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IN THE INCOME TAX APPELLATE TRIBUNAL DELHI BENCH 'B': NEW DELHI (Through Video Conferencing)

BEFORE,
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA Nos.3715/Del/2017
(ASSESSMENT YEAR 2011-12)

M/s Deloitte Haskins & Sells 7th Floor, Building 10, Tower-B, DLF Cyber City Complex, DLF Phase-II, Gurgaon-122 002. PAN-AABFD 2095B	Vs.	The Asst. CIT, Circle-37(1), New Delhi.
(Appellant)		**(Respondent)**

ITA No.3716/Del/2017
(ASSESSMENT YEAR 2012-13)

M/s Deloitte Haskins & Sells 7th Floor, Building 10, Tower-B, DLF Cyber City Complex, DLF Phase-II, Gurgaon-122 002. PAN-AABFD 2095B	Vs.	The Asst. CIT, Circle-61(1), New Delhi.
(Appellant)		**(Respondent)**

Appellant By	**Sh. Percy Pardiwala Adv & Sh. Niraj Sheth, Adv.**
Respondent by	**Sh. Jagdish Singh Sr. DR.**

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ORDER

PER SUDHANSHU SRIVASTAVA, JM:

ITA No. 3715/Del/2017 is the assessee's appeal against order dated 30.03.2015 for Assessment Year 2011-12 whereas ITA No.3716/Del/2017 is the assessee's appeal for 2012-13. As both these appeals involved identical issues, they were heard together and they are being disposed of by this common order for the sake of convenience.

2.0 The brief facts of the case are that the assessee is a Chartered Accountant Firm. For Assessment Year 2011-12, the return of income was filed declaring an income of Rs.10,44,95,714/-. The assessee's case was selected for scrutiny and the assessment was completed at an income of

Rs.15,11,45,380/- after making the following disallowances/additions:

(i) Disallowance of Subscription Fees paid to Deloitte Touche Tohmatsu - Rs.2,55,59,636/-.

(ii) Disallowance of TDS payable - Rs.44,09,937/-.

(iii) Disallowance of payments to Retiring Partners -

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Rs.1,66,80,091/.

2.1 In Assessment Year 2012-13, the return of income was filed declaring an income of Rs. 3,27,04,110/- and the assessment u/s 143(3) of the Income Tax Act, 1961 (hereinafter called 'the Act') was completed at an income of Rs.6,10,37,970/- after making a disallowance of Rs.2,83,33,858/- paid as subscriptions fees to Deloitte Touche Tohmatsu. Apart from this, the Assessing Officer (AO) did not allow deduction of expenditure of Rs.44,09,937/- representing tax deducted at source for Financial Year 2010-11 but paid in Financial Year 2011-12. The Assessing Officer also did not grant assessee's claim of TDS amounting to Rs.8,59,85,393/-.

2.2 Aggrieved, the assessee approached the Ld. First Appellate Authority challenging the orders of the Assessing Officer in both the captioned assessment years. However, the appeals of the assessee were only partly allowed by the Ld. Commissioner of Income Tax (Appeals) {CIT (A)} and now the assessee has approached this Tribunal and has challenged the orders of the Ld. CIT (A) the by raising the following grounds of appeal:

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ITA No.3715/Del/2017 for Assessment Year 2011-12

" The appellant objects to the order of the Commissioner of Income Tax (Appeals)-XX, New Delhi ('learned CIT (A)') passed under section 250(6) of the Income Tax Act, 1961 ('the Act') for the AY 2011-12, on the following among other grounds:

1. Disallowance of subscription fees Rs.2,55,59,636

1.1 The learned CIT (A) erred in confirming the disallowance of Rs.2,55,59,636, being subscription fees paid for membership of Deloitte Global Network ('DTT') by considering the same as capital in nature.

1.2 The learned CIT (A) erred in not appreciating the facts of the matter in right perspective and also erred in following the Commissioner of Income Tax (Appeals) order for the AY 2010-11.

1.3 The learned CIT (A) erred in holding that such expenditure not incurred for the purpose of business of the appellant.

1.4 Without prejudice to the above, the learned CIT (A) ought to have directed the Assessing Officer to allow depreciation under section 32 of the Act on subscription payment being considered by the Assessing Officer as capital expenditure.

2. Disallowance of Tax Deducted at Source ('TDS') payment Rs.44,09,937

2.1 The learned CIT (A) erred in confirming the disallowance of Rs.44,09,937, being amount of TDS Payable as on 31 March 2011.

2.2 The learned CIT(A) erred in holding that since the appellant is following cash system of accounting, the tax deducted from expenses, but paid after 31 March 2011 is not allowable as an expense. The learned CIT (A) ought to have appreciated that on deduction of tax liability towards payee is discharged and hence the entire expenditure ought to be allowed as deduction.

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2.3 The learned CIT (A) ought to have appreciated that as per the provisions of the Act, no disallowance can be made in respect of expenditure on which tax is deducted and paid within the prescribed time.

2.4 Without prejudice to the above, the learned CIT (A) ought to have directed the Assessing Officer to allow deduction for Rs.44,09,937 in the AY 2012-13 i.e. the year in which the TDS of Rs.44,09,937 is paid.

3. Disallowance of payment to Retired Partners Rs.1,66,80,091

3.1 The learned CIT (A) erred in confirming the disallowance of Rs.1,66,80,091, being payment to retired partners in disregard to the underlying principle of diversion by overriding title.

3.2 The learned CIT (A) ought to have appreciated that as per Clause 10.n of the Partnership Deed, the said amount was not income of the appellant firm as it was diverted by overriding title.

3.3 The learned CIT (A) erred in concluding that the payment to retired partners is an application of income without considering the fact that there is a prior charge on the income by way of superior title and therefore it is not an income of the appellant.

3.4 The learned CIT (A) erred in confirming the finding of the Assessing Officer that payment made to retired partners has to be disallowed under section 40(a)(ia) of the Act as no tax is deducted.

3.5 The learned CIT (A) erred in confirming the action of the Assessing Officer in applying the provisions of section 40(b) of the Act in respect of payment to retired partners.

3.6 The learned CIT (A) erred in not appreciating the fact that the amount of Rs.1,66,80,091 is included in the income of the retired partners and offered to tax in their return of income.

3.7 Without prejudice, the learned CIT (A) ought to have allowed deduction for the amount of Rs.1,66,80,091 as business

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expenditure under section 37(1) of the Act.

3.8 The learned CIT (A) erred in not considering reliance placed by the appellant on the Hon'ble Bombay High court and the Mumbai Tribunal judgements passed in case of associated concerns of the appellant, where on identical facts, the issue is decided in favour of the appellant.

3.9 Without prejudice to the above, the learned CIT (A) ought to have directed the Assessing Officer to allow depreciation on such amount being considered by the Assessing Officer as payment for intangible asset.

4. Credit of Tax Deducted at Source ('TDS')

4.1 The learned CIT (A) ought to have specifically directed the Assessing Officer to grant credit for the entire amount of TDS of Rs.8,67,44,316 as claimed by the appellant.

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

5. That the appellant craves leave to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal."

<u>ITA NO.3716/Del/2017 for Assessment Year 2012-13</u>

"The appellant objects to the order of the Commissioner of Income Tax(Appeals)-XX, New Delhi ('learned CIT(A)') passed under section 250(6) of the Income Tax Act, 1961 ('the Act') for the AY 2012-13, on the following among other grounds:

1. Disallowance of subscription fees Rs.2,83,33,858

1.1 The learned CIT(A) erred in confirming the disallowance of Rs.2,83,33,858 being subscription fees paid for membership of Deloitte Global Network by considering the same as capital in nature.

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1.2. The learned CIT (A) erred in not appreciating the facts of the matter in right perspective and also erred in following the Commissioner of Income Tax (Appeals) order for the
AY 2010- 11.

1.3 The learned CIT (A) erred in holding that such expenditure is not incurred for the purpose of business of the appellant.

1.4 Without prejudice to the above, the learned CIT (A) ought to have directed the Assessing Officer to allow depreciation under section 32 of the Act on subscription payment being considered by the Assessing Officer as capital expenditure.

2. TDS payment Rs.44,09,937

2.1 Without prejudice, the learned CIT(A) ought to have directed the Assessing Officer to allow deduction for expenditure of Rs.44,09,937 representing TDS deducted in the Financial Year ('FY') 2010-11 but paid in the FY 2011-12.

3. CREDIT OF TAX DEDUCTED AT SOURCE ('TDS')

3.1 The learned CIT (A) ought to have specifically directed the Assessing Officer to grant credit for the entire amount of TDS of Rs.8,59,85,393 as claimed by the appellant.

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

5. That the Ld. Commissioner of Income Tax (Appeals) has erred in law as well on facts in confirming the additions made by the AO to the returned income."

3.0 The Ld. Authorized Representative (AR) submitted that as far as the disallowance pertaining to subscription payment to Deloitte Touche Tohmatsu was concerned, the issue was covered in favour of the assessee by the order of the Delhi Bench of the

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Tribunal in Assessment Year 2009-10 in ITA No.2927/Del/2013 vide order dated 23.10.2018. The Ld. Authorized Representative explained the necessity of paying subscription fees and further explained how the subscription fees is collected from the members/companies by Deloitte Haskins & Sells, Mumbai. The Ld. counsel for the assessee further drew our attention to the assessment order framed u/s 144C(3) r.w.s 143(3) of the Act in the case of Deloitte Touche Tohmatsu (DTT) and pointed out that in the case of DTT, the subscription fees received from members have been taxed as its income. The Ld. counsel for the assessee further drew our attention to the decision of the co-ordinate bench in the case of Deloitte Haskins and Sells, Mumbai in ITA No. 5096/Mum/2011 vide order dated 30.11.2016 wherein an identical issue arose for consideration before the bench where the subscription fees paid by Deloitte Haskins and Sells, Mumbai to DTT was disallowed u/s 40A (ia) of the Act. It was submitted by the Ld. counsel for the assessee that disallowance was directed to be deleted. The Ld. counsel for the assessee further relied upon the decision of the co-ordinate bench in the case of Deloitte Haskins

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and Sells, Kolkata in ITA Nos. 587 and 588/Kol/2016 vide order dated 11.07.2018. It was submitted by the Ld. Counsel for the assessee that similar subscription fees was paid by the Kolkata firm which was disallowed by the Assessing Officer and was subsequently allowed by the Tribunal. The Ld. Counsel for the assessee further relied upon the decision of the Co-ordinate Bench in the cases of other sister consultancy firms who have paid subscription fees to their parent body. The Ld. Counsel for the assessee concluded by stating that the fees have been incurred wholly and exclusively for the purposes of business and have to be allowed.

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3.1 With respect to assessee's ground challenging disallowance of tax deducted at source amounting to Rs.44,09,937/- in Assessment Year 2011-12, the Ld. Authorized Representative submitted that during the course of assessment proceedings, the Assessing Officer had required the assessee to provide details of payments of TDS subsequent to the end of the financial year and explain the liability of expenses to which the assessee had responded. It was submitted that it had been

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submitted before the Assessing Officer that the deduction of tax at source has been done under the provisions of the Act i.e., when the expenditure is disbursed, the tax is deducted at source from such disbursement and the net amount is disbursed to the payee and, thus, the liability to pay to the payee in respect of that item of expenditure is fully discharged. With such accounting another liability i.e., obligation to deposit the tax so deducted at source is created which has a direct nexus with the disbursement to the payee. Thus, the liability in respect of such expenditure stands fully discharged. It was submitted that, however, the Assessing Officer did not accept the contentions of the assessee and the amount outstanding in respect of TDS payable was disallowed and added back to the income of the assessee on the ground that the assessee was following cash system of accounting and the tax deducted at source was being paid in the next Financial Year. The Ld. Authorized Representative further submitted that as per the provisions of Section 40(a) (ia) of the Act, an expenditure can be disallowed only when the statutory liability has not been deducted or after having deducted has not been deposited as per Chapter-

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XVII-B of the Act. It was submitted that this provision was not applicable as the amount of statutory liability on which had been deducted had been deposited within the specified due date.

3.2 With respect to disallowance of payments made to the Retiring Partners, the Ld. Authorized Representative submitted that the confirmations of the retired partners are on record stating that they have offered this income to tax in their respective returns. Reliance was also placed on the order of ITAT Mumbai bench in the case of C.C. Chokshi & Co. wherein an identical payment made to the retired partners was held to be allowable. It was submitted that the Hon'ble Bombay High Court had dismissed the Department's appeal in this case and, therefore, the same was a binding precedent. Reliance was also placed on another judgment of the Chennai Bench pertaining to a related concern of the assessee where an identical disallowance was held to be allowable. Reliance was also placed on another order of the ITAT Mumbai Bench in the case of Mulla & Mulla & Craigie wherein an identical issue was decided in favour of the assessee.

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3.3 With respect to ground No.4 in assessee's appeal for Assessment Year 2010-11, the Ld. Authorized Representative submitted that suitable directions may be issued for granting the credit of TDS of Rs.8,67,44,316/- as claimed by the assessee.

4.0 Coming to the assessee's appeal in Assessment Year 2012-13, the Ld. Authorized Representative submitted that Ground No.1 pertained to disallowance of subscription fees of Rs.28,33,858/- which was identical to assessee's appeal for Assessment Year 2011-12 and the arguments would be the same on the issue.

4.1 With respect to Ground No.2 in assessee's appeal in Assessment Year 2012-13, the Ld. Authorized Representative submitted that this ground is also related to Ground No.2 of assessee's appeal in Assessment Year 2011-12 wherein it was being prayed that if the disallowance of TDS of Rs.44,09,937/-(disallowed by AO in Financial Year 2010-11, for the reason it was paid in Financial Year 2011-12) is upheld by this Tribunal in assessee's appeal in assessment year 2011-12, then the same should be allowed as a deduction in Assessment Year 2012-13.

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4.2 With respect to Ground No.3 of the assessee's appeal in Assessment Year 2012-13, the Ld. Authorized Representative submitted that this ground sought of direction to the Assessing Officer to grant credit of TDS amounting to Rs.8,59,85,393/-.

5.0 Per contra, the Ld. Sr. Departmental Representative (DR) submitted that as far as the issue of subscription fees paid to Deloitte Touche Tohmatsu in both the years was concerned, he was strongly supporting the findings of the Assessing Officer as well as the Ld. CIT (A). It was submitted that the assessee could not furnish the details of quantification of subscription fees and further the assessee could not establish that these expenses had been incurred wholly and exclusively for the purposes of assessee's business.

5.1 With reference to the arguments of the Ld. Authorized Representative in respect of disallowance of Rs.44,09,937/- relating to tax deducted at source, the Ld. Sr. DR submitted that it is undisputed that the tax deducted at source was not paid into the account of the Government before the end of the Financial Year and, therefore, the same had rightly been disallowed. It was further

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submitted that since the assessee was following the cash system of accounting, the same was deductible only in the year in which the payment has been made and not in the year in which the claim has been made as having accrued.

5.2 With respect to the disallowance of payments made to the Retired Partners amounting to Rs.1,66,80,091/- in Assessment Year 2011-12, the Ld. Sr. DR submitted that this payment had been made to the Retired Partners and that this payment was in the nature of capital outgo as the payments to retired partners are made only out of the capital balances of the partners. It was submitted that the assessee firm had deducted the payment from the current income of the partnership firm which was not permissible.

5.3 With respect to assessee's ground No.4, in Assessment Year 2010-11 for credit of tax deducted at source, the Ld. Sr. DR had no objection to the same being granted after due verification.

6.0 With respect to asessee's appeal for Assessment Year 2012-13, the Ld. Sr. DR submitted that ground No.1 pertaining to disallowance of subscription fees was identical to Ground No.1 in

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Assessment Year 2011-12 and the same arguments would hold good in this year also.

6.1 With respect to assessee's Ground No.2 in Assessment Year 2012-13 regarding allowing deduction of TDS deducted in Financial Year 2010-11 but paid in 2011-12, the Ld. Sr. DR had no objection of the effect being given as per the directions of the Ld. CIT (A) in Assessment Year 2012-13.

6.2 Likewise, the Ld. Sr. DR had no objection to the credit of tax deducted at source being granted to the assessee after due verification.

7.0 We have heard the rival submissions and have perused the material on record. So far as the issue of disallowance of subscription fees is concerned, this ground is common in both Assessment Years 2011-12 & 2012-13. We agree with the contentions of the Ld. Sr. DR that this issue stands covered by the order of the Co-ordinate Bench of this Tribunal in Assessment Year 2009-10 in ITA No.2927/Del/2013 vide order dated 23.10.2018. The relevant observations and findings of the Tribunal are

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contained in paragraphs 11 to 17 of the said order and the same are being reproduced herein under for a ready reference:

"11. We have given thoughtful consideration to the orders of the authorities below. It is not in dispute that the assessee has been paying subscription charges since Assessment Year 2007-8. It appears that this payment of subscription charges has been questioned only in the year under consideration. The observations of the Assessing Officer while disallowing the claim of subscription charges have been mentioned elsewhere.

12. First objection relates to the PAN of the DTT. The Assessing Officer observed that the assessee has paid subscription fees to a company registered in USA. According to the Assessing Officer, it cannot be claimed as business expenditure. In our understanding of law, such observation of the Assessing Officer does not hold any water, because under the Companies Act, a company can be incorporated under any other law also. The Assessing Officer has further mentioned that in the partnership deed, there is no clause relating to payment of DTT. We fail to understand the necessity of such clause in the partnership deed.

13. The Assessing Officer further observed that DHS Mumbai has paid to DTT after deducting tax at source u/s 194J of the Act which means that TDS has been deducted for fees for profession or technical services. The Assessing Officer was of

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the opinion that on the one hand DHS Mumbai is making payment as fees for profession or technical services and, on the other hand, the assessee is claiming the same as subscription fees. As mentioned elsewhere, in the case of DHS Mumbai in assessment years 2003-04, 2004-05 and 2005-06, payment made to DTJ-was disallowed u/s 40A(ia) of the Act. Thereafter, DHS Mumbai started deducting tax at source to avoid unnecessary litigation. But this has nothing to do with the subscription charges paid by the assessee to DHS Mumbai as its share of contribution.

14. In our considered opinion, the reasons given by the Assessing Officer for making disallowance are not based on sound principles. In our understanding of the facts, by becoming part of global net work of professional firms, it is easier to get work of international clients which are referred by firms of other companies from other countries. Similarly, the assessee may also refer its clients to its associated firm in other countries where the clients may require professional services. The use of the name Delotte is in itself sufficient to justify the business necessity of the subscription charges.

15. The co-ordinate bench in the case of DHS Mumbai ITA No. 5096/Mum/2011 and another has examined Article 1 of Verein in detail. The relevant part reads as under:

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"ARTICLE 1 NAME, DOMICILE AND PURPOSES 1.1 Name and Domicile. A Verein is hereby established with domicile in Zurich, Switzer land, under the name of Deloitte Touche Tohmatsu ("Verein"). The Verein consists of members that are professional firms ("Member Firms"). The Member Fir ms are engaged in rendering professional services, to the extent they may lawfully be performed under Local Laws (§7.1), in the fields of accounting, auditing, insolvency, law, management consulting, taxation and related services ("Professional Services"). The Verein is governed by these Articles, by the Supplementary Agreement among the Member Fir ms supplementing these Articles ("Supplemental Agreement"), and by the applicable provisions of the Swiss Civil Code.

1.2 *Purposes. The purposes of the Verein shall be:*

(A) *to further international cooperation and cohesion among the Member Firms;*

(B) *to assure that their practices shall conform to professional standards of the highest quality;*

(C) *to advance the international and national leadership of the Member Firms in rendering Professional Services; and to perform all other functions incidental to the above purposes.*

Article 8 deals with financial matters and Clause (b) of the said Article reads as under:-

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(a) Each Member Firm shall contribute to ward the budgeted operating expenses of the Verein for each fiscal Year in such proportions as shall be allocated by the Board of Directors; and

(b) The amount allocated to each Member Fir m shall be based upon aggregate revenues and such other f actors, if any, as Delotte Haskins and Sells IT A No.: 5096/Mum/2011 ITA No.: 5097/Mum/2011 ITA No.: 5094/Mum/2011 may be determined by the Board of Directors and approved by the Member Firms.

and Article 12 deals with dissolution, which reads as under:-

12.1 By Resolution a dissolution of the Verein shall occur if a resolution to that effect is, adopted by the Member Finns.

12.2 Distributions. Upon dissolution of the Verein, any liquidation proceeds shall be applied in the following order:

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

(B) *payment of any remaining balance to each Member Finn in the proportion that its allocated , contributions to*

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budgeted operating expenses of the Verein bear to the total budgeted operating expenses of the Verein for the then current Fiscal Year, less any unpaid portion of the Member Finn's contribution outstanding on the date of dissolution"

From the reading of above Articles, it is seen that the association constitutes of Member firms which are engaged in rendering of professional services and the purpose of Verein is to further the international cooperation and cohesion among the member firms; to assure that practices of the Members shall conform to professional standards of highest quality; to advance the international and national leadership of the Member firms in rendering professional services, etc. Each Member contributes towards the budgeted operating expenses of Verein in such proportion which has been Delotte Haskins and Sells ITA No.: 5096/Mum/2011 ITA No.: 5097/Mum/2011 ITA No. 5094/Mum/2011 allocated to them. The amount allocated to the each Member firm is based on aggregate revenues and other factors as illustrated therein. In pursuance of such allocation, invoices were issued by DTT to assessee in India allocating the DTT's operational budget. This is evident from certificate of the Chartered Accountant given at page 67. While making the said payment, the assessee had not deducted th e &TDS inter alia on the ground that, firstly, the relationship between

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"the DTT and its Member is based on principle of mutuality", therefore, the Verein itself does not earn any income or renders any kind of professional services and the expenses are made through contribution by its members; and secondly, the reimbursement of expenses is based on allocation made by the DTT which in turn is on the basis of actual expenses.

However both the authorities, Assessing Officer as well as CIT (A), instead of adjudicating the issue whether the subscription fees paid by the assessee to DTT Switzerland is taxable under the Act in India or not, have proceeded to disallow the payment on the premise that even if there existed a doubt regarding changeability of Income Tax, the assessee should have any way deducted the tax and should have complied with the provision of section 195 and 197. In support, strong reliance has been placed on the decision of ITAT Mumbai Bench in the case of Arthur Andersen & Co. and Hon'blee Supreme Court judgment in the case Transmission Corporation Andhra Pradesh (supra)."

16. As mentioned elsewhere, similar issue was considered by the Kolkata Bench in the case of DHS Kolkata [supra]. The relevant findings read as under:

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10. We have heard learned arguments on perused the material available on record, we note far as the case before us is concerned, the assessee paid an amount of Rs. 48,95,212/- to OHS, Mumbai. It is the claim of the assessee that payment was its share of subscription allocated to various Indian entities of a common global network on the basis of the revenue by OHS, Mumbai, of which the assessee is a member. The total subscription is paid by OHS, Mumbai after deduction of tax at source (TDS) to DTT towards utilization of common knowledge systems, common information technology systems and better access for clients of uniform and high quality services by the Indian members of the network. The assessee's contribution/share of Rs.48,95,212/-comprised it share of Rs.31,86,534/- for the relevant previous year and differential share of Rs.17,08,679/-paid for the earlier years being the difference between the contribution payable on the basis of the revenue and contribution already paid earlier for those years and was claimed in line with the cash system of accounting followed by the assessee. The assessee produced debit notes issued by DHS, Mumbai as supporting evidence. The assessee has to pay subscription fees through Delloite, Haskins and Sells, Mumbai (DHS, Mumbai) for this purpose to DTT. However, as DHS Mumbai makes the

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payment after deducting TOS and the assessee only reimburses its share of expenses, tax was not required to be deducted again in respect of its reimbursement of share of expenses of Rs.48,95,212/- to OHS, Mumbai. We note that it is not the case of the AO that the expenses were not genuine. It is also not the case of the AO that the expenses were not incurred Page / 6 M/s. Deloitte Haskins & Sells IT Nos .587 & 588/ Kol/ 2 0 16 Assessment Years : 2 0 10- 11 Si 2 0 11 -1 2 wholly and exclusively for the purposes of business or profession. The assessee has claimed the expenses in accordance with its cash system of accounting and the AO has not disputed the system of accounting. The AO has concluded that the assessee had paid for the professional services rendered by OHS, Mumbai without specifying the nature and details of services rendered by OHS, Mumbai. The assessee has furnished copies of debit notes issued by OHS, Mumbai mentioning the amount debited as "being your share of OTT Operational Budget (Subscription Fee) & Tech, Subscription Fees paid to Deloitte Touch Tohmatsu, New York" which have not been questioned by the AO. The assessee has also furnished evidence to prove that the assessee is a member of the global network of OTT, enjoys certain advantages as a result of the membership and has

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paid its contribution of; the subscription to the membership of the global network. –

11. We note that Hon'ble High Court of Bombay in the ca of CIT vs. Zee Entertainment Fnterprises Ltd. [2018] 92 taxmann.com 30 (Bombay) held that reimbursement of expenses is not taxable. Similarly, the Hon'ble High Court of Karnataka in the case of CIT vs. Kalvani Steels Ltd. [2018] 91 taxmann.com 359 (Karnataka), held as follows:

"11. This provision makes it clear that deduction at source shall be on such income not otherwise. The primary factor to attract section 194J is the ingredient of "income comprised therein". If no income is reflected in the balance sheet and P&L A/c of HSL towards the reimbursement charges paid on cost to cost basis by KSL and ML, it ceases to have the character of income. As such, the assessee cannot be treated as the assessee in default in not deducting tax at source u/s 194J of the Act. The arguments of the Revenue that the fees paid by the assessee is towards technical services is imaginary one not established with substantial materials."

Moreover, we note that Coordinate Bench of ITAT Kolkata in the case of CIT vs. Ernst & Young (P.) Ltd. [2014] 49 taxmann.com386 (Kolkata-Trib.) upheld the same principle

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on the identical issue under consideration, wherein it was held as follows:

"The two concerns, namely, EY&S LLP and Ernst and Young U.K. LLP, were set up by member firms of Ernst and Young for providing resources to obtain best methodologies at a lower cost which in the present days of globalization is imperative for any professional firm. Development of such methods by any one concern would have been cost prohibitive apart from lacking uniformity and mutual compatibility. Accordingly, arrangement was arrived at for such services to be developed in a pool by the said two concerns to which the member firms would have access to it and reimbursing their respective shares of cost incurred therefor. Such reimbursement was agreed on the basis of respective turnover of the member firms. These facts are not denied by the revenue and these are reimbursement of expenses. Once these are reimbursement of expenses, the assessee is not liable to deduct TDS u/s 195. Accordingly, the order of the Commissioner (Appeals) is to be confirmed."

Therefore, we note that the said amount of Rs.48,95,212/- was towards the reimbursement of the expenses, which was in fact incurred on behalf of the assessee and there was no profit element. That being so, we decline to interfere with the order of Ld. CIT (A) deleting the aforesaid

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addition. His order on this addition is, therefore, upheld and the Ground No.1 raised by the Revenue in ITA No.567/Kol/2016 and ground No.2 raised by Revenue in ITA No.588/Kol/2016, are dismissed. "

17. Considering the facts of totality, in the light of the decision of the Co-ordinate bench (supra) we have no hesitation in setting aside the findings of the Ld. CIT(A). The Assessing Officer is directed to delete the addition of Rs.2,16,68,412/-. Ground No.1 with its sub grounds is allowed."

7.0.1 We also note that the Ahmedabad Bench of ITAT also reached a similar conclusion by dismissing the Departmental Appeal on the issue for Assessment Years 2013-14 & 2014-15 in ITA No.1983/Ahd/2017 and 1984/Ahd/2017 vide order dated 01.10.2019. Respectfully following the decisions of the Co-ordinate Benches (supra), we allow ground No.1 in both the years under consideration and direct the Assessing Officer to delete the disallowance.

7.1 As far as Ground No.2 in Assessment Year 2011-12 is concerned, we note that, undisputedly, the assessee is following cash system of accounting and, therefore, generally whatever is the

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cash outflow, the assessee is entitled to claim the same as a deductible expenditure. In the present case, the assessee has made cash payment to the various parties after duly deducting tax at source. The portion of the amount paid to them has already been allowed to the assessee as a deductible expenditure. However, the issue is whether the amount of tax deducted at source from the payment made to the recipient of such income can be said to be the amount of expenditure incurred by the assessee and paid during the year and, therefore, is it allowable to the assessee as business expenditure. We note that according to the provisions of section 198 of the Income Tax Act, 1961 (hereinafter called 'the Act'), tax deducted in accordance with the provisions of the Act is deemed to be the income received by the recipient of the income. Therefore, according to the Act itself the amount of TDS is deemed to have been received by the recipient of the income. Therefore, in our considered opinion, it cannot not be said that the assessee had not paid the amount of tax deducted at source to the recipient of the income from whose payments the tax had been deducted. TDS is a liability cast upon the assessee to deduct the sum from the

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recipient of such income. The moment the assessee deducts the tax at source from the sums paid to the other person it becomes the liability of the assessee who can be held to be an assessee in default for the above sum as well as liable to pay interest and penalty also. Therefore, the amount of TDS is to be considered as the sum paid by the assessee on behalf of the recipient of the income. Therefore, it cannot be said that the above sum had not been paid by the assessee even while following the cash system of accounting. It is also not in dispute that the assessee has duly deposited the tax deducted at source within the time prescribed under the Act. Accordingly, we are unable to concur with the findings of the Ld. CIT (A) on the issue and direct that the impugned amount of TDS be granted as a deduction in assessment year 2011-12. Thus, ground no. 2 also stands allowed in assessment year 2011-12.

7.2 As far as the issue of disallowance of payment to Retired partners in Assessment Year 2011-12 is concerned, it is seen that this issue is also settled in favour of the assessee by numerous judgments of the Hon'ble High Courts as well as the Co-ordinate

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Benches of the Tribunal. We find that an identical issue had come up before the ITAT Chennai bench in the case of a related concern of the assessee in assessment year 2011 - 12 and the ITAT Chennai bench in ITA No. 2077/MDS/2016, vide order dated 25/11 /2018, after relying on an order of ITAT Mumbai Bench in the case of CC Chokshi & Co. for assessment years 2000-01 and 2001-02 had held the issue in favour of the assessee. The Hon'ble High Court of Bombay in the case of DCIT versus Wadia Ghandy & Company, vide judgment dated 12/02/2019, also upheld an identical order of ITAT Mumbai and noted that payment to the partner would amount to diversion of income at source by overriding title. The court went on to observe that it was not necessary to refer to long line of decisions where a similar view in similar circumstances had been taken. The undisputed facts are that the partnership firm envisaged payment to a outgoing partner on the basis that the partner would have rendered service during his tenure as a partner of the firm but could not enjoy the fruits thereof on account of the fact that the work having remained incomplete, the concerned client had not been billed for the work already done. The Hon'ble Bombay High

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Court held that in similar circumstances, the courts have held that payment to the partner would amount to diversion of income at source by overriding title. The Ld. senior departmental representative could not point out any judgment to the contrary on this issue as well and, therefore, in view of the ratio of the decisions as aforesaid and as relied upon by the Ld. Authorized Representative, on identical facts, respectfully following the above cited judicial precedents, we allow ground No.3 of the assessee's appeal in Assessment Year 2011-12 and direct the Assessing Officer to delete the disallowance.

7.3 The only ground remaining for adjudication in Assessment Year 2011-12 is Ground No.4. It is identical to Ground No.3 in Assessment Year 2012-13 and both grounds seek directions for allowing the credit of tax deducted at source. The Ld. Sr. DR has no objection to the same. Accordingly, we direct the Assessing Officer to grant due credit of tax deducted at source in both Assessment Years 2011-12 & 2012-13 after due verification and after giving proper opportunity to the assessee to present its case.

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Thus,this ground stands allowed for statistical purposes in both the years under appeal.

7.4 The only ground now remaining in assessment year 2012-13 is related to Ground No.2 of assessee's appeal in Assessment Year 2011-12. It has been prayed that if the disallowance of TDS of Rs.44,09,937/- (disallowed by AO in Financial Year 2010-11, for the reason it was paid in Financial Year 2011-12) is upheld by this Tribunal in assessee's appeal in assessment year 2011-12, then the same should be allowed as a deduction in Assessment Year 2012-13. As we have already allowed ground no. 2 in assessment year 2011-12, this ground becomes *in fructous* and is dismissed.

7.0 In the final result, the ITA No.3715/Del/2017 stands allowed whereas ITA No.3716/Del/2017 stands partly allowed.

Order pronounced on 15th January, 2021.

Sd/-	Sd/-
(PRASHANT MAHARISHI)	**(SUDHANSHU SRIVASTAVA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 15/01/2021
PK/Ps

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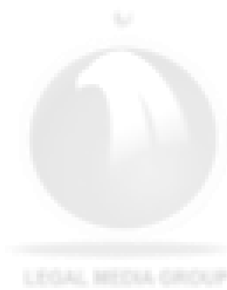

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