आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No.7905/Mum/2011

(**निर्धारण वर्ष /** Assessment Year : 2008-09)

Aakash Lavlesh Leisure Private Limited Juhu Club Millenium A-1, Gulmohar Road JVPD Scheme, Juhu Mumbai-400 049	**बनाम**/ v.	ITO -9(1)(1), Aayakar Bhavan Mumbai-400020
स्थायी लेखा सं./PAN : AAACL6655R		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

आयकर अपील सं./I.T.A. No.8140/Mum/2011

(**निर्धारण वर्ष /** Assessment Year : 2008-09)

ITO -9(1)(1), Aayakar Bhavan Mumbai-400020	**बनाम**/ v.	Aakash Lavlesh Leisure Private Limited Juhu Club Millenium A-1, Gulmohar Road JVPD Scheme, Juhu Mumbai-400 049
		स्थायी लेखा सं./PAN : AAACL6655R
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

आयकर अपील सं./I.T.A. No.5316/Mum/2012

(**निर्धारण वर्ष /** Assessment Year : 2004-05)

Aakash Lavlesh Leisure Private Limited Juhu Club Millenium A-1, Gulmohar Road JVPD Scheme, Juhu Mumbai-400 049	**बनाम**/ v.	DCIT , Range 9(1), Room No. 223 Aayakar Bhavan M K Road Mumbai-400020
स्थायी लेखा सं./PAN : AAACL6655R		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

आयकर अपील सं./I.T.A. No.5337/Mum/2012

(**निर्धारण वर्ष /** Assessment Year : 2005-06)

Aakash Lavlesh Leisure Private Limited Juhu Club Millenium A-1, Gulmohar Road JVPD Scheme, Juhu Mumbai-400 049	**बनाम**/ v.	DCIT , Range 9(1), Room No. 223 Aayakar Bhavan M K Road Mumbai-400020
स्थायी लेखा सं./PAN : AAACL6655R		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

आयकर अपील सं./I.T.A. No.5338/Mum/2012

(**निर्धारण वर्ष /** Assessment Year : 2006-07)

Aakash Lavlesh Leisure Private Limited Juhu Club Millenium A-1, Gulmohar Road JVPD Scheme, Juhu Mumbai-400 049	**बनाम**/ v.	DCIT , Range 9(1), Room No. 223 Aayakar Bhavan M K Road Mumbai-400020
स्थायी लेखा सं./PAN : AAACL6655R		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

आयकर अपील सं./I.T.A. No.5339/Mum/2012

(**निर्धारण वर्ष /** Assessment Year : 2007-08)

Aakash Lavlesh Leisure Private Limited Juhu Club Millenium A-1, Gulmohar Road JVPD Scheme, Juhu Mumbai-400 049	**बनाम**/ v.	DCIT , Range 9(1), Room No. 223 Aayakar Bhavan M K Road Mumbai-400020
स्थायी लेखा सं./PAN : AAACL6655R		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by	Mr. K R Laxminarayanan
Revenue by :	Sh A Ramachandran

सुनवाई की तारीख /**Date of Hearing : 28-06-2016**
घोषणा की तारीख /**Date of Pronouncement : 26-09-2016**

आदेश / O R D E R

PER RAMIT KOCHAR, Accountant Member

These bunch of six appeals out of which one appeal is filed by the assessee for the assessment year 2008-09 , while five appeals are filed by the Revenue relates to the assessment years 2004-05 to 2008-09 involving common issue's and are hence disposed of by this common order for the sake of convenience.

2. First we shall take up cross appeals filed by the assessee and the Revenue for the assessment year 2008-09 which is a lead year wherein the assessments were framed by the learned Assessing Officer (hereinafter called " the AO") u/s. 143(3) of the Income Tax Act,1961 (hereinafter called " the Act") vide assessment orders dated 23-12-2010 , while for assessment years 2004-05 to 2007-08, the assessments were framed by the AO u/s 143(3) read with Section 147 of the Act by reopening the concluded assessments on the identical grounds as are covered by the assessment year 2008-09 vide assessment framed u/s. 143(3) of the Act.

These cross appeals for the assessment year 2008-09, filed by the assessee and the Revenue, being ITA No. 7905/Mum/2011 and ITA no. 8140/Mum/2011 respectively , are directed against the appellate order dated 28th October 2011 passed by learned Commissioner of Income Tax (Appeals)-19, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2008-09, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 23rd December 2010 passed by the AO u/s 143(3) of the Act.

The grounds of appeal raised by the assessee in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called "the Tribunal") in ITA no 7905/Mum/2011 read as under:-

> "1. The order passed by the learned CIT(A) is bad in law.
>
> 2. The learned CIT(A) erred in limiting relief only to the extent of 40% of advance Membership Fee and directing the A.O. to tax 60% of the advance membership fee. CIT(A) further erred in not deleting entirely the addition of Rs.4,18,96,537/- made by the A.O. being advance membership fee received during the year, since income cannot be said to arise to the appellant till the club becomes fully operational which is not so during this year.
>
> 3. Without prejudice to the above, the learned CIT(A) erred in not taking into account the fact that as per the terms of contract with members, appellant is required to provide them continuous club services for the period of membership of 25 years and therefore advance membership fee should be taxed equally each year spread over the period of 25 years.
>
> 4. The learned CIT(A) erred in not applying the ratio of the Supreme Court's judgment in the case of Madras Industrial Investment Corporation Ltd. , 225 ITR 802(SC) allowing similar spread over.
>
> 5. Without prejudice it is prayed that the advance Membership fee of Rs. 4,18,96,537/- may be taxed equally each year by spreading over the period of membership of 25 years."

The grounds of appeal raised by the Revenue in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called "the Tribunal") in ITA no. 8140/Mum/2011 read as under:-

> " 1.On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in treating 60% of the advance membership fees received every year as income instead of treating the entire advance membership fees as income for the year under consideration.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in treating non refundable one time entrance fee as capital receipt of treating the same as revenue receipt.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in accepting additional evidences during the appellate proceedings thereby violating Rule 46A of the I.T. Rules.

4. The appellate prays that the order of the CIT(A) on the grounds be set aside and that of the Assessing Officer be restored."

3. The brief facts of the case are that the assessee is a company engaged in the business of family club known as 'Juhu-Club Millennium' at Juhu and the club is functioning for family entertainment. The club is providing various facilities and activities like health centre, swimming pool, squash court, tennis court , banquet hall, party lawn, bar and restaurant etc. The assessee is earning income from the aforesaid facilities which are provided to its members.

a) <u>Club Entrance Fees:</u>

On perusal of the Balance Sheet , the AO during the course of assessment proceedings u/s. 143(3) read with Section 143(2) of the Act observed that the assessee has shown "Club Membership Enrolment fund' of Rs. 37,00,40,238/- and the assessee was asked to explain the same. From the details submitted by the assessee which are depicted vide chart in page 2 of the assessment order dated 23-12-2010 , it was observed by the AO that the members entrance fee received by the assessee during the previous year relevant to the assessment year was Rs. 4,50,90,574/- excluding refundable deposit of Rs.12,80,142/- and Rs.2,15,25,923/- . It was observed by the AO that the entrance fee received by the assessee was not included in income in the return of income filed with the Revenue. The said club entrance fee is not included in the income by the assessee in preceding assessment years nor in the subsequent years. The AO

observed from perusal of the audit report that in notes to accounts , the assessee relied on accounting standard AS-9 issued by ICAI for revenue recognitions and stated that non-refundable entrance fee received by the assessee will be transferred to the members entrance fee account and will be adjusted as income proportionately during the tenure of membership from the year the club becomes fully functional and the members are provided all the facilities agreed upon at the time of enrollment. It was stated in notes to the account that refundable deposits will be included under the current liabilities as member's deposit from the year in which the club becomes fully functional.

The AO observed that the assessee is following a self proclaimed method of accounting whereby membership entrance fee will be treated as receipt in the year when the club becomes fully functional which is an endless process as additions, alterations and modifications keeps on going in the years to come, while the fact is that the club is operational since a number of years. It was observed that the assessee has also shown income from operations which inter alia included income from banquet, squash coaching, swimming coaching , tennis coaching , commission, guest entrance fees, Gym and health club, subscription income etc. .Thus , it was observed by the AO that the club is operational with its various facilities being functional. The assessee was asked why the club entrance fees should not be treated as income of the assessee as club is fully operational.

The assessee in reply submitted that the assessee was required to give certain facilities to the members in respect of Club Millennium Juhu on enrolment which are as under:

1. Restaurant, Coffee Shop and Bar

2. Swimming Pool
3. Tennis Court
4. Health Club
5. Squash Court
6. Card Room
7. Activity Room
8. Table Tennis Court

Out of the above facilities still the following facilities as on 31-03-2008 are yet to be provided to Members, since the assessee is still in the process of taking various permissions from the authorities:

1. Restaurant, Coffee Shop and Bar
2. Squash Court
3. Card Room
4. Activity Room
5. Table Tennis Court

The assessee submitted that with respect to the Membership of Club Millennium the Revenue is recognized by the assessee as follows:

Club Member's Enrolment Fund:

The amount included under head Club Enrolment Fund in the Balance Sheet consists of Entrance Fees and refundable deposits, received on application from members. The assessee submitted that the amount received from the members as non-refundable entrance fee will be transferred to the Member's Entrance fees account and will be adjusted as income proportionately during the tenure of Membership from the year the club will become fully functional and the members are provided all the facilities agreed upon at the time of

enrollment. The refundable deposits will be included under the head Current Liabilities as Member's Deposit form the year in which the club become fully functional. The assessee submitted that the aforesaid accounting treatment is followed in terms of Para 12 read with Appendix Para B-6 of the accounting standard AS-9 on Revenue Recognition issued by the ICAI.

The AO rejected the contentions of the assessee and observed that the perusal of the Profit and Loss Account reveals that the assessee has already shown income from coaching of squash, income from banquet, commission on banquet sales, commission on coffee shop sales, commission on liquor sales, commission on restaurant sales etc. and hence there is not an iota of truth in the submissions of the assessee and the club is fully functional with almost all of its facilities available to the members and the assessee should have shown the entrance fees as income for the year under consideration.

It was also observed by the AO from the perusal of the Profit and Loss Account under various heads to conclude that substantial expenses have been incurred and claimed by the assessee which are revenue in nature laid out for day to day running activities to offset the afore-stated income from various activities as set out in preceding para which the assessee was contending that these activities have not yet started by the assessee.

The AO also observed that the assessee club is functional where in all the facilities as enlisted at the time of enrollment, are functional except table tennis court which is miniscule /insignificant vis-à-vis services/facilities which are functional. The assessee is also collecting utility charges, facility charges as well annual subscription from its members which also proves that facilities are functional , otherwise the members will not pay the said charges if the club is not functional. The assessee has entered into an agreement with M/s Grand Cuisine Private Limited on 23/03/2007 whereby the food and

beverage operations of the Restaurant and Bar have been handed over to M/s Grand Cuisine Private Limited on commission basis. Thus, contention of the assessee that the club is not fully functional was rejected by the AO and hence the club is treated to be functional which would result in taxability of the entrance fees during the year under consideration.

As the club was fully functional as held by the AO, the assessee was asked to show cause why the membership receipts should not be taxed as income for the year under consideration as the club is operational.

The assessee in reply submitted that the assessee is a company constructing and operating an executive grade club with modern facilities . The assessee is enrolling members who alone will be entitled to entry in the club. The assessee submitted that broadly term of membership provides that a person desirous of becoming member is required to pay certain amount by way of entrance fees , of which certain part i.e. 4/5th part is refundable without interest after say 15 to 20 years while 1/5th part is non refundable. At the end of period, thus, the deposit will be refundable without any interest. In addition the members are obliged to pay regular membership fees to the assessee on annual basis. The assessee submitted that it started levying annual charges w.e.f. 01-01-2005. The club project is still in construction stage as at 31-03-2008 and club is yet to become functional. Since the club is under construction the members effectively have no right at all. The members presently have limited use of part facilities and hedging against the possible risk of enhancement in the entrance fees. Beyond that members have no right in the management, construction and administration of the club or the assessee company.

It was submitted that the entrance fees portion of membership fees paid at the time of enrollment is capital receipt and not liable to tax. Entrance fees is

precondition to membership. It is not price paid for enjoying membership but is a price paid for obtaining the membership. It was submitted that it is different from life membership which can be regarded as one time receipt in substitution of recurring receipts. Thus, it was submitted that entrance fees is capital receipt which is supported by the decision of Hon'ble Bombay High Court in the case of CIT v. WIAA Club Limited (1979) 136 ITR 569(Bom.) which view is supported by Accounting Standard AS-9 issued by ICAI was the contention of the assessee before the AO.

Without prejudice, it was submitted that even if the said entrance fees is regarded as revenue receipts, the same cannot be treated as income until the promise of completion of the project with the provision of all facilities agreed upon is made available to the members, and the assessee cannot appropriate it as its own money. Thus, it was submitted that in case of failure on the part of the assessee to complete its part of the contract or on abandoning of the contract , the assessee will be obliged to return the said entrance fees. Further, without prejudice, it was submitted that even if the entrance fee is treated as revenue receipts, the same shall be required to be spread over the number of years of membership right covered by the contract/tenure of membership. The assessee relied upon decision of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation v. CIT (1997) 225 ITR 802(SC) wherein Hon'ble Supreme Court held that a revenue item which contractually binds the parties over a long period should be considered as accruing over the life of the contract and cannot be appropriated in any one individual year.

Advance Membership Fees:

It was submitted by the assessee that the assessee has introduced new scheme, whereby the assessee is collecting pre-agreed sum as advance membership fees in terms of agreement executed with the member. The

assessee submitted that as per terms of the said agreement, the member is required to pay certain sum as advance membership fees which shall be apportioned in equal installment over the agreed term of the Membership commencing from agreed date. The specimen copy of agreement dated 16-01-2008 executed with one member was placed on record before the AO. In the said agreement it was mentioned that certain facilities like (a) swimming pool, (b) baby swimming pool , (c) open Jacuzzi, (d) squash courts, (e) jogging facility, (f) tennis court , (g)open ground for holding functions (h) health club , Gymnasium are presently available to members . In addition the assessee shall provide further facilities like (a) coffee shop (b) open air restaurant (c) multi cuisine restaurant (d) bar room and subsequently card room, table tennis room, billiards room facilities which are nearing completion shall be opened in due course. The clause 3 in the agreement provided that the membership shall be for a period of twenty five years commencing from the date of inauguration of coffee shop, restaurant bar. It was provided in the agreement that the advance membership fee will be paid in advance by the members towards the enjoyment of facilities provided by the Club and / or to be provided from time to time and shall be appropriated by the assessee on time basis over the tenure of membership. The clause 4 of the agreement provided for refund of the said advance membership fees. Thus, it was submitted that there is a contractual obligation on the assessee to appropriate the said advance membership fees over the tenure of membership and same cannot be brought to tax in its entirety in the year of receipt. Thus, it was submitted that the advance membership fees is received in advance by the assessee and shall be offered for taxation as income over the tenure of the membership commencing from the agreed date. Thus, it was submitted that as per contractual terms, the said advance membership fee has not accrued to the assessee as income and in case if the assessee is not able to provide the agreed services or fails to complete the project or the project is wound up, the assessee shall be liable to refund the said advance membership fees as

provided in the agreement of the assessee with the members. It was also submitted that having regard to implicit provisions of Contract Act there is an implied warranty on the part of the assessee to refund the amount if the assessee is not able to provide promised services. The assessee relied on decision of the Hyderabad Tribunal in the case of Treasure Island Resorts Private Limited v. DCIT (2004)84 TTJ 820(Hyd. Trib.) wherein the Tribunal accepted assessee's method of recognizing revenue on spread over basis keeping in view that the scheme did not provided for refundability. The Tribunal relying on the earlier decision in the case of Meera and Ceiko Pump Private Limited *[IT Appeal No. 652 (Hyd.) of 2001 dated 21-6-2002 for the assessment year 1994-95]* held that under mercantile system of accounting, receipt entailing a continuing liability of rendering services in future years can be spread over years. This proposition is supported by the Hon'ble Supreme Court decision in the case of Madras Industrial Investment Corporation Limited v. CIT , (1997) 225 ITR 802(SC).

Relying on AS-9 issued by ICAI, the assessee submitted that the membership fee should be recognized on a systematic and rational basis having regard to the timing and nature of services provided. Without prejudice, it was submitted that if full collection of advance membership fee is treated as income of the instant assessment year , then deduction should be allowed with respect to the present value of expenditure likely to be incurred on members, which proposition is supported by decision of Hon'ble Supreme Court in the case of Calcutta Company Limited v. CIT (1959) 37 ITR 1(SC) and other decisions. This proposition it was submitted as supported by para 19 of Accounting Standard 18 issued by ICAI, which is called matching concept whereby there is matching of revenue and expenses .

It was also submitted by the assessee that the Revenue had examined and accepted the method of accounting followed by the assessee in the earlier years while framing assessments u/s. 143(3) of the Act and entrance fees and advance membership fees had not been taxed in all the earlier assessment years.

The AO considered the submissions of the assessee and held the same to be untenable due to following reasons:

a) It was observed by the AO that the assessee has received entrance fees and refundable deposits. The assessee has stated that the club has started levying annual subscription from 01-01-2005 and the club is still under construction. The perusal of accounting policies attached to the audited financial statements reveal that the assessee has received one time non refundable entrance fee from nominal members which is treated as income by the assessee and transferred to the profit and loss account. The assessee has three types of membership schemes viz. The CMJ membership, CMJ(nominal) membership and CMJ(Advance membership) . The assessee was treating non refundable entrance fee under nominal membership scheme as income while the entrance fee received under the two other types of membership schemes had not been shown as income, while the services /facilities which are being availed by the members of all the three types of schemes are same and hence on the same analogy the entrance fee received with respect to all the three schemes should have been offered for taxation by the assessee.

b) The AO held that the assessee's contention that the entrance fee is a capital receipt is not tenable. The assessee has relied on AS-9 para 12 read with Appendix B-6. The perusal of the AS-9 shows that for

the entrance and membership fees , the revenue recognition is broadly divided into two parts:

i) If the membership entrance fees permits only membership and all other services/facilities are paid for separately , or if there is a separate annual subscription then the membership entrance fees should be recognized as income when it is received.

ii) If the membership entrance fees entitles the member to services/facilities during a period of time then the membership entrance fees should be recognized as income on a systematic and rational basis (i.e. the membership fees should be divided over the period of membership and treated as income accordingly)

It was held by the AO that the assessee is following the former method whereby the assessee is charging annual subscription as well separate charges for various facilities like squash, tennis, swimming , use of party lawns etc. . Hence it was held by the AO that the assessee company as per accounting standard relied upon by the assessee should declare as income the entire membership entrance fees received by the assessee in the year of receipt. The AO distinguished the case relied upon by the assessee decided by Hon'ble Bombay High Court in the case of CIT v. WIAA Club Limited (1982) 136 ITR 0569(Bom.) and held that in this case entrance fees was paid by the members to the tax-payer which was a larger amount and thereafter the life members were not required to pay any annual subscription and they were relieved of their recurring liability to pay annual subscription year after year . The Hon'ble Court held that in case of life members , part of the entrance fee is a compounded payment in lieu of the recurring payments to be made

annually in the nature of annual subscriptions. Thus, it was held by the Hon'ble Court that in respect of assessment years 1963-64 and 1964-65 , out of the amounts received by the tax-payer on account of entrance fee from life members , Rs. 500 should be treated as capital receipts and the balance Rs. 2000 should be treated as the income of the tax-payer. Thus, it was held by the AO that the assessee's case is different as the members pay entrance fees as well as annual subscription and facility charges and hence ratio of the case law relied upon by the assessee is not applicable in the instant case.

The AO also held that as per AS-9 , the entrance fee has to be recognized as income in the year of receipt. The AO also distinguished the case relied upon by the assessee in the case of Madras Industrial Investment Corporation v. CIT (1997) 225 ITR 802(SC) as the said case law dealt with expenditure incurred by the tax-payer by way of discount paid to the persons who had subscribed to the debentures issued. The AO observed that the said decision is with respect to expenditure which is to be spread over a number of years and the facts in the instant case are totally different , the ratio of decision of the Hon'ble Supreme Court in the said case is not applicable to the instant case. Thus, it was held that as per AS-9, the entrance fees is to be taxed in the year of receipt.

The AO also held that as per AS-9 adopted by the assessee , the advance membership fee is to be brought to tax in the year of receipt. The assessee cannot treat the advance membership fees on a different footing than the other membership schemes for taxation purposes. The assessee company is collecting annual charges as well as utility/facility charges separately from its members irrespective of the scheme under which they have taken membership. Thus, as per AO by following AS-9 issued by ICAI, the assessee has to offer for tax advance membership fee received during the year in the year of receipt. The assessee relied on decision of Hyderabad Tribunal in the

case of Traesure Island Resorts Private Limited v. DCIT (2004) 84 TTJ 820(Hyd. Trib.) which the AO distinguished that in the said case the life members and privileged members were not required to pay any monthly or annual subscription to the tax-payer and facilities availed by them were free and hence based on facts, the entrance fees was directed to be spread over a period of five years and two years, while in the case of the assessee, the members have to pay separate annual charges and facilities charges and hence the entrance fee is taxable in the year of receipt as per AS-9, para 12 appendix B-6.

With respect to the contention of the assessee that if full collection is treated as income, the deduction should be allowed in respect of present value of expenditure likely to be incurred on a member. It was held by the AO that since the assessee is charging annual subscription and utilities/facilities charges for the various services offered by the Club and hence the expenditure which is likely to be incurred on a member is being separately collected by the assessee in the form of annual subscription and utilities/facilities charges for each year. Thus, it was held that question of appropriating the advance membership fees over the tenure of membership does not arise. The AO observed that in case the assessee is required to refund the advance membership fee as per the terms of agreement, the assessee can always claim the same as an expenditure in the year in which the advance membership fees is refunded as the same had already been taxed as income in the year of receipt.

The AO also held that merely because a particular view has been taken in the earlier years cannot bind the AO in subsequent year as the facts may change from year to year. The assessee has entered into an agreement with M/s Grand Cuisines Private Limited on 23-03-2007 whereby the food and beverages operations of the restaurant and bar have been handed over to the

said company on commission basis. Thus, in this year the club was functional and hence the assessee's contention that entrance fees and advance membership fees are not taxable is not tenable.

Thus, the AO held that the club is fully functional and the assessee is trying to postpone its tax liability indefinitely by showing the club as non functional. The assessee has deferred the income which was chargeable to tax and postponed taxability of income. The AO held that membership entrance fees received by the assessee in the year under consideration , has to be taxed in this assessment year. The assessee having received Rs.4,50,90,574/- as membership entrance fees which is inclusive of advance membership fees received of Rs. 4,18,93,567/-. The AO held that advance membership fee is also of the same nature as the regular entrance fees i.e. allowing member a right to enter in the club and use its various services/facilities by paying the appropriate annual fees and services charges and hence the advance membership fee received by the assessee during the previous year relevant to the instant assessment year is also taxable in the instant assessment year. The AO relied on decision of Hon'ble Patna High Court in the case of CIT v. United Club (1986) 161 ITR 853(Pat. HC) wherein Hon'ble Patna High Court has held that the entrance fee received by the tax-payer club at the time of entrance of the new member is a receipt of revenue nature and is chargeable to tax in the hands of the club. Similarly, reliance was also placed by the AO on the decision of Hon'ble Supreme Court in the case of CIT v. Calcutta Stock Exchange Association Limited (1959) 36 ITR 222(SC) wherein Hon'ble Supreme Court held that the entrance fee received from members is taxable. The AO also relied on the decision of Hon'ble Supreme Court in the case of Delhi Stock Exchange Association Limited v. CIT (1961) 41 ITR 495(SC) wherein Hon'ble Supreme Court held that members entrance fee is taxable as income of the tax-payer association.

Thus, the AO vide assessment order dated 23-12-2010 passed u/s 143(3) of the Act held that members entrance fee of Rs. 4,50,90,574/- received by the assessee is taxable as income of the assessee for the instant assessment year.

4. Aggrieved by the assessment order dated 23-12-2010 passed by the AO u/s. 143(3) of the Act, the assessee filed first appeal with the learned CIT(A).

5.Before the learned CIT(A), the assessee contended that the entrance fee is a capital receipt as held in the case of CIT v. WIAA Club (1982)136 ITR 569(Bom.) , CIT v. Diners Business Services Private Limited (2003) 263 ITR 1(Bom.) and ACIT v. Karnavati Club (2010-004-ITR(Trib.) 174 Ahm.). The assessee also submitted that advance membership fee received is fee collected from members in advance for a period of 25 years and the same cannot be treated as income in the very first year as the assessee is mandated to provide services to members for the entire tenure of 25 years. The assessee relied upon decision of Special Bench of the Tribunal in the case of Mahindra Holidays and Resorts Limited (2010) 39 SOT 438(Chennai)(SB) and decision of Hon'ble Supreme Court in the case of Madras Industrial Investment v.CIT (1997) 225 ITR 802(SC) to submit that advance membership fee be spread over 25 years and only 1/25 portion be brought to tax during the impugned assessment year.

It was observed by the learned CIT(A) that from perusal of the facts of the case and the decision of Hon'ble Bombay High Court in the case of CIT v. WIAA Club (1982) 136 ITR 569(Bom.) , CIT v. Diners Business Services Private Limited (2003) 263 ITR 1(Bom.) and ACIT v. Karnavati Club (2010-004-ITR(Trib.) 174 Ahm.) held that non refundable one time entrance fee which is charged for the enrolment from members of Rs.31,34,037/- be treated as capital receipt and shall not form part of total income vide appellate order dated 28.10.2011 passed by learned CIT(A).

With respect to advance membership fee of Rs.4,18,96,537/- which was collected in the first year for a tenure extending up-to 25 years , it was noticed by learned CIT(A) that the advance membership fees is essentially a payment for brand image , for the capital works and future maintenance of the utilities. The learned CIT(A) observed that the assessee's club started operation from assessment year 2003-04 as operational income was disclosed from that year. It was also observed that all the facilities were not created/functional from assessment year 2003-04 and capital work in progress was continuing and that as on 31-03-2008 , the capital work in progress stood at Rs.22.85 crores , and as on 31-03-2011 it was Rs. 7.69 crores . The learned CIT(A) observed that the assessee admitted before him that 70% of the planned utilities were completed by 31-03-2008. The learned CIT(A) held that the assessee is required to render continuous services for the entire period of 25 years and that taxing the entire receipt as income in the first year of collection would be against the matching principle of accountancy. The learned CIT(A) keeping in view the decision of Special Bench of the Tribunal in the case of Mahindra Holidays and Resorts Limited (Supra) and also keeping in view that 70% of planned facilities were completed and that the assessee is required to maintain these facilities without further matching contribution from the enrolled member , directed that the AO may tax 60% of the advance membership fee i.e. Rs.2,51,37,922/- (0.6 X 4,18,96,537/-) received every year vide appellate order dated 28.10.2011 passed by learned CIT(A).

6.Aggrieved by the appellate order dated 28.10.2011 passed by learned CIT(A), the Assessee as well as Revenue filed cross appeals with the Tribunal raising grounds of appeal as set out above in preceding para's of this order, wherein the assessee is in nutshell aggrieved by the orders of learned CIT(A) upholding taxability of 60% of advance membership fee in the instant

assessment year despite the club being not fully functional in the instant assessment year as contended by the assessee and without prejudice bringing to tax advance membership fee to the extent of 60% in the year of receipt instead of spreading the same over a period of 25 years during which period the services are to be provided to the members by the assessee , and the Revenue is aggrieved by the orders of learned CIT(A) holding entrance fee to be capital receipt not exigible to tax and also holding that advance membership fee is taxable only to the extent of 60% in the year of receipt instead of holding that 100% of advance membership fee is taxable in the year of receipt and also revenue is aggrieved with the admission of certain additional evidences by learned CIT(A) without complying with Rule 46A of the Income Tax Rules, 1962. We are taking these issue's raised by the assessee and the Revenue together and disposing all of them together vide this common order as the issues are inter-woven and connected closely with each other.

7.Before the Tribunal, learned counsel for the assessee reiterated its submissions as were made before the authorities below which are not repeated for the sake of brevity . The learned counsel for the assessee relied upon the following case laws:

a) CIT v. Diners Business Services Private Limited 263 ITR 1(Bom.)
b) CIT v. W.I.A.A Club Limited 136 ITR 569(Bom.)
c) ACIT v. Karnavati Club Limited 4 ITR Trib. 174-Ahd. Trib
d) ACIT v. Mahindra Holidays and Resorts India Limited 59 SOT 438 (Chennai –SB)
e) CIT v. Aspee Distributors Association (1994) 209 ITR 294(Bom.)

The learned DR on the other hand supported the orders of the AO and relied on decision of Hon'ble Patna High Court in the case of CIT v. United Club

(1986) 161 ITR 853(Pat. HC) and Hon'ble Supreme Court decisions in the case of CIT v. Calcutta Stock Exchange Association Limited (1959) 36 ITR 222(SC) and Delhi Stock Exchange Association Limited (1961) 41 ITR 495(SC) and others.

8.We have considered the rival contentions and perused the material on record including the case laws relied upon by both the parties. It is important to briefly discuss the entire background of the case first before proceeding to decide the issues.

We have observed that the assessee is a Private Limited Company and is a company limited by shares, registered with Registrar of Companies , Mumbai incorporated on 27-12-1995 .The assessee is engaged in the business of family club known as 'Juhu Millennium Club' and club is functioning for family entertainment . It is an admitted position that the assessee is not claiming exemption from taxation based on doctrine of mutuality as the body of members who paid the entrance fees , membership fee , annual charges etc. to avail the facilities and utilities of family Club known as 'Juhu Millennium Club' at Juhu and the shareholders of the company among whom profits/surplus of the company were to be distributed as dividends are not identical and the element of mutuality is lacking . The assessee started levying annual subscription charges w.e.f. 01-01-2005. The assessee has also not been able to controvert by cogent evidences and explanation that the club was not functional during the impugned assessment year while the authorities below have elaborately discussed in their orders the operations being carried on by the assessee w.r.t. to functionality of the club during the impugned assessment year, while it is also admitted by the assessee before the learned CIT(A) that 70% of the club functions were in operations during the impugned assessment year. The contention of the assessee that in case if it is not able to complete all the committed activities to the members, it may

be required to refund all fees etc. collected from members cannot be accepted as the principles of going concern are to be applied while computing income of the assessee rather than on the hypothesis that the entity would be wound up, except where compelling situation so warrant based on cogent reasons and evidences on record to adopt a different course.

The assessee company is collecting Club membership enrollment fund at the time of admission of members which composes of two parts , one refundable deposits which constitute 80% of club membership enrollment fund and secondly non-refundable entrance fee which constitute 20% of club membership enrollment fund. We are concerned in this appeal with only chargeability to tax of non-refundable entrance fee as the revenue has not brought to tax refundable deposits collected by the assessee being part of club membership enrollment fund at the time of admission of members. Secondly, the assessee company is also charging advance membership fee from members for a period of 25 years which is paid up-front by the members after being admitted to membership of the club. Thirdly, the assessee company is charging annual subscription charges from members which are paid annually for availing various services of club which started from 01-01-2005. Fourthly, the assessee is also collecting charges from members for availing various services such as food, beverages, banquet , swimming coaching, squash coaching, gym and health club, commission, guest entrance fee, etc.. There is no dispute with respect to chargeability to tax of annual subscription charges as well charges collected by the assessee company for food, beverages, banquet, swimming coaching, squash coaching, gym and health club, commission, guest entrance fee and other facilities / amenities availed by the members which are accepted by the assessee company to be exigible to tax. Similarly, Revenue has not brought to tax refundable deposit component of entrance fee which is an undisputed issue in the instant appeal. Thus, the dispute narrows down to chargeability to tax or otherwise

of non-refundable entrance fee charged by the assessee company from its members at the time of their admission as member of the Club , and as well about chargeability to tax of advance membership fee received by the assessee from its members for a period of 25 years in the year of receipt itself or to spread it over the years to which it pertains.

a) Non-refundable Entrance fee received by the assessee:-

Before , we move further it is important to discuss important judicial pronouncements having bearing on the decision on the chargeability to tax of non-refundable component of entrance fee to club received by the assessee company from its members.

(a) Hon'ble Bombay High Court decision in the case of Native Share and Stock Brokers' Association v. CIT (1946) 14 ITR 628(Bom.) more commonly known as Bombay Stock Exchange. The association was recognized by the Government under the Bombay Securities Contracts Control Act, 1925 and rules were framed by the association for the regulation and control of transactions in securities , so that it becomes what is referred to in the Act as a "Recognized Stock Exchange" . Being a mutual association not formed for the purpose of making profits it does not pay income-tax unless its activities come within Section 10(6) of Income Tax Act,1922 (Act of 1922) which reads as follows:-

> *" A trade, professional or similar association performing specific services for its members for remuneration definitely related to those services shall be deemed for the purpose of this section to carry on business in respect of those services , and the profits and gains therefrom shall be liable to tax accordingly."*

The issue in this appeal before the Hon'ble Bombay High Court was with respect to taxability of sum of Rs.1,22,600/- representing 1226 fees or subscription of Rs.100 each paid in respect of the authorization by the Association of 1226 clerks or remisiers belonging to some 475 firms which admit them to certain privileges or rights in the exchange building which otherwise they could not enjoy under the rules of association . The short question before the Hon'ble Bombay High Court was whether the Association is performing specific services for its members for remuneration definitely related to these services.

It was argued by Sir Jamshedji Kanga on behalf of the Association that the sum of Rs.100 is the license fee paid by a member for the granting of facilities which the member would not otherwise enjoy and this is not performing services by the Association who grants the license. The facility granted is merely admission of clerks and remisiers of the members of the exchange building and there are no services performed by the Association for its members. In the alternative it was submitted that if any services are performed they are performed for all the members and not only for those members who pay the fees of Rs.100 and that therefore the remuneration does not definitely relate to any service rendered to the member paying them. On the other hand, Mr. Setalvad on behalf of the Commissioner submitted that the answer is to be found by asking the question , " for the remuneration paid, what, if any ,are the services performed? The attention of Hon'ble Bombay High Court was drawn to some of the rules which showed a definite scheme for the admission and supervision of the authorized clerks which confers definite advantages to the members who pay the fees.

Sir Leonard Stone, Chief Justice writing a separate judgment held that these rules lay down a definite scheme and provide an organized arrangement, controlled and supervised by the Association for the benefit of its members. It

was held that the carrying of their scheme into effect is performing services for its members of the Association. It was held by Sir Leonard Stone, Chief Justice of Hon'ble Bombay High Court that no doubt the benefit will redound to the benefit of all members since all would have the advantage of disciplined supervision exercised over the authorized clerks and remisiers of the others. It was held that services performed are specific because they provide an identifiable scheme laid down with sufficient clarity and the remuneration is definitely related to the services and is for the benefit of the members of the Association and the amount was held to be exigible to tax within provision of Section 10(6) of the Act of 1922.

Hon'ble Kania, Justice(as he then was) wrote a separate and concurring judgment agreeing with Sir Leonard Stone, Chief Justice. It was held by Hon'ble Kania, Justice that it is clear that the scheme taken as a whole is based on institution of the authorized clerks and their work for the members who employ them. For that the Association has to render services and these are clearly specific services rendered by the Association for its members who desire to employ authorized clerks. The Association has undertaken certain obligations by the rules towards its members in accepting these fees. By the rules the Board and the Secretary have to perform certain duties as prescribed by the rules in respect of authorized clerks and it is futile to contend that they amount merely to facilities and do not constitute performance of services by the Association. It was held that it is true that several of the services to be rendered may be helpful to the other members for their business. Taken as a whole it was held that as a performance of services by the Association for the benefit, of morn bets who pay the remuneration. Secondly , It was also held that on the payment of Rs.100/- " the authorized clerks" comes into existence and all the services which the Association has thereafter to render are in respect of the authorized clerks in respect of whom the specific services are definitely related . Thus, in opinion of Hon'ble Kania,

Justice the two requisites of the section are fulfilled under the rules of the Association and the amounts were held to be exigible to tax u/s 10(6) of the Act of 1922.

b)Hon'ble Supreme Court judgment in the case of CIT v. Calcutta Stock Exchange Association Limited (1959) 36 ITR 222(SC)- The facts of this case is that respondent is a limited liability company incorporated on 07-06-1933 with a view to takeover the assets and liabilities of unincorporated association called "The Calcutta Stock Exchange Association" and to carry on the affairs of the stock exchange which had been founded by that association. In view of that objective, the company had to make rules and bye-laws , regulating the mode and the conditions in , and subject to , which the business of the stock exchange had to be transacted. The company is composed of "members" who except those who were members of unincorporated association have to be elected as such, and upon such elections have to acquire a share of the company and pay an entrance fee. The members have to pay a monthly subscription according to the by-laws of the company. Under the by-laws of the respondent company, members with a certain standing , are allowed to have "authorized assistants" who are permitted to use of the premises of the association and to transact business therein in the names and on behalf of the members employing them. The members have to pay an admission fee for such authorized assistants according to prescribed scales. It was observed by the Hon'ble Apex Court that the rules relating to the admission of members' assistants , confer the benefit upon those members only who are qualified according to the by-laws to have such assistants , and who have paid admission fees and pay a monthly subscription for each of them, besides their own dues, to the company. The by-laws also provided that an authorized assistant shall not enter into any contracts on his own behalf and all contracts made by him shall be made in the name of the member employing him and such member shall be absolutely responsible for the due fulfillment

of all such contracts and for all transactions entered into by the authorized assistants on his behalf. It is also provided by the by-laws that tickets are to be issued to the authorized assistants , besides the members tickets. The by-laws also provided that member shall give notice in writing to the association of the termination of the employment of the authorized assistant and on such termination such authorized assistant shall have no right to transact business in the name and on behalf of the member and right of the assistant to use the rooms of the association shall cease.

The respondent-Calcutta Stock Exchange Association Limited during the accounting year 1944-45(assessment year 1945-46) received from its members the sum of Rs. 60,750/- as entrance fees and the sum of Rs.15687/- as subscription in respect of authorized assistant, both the payments being received from members of the association in respect of their authorized assistants. The company also received Rs.16000/- as fees from members for putting the names of companies on quotation list. The Hon'ble Apex court observed that it is manifest that unless the respondent company is brought within the terms of subsection (6) of section 10 of Act of 1922, the three items of income coming into hands of the association, would not be chargeable to tax. The sub-section(6) of Section 10 of Act of 1922 is reproduced hereunder:

> *"(6) A trade, professional or similar association performing specific services for its members for remuneration definitely related to those services shall be deemed for the purpose of this; section to carry on business in respect of those services, and the, profits, and gains therefrom, shall be liable to tax accordingly."*

The Hon'ble Apex Court observed that the words "performing specific services" mean in the context , "conferring particular benefits" on the members. The

word “services” is a term of a very wide import, but in context of Section 10 of Act of 1922 , its use excludes its theological or artistic usage. Thus, it was held that in reference to a trade, professional or similar association, the performing of specific services must mean conferring on its members some tangible benefit which otherwise would not be available to them as such, except for payment received by the association in respect of those services. The sub-section further requires that remuneration should be “definitely related” to the specific services . The word “remuneration” it was held is a word of much wider import including “recompense” , “reward” , “payment” etc.. Thus, it was held that it should be shown that those services would not be available to the members or such of them as wish to avail themselves of those services, but for specific payments charged by the association as a fee for performing those services.

It was held by the Hon’ble Apex court that the entrance fee is , thus, a price paid for the services of the association in making suitable arrangements for an absentee member to transact business on his behalf and in his name by his representative or agent . The entrance fee in question , therefore, cannot but be ascribed to the specific services rendered by the association in respect of authorized assistant who thus become competent to transact business on behalf of their principal.

Coming next to sum of Rs.15,687/- which was realized from the members by way of subscription in respect of their authorized assistants, it was observed by the Apex Court that this sum consists of the contribution severally made by the members periodically , so as to continue to have the benefits conferred by the association of having the use of their representative or agent even during absence which is a substantial benefit to the member.

Lastly, the sum of Rs.16000/- represented the fees received from members for allowing their application for enlisting the name of companies not already on quotation list, so that shares and stocks of these companies may be placed on stock market. This fees has not to be paid by company concerned directly but by the member who initiates the proposal and , apparently , finds it worthwhile to pay that prescribed fee to the association. Apparently, such a member is interested in placing the stocks of that company on the market. Thus, it was observed by Hon'ble Apex Court that the sum of money is definitely related to the specific services performed by the association , namely, to permit transactions in respect of the shares of the company concerned , which services would not be otherwise available to the members as a body or to the individual member or members interested in that company.

The Hon'ble Apex court held that each one of three sources of income to the association accrues to it on account of its performing these specific services in accordance with its rules and by-laws. It was held that each one of the three distinct sources of revenue to the association is specifically attributable to the distinct services performed by the association for its members or such of them as avail themselves of those benefits. It was held that each one of them is separately charges for , according to the rate or schedule laid down by the rules and by-laws of the association and therefore, Hon'ble Apex Court held that requirements of Section 10(6) of the Act of 1922 have been fulfilled in this case. The Hon'ble Apex court concurred with the findings of Hon'ble Bombay High Court in the case of Native Share and Stock Brokers' Association v. CIT (1946) 14 ITR 628(Bom.) to arrive at above conclusions. The Hon'ble Apex Court also referred to decision of Hon'ble High Court of Travancore in the case of CIT v. Chamber of Commerce, Alleppey (1955) 27 ITR 535(Coch.) wherein Hon'ble Supreme Court observed that the facts of the case are not similar but the ratio decidendi of the case is relevant. The case

referred to Alleppey Chamber of Commerce. The Chamber inaugurated a produce section with the object of promoting the interest of merchants in general , and of those engaged in the produce trade, in particular; of acting as arbitrators and collecting and publishing information relating to the produce trade. Members were admitted to the produce section on payment of admission fees, monthly fees and contributions at certain rates. The question which was referred to the Hon'ble High Court was whether the receipts by way of fees and contributions could be chargeable u/s. 10(6) of the Act of 1922, and it was answered in the affirmative.

The Hon'ble Supreme Court referred to the decisions rendered by Courts in England and observed that"

> *" Though cases in England, by way of precedent for the decision of the case in hand, have not been cited at the bar, apparently because the scheme of the income-tax law in England is different and the words of the statute are not in pari materia, yet there are some cases which throw some light on the controversy before us. For example, the case of Carlisle and Silloth Golf Club v. Smith [1912] 6 Tax Cas 48 related to a golf club which was not incorporated. It was admittedly a bona fide members' club, but under one of the terms of its lease, it had to admit non-members to play on its course on payment of "green fees" at certain prescribed rates. Those fees were paid by non-members. Receipts from those fees were entered in the general accounts of the club, thus showing an annual excess of receipts over expenditure of the club as a whole. It was held by Hamilton, J. (as he then was), that the club carried on a concern or business in respect of which it received remuneration which was assessable to income-tax. He pointed out that the receipts from non-members went to augment the funds of the club, and the revenue thus received was applied for the purposes of the club—towards its general*

expenditure. The case was taken up to the Court of Appeal, and the decision of that court is reported in the same volume at page 198. The Court of Appeal affirmed the decision and dismissed the appeal.

The judgment of the King's Bench Division in Liverpool Corn Trade Association Limited v. Monks [1926] 10 Tax Cas 442, was based on facts which are similar to the facts of the present case. In that case, the Liverpool Corn Trade Association Limited was an incorporated body under the Companies Act, with the object, inter alia, of protecting the interests of the corn trade, and of providing a clearing house, a market, an exchange, and arbitration and other facilities to the trade. Membership of the association was confined to persons engaged in the corn trade. Each member was required to have one share in the company, and had to pay an entrance fee and an annual subscription. Non-members could also become subscribers. Payments were made to the association by members and others for services rendered through the clearing house, etc. The assessee was taxed on the excess of its receipts over expenditure. On appeal to the Special Commissioner's, they upheld the assessment. One of the points raised before the Special Commissioners was that transactions with its members were mutual ones, and that any surplus arising from such transactions was not a profit assessable to income-tax. On appeal, the High Court agreed with the determination of the Special Commissioners, and held that any profit arising from the association's transactions with members was assessable to income-tax as part of the profits of business, and that the entrance fees and subscriptions received from members must be included in the computation of such profits.

It was suggested that the service in this case, if any, was extremely trivial and the remuneration which was large was for that reason not definitely related to the service. It was held by Upjohn, J., inBradbury (H.

M. Inspector of Taxes) v. Arnold [1957] 37 Tax Cas 665,669, that the extent of the services was of no materiality. There, the question was being dealt with under Case VI of Schedule D of the Income Tax Act, 1918. The learned Judge observed:

> *"There is no doubt that a contract for services may, and clearly does, form a matter for assessment under Case VI of Schedule D, and not the less so that the services to be rendered are trivial or that they are to be rendered once and for all so that the remuneration may be regarded as a casual profit arising out of a single and isolated transaction."*

The same view was expressed by Harman, J., in Housden (Inspector of Taxes) v. Marshall [1958] 3 All ER 639. In that case, a well-known jockey contracted with a newspaper company to make available to its nominee "reminiscences of his life and experiences on the turf for the purpose of writing a series of four articles", and to provide photographs, press cuttings, etc. He was paid £ 750. The question was whether this amounted to sale of property, or was a payment for services rendered. It was held that it was the latter, and that it did not matter if the service rendered was trivial."

Thus, the Hon'ble Supreme Court held in the case of Calcutta Stock Exchange Association Limited(supra) that the nature of the service which the association performed in respect of the assistants, the payment of the admission /entrance fee was definitely related to that service. It was held that the case fell within section 10(6) of the Act of 1922 and is exigible to tax .

(c).The Hon'ble Supreme Court judgment in the case of Delhi Stock Exchange Association Limited v. CIT (1961) 41 ITR 495(SC). The facts of the case are that the appellant company in this case was incorporated in the year 1947

with an objects, inter-alia, to acquire going concern activities, functions and business of the Delhi Stock & Share Exchange Limited and the Delhi Stock and Share Brokers Association Limited and to promote and regulate the business of exchange of stocks and shares , debentures and debenture stocks government securities , bonds and equities of any description and with a view thereto, to establish and conduct stock exchange in Delhi and/or elsewhere. The rules were made by the appellant company for the conduct of business of sale and purchase of shares in the exchange premises. The appellant earned income of Rs. 29,363/- during the year 1947-48 out of which a sum of Rs. 15,975/- shown as admissions fees was deducted and returned income was Rs.13,388/- . The appellant showed income of Rs.9,000/- on account of members' admission fee and Rs.6,875/- on account of authorised assistants' admission fee in the profit and loss account. The Revenue added the members admission fee and authorised assistants' admission fee to the income of the assessee. The Tribunal held in favour of the tax-payer by holding that the amounts received as entrance fee were intended to be and were in fact treated as capital receipts and were therefore excluded from assessment as there was no requisite periodicity , these amount were not taxable.

The Hon'ble High court held that the admission fee of members or authorised assistants received by the tax-payer is taxable in its hands.It was held that the tax-payer is not mutual society and therefore not exempt from payment of income-tax;that it had a share capital on which dividend could be earned and any person could become a shareholder of the tax-payer company by purchasing a share but every shareholder could not become a member unless he was enrolled, admitted or elected as a member and paid a sum of Rs. 250 as admission fee. On becoming a member he was entitled to exercise all rights and privileges of membership. It was found that the real object of the tax-payer company was to carry on business as a stock exchange and the earning

of profits. It was held that the admission fees fell within the ambit of the expression "profit and gains of business , profession or vacation".

The Hon'ble Supreme Court held that membership admission fee paid by the members on account of authorised assistants is covered by the decision of Hon'ble Supreme Court in the case of CIT v. Calcutta Stock Exchange Association Limited (1959) 36 ITR 222(SC). The Hon'ble Supreme Court held that members' admission fees paid by the members for their own admission, has to be decided in accordance with the nature of the business of the appellant company, its memorandum and articles of association and the rules made for the conduct of business. It was observed by Hon'ble Supreme Court that the tax-payer company was an association which carried on a trade and its profits were divisible as dividend amongst the shareholders. The object with which the company was formed was to promote and regulate the business in shares, stocks and securities etc., and to establish and conduct the business of a stock exchange in Delhi and to facilitate the transaction of such business. It was observed by Hon'ble Supreme Court that the business was more like that in *Liverpool Corn Trade Association* v. *Monks* [1926] 2 KB 110 and observed as under:-

> *"In that case an association was formed with the object of promoting the interest of corn trade with a share capital upon which the association was empowered to declare a dividend. The association provided a corn exchange market, newsroom and facilities for carrying on business and membership was confined to persons engaged in the corn trade and every member was required to be a shareholder and had to pay an entrance fee. The association also charged the members and every person making use of facilities a subscription which varied according to the use made by them. The bulk of the receipts of the association was derived from entrance fees and subscriptions. It was, therefore, contended that the association did not carry on a trade and that it was a*

mutual association and entrance fees and subscriptions should be disregarded in computing assessment of the assessable profits. It was held that it was not a mutual association whose transactions were incapable of producing a profit; that it carried on a trade and the entrance fee paid by members ought to be included in the association's receipts for purposes of computing the profit. Rowlatt, J., said at page 121:

> *"I do not see why that amount is not a profit. The company has a capital upon which dividends may be earned, and the company has assets which can be used for the purpose of obtaining payments from its members for the advantages of such use, and one is tempted to ask why a profit is not so made exactly on the same footing as a profit is made by a railway company who issues a travelling ticket at a price to one of its own shareholders, or at any rate as much a profit as a profit made by a company from a dealing with its own shareholders in a line of business which is restricted to the shareholders."*

In Commissioner of Income-tax v. Royal Western India Turf Club Ltd. [1953] 24 ITR 551 . this court rejected the applicability of the principle of mutuality because there was no mutual dealing between members inter se. There was no putting up a common fund for discharging a common obligation undertaken by the contributors for their mutual benefit and for this reason the case decided by the House of Lords in Styles v. New York Life Insurance Company [1889] 2 Tax Cas. 460 was held not applicable."

In the instant case of Delhi Stock Exchange Association Limited it was observed by the Hon'ble Supreme Court that the Memorandum of Association shows that the object with which the company was formed was to promote and regulate the business of exchange of stocks, shares, debentures,

debenture stocks etc. The income, if any, which accrued from the business of the appellant company was distributable amongst the shareholders like in every joint stock company. According to the articles of association the members included shareholders and members of the exchange and according to the rules and bye-laws of the appellant company "member" means an individual, body of individuals, firms, companies, corporations or any corporate body as may be on the list of working members of the stock exchange for the time being. In the articles of association, clauses 7 and 8, provision was made for the election of members by the board of directors and rules 9 and 10 laid down the procedure for the election of these members. The entrance fees were payable by the trading members elected under the rules and bye-laws of the association, who alone with their associates, could transact business in stocks and shares in the association. Therefore, the body of trading members who paid the entrance fees, and the shareholders among whom the profits were distributed were not identical and thus the element of mutuality was lacking. It is the nature of the business of the company and the profits and the distribution thereof which are the determining factors and in this case it has not been shown that the appellant's business was in any way different from that which was carried on in the case reported as *Liverpool Corn Trade Association* v. *Monks* [1962] 2 KB 110 .

Thus, the Hon'ble Supreme Court approved the judgment of Hon'ble High Court and held that the membership admission fee paid by the members for their own admission as well admission of their authorised assistants is exigible to tax under the Act of 1922.

(d) The next judgment is CIT v. W.I.A.A. Club Limited (1982) 136 ITR 569(Bom.HC) decided by Hon'ble Bombay High Court. In this reference which was made at the instance of Revenue, the tax-payer was a club which was incorporated under the Indian Companies Act on 10-09-1947. It was an

undisputed position that the tax-payer club was a trading company. The Club has six categories of members (a) honorary members, (b)life members, (c) ordinary members, (d) temporary members,(e) service members,(f) associate members. Under the articles of association, the entrance fee were payable by the life members and ordinary members of such amount as determined by executive committee. During the impugned assessment year, the entrance fee payable for life members was Rs.2,500/- and the entrance fee payable for ordinary member was Rs.500/-. An ordinary member can become a life member on payment of fees prescribed for life members . An ordinary member has to pay an annual subscription in advance on election and on the 1st day of April in each year thereafter. Life members, service members and temporary members are, however, not liable to pay any annual subscription under article 38. Under the articles, temporary, honorary, service and associate members are subject to the memorandum and articles of association and the rules and bye-laws of the club for the time being in force, but they are not entitled to receive notice of or to attend or to vote at the general meeting of the club or to be elected members of the Executive Committee of the club or of any sub-committee of the club or to stand for election or to hold any office of the club or to participate in the distribution of any assets of the club. Generally, the rights of the life members and the ordinary members, so far as the enjoyment of the facilities provided by the club are concerned, are the same, though there is some difference between their rights in relation to the share in the property of the club in the case of winding-up or dissolution of the club. A life member has an equal share in the property of the club irrespective of the period for which he has been a life member, while an ordinary member is eligible for the share in the club property only if he has been a member of not less than five years' standing. Under the bye-laws the club provides several facilities and the members are entitled to use the club house and to bring guests with them. There are facilities for accommodation in the club's residential room on a daily, weekly

or monthly basis available to all members; sport facilities are also provided for playing tennis, badminton, billiards; members can avail of the facility of the card room and the swimming pool. These are some of the facilities provided by the club.

The tax-payer club received Rs.2500 as entrance fees from life member, while entrance fee from ordinary member was Rs.500.The Revenue split the entrance fee received from life members into two part whereby Rs.500 was treated as entrance fee while Rs 2000 was treated as consolidated annual subscription.

The Court observed as under:

> *"Coming to the main question, in order to arrive at a proper decision of the question referred to us we are required to consider the real nature of the payment which is made by a life member on account of entrance fees. In order to decide whether the entrance fees paid by a life member should be treated as income in the hands of the assessee or as being in the nature of a capital receipt, neither the nomenclature used by the assessee nor the manner in which the receipt has been treated by the assessee for the purposes of its accounts would be conclusive. The articles of association of the assessee no doubt provide for different categories of members. Out of these categories of members, we must leave out of consideration the honorary members who are not required to pay any entrance fees or subscription. It is well known that when a body like a club elects an honorary member, that is done by way of honour more to the club than to confer any additional benefit on the member himself. Normally, a club wants to be proud of having some prominent and distinguished persons as its members and that is the sole consideration for electing a person as an honorary member. Life members, service members and temporary members are not liable to pay any annual subscription and the liability to pay annual subscription is*

only on the ordinary members. In addition to the annual subscription, the ordinary members, who are ordinarily resident within the local area, have to pay annually, in advance, a local subscription of such amount as may from time to time be determined by the executive committee. The temporary members, service members and associate members form, by the very nature of the incidents of their membership, an independent class of persons who are not entitled to take part in the management of the club though, in other respects, all of them are entitled to enjoy the same privileges as other members. Their membership is entirely of a temporary nature and its duration is controlled by the appropriate articles. They cannot, therefore, be compared with either life members or ordinary members. If a person wants to avail of the facilities afforded by a club and exercise the rights which are available to an ordinary member, he has to pay an entrance fee plus an annual subscription if he wants to become an ordinary member. If a person wants to become a life member, he pays an amount which is styled as entrance fees which comparatively is a much larger amount than the entrance fees paid by ordinary members. The only effect of the life members paying the entrance fees at a larger amount is that they are relieved of their recurring liability to pay the annual subscription year after year. It is obvious that the life members are not required to pay the annual subscription year after year because they have already paid a large amount which was styled as entrance fees. Now, if we compare the rights and privileges of the life members and the ordinary members, there is hardly any substantial difference between the two, and, as already pointed out, the only substantial difference between the two classes of members is that there is no liability to pay annual subscription in the case of life members. If the rights and privileges which are enjoyed by the life members and the ordinary members are the same and if for the purposes of enjoying these rights and privileges the ordinary member has

to pay not only an entrance fee but also an annual subscription, it is obvious that when the articles of association of the assessee-club required the life members to pay a larger amount which was described as entrance fees, it was intended to commute the amount of annual subscription which a member would otherwise be required to pay. The amount which is paid by life members and is styled as entrance fees has, in our view, obviously two elements in it. A part of the amount paid partakes of the nature of entrance fees which is a fee paid to the club with a view to acquire the right to avail of the services and the facilities made available to the club on annual subscription and other rights provided under the articles and the bye-laws. The other part of the amount is a consolidated commuted payment in lieu of the annual subscription which a member would otherwise be required to pay. It is difficult to imagine that those who founded the club and framed the articles of association could have intended that while ordinary members would be allowed to exercise member's rights and avail of the facilities available in the club on payment of the annual subscription, the same facilities would be available to the life members free of any cost and it appears obvious to us that the entrance fees includes within it a compounded payment in lieu of the annual subscription which a member would have been required to pay as an ordinary member. We have, therefore, no doubt in our mind that in the case of life members when the entrance fee is paid, it is a consolidated amount, part of which must be treated as entrance fees and part of it as a compounded payment in lieu of the recurring payments to be made annually in the nature of annual subscriptions.

When the amount paid by a life member, which is styled as entrance fee, is so split, it will not be correct to say that this would result in rewriting

the constitution or articles of association of the assessee. As already pointed out, the real question which has to be determined is the nature of the receipt in the hands of the assessee and if a discussion of the nature of the receipt is not foreclosed by any nomenclature adopted by the assessee, it would be perfectly open to the I.T. authorities to scrutinise the nature of the receipt and to classify it as either capital receipt or a revenue receipt or partly of one kind and partly of another.

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The argument that there is no apparent connection between the compounded payment and the length of the period for which a life member would avail of the facilities of the club and would have been required to pay the annual subscription and, therefore, there was no justification for splitting up the amount of entrance fee does not, in our view, affect the conclusion which we have reached. It cannot be disputed that in a given case a person may continue to be a life member for a long time and if he had become an ordinary member and paid annual subscription, the club would have received a much larger amount by way of annual subscription than what was received by the club by way of a consolidated payment. Such uncertainties are, however, inherent in the nature of the fee that is fixed in such a case. The possible length of the period during which a life member would take advantage of the facilities of the club can never be predicted with any certainty. Finalisation of such fees is found to have an element of arbitrariness in their determination. What amount should be fixed by way of entrance fees for life members was a matter squarely within the discretion of the assessee. Just as, in a given case, a person might take advantage of the facilities of the club for

a long period it may also be that, in a given case, a life member may cease to take advantage of the facilities of the club only after a very brief period. The crucial question is whether it was intended that the services which had to be availed of by ordinary members on the payment of an annual subscription could be availed of by life members without any charge or was such charge intended to be recovered in a lump sum at the beginning itself. We are thus mainly concerned with the character of the payment and if the character is such that a part of it is in lieu of recurring annual payments, then the possible advantage or disadvantage either to the member or to the club would not affect the nature of the payment.

That brings us to the second aspect of the case argued by Mr. Joshi for the revenue. Once a part of the entrance fees paid by a life member is held to be a compounded payment for annual subscriptions, there is no difficulty in holding that that part of it would be income in the hands of the assessee. So far as the remaining amount is concerned, it would be in the nature of a capital receipt of the assessee. What is, however, argued by Mr. Joshi on behalf of the revenue is that even that part of the consolidated amount of entrance fees which could be classified as entrance fees should be treated as income. We must first decide what part of the entrance fees paid by a life member should be treated as a capital receipt.

Now, so far as the year in question is concerned, the entrance fees for an ordinary member prevalent was Rs. 500. It would, therefore, be reasonable, while dissecting the consolidated entrance fees of Rs. 2,500 into entrance fee as such and a commuted payment on account of annual subscription, to treat Rs. 500 out of Rs. 2,500 as entrance fees and the rest of it is in the nature of a consolidated payment by way of annual

subscriptions and, therefore, as income. With regard to this entrance fee of Rs. 500 it is contended that this must also be treated as income in the hands of the assessee and our attention has been invited to a passage from Halsbury's Laws of England, 3rd Edn., Vol. 20, para. 8, under Pt. 1, Sec. 1, at p. 13. It reads as follows:

> *"Factors considered in determining quality of receipt.—In the decided cases the courts have had regard to various factors in determining whether the proper nature of an item of receipt is income. If an item recurs or is likely to recur annually or repeatedly to form a series, that is an indication of its quality of income."*

Mr. Joshi contended that entrance fee is in the nature of a recurring receipt in the hands of the assessee and since entrance fee is received from time to time, the test laid down above is satisfied.

Now, it is important to bear in mind that though entrance fee is received by the assessee from time to time, it is received from different persons and it is not one of those payments which are made by the same person by virtue of any recurring liability. Entrance fee is paid by a member only once and it is this payment which has to be considered whether it is in the nature of income or a capital receipt. If we look at the articles of association of the assessee-club, it is clear that in order to avail of the rights of a member and the facilities and the services provided by the assessee-club, it is not enough for a person merely to pay the annual subscription. As a matter of fact a person cannot exercise the rights and privileges of a member merely by volunteering to pay the annual subscription. What a member has to acquire first is the right of membership of the club. A person has first to get elected as a life or

ordinary member, as the case may be, in the manner provided in the articles of association. It is only after a person is elected that he is required to pay the subscription and entrance fee within fourteen days of notice of his election under article 31. The acquisition of right as an ordinary member is done by the payment of the entrance fee of Rs. 500 in the relevant assessment years. In lieu of this payment of the entrance fee, a member does not get any return in the form of any services or amenities. All that he gets is a right to avail of the amenities or facilities provided by the club on a payment of the annual subscription. This right can be exercised by him as long as the membership is not determined as provided by article 44. This receipt of Rs. 500 received by the club is a return for vesting a right of membership in the member and, therefore, in our view, the entrance fee would clearly be in the nature of a capital receipt in the hands of the assessee.

Mr. Joshi has heavily relied on the decision in Liverpool Corn Trade Association Ltd. v. Monks [1926] 10 TC 442 (KB). The question there was whether the Liverpool Corn Trade Association Ltd. was a mutual association or was a trading company. The association, which was a limited company under the Companies Act, was formed for the purpose of protecting the interests of the corn trade and for providing a clearing house, a market, an exchange and arbitration and other facilities for the persons engaged in that trade. Membership of the association was confined to persons engaged in the corn trade as principals. Each member had to acquire one share (of £ 150 nominal value) in the company and had to pay an entrance fee and an annual subscription. Non-members could also become subscribers. Payments were made to the association by members and others for services rendered through the clearing house, etc. The association had the power to declare a dividend

out of its profits, though it had not done so since 1906. The association had been assessed to income-tax on the excess of receipts over its expenditure. The association had contended before the Special Commissioners that it did not carry on a trade, etc., the profits of which were assessable under Case I of Sch. D and that so far as concerns transactions with its members, the association was a mutual one, and that any surplus arising from such transactions was not a profit assessable to income-tax. The Special Commissioners confirmed the assessments. On a case being stated for the opinion of the King's Bench Division of the High Court, Rowlatt J. held that any profit arising from the association's transactions with members was assessable to income-tax as part of the profits under Case I of Sch. D and that the entrance fees and subscriptions received from members must be included in the computation of such profits. Rowlatt J. made the following observations on which Mr. Joshi relied (p. 453):

> *"But in a case of this kind, where there is a share capital, with a chance of dividends, a chance of a right to dividends if declared, upon the share capital, and to one side of that a dealing with people who happen to be the owners of the share capital, affording benefits to those people one by one individually, for which they pay money by way of subscriptions and by way of entrance fees as a sort of overriding subscription, if I may use that word, which opens the door to subscriptions, there is no reason at all for saying that you are to neglect the incorporation, or that you can regard otherwise than as profits the difference which is obtained by dealings between that corporation and people who happen to be its members."*

According to Mr. Joshi, Rowlatt J. has described the entrance fee as a sort of overriding subscription and, therefore, according to him, the entrance fee must be treated on the same footing as subscription. Since subscription was a part of the income of the assessee, the overriding subscription also, according to Mr. Joshi, must be treated similarly.

Now, there is no doubt that the entrance fee has been described by Rowlatt J. as "as a sort of overriding subscription ". What has, however, to be borne in mind is that there is no reasoning in the judgment as to why the entrance fee and the subscription were treated as having the same character of payment. It must also be appreciated that the main question which fell for determination before Rowlatt J. was whether the association in question was a mutual association or it was a trading company and the question was whether the profits obtained as a result of dealings between the corporation and its members should be regarded as profits as such. The decision seems to have proceeded on the footing that the association may profit from receiving the entrance fee and the subscription for the various facilities as will be clear from the manner in which the case has been approached in the following paragraph (p. 452):

> *"Now, the question is here, whether, so far as this company makes a profit out of what the members pay to it, that is taxable income of the business which they undoubtedly carry on. That alleged profit consists of the amount by which the entrance fees of the members and their subscriptions for the various facilities, if I may use that general word, exceed the amount which is to be taken to be the cost of keeping up the buildings and affording the facilities."*

The judgment in Liverpool Corn Trade Association's case [1926] 10 TC 442 (KB) does not indicate that it was ever disputed in that case that the entrance fees constituted the income of the association. That decision cannot, with respect, be taken as an authority laying down that the entrance fees and the annual subscription must always be treated on the same footing for the purpose of deciding whether the entrance fees could be treated as income or not.

We are, therefore, inclined to take the view that the amount of Rs. 2,500 which is described as entrance fees paid by a life member must be dissected and a sum of Rs. 500 out of the total amount paid by way of entrance fees by a life member, must be treated as a capital receipt and the balance must be treated as income.

Consequently, for the years 1963-64 and 1964-65 when the entrance fees for life members was Rs. 2,500 and the entrance fees for ordinary members was Rs. 500 an amount of Rs. 500 out of the entrance fees paid by a life member will have to be treated as a capital receipt in the hands of the assessee and Rs. 2,000 as income of the assessee.

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Accordingly, the question referred to us is answered as follows:

In respect of the assessment years 1963-64 and 1964-65, out of the amounts received on account of entrance fee from life members, Rs. 500 should be treated as a capital receipt and the balance of Rs. 2,000 should be treated as the income of the assessee. In case an ordinary member becomes a life member on payment of Rs. 2,000, the entire

> amount of Rs. 2,000 should be treated as the income of the assessee. *****
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(d) The next judgment is of Hon'ble Patna High Court in the case of CIT v. United Clubs (1986) 161 ITR 853(Patna HC). The statement of the case was submitted by ITAT u/s. 256(1) of the Act of 1961 referring the following question of law for the opinion of the Court :

> " Whether, on the facts and in the circumstances of the case, the entrance fee received by the club at the time of entrance of the new members is a receipt of revenue nature and is chargeable to tax in the hands of the club?"

The relevant facts of the case are that the taxpayer is a club in Jamshedpur offering various recreational facilities to its members. The club receipts constituted in the shape of membership fee from its members and it derives income from bar and restaurant and other connected activities. The club received Rs.25,050/- which represented entrance fees received from its new members during assessment year 1966-67 which was included by the Revenue in the income computed of the club under the Act. The tax-payer club directly capitalised the said entrance fees in the Balance Sheet. On appeal before the AAC , it was noted by the AAC that the initial admission fees conferred the right of membership but did not entitle the member to participate without paying monthly subscription. The AAC held that this fee was in nature of share capital of the company and was a capital receipt in the hands of club not exigible to tax. The Tribunal on appeal held it to be capital receipt following its own decision in ITA no. 1653 to 1655(Patna) of 1972-73 dated 10-12-1973 in the case of Beldih Club of Jamshedpur.

The Hon'ble Patna High observed that the assessee-club is offering various recreational facilities to its members most of whom are Tata Employees. The club has provision for games like tennis, badminton, table-tennis, basket ball, billiards etc. beside having its own swimming pool , library and exhibition of film shown in the club. The Hon'ble High Court observed that now undisputed and settled position is that the assessee is not exempt on the basis of mutuality.

The Revenue relied on the judgment of the High Court of Justice (King's Bench Division) in the case of Liverpool Corn Trade Association Limited v. Monks (1926) 10 TC 442 (KB) to contend that in this case the appellant-association was incorporated under the Companies Act, as a limited company with the objects, *inter alia,* of protecting the interests of the corn trade and of providing a clearing house, a market, an exchange, and arbitration and other facilities for the persons engaged in that trade. Membership of the Association is confined to the persons engaged in that trade. Membership of the Association is confined to the persons engaged in the corn trade as principals. Each member must acquire one share of £ 150 nominal value in the company, and must pay an entrance fee and an annual subscription. Non-members may also become subscribers. Payments are also made to the association by members and others for services rendered through the clearing house, etc. The association has power to declare a dividend out of its profits but has not done so since the year 1906. The association having been assessed to income-tax under Schedule D on the excess of its receipts over its expenditure, appealed to the Special Commissioner, contending, *inter alia,* (*i*) that it did not carry on a trade, etc., the profits of which were assessable under Case I of Schedule D, and (*ii*) that so far as concern's transactions with its members, the association was a mutual one and that any surplus arising from such transactions was not a profit assessable to income-tax. The Special Commissioner, however, confirmed the assessment.

In those circumstances it was held that any profit arising from the association's transactions with members was assessable to income-tax as the part of the profits of its business under Case I of Schedule D and that the entrance fees and subscriptions received from the members must be included in the computation of such profits. Thus, it is evident that in view of this decision the entrance fees and subscription received from the members must be included in the computation of the profits of the club.

The Revenue also relied on the judgment in the case of *CIT* v. *Calcutta Stock Exchange Association Ltd.* [1959) 36 ITR 222(SC) which is a decision of their Lordships of the Supreme Court. In this case the assessee-Calcutta Stock Exchange Co. Ltd. was a company formed to facilitate transaction of business on the Calcutta Stock Exchange under its bye-laws, members with a certain standing were allowed to have six authorized assistants to transact business on the stock exchange in their names and on their behalf. Members appointing such assistants had to pay an entrance fee for each assistant and also a periodical subscription for continuing the service of such assistants in addition to the subscription payable by each member for his membership, every member who wished to have the name of any company included in the quotations list so that its shares or stock may be placed on the stock market, had to make an application in that behalf with a fee of Rs. 1,000. The assessee received during the accounting year Rs. 60,750 as entrance fees and Rs. 15,687 as subscription in respect of the authorized assistants and a sum of Rs. 16,000 as application fees from the members for including new companies in the quotations list. In those circumstances it was held that each of the aforesaid sums of money accrued to the assessee on account of its performing specific services for its members, that these sums were remuneration definitely related to distinct services performed by the assessee for its members or such of them as availed themselves of such services and

the same sums were, accordingly, assessable to the income-tax under section 10(6) of the Act of 1922 as profits and gains derived from carrying on business. It was also held in this decision that the words 'performing specific services' in section 10(6) of the Act of 1922 mean 'conferring particular benefits', that is, conferring on the members some tangible benefit which would not be available to them unless they paid the specific fees charged for such special benefits and that the word 'remuneration' is a term of much wider import than 'wages' and includes 'recompense', 'reward' or 'payment'.Thus, it is evident that the amount of Rs. 60,750 received from the members as entrance fees were held to be taxable as held by Hon'ble Apex Court.

The Revenue also relied on the case of *Delhi Stock Exchange Association Ltd.* v. *C1T* [1961] 41 ITR 495(SC). This is also a decision of their Lordships of the Hon'ble Supreme Court. In this case, the appellant-company was formed with the object of promoting and regulating the business in shares, stocks and securities and of establishing and conducting the business of a stock exchange. Its capital was Rs. 5 lakhs divided into 250 shares of Rs. 2,000 each on which dividends could be earned. The company charged fees for the admission of members and their authorized assistants. Trading members had to be elected and pay entrance fees and they alone with their authorized assistants, could transact business in stocks and shares in the company. The question was whether the admission fees received by the company from the members and the authorized assistants were taxable in the hands of the company. In those circumstances, it was held by their Lordships of the **Supreme Court that it was not how the assessee treated any monies received, but what was the nature of the receipts in the question that was decisive of their taxability ; and, therefore, the fact that the appellant-company showed the admission fees as capital in its books was**

not decisive on the question of their taxability ; that the amounts received as admission fees from the authorized assistants fell within the principle of the decision of the Supreme Court in *Calcutta Stock Exchange Association Ltd.'s* case (*supra*) and were taxable ; and that as the body of trading members who paid the entrance fees and the shareholders among whom the profits of the company were distributed were not identical and the element of mutuality was lacking, the company carried on a business whose profits were taxable and, therefore, the admission fees received from members were taxable in its hands. It appears from this decision at pages 496 and 497 that the total income of the assessee for the year 1947-48 was Rs. 29,363 out of which a sum of Rs. 15,975 shown as admission fees was deducted and the income return was Rs. 13,388. In the profit and loss account of that year members' admission fees were shown as Rs. 9,000 and on account of the authorized assistants' admission fees as Rs. 6,875. The ITO who made the assessment for the year 1947-48 disallowed this deduction. The return for the following year also was made on a similar basis but the return for the years 1949-50 and 1950-51 did not take into account the admission fees received but in the director's report the amounts so received were shown as having been taken directly into the balance sheet. The ITO, however, disallowed and added back the amount so received to the income returned by the appellant. The Tribunal ultimately decided all the appeals in favour of the appellant and it held that the amounts received as entrance fees were intended to be and were in fact treated as capital receipts and were, therefore, excluded from assessment and it was also held that as there was no requisite periodicity, those amounts were not taxable. The question referred to the High Court was as follows :

"Whether the admission fees of the members or authorized assistants received by the assessee is taxable income in its hands ?"

In those circumstances their Lordships of the Hon'ble Supreme Court gave findings as mentioned above. Their Lordships have clearly laid down that the amounts were received by the appellant as membership admission fees and as admission fees paid by the members on account of authorized assistants and the matter relating to the members' admission fees had to be decided in accordance with the nature of the business of the appellant-company, its memorandum and articles of association and the rules made for the conduct of business. It was observed by Hon'ble Apex Court that it is not in dispute that the income of the assessee before the Court is taxable and is not exempt on the ground of mutuality. It was held that this clearly means that the assessee-club is carrying on business and in view of this decision the members' entrance fee is taxable as income of the assessee.

The assessee on the other hand relied on the decision of PangalNayak Bank Limited v. CIT (1964) 52 ITR 915(Mys.) which is decision of Hon'ble Mysore High Court. In this case the articles of association of a banking company contained a provision that no person shall be considered as a shareholder until he has paid the prescribed entrance fee and premium, if any, fixed per share. The company resolved to issue new shares and collected a sum of Rs. 10,000 as entrance fee at the rate of 8 annas per share in respect of new shares that were issued and it was held that the sum of Rs. 10,000, thus, collected was a capital receipt and not a revenue receipt at any rate it was a casual and non-recurring receipt not arising from business contemplated by section 4(3)(*vii*) and was not assessable to income-tax. It was observed by Hon'ble Patna High Court that in this case reference was made to the decision of the Supreme Court In *Calcutta Stock Exchange Association Ltd.'s* case (*supra*) but reference was made only to the amount of Rs. 16,000 which was realised in consideration of putting the names of certain companies on the quotation list, but no reference was made of Rs. 60,750 as entrance fees from

the members which was received as entrance fees for the authorized assistants. In this case no reference was made to the decision in *Delhi Stock Exchange Association Ltd.'s* case (*supra*) where admission fees were received from the members as entrance fees although certain amounts were also received from the members of authorized assistants. In view of the Hon'ble Supreme Court decision in *Delhi Stock Exchange Association Ltd.'s* case (*supra*) the decision of the Mysore High Court cannot be followed , as was held by Hon'ble Patna High Court.

The assessee also relied on the case of Hon'ble Bombay High Court *CIT* v. *WIAA Club Ltd.* [1982] 136 ITR 569(Bom). In this decision it has been held by the Hon'ble Bombay High Court that the entrance fee is paid by the members only once and it is this payment which has to be considered whether it is in the nature of income or a capital receipt. It has also been held in this decision that from the articles of association of the assessee-club, it is clear that in order to avail of the rights of a member and the facilities and the services provided by the assessee-club, it is not enough for a person merely to pay the annual subscription, and that as a matter of fact a person cannot exercise the rights and privileges of a member merely by volunteering to pay the annual subscription. What a member has to acquire first is the right of membership of the club. It has also been held in this decision that a person has first to get elected as a life or ordinary member, as the case may be, in the manner provided in the articles of association, and it is only after a person is elected that he is required to pay the subscription and entrance fee within fourteen days of notice of the election. It has also been held in this decision that the acquisition of right as an ordinary member is done by the payment of the entrance fee of Rs. 500 in the relevant assessment year, and in lieu of this payment of the entrance fee a member does not get any return in the form of any services or amenities, and all that he gets is a right to avail

of the amenities or facilities provided by the club on a payment of the annual subscription. This right can be exercised by him as long as the membership is not determined. The Hon'ble Bombay High Court held that this receipt of Rs. 500 received by the club is a return for vesting a right of membership in the member and, therefore, the entrance fee would clearly be in the nature of a capital receipt in the hands of the assessee. **It was held by Hon'ble Patna High Court that the Hon'ble Bombay High Court has referred *Liverpool Corn Trade Association Ltd.'s* case (*supra*) but no reference was made to the Hon'ble Supreme Court cases in *Calcutta Stock Exchange Association Ltd.'s* case (*supra*) and *Delhi Stock Exchange Association Ltd.'s* case (*supra*) and so it is difficult to follow the decision of the Bombay High Court**.

The Hon'ble Patna High Court following the decisions of Hon'ble Supreme Court in CIT v. Calcutta Stock Exchange Association Limited(1959) 36 ITR 222(SC) and Delhi Stock Exchange Association Limited v. CIT (1961) 41 ITR 495(SC) , held that the entrance fees received by the United Club at the time of entrance of the new members is a receipt of revenue nature and is chargeable to tax in the hands of the tax-payer club.

(e) Hon'ble Bombay High Court in the case of Shree Nirmal Commercial Limited v. CIT in (1992) 193 ITR 694(Bom.HC) held that non-refundable interest bearing deposits received by assessee-company from its shareholders for allotting occupancy rights were assessee's trading receipts . The assessee was a company out to do business in construction and sale of property. Since it had a paucity of funds, it chose to raise the funds by seeking non-refundable deposits from its members. These deposits, proportionate to the floor area required by each member were to be permanently held by the assessee-company as long as the member/ shareholder was in occupation of

the floor area allotted to him. Though it was said that these deposits would fetch an interest as may be determined by the Board of Directors of the assessee-company, the said fact is not determinative of the character of the deposits as was held by the Hon'ble Bombay High Court. The deposits were to be held by the assessee-company as long as the member continued to occupy floor area allotted to him and, in the event of the member transferring or alienating his occupancy rights to another, with the approval of the Board of Directors, the amount standing to the credit of the member would be transferred in the books to the credit of the new transferee. There was no event or contingency contemplated in which the shareholder could demand repayment of the deposit. Though the said amount might have been shown as liability in the balance sheet of the assessee-company, it did really partake of the character of a loan or an amount which had to be returned. Having regard to the manner in which the non-refundable deposits were taken from the shareholders, the shareholders were allotted floor space area which they were not only entitled to occupy but were also entitled to assign to others on payment of compensation and to transfer their occupancy rights by sale of shares and the purpose for which the compensation was charged, the whole transaction, it appears to us, is in reality of sale of floor space by the assessee-company to its shareholders. The assessee-company had kept with itself only the right of the management of property as a whole, the compensation being charged by way of reimbursement of the expenses which were likely to be incurred. It was observed by Hon'ble Bomaby High court that that is why there was a provision in the agreement for increase of compensation from time to time. Notwithstanding the description of these amounts in the books of the assessee and its records as 'deposits', the Hon'ble Bombay High Court was of the view that the Tribunal was right in holding that these deposits were in essence the consideration paid by the shareholder for allotment of the floor space. The Hon'ble Bombay High Court held that the AAC and the Tribunal were, therefore, right in taking the view

that this was in the nature of sale proceeds for sale of floor space area and legitimately ought to be treated as trading receipts. The said decision in 193 ITR 694 was later reiterated by the Full Bench decision of Hon'ble Bombay High Court in the case of this tax-payer for subsequent assessment years in CIT v. Shree Nirmal Commercial Limited (1995) 213 ITR361(Bom.)(FB). In a recent judgment, Hon'ble Supreme court approved the ratio of the said decision in 193 ITR 694 , in the case of G S Homes and Hotels Private Limited v. DCIT in civil appeal no 7379-7380 of 2016 vide judgment dated 09-08-2016.

(f) The decision of Hon'ble Bombay High Court in the case of CIT v. Diners Business Services Private Limited (2003) 263 ITR 1(Bom), wherein Hon'ble Bombay High Court following the decision of CIT v. W.I.A.A. Club Limited (1982) 136 ITR 569(Bom.) held that the one-time non-refundable entrance fee charged by the tax-payer for enrolment of its customers as members of the "executive centre" to become eligible to avail of the facilities available in the "executive centres" is not exigible to tax.

(g) Hon'ble Bombay High Court decision in the case of CIT v. Aspee Distributors Association (1994) 209 ITR 294(Bom. HC) held in context of chargeability of membership fee to tax in the hands of the taxpayer-association that looking at the facts set out above, it is clear that the taxpayer-association is not a trading association. It does not carry on any activities in the nature of trade. Its purpose is basically to encourage fellowship amongst its members who are all distributors of one concern, *viz.,* American Spring & Pressing Works (P.) Ltd. Undoubtedly each member of the association carries on trading activities, but the taxpayer-association itself does not carry on any trading activity. The aims and objects of the taxpayer-association also make it clear that no trading activities are

being carried on by the association. It was also found by the Tribunal that during the relevant assessment years, the taxpayer-association did not carry on any trading activity. Hence, the Hon'ble Bombay High Court held that the Tribunal was right in coming to the conclusion that the taxpayer-association was merely a trade association and not a trading association.Under section 28(*iii*) any income derived by a trade, professional or similar association from specific services performed for its members is chargeable to income-tax under the head 'Profits and gains of business or profession'. In the present case, the membership fee is not taken by the taxpayer-association for any specific services performed by it to its members. The Tribunal has commented that the taxpayer-association does not render any specific services to its members. In view of this fact, as found by the Tribunal, it cannot be said that the membership fees are relatable to any specific services which are rendered by the taxpayer-association to its members. In the premises, the question is answered as follows:

The membership fees received by the taxpayer-association were not related to any specific services rendered by it to its members. The taxpayer-association was merely a trade association. Hence, the membership fees were not taxable under section 28(*iii*) as held by Hon'ble Bombay High Court.

The question referred to the Hon'ble High Court of Bombay was, accordingly, answered in favour of the assessee and against the revenue."

Thus, the above case is distinguishable and not applicable for deciding the issue in present appeal as to exigibility of entrance fee received by the assessee as the assessee in the instant case is a trading company whose income under the provisions of the Act is exigible to tax which is an admitted position and also the assessee has not invoked principles of mutuality .

There are some decisions of the Tribunal also cited by learned counsel for the assessee which we have stated in preceding para's and the same are duly considered by us while arriving at the decision in this order.

With the above background now we proceed to adjudicate the issue of exigibility of non refundable entrance fee in the hands of the assessee. It is well established principles of taxing statute that the nomenclature of entries in the books of accounts are not determinative of the chargeability to tax rather it is the true nature and character of receipt which shall be decisive of bringing the same to chargeability to tax as income exigible to tax. The assessee has received club membership enrollment fund which comprises two components , firstly refundable deposits and secondly non-refundable entrance fee . The dispute is regarding the chargeability to tax of non-refundable entrance fee received by the assessee from its members at the time of admission. The Hon'ble Bombay High Court vide its judgment delivered on 13-10-1944 in the case of Native Share and Stock Brokers' Association v. CIT (supra) held that admission fee received from members for admitting and supervision of the authorized assistants was held to be exigible to tax as revenue receipt. Thereafter vide judgment delivered on 26-03-1959 , the Hon'ble Supreme Court in CIT v. Calcutta Stock Exchange Association Limited(supra) in similar matter took note of decision of Hon'ble Bombay High Court in the case of Native Share and Stock Brokers' Association (supra) and several English decisions and Hon'ble Supreme Court affirmed the decision of Hon'ble Bombay High Court in the case of Native Share and Stock Brokers' Association (supra) and held that entrance fees and subscription received from members in respect of authorized assistants is exigible to tax and also fee received from members for enlisting names of newly floated companies on stock exchange is also exigible to tax . Thereafter vide judgment delivered on

30-11-1960 , the Hon'ble Supreme Court in the case of Delhi Stock Exchange Association Limited v. CIT(supra) following the decision of Hon'ble Supreme Court in Calcutta Stock Exchange Association Limited(supra) held that admission fees received in respect of admission of authorized assistants **as well for admission fee received for admission of members are exigible to tax as revenue receipts**. The Hon'ble Bombay High court vide judgment delivered on 31-01-1979, thereafter , in WIAA Club Limited(supra) took a view that entrance fee received by the club is not exigible to tax as the same is paid for obtaining membership and is a capital receipt. The judgments of Hon'ble Bombay High Court in the case of Native Share and Stock Brokers' Association (supra) and decisions of Hon'ble Supreme Court in the case of CIT v. Calcutta Stock Exchange Association Limited(supra) and decision of Hon'ble Supreme Court in the case of Delhi Stock Exchange Association Limited v. CIT(supra) were not brought to the notice of Hon'ble Bombay High Court in the case of WIAA Club Limited(supra) while Hon'ble Bombay High Court took note of decision of Kings Bench Division of the High Court in the case of Liverpool Corn Trade Association Limited v. Monks (1926) 10 TC 442(KB) , and the Hon'ble Bombay High Court distinguished the said judgment on the grounds that the main question in the said case was to determine whether the association in question was a mutual association or a trading company and the question was whether the profits obtained as a result of dealing between the corporation and its members should be regarded as profits as such . The Hon'ble Bombay High Court in the case of WIAA Club(supra) held that life membership fee of Rs. 2500 has two components , one Rs. 500 towards entrance fee which is capital receipt not exigible to tax , and secondly Rs. 2000 towards consolidated annual subscription which is a revenue receipt exigible to tax , as in the said case the tax-payer being life member was not required to pay any further annual charges. The Hon'ble Patna High Court vide judgment dated 28-09-1985 while deciding the case of CIT v. United Club(supra) took note of this fact that Hon'ble Bombay High

Court while deciding WIAA Club Limited(Supra) did not took note of decisions of Hon'ble Supreme Court in the case of CIT v. Calcutta Stock Exchange Association Limited(supra) and decision of Hon'ble Supreme Court in the case of Delhi Stock Exchange Association Limited v. CIT(supra) , and Hon'ble Patna High court following above Supreme Court decisions in CIT v. Calcutta Stock Exchange Association Limited(supra) Delhi Stock Exchange Association Limited v. CIT(supra) held that entrance fee received by the club is a revenue receipts exigible to tax and not a capital receipts. Again Hon'ble Bombay High Court decided the issue of taxability of entrance fee in the year 2003 vide decision rendered on 17-04-2003 in the case of CIT v. Diners Business Services Private Limited (2003) 263 ITR 1(Bom.) whereby it was held by Hon'ble Bombay High Court following the decision of Hon'ble Bombay High Court in the case of CIT v. WIAA Club Limited(Supra) that non-refundable entrance fee is not exigible to tax being a capital receipts.The Hon'ble Bombay High Court in the case of CIT v. Shree Nirmal Commercial Limited(supra) held that non-refundable interest bearing deposits received by the tax-payer from the shareholders for allotting occupancy rights are chargeable to tax as revenue receipts, The said decision of Hon'ble Bombay High Court in 193 ITR 694 in the case of Shree Nirmal Commercial Limited(supra) was later reiterated by the Full Bench decision of Hon'ble Bombay High Court in the case of the same tax-payer for subsequent assessment years in CIT v. Shree Nirmal Commercial Limited (1995) 213 ITR361(Bom.)(FB). In a recent judgment, Hon'ble Supreme court approved the ratio of the said decision of Hon'ble Bombay High Court in 193 ITR 694 in the case of G S Homes and Hotels Private Limited v. DCIT in civil appeal no 7379-7380 of 2016 vide judgment dated 09-08-2016.

We have gone through the entire background of the case and also delved upon the various important case laws on the issue in hand, we have observed

that the assessee is not governed by the doctrine of mutuality which is settled and undisputed position between the rival parties in the instant case. The assessee is a company and shareholders in their capacity as shareholders are distinct from members of the club who are entitled to avail the facilities and amenities offered by the club and hence complete identity between shareholders of the company and members of the club is lacking. The surplus of the assessee company being private limited company is distributable as dividend to shareholders . Nothing contrary to the afore-stated propositions are on record brought by the assessee to rebut the said propositions The assessee has recovered club membership enrollment fund at the time of admitting members which comprises of non-refundable deposits of entrance fee at the time of admission of members which constitute 20% of the total club membership enrollment fund collected from an member at the time of admission , as well refundable deposits at the time of admission of member which constitute bulk being 80% of the club membership enrollment fund. The assessee is also receiving membership fee from its members, annual charges and also charges for various facilities and amenities provided to its members such as food, beverages, swimming pool etc. . The said refundable deposit received by the assessee at the time of admission being bulk amount i.e. 80% of club membership enrollment fund is treated as capital receipts by the Revenue and brought to tax, while non-refundable entrance fees constituting 20% of club membership enrollment fund paid by the members on being admitted to the membership of the club in our considered view in the instant case based on factual matrix of the case has close proximity and nexus to the specific services performed by the assessees' club to its members which are being made available by the assessee club to members only on obtaining of membership of the club and is covered by the provisions of Section 28(i) and 28(iii) of the Act and is a revenue receipt in the hands of the assessee exigible to tax, while refundable deposit constituting bulk of payment being 80% of club membership enrollment fund appears to have

close nexus with payment made for obtaining club membership in the instant case. It is not important that services rendered or performed are trivial or immaterial so long specific services are being performed by the assessee to its members being made available on becoming member of the club which are only available to the members of the club on being admitted as member of the club. In our considered view, the Hon'ble Bombay High Court in the case of WIAA Club Limited (supra) has correctly segregated the life membership fee into two segments i.e. one towards capital receipts being paid for obtaining membership of the club which has no proximity to services being performed to its members and is merely a price paid for obtaining membership of the club which is capital receipts not exigible to tax, and secondly for the consolidated annual subscription included in the life membership fees which is revenue receipt which is exigible to tax being charged for making available services by the club which are only available to members of the club on obtaining membership of the club. In the instant case , there are two components of the amount paid by the members at the time of seeking admission for becoming member of the club being club membership enrollment fund, one is a refundable deposits which , in our considered view, has close proximity to payment being made for obtaining the membership of the club and being capital receipts is not exigible to tax, and second component is towards non-refundable one time entrance fee paid by the members on being admitted to membership which has close nexus and proximity with the payments being made for services being performed by the assessee to its members being made available to members immediately on obtaining the membership of the club and also the assessee being a trading company whereby profits are distributable to shareholders where there is a lack of identity between shareholders of the company and members of the club and doctrine of mutuality is not invoked , hence , the non-refundable entrance fee is revenue receipts which is exigible to tax. The membership fee, annual charges and payments for availing services are undoubtedly revenue

receipts in the hands of the assessee as they are related to the services being performed or made available by the assessee after the members are admitted to the club. The ratio of law laid down by Hon'ble Supreme Court in the case of Delhi Stock Exchange Association Limited v. CIT(supra) clearly held that the admission fee paid by the member at the time of entering as member of association is exigible to tax wherein it was held that in case of trading association and profits being divisible as dividend amongst shareholders the same is trading receipts exigible to tax relying on decision of Kings Bench of the High Court in the case of Liverpool Corn Trade Association v. Monks(1962) 2 KB 110, wherein it was held by the Hon'ble Apex court as under:

> *"It is wholly immaterial in the circumstances of the present case to take into consideration as to how the appellant treated the amounts in question. It is not how an assessee treats any monies received but what is the nature of the receipts which is decisive of its being taxable. These amounts were received by the appellant as membership admission fees and as admission fees paid by the members on account of authorised assistants. As far as the latter payment is concerned that would fall within the decision of this court in Commissioner of Income-tax v. Calcutta Stock Exchange Association Ltd. [1959] 36 ITR 222 and therefore is taxable income. The former, i.e., members' admission fees, has to be decided in accordance with the nature of the business of the appellant company, its memorandum and articles of association and the rules made for the conduct of business. The appellant company was an association which carried on a trade and its profits were divisible as dividend amongst the shareholders. The object with which the company was formed was to promote and regulate the business in shares, stocks and securities etc., and to establish and conduct the business of a stock*

exchange in Delhi and to facilitate the transaction of such business. The business was more like that in Liverpool Corn Trade Association v. Monks [1926] 2 KB 110. In that case an association was formed with the object of promoting the interest of corn trade with a share capital upon which the association was empowered to declare a dividend. The association provided a corn exchange market, newsroom and facilities for carrying on business and membership was confined to persons engaged in the corn trade and every member was required to be a shareholder and had to pay an entrance fee. The association also charged the members and every person making use of facilities a subscription which varied according to the use made by them. The bulk of the receipts of the association was derived from entrance fees and subscriptions. It was, therefore, contended that the association did not carry on a trade and that it was a mutual association and entrance fees and subscriptions should be disregarded in computing assessment of the assessable profits. It was held that it was not a mutual association whose transactions were incapable of producing a profit; that it carried on a trade and the entrance fee paid by members ought to be included in the association's receipts for purposes of computing the profit. Rowlatt, J., said at page 121:

> *"I do not see why that amount is not a profit. The company has a capital upon which dividends may be earned, and the company has assets which can be used for the purpose of obtaining payments from its members for the advantages of such use, and one is tempted to ask why a profit is not so made exactly on the same footing as a profit is made by a railway company who issues a travelling ticket at a price to one of its own shareholders, or at any rate as much a profit as a profit made by a company from a dealing with its own*

shareholders in a line of business which is restricted to the shareholders."

In Commissioner of Income-tax v. Royal Western India Turf Club Ltd. [1953] 24 ITR 551 . this court rejected the applicability of the principle of mutuality because there was no mutual dealing between members inter se. There was no putting up a common fund for discharging a common obligation undertaken by the contributors for their mutual benefit and for this reason the case decided by the House of Lords in Styles v. New York Life Insurance Company [1889] 2 Tax Cas. 460 was held not applicable.

In the present case the memorandum of association shows that the object with which the company was formed was to promote and regulate the business of exchange of stocks, shares, debentures, debenture stocks etc. The income, if any, which accrued from the business of the appellant company was distributable amongst the shareholders like in every joint stock company. According to the articles of association the members included shareholders and members of the exchange and according to the rules and bye-laws of the appellant company "member" means an individual, body of individuals, firms, companies, corporations or any corporate body as may be on the list of working members of the stock exchange for the time being. In the articles of association, clauses 7 and 8, provision was made for the election of members by the board of directors and rules 9 and 10 laid down the procedure for the election of these members. The entrance fees were payable by the trading members elected under the rules and bye-laws of the association, who alone with their associates, could transact business in stocks and shares in the association. Therefore, the body of trading members who paid the entrance fees, and the shareholders among whom the profits were distributed were not identical and thus the element of mutuality was

lacking. It is the nature of the business of the company and the profits and the distribution thereof which are the determining factors and in this case it has not been shown that the appellant's business was in any way different from that which was carried on in the case reported as Liverpool Corn Trade Association v. Monks [1962] 2 KB 110 .

In our opinion the judgment of the High Court is right and the appeals are therefore dismissed with costs. One hearing fee."

Keeping in view our detailed discussions and reasoning in preceding paras' as also the case laws discussed viz. Hon'ble Bombay High Court decision in the case of Native Share and Stock Brokers Association(supra), decision of Hon'ble Supreme Court in the case of Calcutta Stock Exchange Association Limited(supra), decision of Hon'ble Supreme Court in the case of Delhi Stock Exchange Association Limited, decision of Hon'ble Patna High Court in the case of United Clubs(supra) , decision of Hon'ble Bombay High Court in the case of Shree Nirmal Commercial Limited(supra) which was later reiterated in Full Bench decision of Hon'ble Bombay High Court in the case of Shree Nirmal Commercial Limited (supra) and which was recently affirmed by Hon'ble Supreme Court in the decision of G.S. Homes and Hotels Private Limited(supra) which also supports' our decision that non-refundable entrance fee of Rs.31,34,037/- received by the assessee in the instant case based on factual matrix of the case is chargeable to tax as revenue receipts in the hand of the assessee .We order accordingly.

(b) **Advance Membership fee**- The assessee received Rs.4,18,96,537/- as advance membership fee for 25 years from its members. The assessee is also receiving annual charges from its members and also charges are collected from members additionally for use of various amenities/facilities by its members such as food , beverages, swimming pool etc.. There is no

dispute between the rival parties that the said amount of advance membership fee received by the assessee is exigible to tax but the dispute is with respect to the year of taxability i.e. whether the same is chargeable to tax in the year of receipt or is to be spread over number of years. The AO brought to tax 100% of the receipt of advance membership fee as income in the year of receipt itself, while the learned CIT(A) relying on decision of Special Bench of the Chennai Tribunal in the case of Mahendra Holidays and Resorts Limited (2010) 39 SOT 438(Chennai)(SB) has held that 60% of the advance membership fee received shall be brought to tax in the year of receipt as the assessee has to maintain the facilities in subsequent years for which it would be required to incur expenditure without matching contribution from members based on concept of matching principles' of revenue and expenditure and also considering that 70% of the facilities are completed by the end of the previous year as admitted by the assessee . We are agreeable that assessee having received advance membership fee for 25 years , concept of matching principles are to be applied while computing income under the Act and the entire amount of revenue received by the assessee cannot be brought to tax in the year of receipt itself as the assessee will be required to render services and maintain facilities in subsequent years for which expenditure will have to be necessarily incurred as per contractual obligations of the assessee with its members and hence rollover of revenue has to be undertaken which is required to be based on peculiar facts and circumstances of the case keeping in view factual matrix of the case to arrive at reasonable and fair apportionment, otherwise there will be huge income reported in the initial years when members are enrolled by the assessee while in subsequent years when the assesses stop enrolling members, there will be huge losses reported by the assessee as then the assessee will be required to maintain facilities in subsequent years for which expenditure will have to be necessarily incurred with no matching inflows from members as the

membership fee is collected in advance and the assessee being bound by contractual obligations undertaken while collecting membership fee will have to maintain the facilities and incur necessary expenditure without matching revenue been received from the members of the club. It is equally true that the assessee is also collecting annual charges w.e.f. 01-01-2005 from members apart from membership fee and also collecting charges for usage of various services such as swimming coaching, squash coaching food, beverages ,banquet, gym and health club, commission etc. by the members which are separately collected by the assessee from its members based on actual usage of such facilities/amenities which will also enable the assessee to have regular stream of revenue in the years to come to enable it to incur expenditure for maintaining the facilities/amenities in the years to come. But, this is also undisputed position between the rival parties that the advance membership fee is collected by the assessee from its members for a period of 25 years in advance. The learned CIT(A) had based on decision of Special Bench of Chennai Tribunal in the case of Mahendra Holidays and Resorts India Limited(supra) has brought to tax 60% of advance membership fee collected for 25 years in the year of receipt. It is also true that some members may leave the club after a brief stay despite paying membership fee for 25 years and some may continue for a long period of time. The Hyderabad Tribunal in the case of Treasure Island Resorts Private Limited v. DCIT (2004)84 TTJ 820(Hyd. Trib.) wherein the Tribunal accepted assessee's method of recognizing revenue on spread over basis keeping in view that the scheme did not provided for refundability. The Tribunal relying on the earlier decision in the case of Meera and Ceiko Pump Private Limited *[IT Appeal No. 652 (Hyd.) of 2001 dated 21-6-2002 for the assessment year 1994-95]* held that under mercantile system of accounting, receipt entailing a continuing liability of rendering services in future years can be spread over years. This

proposition is supported by the Hon'ble Supreme Court decision in the case of Madras Industrial Investment Corporation Limited v. CIT , (1997) 225 ITR 802(SC) . In our considered view, a reasonable and fair estimate under these circumstances has to be made based on reasonable scientific method keeping in view business matrix and model of the assessee after study of the by-laws, rules and regulations governing the assessees' club , memorandum and articles of association, terms and conditions for the grant of membership , terms and conditions under which advance membership fee was received by the assessee, conditions for refund of membership fee, empirical experiences and a scientific working , which need to be carried out keeping in view peculiar business model and matrix of the assessee and also with respect of the assessees' club. We are , therefore, inclined to set aside and restore the matter to the file of the AO for de-novo determination of the issue on merits in accordance with law to work out spread/rollover of advance membership fee collected for a period of 25 years spread over period of time based on reasonable scientific method keeping in view business matrix and model of the assessee worked out after study of the above parameters as cited by us and also of any other relevant parameter having impact and bearing on computation of correct income of the assessee chargeable to tax. Our decision is in consonance with the recent decision of the Hon'ble Supreme Court in the case of Seagram Distilleries Private Limited(now Pernod Ricard India Limited) v. CIT-III,(2016) –TIOL-117-SC-IT rendered on 11-07-2016. The assessee is directed to appear before the AO and produce all necessary and relevant evidences and explanations to enable the AO to arrive at correct computation of income of the assessee as per our directions. Needless to say that proper and adequate opportunity of hearing shall be granted by the AO to the assessee in accordance with the principles of natural justice in accordance with law. We order accordingly.

9. In the result, appeal filed by the assessee in ITA No. 7905/Mum/2011 and appeal filed by the Revenue in ITA no.8140/Mum/2011 for the assessment year 2008-09 are partly allowed as indicated above.

10.Our decision in ITA no. 7905/Mum/2011 and ITA no. 8140/Mum/2011 for the assessment year 2008-09 shall apply mutatis mutandis to the appeals for assessment years 2004-05 to 2007-08 as applicable.

11. Thus, the Revenue appeals in ITA no. 5316/Mum/2012 for assessment year 2004-05 is allowed while Revenue appeals in ITA No. 5337/Mum/2012 for assessment year 2005-06,ITA no.5338/Mum/2012 for assessment year 2006-07, ITA no. 5339/Mum/2012 for assessment year 2007-08 are partly allowed. We order accordingly.

12. In the result, appeal filed by the assessee in ITA No. 7905/Mum/2011 and appeal filed by the Revenue in ITA no.8140/Mum/2011 for assessment year 2008-09 are partly allowed while the Revenue appeals in ITA no. 5316/Mum/2012 for assessment year 2004-05 is allowed and the Revenue appeals in ITA No. 5337/Mum/2012 for assessment year 2005-06,ITA no.5338/Mum/2012 for assessment year 2006-07, ITA no. 5339/Mum/2012 for assessment year 2007-08 are partly allowed.

Order pronounced in the open court on 26th September, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांकः 26-09-2016 को की गई ।

Sd/-	sd/-
(MAHAVIR SINGH)	(RAMIT KOCHAR)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated **26-09-2016**

I

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "A" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**