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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on: 05.10.2023*
Judgment pronounced on: 18.10.2023

\+ **ITA 399/2022**

THE COMMISSIONER OF INCOME TAX, INTERNATIONAL TAXATION-1, NEW DELHI ..... Appellant

Through: Mr Puneet Rai, Sr Standing Counsel.

versus

DELOITTE TOUCHE TOHMASTU ..... Respondent

Through: Mr Percy J. Pardiwalla, Sr Adv. with Mr Vishal Kalra and Ms Snigdha Gautam, Advs.

\+ **ITA 402/2022**

THE COMMISSIONER OF INCOME TAX, INTERNATIONAL TAXATION-1, NEW DELHI ..... Appellant

Through: Mr Puneet Rai, Sr Standing Counsel.

versus

DELOITTE TOUCHE TOHMASTU ..... Respondent

Through: Mr Percy J. Pardiwalla, Sr Adv. with Mr Vishal Kalra and Ms Snigdha Gautam, Advs.

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CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA

GIRISH KATHPALIA, J.:

1. These four appeals under Section 260A of the Income Tax Act brought by revenue to assail common order dated 11.04.2022 passed by the Income Tax Appellate Tribunal are taken up together for disposal on account of similar legal and factual matrix. These appeals registered as ITA 399/2022, ITA 402/2022, ITA 403/2022, and ITA 404/2022 pertain to Assessment Years 2008-09, 2009-10, 2010-11 and 2011-12 respectively. On issuance of notice, the respondent/assessee entered appearance through counsel. We heard learned counsel for both sides and perused the written submissions filed by them.

2. Briefly stated, circumstances leading to these appeals are as follows.

2.1 The respondent/assessee is an association (Verein), established in Switzerland, with its members being Chartered Accountant firms situated across the world. The respondent/assessee Verein filed returns of income for the concerned Assessment Years (2008-09 to 2011-12) declaring its income at nil; however, in the return of income for Assessment Year 2011-12, the respondent/assessee also claimed a refund of Rs.1,35,18,298/-.

2.2 The said returns of income having been selected for scrutiny, notices under Section 143(2) of the Act were issued to the respondent/assessee. By way of assessment orders dated 28.02.2011 (*for assessment year 2008-09*), 12.01.2012 (*for assessment year 2009-10*), 23.04.2013 (*for assessment year 2010-11*) and 23.05.2014 (*for assessment year 2011-12*) the total income of the respondent/assessee Verein were determined respectively as Rs.9,71,58,805/-, Rs.15,32,08,246/-, Rs.20,12,98,446/- and Rs.13,70,59,258/- by the Assessing Officer.

2.3 The respondent/assessee being aggrieved by the said assessment orders preferred appeals before the Commissioner, Income Tax. The said appeals of the respondent/assessee were allowed by CIT(A), observing that Verein is registered as not-for-profit entity under the Swiss laws and examination of records establish that the recoveries made by the respondent/assessee Verein from its members could not be held to

be in the nature of trading receipts and the same stood covered by the concept of mutuality.

2.4 The first appeal filed by the appellant/revenue was dismissed by the Income Tax Appellate Tribunal, reaffirming that the Articles of Verein coupled with rest of the records established that Verein was functional on the principles of mutuality and consequently the money received by it in the form of subscriptions is not amenable to tax.

2.5 Hence, the present appeal.

3. In the above backdrop, following solitary substantial question of law as proposed by learned counsel for appellant/revenue was framed:

> *"Whether the Tribunal erred in holding that the receipts of the assessee were not in the nature of fees for technical services and the same were exempt from tax on the principle of mutuality?"*

After framing of the above substantial question of law, learned counsel for both sides kindly consented to address final arguments at this stage itself. Accordingly, we heard learned counsel for both sides.

4. Learned counsel for appellant/revenue contended that the impugned order is not sustainable in the eyes of law since the learned Tribunal failed to appreciate that the respondent/assessee was rendering specific services to its members and those services were being commercially exploited by the latter. It was argued on behalf of appellant/revenue that the so called subscription fee charged for the

services rendered by the appellant/assessee to its members cannot be termed as contributions as the same was payment made by the members of the respondent/assessee in lieu of various services including information technology related services and thus the respondent/assessee was trading with its members and not trading with itself. It was further argued by learned counsel for the appellant/revenue that the respondent/assessee has been providing to its members a range of services including global wide area network, information security, software licenses etc, which services being technical services, the same were used by the members of the respondent/assessee to earn money and therefore, money paid by the members to the respondent/assessee was in the nature of fee for technical services, liable to be taxed since the members of Verein would not be in a position to perform their professional activities and earn profit, therefore, the principle of mutuality cannot be applied in the present case. Learned counsel for appellant/revenue placed reliance on the judgments in the cases titled ***Yum Restaurants (Marketing) Pvt Ltd vs Commissioner of Income Tax,*** (2021) 7 SCC 678 (SC); and ***Haryana State Co-op Labour & Construction Federation Ltd vs CIT,*** (2002) 122 Taxman 408 (P&H) and submitted that where members have no control over funds and they could not direct the remaining amount to be returned to them, principle of mutuality does not come into play.

5. Per contra, learned counsel for the respondent/assessee Verein supported the impugned order and contended that these appeals are completely devoid of merit. Learned counsel for respondent/assessee contended that the judicial precedents cited on behalf of the

appellant/revenue are distinguishable. It was argued on behalf of the respondent/ assessee that Verein is a non-profit entity registered under Swiss laws and merely because its members contribute to its budgeted expenditure on the basis of their respective turnover does not alter the nature of the subscription into fee for technical services. Learned counsel for respondent/assessee took us through the relevant Articles and Regulations of Verein, showing that the respondent/assessee is an association of its members, managed by its members and providing services solely for the benefits of its members. Placing reliance on the judgments in the cases of ***CIT vs Bankipur Club Ltd,*** (1997) 5 SCC 394; ***Chelmsford Club vs CIT***, (2000) 3 SCC 214 and ***Commissioner of Income Tax vs Common Effluent Plant (Thane Belapur) Association,*** (2010) SCC OnLine Bom 2042, learned counsel for the respondent/assessee strongly contended that the present case clearly stands governed by the concept of mutuality.

6. Thence, fulcrum of the present dispute being on the concept of mutuality, it would be apposite to briefly traverse through this doctrine. The doctrine of mutuality originated from the basic principle that an individual cannot engage into business with herself and it is deemed in law that if identity of the seller and the buyer is marked by oneness, then no profit motive can be attached to such a venture. On account of profit motive, excess of income over the expenditure or the surplus remaining in the hands of such venture cannot be regarded as income amenable to tax under law. For, it is the income or profit accruing to a person in his dealings with the other party which is taxable under law. Reference in this regard can be drawn from the apex court judgment in the case of

Bankipur Club (supra). Plethora of judicial pronouncements including those cited by both sides in this case propound three basic conditions to test the existence of mutuality in a case. These conditions are element of commonality, element of non-profiteering and element of obedience to mandate.

7. Firstly, for applicability of doctrine of mutuality, there must be an element of commonality of identity between the members of the association and participators in the surplus. In this regard, the Hon'ble Supreme Court in the case of ***Yum Restaurants*** (supra) elucidated thus:

> "*18. Common identity - The first element involves the test of commonality of identity between the members or participators in the mutual concern and the beneficiaries thereof. Succinctly put, this limb of the three-pronged test requires that no person ought to contribute to the common fund without having the entitlement to participate as a beneficiary in the surplus thereof. Conversely, no person ought to participate as a beneficiary without first having been a contributor or a member of the class of contributors to the common fund.* ***Common identity, as it occurs in the present context, signifies that the class of members should stay intact as the transaction progresses from the stage of contributions to that of returns/surplus.*** *It must manifest uniformity in the class of participants in the transaction.* ***The moment such a transaction opens itself to non-members, either in the contribution or the surplus, the uniformity of identity is impaired and the transaction assumes the taint of a commercial transaction.*** *The emphasis on the words member and non-member is of import because the doctrine of mutuality does not prohibit the inclusion or exclusion of new members. What is prohibited is the infusion of a participant in the transaction who does not become a "member" of the common fund, on a par with other members, and yet participates either in the contribution or surplus without subjecting itself to mutual rights and obligations. The principle of common identity prohibits any one-dimensional alteration in the nature of participation in the mutual fund as the transaction fructifies. Any such alteration would lead to the non-uniform participation of an external element or entity in the transaction, thereby opening the scope for a manifest or latent profit-based dealing in the transaction with parties*

outside the closed circuit of members. It would be amenable to income tax as per Section 2(24) of the 1961 Act."

(emphasis is ours)

In the said case, an outsider namely Pepsi Foods Ltd contributed to the common pool of funds but did not participate as beneficiary in surplus because it was not a franchisee of Yum Restaurants, therefore, the case was held to be not covered by the doctrine of mutuality.

7.1 In contrast, in the present case, it is nobody's claim that any outsider contributed to the common pool of funds of Verein. In the case of ***Common Effluent Treatment Plant*** (supra), Bombay High Court observed thus:

> *"7. The principle of mutuality postulates that all the contributors to the common fund must be entitled to participate in the surplus and that all the participators in the surplus are contributors to the common fund. It is in this sense that the law postulates that* ***there must be a complete identity between the contributors and the participators. The essence of the doctrine of mutuality lies in the principle that what is returned is what is contributed by a member****. A person cannot trade with himself. It is on this hypothesis that the income which falls within the purview of the doctrine of mutuality is exempt from taxation".*
>
> *(emphasis is ours)*

7.2 On this aspect, the case of ***Haryana State Co-op*** (supra) cited on behalf of the appellant/revenue is distinguishable insofar as in the said case the concerned assessee co-operative society was under no obligation to return the funds to the contributors, so it was not extended benefit of the doctrine of mutuality.

7.3 In contrast, in the present case, as reflected from various Articles of Verein, it has been established with domicile in Zurich, Switzerland

and consists of members that are Chartered Accountant firms engaged in rendering professional services in the fields of accounting, audit, insolvency, law, management, consulting etc. There are elaborate provisions in the Articles of Verein which prescribe the duties of member firms to Verein and vice versa as well as obligations of member firms to each other. Article 7 of the Articles of Verein deals with the manner and the extent of collection of contributions from member firms towards budgeted operating expenses of Verein. Article 11.1 deals with dissolution of Verein if a resolution to that effect is adopted by the member firms. Article 11.2 meticulously stipulates distribution of surplus and liabilities of Verein in case of dissolution. Sub-Article (b) of Article 11.2 contemplates payment of surplus to each member firm in the proportion to its allocated contribution to budgeted operating expenses of Verein for the then fiscal year.

7.4 Merely because members of Verein are able to avail various technological services and license to use goodwill of Verein, their contributions cannot be regarded as *quid pro quo*. The Articles of Verein clearly show that all member firms of Verein come together and contribute to a common fund for achieving common objectives, which objectives qua Verein are non-commercial objectives and that all member firms contribute towards budgeted operating expenses of Verein and are entitled to proportionate share in the surplus lying with Verein in case of dissolution. Nothing in the Articles of Verein even feebly indicates any commercial nexus between the contributions and benefits enjoyed by its member firms.

7.5 There is, thus, a complete identity between contributors and participants. Consequently, the first test of mutuality stands satisfied.

8. The second test of mutuality is non-profiteering. As held in the case of ***Yum Restaurants*** (supra), the mutuality and non-profiteering character of the concern are to be determined in the light of its actual working structure; and the factum of corporation or incorporation or the firm in which it is clothed is immaterial. Therefore, one has to examine the actual framework of the Verein *vis a vis* its member firms.

8.1 Article 1.2 of the Articles of Verein show that the Verein was established for specific purposes mentioned in the articles. Those articles do not reflect even iota of element of commerciality between the members themselves or between the members and the Verein or between the Verein and any outsider. Article 7.5 contemplates that Verein shall not provide services to clients or direct or control the manner in which each member firm provides audit or other services to its clients and the Verein shall not share profits and losses of the member firms. Read in entirety, the Articles of Verein clearly convey that it is formed for the benefits of the members by allowing them to be identified as members of the Verein so as to assure their respective clients of certain standards. The ultimate object of Verein is to benefit its member firms with the goodwill of the Verein as a whole, to which they add with their individual professional excellence on the basis of shared information and expenses in the field of their profession. Thus, the sole objective of the Verein is to benefit its members in lieu of subscription to evolve better professional practices.

8.2 That being so, non-profiteering, the second test of mutuality also stands satisfied.

9. The third test of mutuality is obedience to the mandate of the association for convenience and benefit of its contributors and participators. The expression "mutuality" flows from the expression "mutual", which indicates reciprocity of arrangement in which the concerned parties have reciprocal rights or understanding or arrangement to abide by the mandate of the group for benefit of other members. And such arrangement is unlike an arrangement in which one member would be subjected to the absolute discretion of another in such a manner that the entire liability may fall upon one whereas benefits are reaped by all or all others. In a mutual concern, an obligation to pay may or may not be there but at the same time, an over ridding discretion of one member over others cannot be sustained in order to preserve the real essence of mutuality. In other words, the association created should operate only for the convenience and benefit of its members.

9.1 Article 6.2(a) of the Articles of Verein mandates that in addition to all obligations, each member firm under the Articles, the supplemental regulation or otherwise shall support and adhere to the purposes and policies of the Verein; align national plans, strategies and operations with global plans strategies and operations in consultation with Verein Management; conduct itself in such a manner as to advance the reputation of the Verein; be bound by the requirements contained in resolution and protocols adopted by the Board of Directors or the governing bodies consistent with the Articles of Verein and supplemental

regulations qua professional standards and methodologies, governance of the Verein and systems for quality control and risk management and other matters specified in or pursuant to the supplemental regulations. Article 6.2(b) stipulates that if due to local laws, any member firm is unable to comply with any of the provisions of the Articles or supplemental regulations or any other obligation undertaken in connection with membership of Verein it shall promptly inform the Verein of the particulars so that Verein may waive compliance or establish alternate requirement.

9.2 Thus, third test of mutuality also stands satisfied in the present case.

10. All three tests of mutuality having been satisfied as aforesaid, we are of the considered view that the receipts of the respondent/assessee Verein from its members were not in the nature of fees for technical services and that the same were exempt from tax having regard to the principle of mutuality. Accordingly, the substantial question of law framed above is answered in favour of the respondent/assessee and against the appellant/revenue. The order dated 11.04.2022 of the Tribunal, impugned in the present appeals is upheld and accordingly, the appeals stand disposed of.

(GIRISH KATHPALIA)
JUDGE

(RAJIV SHAKDHER)
JUDGE

OCTOBER 18, 2023/*as*