties that do not share the same identity with the assessee. For income, there is an underlying exchange of a commercial nature between two different entities. In *Commissioner of Income Tax, Bihar v. Bankipur Club Ltd.*<sup>1</sup>, this court observed on the nature of liability under the 1961 Act thus:

“6. Under the Income Tax Act (hereinafter referred to as “the Act”) what is taxed is, the “income, profits or gains earned or “arising”, “accruing” to a person”. The question is whether in the case of members’ clubs - a species of mutual undertaking - in rendering various services to its members which result in a surplus, the club can be said to “have earned income or profits” In order to answer the question, it is necessary to have a background of the law relating to “mutual trading” or “mutual undertaking” and a “members club”.”

15. The law regarding the tenets of mutuality is no more *res integra*. It has been settled in a catena of judicial pronouncements and academic works across multiple jurisdictions. In *Bangalore Club v. Commissioner of Income Tax & Anr.*<sup>2</sup>, this Court authoritatively quoted one of the earliest judicial pronouncements in *New York Life Insurance Co. v. Styles (Surveyor of Taxes)*<sup>3</sup> thus:

“When a number of individuals agree to contribute funds for a common purpose. . . and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them. I cannot conceive why they should be regarded as traders, or why contributions returned to them should be regarded as profits.” 1 (1997) 5 SCC 394 2 (2013) 5 SCC 509 3 (1889) 2 TC 460 The proposition of law is restated in *Bankipur Club (supra)* and *Bangalore Club (supra)* by placing reliance upon the following extract from *Simon’s Taxes*<sup>4</sup>:

“... it is settled law that if the persons carrying on a trade do so in such a way that they and the customers are the same persons, no profits or gains are yielded by the trade for tax purposes and therefore no assessment in respect of the trade can be made. Any surplus resulting from this form of trading represents only the extent to which the contributions of the participators have proved to be in excess of requirements. Such a surplus is regarded as their own

*money and returnable to them. In order that this exempting element of mutuality should exist it is essential that the profits should be capable of coming back at some time and in some form to the persons to whom the goods were sold or the services rendered.."*

16. *In order to undertake the examination of mutuality, we gainfully advert to The English and Scottish Joint Co- operative Wholesale Society Ltd. v. Commissioner of Agricultural Income-Tax, Assam<sup>5</sup>, which has been quoted with approval by this Court in Commissioner of Income Tax, Bombay City v. Royal Western India Turf Club Ltd. 6 and Bangalore Club (supra). The afore stated stream of judicial pronouncements expound three conditions/tests to prove the existence of mutuality:*

*4 Simon's Taxes, Volume B, 3rd Edition, Pgs. 159, 167 5 AIR 1948 PC 142 6 AIR 1954 SC 85*

*(i) Identity of the contributors to the fund and the recipients from the fund;*

*(ii) Treatment of the company, though incorporated as a mere entity for the convenience of the members and policy holders, in other words, as an instrument obedient to their mandate, and;*

*(iii) Impossibility that contributors should derive profits from contributions made by themselves to a fund which could only be expended or returned to themselves. Whereas the legal position on what amounts to a mutual concern stands fairly settled, the factual determination of the same on a case to case basis poses a complex issue that requires deeper examination. Such examination ought to be conducted in the light of the tests enunciated above.*

### **Common Identity**

17. *The first element involves the test of commonality of identity between the members or participators in the mutual concern and the beneficiaries thereof. Succinctly put, this limb of the three- pronged test requires that no person ought to contribute to the common fund without having the entitlement to participate as a beneficiary in the surplus thereof. Conversely, no person ought to participate as a beneficiary without first having been a contributor or a member of the class of contributors to the common fund. Common identity, as it occurs in the present context, signifies that the class of members should stay intact as the transaction progresses from the stage of contributions to that of returns/surplus. It must manifest uniformity in the class of participants in the transaction. The moment such a transaction opens itself to non-members, either in the contribution or the surplus, the uniformity of identity is impaired and the transaction assumes the taint of a commercial transaction. The emphasis on the words member and non-member is of import because the doctrine of mutuality does not prohibit the inclusion or exclusion of new members. What is prohibited*

*is the infusion of a participant in the transaction who does not become a 'member' of the common fund, at par with other members, and yet participates either in the contribution or surplus without subjecting itself to mutual rights and obligations. The principle of common identity prohibits any one-dimensional alteration in the nature of participation in the mutual fund as the transaction fructifies. Any such alteration would lead to the non-uniform participation of an external element or entity in the transaction, thereby opening the scope for a manifest or latent profit-based dealing in the transaction with parties outside the closed circuit of members. It would be amenable to income tax as per Section 2(24) of the 1961 Act.*

### ***Completeness of Identity***

*18. Coterminous with the requirement of common identity, as discussed above, the law also contemplates a completeness of identity between the contributors and participators. The theory of completeness of identity presupposes the contributors and participators to be two separate classes, but there is oneness or equality in the matter of sharing of surplus/profits. This is to ensure that there is no interference of any alien commercial entity in the transaction. With the interference of any alien entity, the idea of conducting business with oneself is defeated and any profits or gains accruing therefrom become subject to tax liability. This proposition of law is succinctly predicated in British Tax Encyclopaedia<sup>7</sup>, which reads thus: 7 British Tax Encyclopedia (I), 1962 Edition, Pgs. 1200 and 1201 "...For this doctrine to apply it is essential that all the contributors to the common fund are entitled to participate in the surplus and that all the participators in the surplus are contributors, so that there is complete identity between contributors and participators. This means identity as a class, so that at any given moment of time the persons who are contributing are identical with the persons entitled to participate; it does not matter that the class may be diminished by persons going out of the scheme or increased by others coming in" It is pertinent to note that in order to determine the breach in mutuality, the court is well within its powers to go beyond the periphery of the concern and undertake an examination akin to the lifting of the veil in order to discern the real nature thereof.*

### ***Non-profiteering and Obedience to Mandate***

*Para 24. "The mutuality and non-profiteering character of a concern are to be determined in light of its actual working structure and the factum of corporation or incorporation or the form in which it is clothed is immaterial."*

*Para 26 'It is no doubt true that every member of the mutual concern might not be required to contribute to the common pool at all times. However, it does not mean that one member cannot be made to contribute under any pretext whatsoever. For, that would amount to the grant of an overriding position to a*

*member in the mutual agreement, extending upto even overruling the requests for contribution from other members for mutual necessity. It is this all-pervasive overriding position of one member over the others that negates the effect of mutuality.”*

*Para 27. More importantly, an examination of the judicial decisions relied upon by the parties brings out the settled legal position that in order to qualify as a mutual concern, the contributors to the common fund either acquire a right to participate in the surplus or an entitlement to get back the remaining proportion of their respective contributions.*

*Para 29. The doctrine of mutuality, in principle, entails that there should not be any profit earning motive, either directly or indirectly. The third test of mutuality, quoted above, requires that the purported mutual operations must be marked by an impossibility of profits.*

*Para 30 Furthermore, the exemption granted to a mutual concern is premised on the assumption that the concern is being run for the mutual benefit of the contributors and the contributions made by the members ought to be directed in that direction.*

*Para 34. The doctrine of mutuality bestows a special status to qualify for exemption from tax liability. It is a settled proposition of law that exemptions are to be put to strict interpretation.”*

10. So, based on aforesaid reproduced relevant Articles of the Verein and principles of law as with regard to the question as to if the assessee was operating on the concept of mutuality, the first thing that can be observed is that the Tax Residency Certificate in favour of the assessee issued by authorities specifically mention that the source of income of the assessee is subscription fee. The **Collins dictionary** defines Subscription as “A subscription is an amount of money that you pay regularly in order to belong to an organization, to help a charity or campaign, or to receive copies of a magazine or newspaper.” The **Black’s Law Dictionary** defines Subscription as “The act of writing one's name under a written instrument; the affixing one's signature to any document, whether for the purpose of authenticating or attesting it, of

*adopting its terms as one's own expressions, or of binding one's self by an engagement which it contains.”*

10.1 Thus without importing any other meaning and rational to the meaning of subscription and same being the only source of income of the Verein, as recognized by the relevant tax authorities, it can be concluded that the only source of generating funds for the assessee was the subscription amount from its members determined on the basis of proposed annual expenditure, which were paid by member firms, being subscribers to the Articles of Verein.

11. Then the invoices for the relevant year placed on record also show that the invoices were primarily raised for subscription according to Articles of Verein on account of operating expenditure, technology subscription or miscellaneous expenditure. The invoices are also raised for specific events organised and conducted by the assessee in furtherance of its recognised scope of activities and for the benefit of the Member Firms or the profession itself as a whole. These have been duly considered by the Id. F.A.A. while holding that no services were specifically provided by the assessee to its member in the nature of trading and the receipts were not in the nature of trading receipt.

11.1 The Bench is of the considered opinion that the contributions in the form of Operational Subscription, Technology subscription and Miscellaneous subscription, were only indicative of the three heads of subscription. The contributions were to be made by Member Firms for “*total budgeted operating expenses*”. Mere name of a head for contribution is not consequential to term the activity for which such contribution is made to be in nature of “services” as trading or technical services. It is the prospective beneficiaries and the benefit that is relevant. The prospective beneficiaries here were only the Member Firms of the Verein and tangible benefit derived from activities for which contribution

was received was merely pursuit of excellence of the Member Firms in professional field.

11.2 The Ld. FAA has rightly concluded that these contributions were in the nature of reimbursements. As, they were pre determined on basis of budgeted expenditure. There is certainly force in the contention of Ld Senior Counsel for the assessee that in any case allowing the contributions as reimbursement should have been a separate ground of challenge in appeal which has not been taken by the Revenue.

12. The Bench is of firm view that the Ld. Assessing Officers failed to appreciate the various Articles of the Verein which were relevant to understand for what the Verein was composed, how it worked for the benefit of the members of Verein. Ld. AOs attached commerciality to the activities of Verein by calling the same trading activity and given finding in para 4.5 of the order of Ld. AO for AY 2008-09 that *“the Verein has been set up for the purpose of rendering specific services to its members. It was mentioned in para no. 6 that assessee has not provided agreement between the assessee and the Indian members, however, the Articles in pursuance of which income is earned by the assessee is dated 12.06.2003 it would be safe to assume that such fee for technical services are chargeable to tax at 20% rate.”* Pertinent to observe here is that actually there was no bilateral agreement between the Assessee and its Member Firms but the Member Firms were supposed to file a Declaration of Acceptance only in a way subscribing to the Articles of Verien. A copy of such declaration with letter dated 8/2/2013 with the Ld AO and copy of same is on record at page no 26 of the PB for the year 2010-11.

13. The Id. Assessing Officers failed to appreciate that the Section 1 of the Verein, document defined “international name”, “international practice name”, “related names” and Section 2.1 gave Member firms right to use these names and Section 2.2 provided certain responsibilities. These clauses establish that the

Verein was formed for the benefit of the members to allow them being identified as member of the Verein in assuring their clients of certain professional standards being followed by the Member Firm. The only benefit members drive by way of paying subscription is to have benefit of the goodwill of the Verein as a whole, to which they are also members and adding to the goodwill, in terms of professional excellence on basis of shared information and experiences in the field of profession. The only objective of the Verein thus was to benefit its member in the professional field and to evolve better professional practices.

14. The Verein was established for specific purposes mentioned in Article 1.2 and they nowhere indicate that any element of commerciality between the members themselves or by the members of the Verein and Verein itself with any outside members or clients was directly possible. Special reference can be made to Article 7.5 which provides that Verein shall not provide services to clients or direct or control the manner in which each member firm provides audit for other services to its clients and the Verein shall not share in the profit and losses of the member firms.

15. The manner in which the funds for the activities of the Verein were to be collected by way of contribution as per article 7.1, limiting financial obligations of the member firms to the Verein to the extent of annual contributions towards budgeted operating expenses as per article 7.4 and the distribution of funds on dissolution of the Verein or withdrawal or expulsion of the member firm from the Verein as per Article 11.2 firmly indicate that the Verein was working on principles of mutuality and not in a commercial venture on *quid pro quo* basis..

16. As with regard to the findings of the Id. AO on the basis of news reports that Verein has converted into the private company with limited guarantee the same being on hearsay had no evidentiary value. Though, on behalf of the

assessee it has been submitted that another entity has come into existence for the purpose of certain local laws which has no concern with the present assessee.

17. The activities of the Verein were certainly not for social cause and cultural cause but pursuit of excellence in professional field is no less a noble cause. The services may be customized and focused but are not “special services in the sense that their utility is not restricted to few beneficiaries but across board all the member firms and substantially the profession as a whole is the beneficiary. The use of technology for benefit of all member firms commensurate with the scope and objectives of the Verein. The subscription charges cannot be said to be consideration for any specific service performed or for some specific members. Hon’ble Madras High Court in the case of **South Indian Films Chambers of Commerce [1981, 129 ITR 22 (Madras)]** has held that provisions of Section 28(iii) of the Act will not be attracted in a case where profit making was only incidental and not the means of achieving the main objects. In the case in hand rather there is no element of profit making by the assessee from its member firms or non-members.

18. In the case of **Dy. Commissioner of Income Tax , 3(1), Mumbai vs. KPMG (supra)** relied by the assessee, the Mumbai Bench of the Tribunal has dealt with a similar matter and decided the same in favor of the said assessee which was an Indian Member Firm of KPMG International. The assessee had made payment to KPMG International. The Assessing Officer had concluded that expenses incurred by the assessee on account of alleged reimbursement of cost was in nature of royalty, therefore, such remittance constituted income of foreign company for purpose of Section 195 of the Act requiring deduction at source. The Commissioner (Appeal) had upheld the findings of Assessing officer but the Tribunal had remanded the matter and in remand proceedings, Commissioner held that KPMG international was a mutual association of

assessee and its receipt could not constitute income chargeable to tax and assessee was not obliged to withhold any tax on such receipt. The revenue had preferred appeal which was dismissed by the Tribunal while relying the judgment of Hon'ble Supreme Court of India in **Bankipur Club Ltd. (Supra)** and **Chelmsford Club (Supra)** which have been rightly relied in the present case also by the Ld. First Appellate Authority while holding that the payments made to the Verein by Indian entities were in the nature of reimbursement and is exempt from taxation having been covered by the principle of mutuality.

19. This wholesome discussion makes it crystal clear that the Verein was functional on the principles of mutuality which Ld. Assessing Officer failed to appreciate while Ld. First Appellate Authority corrected the same in appeal. The element of commonality of identity between the Member Firms, in the mutual concern to evolve better professional practices. The completeness of identity between the member Firms due to contributions of Member Firms being only source of meeting expenditure for running the Verein and for activities of Verein and Non-profiteering, while obedience to mandate of the Verein are established from the matter on record.

20. Thus no fault can be found, on facts or law, in the findings of Ld FAA and there is no substance in the grounds of appeal raised by the Revenue. **The order of Ld. FAA is upheld and the appeals of Revenue are dismissed.**

21. As a Consequential effect to above dismissal of appeals of Revenue, the **Cross objections of the Assessee Cross Objection no. 182/Del/2016 , A.Y. 2011-12 (Arising Appeal No. 530/Del/2016) are dismissed**, being infructuous.

Order pronounced in open court on this day 11<sup>th</sup> April, 2022.

Sd/-

Sd/-

**(R.K.PANDA)**

**(ANUBHAV SHARMA)**

**ACCOUNTANT MEMBER**

**JUDICIAL MEMBER**

*Date:-11.04.2022*

**\*Binita, SR.P.S\***

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1. Appellant
2. Respondent
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