

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 2900 of 2012

(Arising out of Order-in-Original No. 36/2012 dated 17/08/2012 passed by the Commissioner of Central Excise, Bangalore II Commissionerate, Bangalore)

**M/s. ICICI Econet Internet And
Technology Fund**

....Appellant

C/o ICICI Ventures Fund Management Co.
Ltd , 10th Floor, Prestige Obelisk Kasturba
Road, Bangalore 560 001

VERSUS

**Commissioner Of Central Tax,
Bangalore North**

....Respondent

No-59, HMT Bhawan
Ground Floor, Bellary Road
BANGALORE
KARNATAKA
560032

WITH

(i) Service Tax Appeal No. 1641 of 2012 (India Advantage Fund III)

[Arising out of Order-in-Original No. 22/2012 dated 29/02/2012 passed by the Commissioner of Service Tax, Bangalore]

(ii) Service Tax Appeal No. 1642 of 2012 (India Advantage Fund II)

[Arising out of Order-in-Original No. 21/2012 dated 27/02/2012 passed by the Commissioner of Service Tax, Bangalore]

(iii) Service Tax Appeal No. 1643 of 2012 (India Advantage Fund IV)

[Arising out of Order-in-Original No. 25/2012 dated 27/02/2012 passed by the Commissioner of Service Tax, Bangalore]

(iv) Service Tax Appeal No. 1644 of 2012 (India Advantage Fund I)

[Arising out of Order-in-Original No. 18/2012 dated 27/02/2012 passed by the Commissioner of Service Tax, Bangalore]

(v) Service Tax Appeal No. 1645 of 2012 (India Advantage Fund VII)

[Arising out of Order-in-Original No. 31/2012 dated 29/02/2012 passed by the Commissioner of Service Tax, Bangalore]

(vi) Service Tax Appeal No. 1646 of 2012 (India Advantage Fund VI)

[Arising out of Order-in-Original No. 29/2012 dated 29/02/2012 passed by the Commissioner of Service Tax, Bangalore]

(vii) Service Tax Appeal No. 1647 of 2012 (India Advantage Fund I)

[Arising out of Order-in-Original No. 19/2012 dated 27/02/2012 passed by the Commissioner of Service Tax, Bangalore]

(viii) Service Tax Appeal No. 1648 of 2012 (India Advantage Fund VII)

[Arising out of Order-in-Original No. 30/2012 dated 29/02/2012 passed by the Commissioner of Service Tax, Bangalore]

(ix) Service Tax Appeal No. 1649 of 2012 (India Advantage Fund III)

[Arising out of Order-in-Original No. 23/2012 dated 29/02/2012 passed by the Commissioner of Service Tax, Bangalore]

(x) Service Tax Appeal No. 1650 of 2012 (India Advantage Fund IV)

[Arising out of Order-in-Original No. 24/2012 dated 27/02/2012 passed by the Commissioner of Service Tax, Bangalore]

(xi) Service Tax Appeal No. 1651 of 2012 (India Advantage Fund II)

[Arising out of Order-in-Original No. 20/2012 dated 27/02/2012 passed by the Commissioner of Service Tax, Bangalore]

(xii) Service Tax Appeal No. 1652 of 2012 (India Advantage Fund V)

[Arising out of Order-in-Original No. 27/2012 dated 29/02/2012 passed by the Commissioner of Service Tax, Bangalore]

(xiii) Service Tax Appeal No. 1653 of 2012 (India Advantage Fund VI)

[Arising out of Order-in-Original No. 28/2012 dated 29/02/2012 passed by the Commissioner of Service Tax, Bangalore]

(xiv) Service Tax Appeal No. 1654 of 2012 (India Advantage Fund V)

[Arising out of Order-in-Original No. 26/2012 dated 29/02/2012 passed by the Commissioner of Service Tax, Bangalore]

(xv) Service Tax Appeal No. 1688 of 2012 (ICICI Strategic Investments Fund)

[Arising out of Order-in-Original No. 09/2012 dated 20/03/2012 passed by the Commissioner of Central Excise, Bangalore-III Commissionerate, Bangalore]

(xvi) Service Tax Appeal No. 2899 of 2012 (ICICI Emerging Sectors Fund)

[Arising out of Order-in-Original No. 37/2012 dated 17/08/2012 passed by the Commissioner of Central Excise, Bangalore-II Commissionerate, Bangalore]

(xvii) Service Tax Appeal No. 2901 of 2012 (ICICI Equity Fund)

[Arising out of Order-in-Original No. 35/2012 dated 17/08/2012 passed by the Commissioner of Central Excise, Bangalore-II Commissionerate, Bangalore]

(xviii) Service Tax Appeal No. 25134 of 2013 (ICICI Strategic Investments Fund)

[Arising out of Order-in-Original No. 106/2012 dated 08/10/2012 passed by the Commissioner of Service Tax, Bangalore]

(xix) Service Tax Appeal No. 25135 of 2013 (ICICI Equity Fund)

[Arising out of Order-in-Original No. 107/2012 dated 09/10/2012 passed by the Commissioner of Service Tax, Bangalore]

(xx) Service Tax Appeal No. 25938 of 2013 (ICICI Emerging Sectors Fund)

[Arising out of Order-in-Original No. 09/2012 dated 20.12.2012 passed by the Commissioner of Central Excise and Service Tax (Adjudication), Bangalore]

(xxi) Service Tax Appeal No. 21671 of 2014 (India Advantage Fund V)

[Arising out of Order-in-Original No. 14/2013 dated 23/12/2013 passed the Commissioner of Central Excise and Service Tax (Adjudication), Bangalore]

(xxii) Service Tax Appeal No. 22016 of 2014 (India Advantage Fund VI)

[Arising out of Order-in-Original No. 19/2013-14 dated 06/01/2014 passed the Commissioner of Central Excise and Service Tax (Adjudication), Bangalore]

(xxiii) Service Tax Appeal No. 22133 of 2014 (India Advantage Fund III)

[Arising out of Order-in-Original No. 21/2013-14 dated 15/01/2014 passed by the Commissioner of Central Excise and Service Tax (Adjudication), Bangalore]

(xxiv) Service Tax Appeal No. 22335 of 2014 (India Advantage Fund IV)

[Arising out of Order-in-Original No. 26/2013-14 dated 06/02/2014 passed by the Commissioner of Central Excise and Service Tax (Adjudication), Bangalore]

(xxv) Service Tax Appeal No. 22361 of 2014 (India Advantage Fund I)

[Arising out of Order-in-Original No. 27/2013-14 dated 07/02/2014 passed by the Commissioner of Central Excise and Service Tax (Adjudication), Bangalore]

(xxvi) Service Tax Appeal No. 22483 of 2014 (India Advantage Fund VII)

[Arising out of Order-in-Original No. 35/2013-14 dated 26/03/2014 passed by the Commissioner of Central Excise and Service Tax (Adjudication), Bangalore]

(xxvii) Service Tax Appeal No. 22544 of 2014 (ICICI Strategic Investments Fund)

[Arising out of Order-in-Original No. 34/2013-14 dated 25/03/2014 passed by the Commissioner of Central Excise and Service Tax (Adjudication), Bangalore]

(xxviii) Service Tax Appeal No. 22609 of 2014 (ICICI Emerging Sectors Fund)

[Arising out of Order-in-Original No.02/2014-15 dated 04/04/2014 passed by the Commissioner of Central Excise and Service Tax (Adjudication), Bangalore]

(xxix) Service Tax Appeal No. 22700 of 2014 (ICICI Econet Internet & Technology Fund)

[Arising out of Order-in-Original No. 533/2014 dated 22/07/2014 passed by the Commissioner of Central Excise (Appeals-II), Bangalore]

(xxx) Service Tax Appeal No. 22701 of 2014 (ICICI Equity Fund)

[Arising out of Order-in-Original No. 04/2014-15 dated 21/04/2014 passed by the Commissioner of Central Excise and Service Tax (Adjudication), Bangalore]

APPEARANCE:

Shri Vikram Nankani, Senior Advocate for the Appellant
Shri P.R.V. Ramanan, Special Counsel, Authorized Representative for the Respondent

**CORAM: HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER**

FINAL ORDER NO. 20372-20402/2021

DATE OF HEARING: 22.01.2021

DATE OF DECISION: 01/07/2021

PER: P. ANJANI KUMAR

Brief facts of the case are that the Appellants are venture capital funds established as a trust under the Indian Trusts Act, 1882, ("Trusts Act") and registered with the Securities and Exchange Board of India ("SEBI") as a Venture Capital Fund ("VCF"). The Appellants are represented and managed by a Trustee and the terms and conditions pertaining to the formation of the Appellants-Trust are

contained in the Indenture of Trust ("Trust Deed or "IOT; a Private Placement Memorandum (PPM), which is an Offer Document for inviting contributors or subscribers to be part of the Trust set up by the Settlor, is issued with the intent of allowing evaluation of possibility of investment in the units of the VCF; the Appellants' properties (i.e, money contributed by investors) are held in *trust* by the Trustee for the benefit of beneficiaries, who are contributors to the Funds ("Contributors/ Beneficiaries"); the Trust Deed executed for this purpose, lays down the objectives for which the Appellants' Trusts are set up, its establishment, management and other allied matters; the Trustee receives remuneration in the form of Trusteeship fees for services rendered by it to the Appellants. To ensure that the Appellants receives relevant professional and experienced advice, the Trustee appoints an Investment Manager or Asset Manager to manage the assets of the Appellants. The terms for appointment of the Investment Manager/ Asset Manager are contained in the "Investment Management Agreement" ("IMA"). The Investment Manager is responsible for managing the assets/ investments of the Appellants and receives remuneration in the form of management fees for the services rendered by it. The Department launched investigation into the taxability of the services rendered by ICICI Econet Internet and Technology Fund floated by the Settlor (ICICI Ltd.) under the entry 'Banking and other financial services" in Sec. 65 (12) of the Finance Act, 1994. The said investigation resulted in the issue of series of notices demanding Service tax on the said activities, which were confirmed by the adjudicating authority. Aggrieved by these OIOs , the appellants are before this Bench in the following.

Appeals Nos	Name of the Trust/Fund, the appellant
ST/2900/12, ST/22700/14	ICICI Econet Internet and Technology Fund
ST/1644/12, ST/1647/12, ST/22361/14	India Advantage Fund I
ST/1651/12, ST/1642/12	India Advantage Fund II

ST/1641/12, ST/1649/12, ST/22133/14	India Advantage Fund III
ST/1650/12, ST/1643/12, ST/22335/14	India Advantage Fund IV

ST/1654/12, ST/1652/12, ST/21671/14	India Advantage Fund V
ST/1653/12, ST/1646/12, ST/22016/14	India Advantage Fund VI
ST/1648/12, ST/1645/12, ST/22483/14	India Advantage Fund VII
ST/2899/12, ST/25938/13, ST/22609/14	ICICI Emerging Sectors fund
ST/2901/12, ST/25135/13, ST/22701/14	ICICI Equity Fund
ST/ 1688/ 12, ST/25134/13, ST/22544/14	ICICI Strategic Investment Fund

2. Shri Vikram Nankani, senior Counsel, appearing for the appellants submits that the department demands service tax, interest and penalty on the Appellants on account of Expenses incurred by the Trust (expenses incurred by the Appellants have been sought to be characterised as service income earned by the Trusts); Disbursement of carry income or carried interest to Class C unit holders in the Trust (return of income earned by a specific class of unit holders has sought to be characterised as service income earned by the Trusts) and Provision for losses and impairment of investment debited to financials (provisions made as per accounting policies have been sought to be characterised as service income earned by the Trusts).

2.1. He submits that a person who reposes or declares the confidence is called the Settlor or the Author of the Trust; the person who accepts the confidence is called the Trustee; the person for whose benefit the confidence is accepted is called the beneficiary. In sum he argues that there is no Service being provided by the Appellant-Trusts to the Contributors /Beneficiaries; even assuming for the sake of an argument without

conceding that there is a Service, Service tax not payable because there is no distinction between a Trust and Contributors/Beneficiaries; in any view of the matter, Service tax not payable because of the doctrine of mutuality; issue is covered by a direct judgement in the case of State of WB v. Calcutta Club; even assuming the doctrine of mutuality does not apply for any reason, there is no Service falling under the taxable entry "Banking and other financial services" (BFS) for the present tax demand to be sustained; expenses incurred by Trust do not constitute consideration for "services" by Trust to Contributors/ Beneficiaries.

2.2. Shri Vikram Nankani further submits that carrying Interest or Carried Interest is a return on investment and not performance fee; in any case it is not a fee received by the Appellant-Trusts for liability to arise in the hands of the Appellant-Trusts (it is the recipients of such income who need to evaluate tax liability if any with respect to the same); notwithstanding the above, service tax (if any) needs to be calculated on the amount received as including service tax; the extended period of limitation is not applicable and as a consequence, for the periods in question, normal period limitation also fails; demand is not sustainable since Cenvat Credit is available of the service tax paid on the services received by the Trust; no tax liability can be fastened on provisions made for accounting purposes/ as per accounting policy; in any view of the matter, penalty shall not arise having regard to the interpretative nature of the issue and the provisions for its waiver as contained under Section 80 of the Act.

2.3. Shri Nankani submits the fundamental question is the nature of the relationship between a trust and its beneficiaries who also contribute to the corpus of the trust for a common purpose; this case does not deal with the relationship between the Trust, on one hand and trustee, investment manager and other third party service providers on the other hand, since qua such third parties, services received by the Trust have suffered tax, which in other words means; trust has only been a recipient of services, on which tax has been discharged; hence, the entire demand is on expenses incurred by the Trust or provisions made by the Trust with no substantiation

of how the Trust qualifies to be a service provider liable to service tax in incurring these expenses or provisions.

3. The senior Counsel submits that to levy service tax, there must be a service; in the present case, there is no service rendered by the Trust; there must be a consideration received for the service, as agreed to between the service provider and recipient; there is no such consideration agreed or settled between the parties ; it is a settled principle that consideration cannot be inferred or derived when there is no express agreement of the same ; to levy service tax, there must be two distinct persons- a service provider and a recipient. It is not so in case of a Trust; Trust is not a person distinct from its contributors/ beneficiaries; there is therefore complete identity between and amongst the contributors/beneficiaries and the collective name (trust) by which they are known; Trust is an obligation annexed to ownership of fund property by the Trustee. A Trust is a legal obligation that arises out of transfer of ownership of property (in which trust is reposed) to a Trustee and is a pooled vehicle of funds that is created in law for the benefit of the Contributors. "Trust" had been defined under Section 3 of the Indian Trust Act 1882 as "*A 'Trust' is an obligation annexed to ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared by him, for the benefit of another, or of another and the owner*". Simply put, a Trust is an arrangement whereby property is held by a person (the "Trustee") for the benefit of specific people (the "Beneficiaries") or for some object permitted in law. The property is held by a Trustee by virtue of confidence reposed/ declared in him and his abilities to achieve the objects of the Trust. The person who declares the confidence is called the "Author of the Trust" (or the "Settler").

3.1. The senior Counsel submits that the Appellants are Venture Capital Funds that work on a high-risk model by investing in nascent companies professing pioneering and innovative technology and skills. Venture Capital investments are generally done in a pooled or collective format, such that several investors combine their investments into one large corpus that invests in many companies. The Appellants are therefore a pooled vehicle

of investments or funds contributed by the Contributing Investors who are the Beneficiaries of the Trust. The extent of power including manner of usage of the funds pooled are in pre-determined and articulated in the various documents associated with the Trust and agreed to by the parties. The Trust is represented by a Trustee and can sue or be sued only in the name of the Trustee.

Submissions on definition of 'Trust'; Trust is not a legal Entity

4. Shri Nankani, explains the definition and concept of Trust and submits that the fact that a Trust is not recognized in law as a "person" is confirmed in the following rulings:

- (i). *Bombay High Court in Homi Nariman Bhiwandiwalla v Respondent: Zoroastrian Co-operative Credit Bank Limited and another AIR 2001 Bom 267. This view is taken by a Division Bench of the Gujarat High Court, reported in Atmaram Ranchhodbhai v Gulamhusein Gulam Mohiyaddin AIR, 2001 Bom 267 (Bombay High Court)*
- (ii). *Venkatesh Iyer v Bombay Hospital Trust & others MANU/MH/0198/1998.*
- (iii). *National Thermal Power Corporation v Canara Bank & Others 2008 (1) CTLJ 251 Del (New Delhi High Court) held that (para 19)*
- (iv). *Duli Chand v Mahabir Pershad Trilok Chand Charitable Trust AIR 1984 DELHI 144, held that a trust is not a legal entity observing that (para 16).*

5. Adverting to the Revenue's reliance on the Hon'ble Madras High Court ruling in case of Abraham Memorial Education Trust v C. Suresh Babu MANU / TN / 1088 / 2012, Shri Nankani submits that reliance is misplaced and does not support their case. In the instant ruling, the petitioner had filed a case against Abraham Memorial Education Trust (a public charitable trust) (the "first accused") and its trustees (the "second accused") on account of dishonour of cheques issued by the first accused. The petitioner was of the view that the first accused is liable for punishment under Section 138 of the Negotiable Instruments Act, 1881. The question which arose in the instant petition before the Hon'ble Madras High Court was *as to whether a public*

charitable trust is a juristic person and a company in terms of Section 141 of the Negotiable Instruments Act, 1881?" The Hon'ble Single Judge ruled that "For the offence under Section 138 of The Negotiable Instruments Act, committed by the Trust, every trustee, who was in-charge of the day-to-day affairs of the Trust, shall also be liable for punishment besides the Trust."

5.1. He submits that the aforesaid ruling is not applicable to the case on hand. The ruling is in the context of the Negotiable Instruments Act which confers liability on a juristic person. On the other hand, the present appeals are in the context of the service tax law, which, during the period under dispute did not confer any liability on juristic persons; the inclusion of trusts as a person/ juristic person under the service tax law/ goods and service tax law was incorporated in the legislation much after the periods under dispute; Pertinently, in the case above, the Trustee was proceeded against and not just the Trust as provided for under law; whereas, the present proceedings fail on grounds of the Trustee (who alone can sue and be sued for the actions of a Trust) has not been made a party to the proceedings rendering the entire proceedings invalid; further, the Respondent has completely disregarded the fact that the dispute in the case of Abraham Memorial Education Trust was with respect to a transaction between the trust and a third party (and not the beneficiaries of the trust). Hence, the issue in this case was not of any alleged transaction between the trust and its beneficiaries, as is the issue in the instant appeals. Therefore, the said ruling of Abraham Memorial Education Trust is not relevant to the instant appeals which are protected by the doctrine of mutuality of interest. Further, while deciding the above, the Hon'ble Single Judge heavily relied on Hon'ble Supreme Court rulings in case of *Shiromani Gurdwara Prabandhak Committee Vs. Som Nath Dass* MANU/SC/0219/2000 and *Yogendra Nath Naskar Vs. Commissioner of Income Tax, Calcutta* MANU/SC/0252/1969 It is to be noted that the above referred rulings were issued in context of "whether a deity can be considered as a juristic person?" and not in context of a trust. He invites reference to Para 1 and 43 of *Shiromani Gurdwara Prabandhak Committee Vs Som Nath Dass* MANU/SC/0219/2000 and Para 4, 5 and 8 of *Yogendra Nath Naskar Vs Commissioner of Income Tax, Calcutta*

MANU/SC/0252/1969 and submits that in the above rulings, the Hon'ble Supreme Court held that the deity can be considered as a juristic person and the same were not in the context of Trusts set up in relation to such deity. Therefore, as the rulings basis which the Hon'ble Madras High Court has pronounced the judgment in the case of Abraham Memorial Education Trust v C. Suresh Babu are not directly relevant to the facts of the impugned orders and the same cannot be made applicable to the instant case and are liable to be disregarded in consideration of various direct judgements relied on by the Appellants which squarely cover the case on hand. He submits that hence, a Trust cannot be proceeded against and any proceeding, if at all, would need to be initiated in the name of the Trustee and accordingly, the present proceeding fails on grounds of the demand being raised on the Trust without the Trustee being made a party to the proceedings.

Submissions on whether obtaining registration under any statute entails the trust to a Tax liability

6. Shri Nankani argues that there is no specific provision for taxation of Trusts under the Act and submits that in pre-negative list regime i.e. up to 30 June 2012, the levy of service tax operated on the basis of the the service category type and the service providers covered under the definition of the relevant service who alone were liable to pay service tax on provision of such defined taxable service. The Respondent has raised demand under the service category of "Banking and other financial services", whereas the Appellants were not covered under the meaning of any class of service providers, who were required to pay service tax under the category of "banking and other financial services". Moreover, the definition of the term "Person" has been included with effect from effective 1 July 2012 in the Act, and even at that stage, the said term did not include a "Trust". Accordingly, during the period under dispute, any demand of service tax on Trusts would fail simply on grounds that Trust is not recognized as a person, much less a person liable to tax under the Act.

6.1. Learned senior Counsel submits that under the Income tax Act, 1961 (the "IT Act") as well, the term, "person" does not include trusts.

Notwithstanding this, provisions in the IT Act pertaining to taxation of Trusts have been formulated keeping in mind the representative capacity in which Trusts/ Trustees operate for and on behalf of the Beneficiaries. Trustees of a private trust are treated as the Representative Assesses for assessment of private trusts as per Section 160 (2) of the IT Act. Further, basis a conjoint reading of Section 161 and 166 of the IT Act leads to an unequivocal conclusion that, unlike companies, which are taxed as separate legal entities under the IT Act, taxation of Trusts is typically done in the hands of the Trustee (Trustee), who is the Representative Assessee on behalf of Beneficiaries or directly in the hands of the person represented (i.e, the Beneficiary). Hence, a Trust *per se* in addition to not being recognized as a separate legal entity and does not qualify to be a “person” liable to service tax.

7. Shri Vikram Nankani argues that it is the respondents surmising that reading of the Indenture of Trust (IOT) shows that the Trust is distinct from the Contributors/ Beneficiaries; this is supplemented by the fact that Trust undertakes KYC or due diligence of the Contributors/ Beneficiaries; the Trust is registered under the SEBI (Venture Capital Fund) Regulations, 1996 (**SEBI Regulations**) as well as under the income tax and service tax laws and that the Trust is a commercial concern that is carried on with profit motive. He submits that the IOT must be read in conjunction with the provisions of the Indian Trust Act, 1882 (**the Trust Act**); Section 3 of the Trust Act defines Trust as “*an obligation annexed to the ownership of the property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner*” ; significantly, the Trust is not a party to the IOT; if Trust was a distinct person, it would have been a party to the IOT; The fact is that a Trust, in law, is only an obligation attached to the ownership of the property, shows that a Trust can be sued or sue only through a Trustee.

7.1. Shri Nankani submits that the mere fact that KYC of each contributor or subscriber is undertaken, such as obtaining PAN Card, Aadhar Card, Income-tax Returns etc. does not mean that in law, there is a distinction

between the Trust and the contributors or subscribers; taking the example of club or association, in respect of which the Hon'ble Supreme Court in *State of West Bengal v. Calcutta Club* 2019-VIL-34-SC-ST has held that the fact that every club or association undertakes due diligence of the person before granting membership will not militate against the principle of mutuality of interest; hence, undertaking KYC does not challenge the legal position.

7.2. Shri Nankani submits that The Appellants obtained registration as mandated under various laws and regulations from a compliance standpoint; mere registration does not connote status of an "assessee" leading to tax liability as presumed by the Department; the entire understanding of the Respondent that all Appellants have obtained service tax registration and are therefore liable for service tax on the disputed demands is misguided and incorrect; the detail of service tax registration obtained by each of the Appellants including the rationale for the same have been explained in Para 9 of the Rejoinder submitted on 18 December 2020; many of the Funds obtained service tax registration under protest with a view to reserve their right to avail CENVAT credit in terms of Rule 3 of CENVAT Credit Rules, 2004 ("CCR"), having regard to the timeline brought in for availment of CENVAT vide Notification No. 21/2004-CE(NT) dated 11 July 2014; the Appellants had availed/reserved their right to avail CENVAT credit under protest merely to ensure and protect the Funds' right to CENVAT credit in the event of confirmation of service tax liability pending in these appeals; respondent has failed to appreciate the fact that merely obtaining registration under the Act, as mandated by law, or qua transactions with third parties on a conservative basis, cannot consequently lead to fastening of liability to pay service tax to the Government on notional services assumed or presumed by the Department; Respondent has erred in assuming that obtaining service tax registration tantamount to incidence of service tax liability; Appellants place reliance on Hon'ble Patna High Court ruling in case of *Bihar Alloys Steels and Another vs State of Bihar and Ors* MANU/BH/0150/1996, where in it was held (Para 18) that that merely because the appellant was registered under the

relevant laws, the same did not fasten liability upon them to pay duty directly to the government. It was held that:

"The said Sub-section shows that the licensee alone is entitled to recover the amount of duty on the quantum of energy sold to the consumer and the petitioner-company is liable to pay the same to the licensee alone and not to the State Government. If there is an agreement between the petitioner-company and DVC to pay the amount of duty to the State on the energy purchased by the petitioner-company from it, the same is internal arrangement between them and on the basis of same, no liability can be fastened on the petitioner-company to pay duty to the State Government. On the basis of that agreement, if the petitioner-company pays duty, it will be treated that it is paying duty to the State Government on behalf of DVC at its agent and not in its individual capacity. Since under law, the petitioner-company is not obliged to pay duty directly to the State, *an application filed by it for registration as an assessee under the provisions of the Rules and consequent registration thereof cannot fasten liability upon it to pay electricity duty to the State Government.*"

7.3. Further, the Appellants wish to place reliance on Hon'ble Jharkhand High Court ruling in case of *Anjaney Ferro Alloys Ltd Vs State of Jharkhand and Others* MANU/JH/0335/2012, wherein it was held that mere obtaining registration cannot lead to fastening of liability. Relevant extracts (Para 32 and 63) of the same are reproduced as follows:

"32. *It is also submitted that petitioners obtained certificate of registration under the Rules of 1949 for their registration as Assessee; which is void from inception. The Hon'ble Supreme Court, therefore, has made it clear that the core issue in these matters is that who the assessee is. Therefore, we have to examine that whether the petitioners who have obtained the Certificate of Registration under the Rules of 1949 can be said to be assessee and because of their obtaining the Certificate, whether they are precluded and estopped from saying that they are not the assessee and whether they are liable to pay the electricity duty to the State Government directly or the State Authorities through its Commercial Tax Department who is the in-charge for recovery of electricity duty.*

63. *In view of the above, it is held that:*

(III) The petitioner Companies are neither licensees nor assessee but obtained the registration under the Chapter-II of the Bihar Electricity Duty Rules, 1949. Their registration is of no use.

They may have obtained the registration under misconception of law or wrong advice but that will not make them the assessee registered under the Rules of 1949;”

7.4. He submits that therefore, the contention of the respondents that the Appellants is registered under the provisions of service tax laws, and hence is a legal entity liable to pay service tax, is not sustainable; the contention of the Respondent that the Appellants have obtained service tax registration for payment of service tax and availment of CENVAT credit, does not take away the fact that the Appellants are not a separate entity qua the Contributors. Therefore, the fact that the Appellants had taken service tax registration for complying with the provisions of service tax laws, with respect to transactions carried out with other parties, or for availment of CENVAT credit (under protest), does not enable the Respondent to treat the Appellants as distinct persons from the Contributors.

7.5. He submits that respondent contend that the Appellants have a bank account, prepare profit and loss account and balance sheet, deduct TDS wherever applicable, obtain approvals and registration from SEBI, and hence they are not an amorphous entity; appellants wish to submit that the Appellants are regulated by various laws wherein the Appellants are required to comply with various reporting and administration compliances; the respondent has failed to appreciate the fact that the Appellants are heavily regulated, wherein, the orderly compliance with statutory guidelines and regulations ensures inflow of foreign or domestic investment to meet the funding requirement of various organizations.

7.6. He submits that the compliance with statutory requirement under any other regulation such as Income Tax Act, 1961 or approvals and registrations from SEBI would not change the legal status provided to a trust (i.e. a trust is not a legal entity) under the relevant parent act i.e. The Trust Act as well as under the service tax law during the period under dispute; compliance with a statutory requirement cannot lead to a conclusion on legal status of the Appellants; respondent’s contention is grossly erroneous and

misconceived; the Appellants cannot be fastened with service tax liability under banking and other financial services, qua the Contributors, merely on the grounds that the Appellants have a bank account, prepare profit and loss account and balance sheet, deduct TDS wherever applicable, obtain approvals and registration from SEBI, as the case may be. He submits that the Appellants do not retain any amounts as income for providing services, and act as a pass through with respect to expenses incurred in relation to investment activities. This is evident from the Trust Deed as well as the profit and loss statement of the Appellants. This is also evidenced by the Trust Deed entered (clause 2.1.4) in case of India Advantage Fund II (Appeal No. ST/1651/2012).

Submissions on Mutuality of Interest between Trust and Members

8. Submitting on the issue of Mutuality of Interest, Learned Senior Counsel says that there is no service provider - service recipient relationship between the Appellants and the Contributors; the fundamental requirement for levy of service tax is that service should be provided by a service provider and received by a service recipient; therefore, even assuming for the sake of an argument, without conceding, that the Appellants qualify to be an assessee or person liable to service tax, such levy shall stand negated on applying the principles of "mutuality of interest"; he submits that the doctrine of mutuality is a well-recognised and well accepted doctrine in the area of taxation; this doctrine essentially states that when persons contribute to a common fund in pursuance of a scheme for their mutual benefit, having no dealings or relations with any outside body, they cannot be said to have traded or made profit from such mutual undertaking, since there is no distinction in identity between the mutual undertaking and the persons contributing to it. He relies upon the following.

(i). state of West Bengal Vs Calcutta Club Limited & Chief Commissioner of Central Excise and Service Vs Ranchi Club Ltd 2019-VIL-34-SC-ST.

(ii). JCTO, Harbour Division, II- Madras v The Young Men's Indian Association, Madras and Others MANU/SC/0472/1970

(iii). Saturday Club Limited v Assistant Commissioner of Service Tax 2005 (180) ELT 437 (Cal)

(iv). *CST v Delhi Gymkhana Club Limited* (2009) 18 STT 227 (New Delhi Tribunal)

(v). *Bowring Institute v Commissioner of Central Tax, Bangalore* 2019 (12) TMI 944 - CESTAT (BAN)

(vi). *CCT, Bangalore Vs Karnataka Golf Association* 2020 (3) TMI 1098 - CESTAT (BAN).

(vii). *CST Vs Shobha Developers Ltd* 2020 (5) TMI 224 (KAR)

8.1. Shri Vikram Nankani rebuts the revenue reliance on the case of *Bangalore Club v. CIT* MANU/SC/0030/2013 and submits that revenue contends that that the appellant has not satisfied any of the conditions, under the doctrine of mutuality i.e. firstly, Complete identity between the contributors and participators; secondly, the actions of the participators and contributors are not in furtherance of the mandate of the association and lastly, condition of lack of scope of profiteering by the contributors from a fund made by them which could only be expended or returned to themselves. He submits that the issue in *Bangalore Club (supra)* was entirely different as the question under consideration of the court was can be seen para 4 thereof which is reproduced herein whether or not the interest earned by the assessee on the surplus funds invested in fixed deposits with the corporate member banks is exempt from levy of Income-Tax, based on the doctrine of mutuality; Hence, the issue was not with regard to amounts received from the members but from third parties as concluded in Paras 32 and 33; Hon'ble Supreme Court reaffirmed the principle of mutuality of interest applicable to amounts received from members. Hence, this judgment does not support the case of the Respondent.

8.2. Learned Senior Counsel further submits that the Appellants satisfy the three conditions as laid down in *Bangalore Club v. CIT (Supra)*; Respondent has stated that till the stage of generation of surplus funds, the setup of trust was in satisfaction of concept of mutuality i.e. the flow of money, to and fro, would have been maintained within the closed circuit formed by the trust and Contributors. Further, it has been stated that as soon as these funds were invested in portfolio companies as mentioned in the Trust Deed, the doctrine of mutuality has been violated by way of exposure to commercial investing and profit generating operations; in doing so, the

Respondent has failed to consider the fact that the aforesaid ruling was in context of interest earned qua banks or third parties, whereas the present case is with respect to monies spent on behalf of and returned to contributors. Even as per the Supreme Court ruling above, qua contributors, there is complete mutuality of interest and consequent non taxability; the Respondent failed to note that the relied upon case was in respect of applicability of doctrine of mutuality on the interest income earned on fixed deposits made with banks; in that backdrop, the Hon'ble Supreme Court held that in such a case, the doctrine of mutuality would not be applicable, and the interest earned from bank deposits would be liable to income tax (however fees or consideration received from the members of the club shall stand governed by the principle of mutuality); in the present case, there is no such income earned making this case stronger for relief; mere generation of income from investment in portfolio companies could not be construed as violation of mutuality in respect of relationship between the trust and the beneficiaries. The Respondent has failed to understand that these are two different transactions; income earned on such investments is distributed to the beneficiaries. Moreover, the income earned on such investments has been taxed ultimately in the hands of beneficiaries or the trustee (as a representative assessee of the beneficiaries). Reliance could be placed on Hon'ble Madras High Court ruling in case of *CIT v. Madras Race Club* MANU/TN/0271/1975, wherein it has been observed that application of principle of mutuality would not be violated due to presence of transactions with, or profits derived from non-members.

8.3. On the issue of furtherance of mandate, Learned senior counsel submits that the actions of the participators and contributors are in furtherance of the mandate of the association; Para 12 of the Trust Deed provides for distribution to Contributors by way of dividends or redemption of units or any other way; further, in respect of manner of distribution, the Trust Deed refers to Private Placement Memorandum and other relevant documents; hence, the contention of the Respondent in respect of mandate of the trust being incomplete without distribution of profits fails; furtherance of mandate of a trust means the surplus should be utilized as mandated in

the charter documents executed at the stage of formation of the Trust as held in Supreme Court's judgment in case of Bangalore Club v. CIT (Supra); it could be understood that furtherance of mandate of a trust means the surplus should be utilized as mandated in the charter documents executed at the stage of formation of the Trust; trusts have distributed surplus fund to the Contributors after meeting out the expenses for day to day operations of the trust. Therefore, the benefit derived by the Appellants has been distributed among the beneficiaries clearly which satisfies the condition laid down in case of Bangalore Club v. CIT (Supra). This decision further debunks the entire line of argument of the Respondent that every investor needs to receive similar returns as the doctrine of mutuality is embedded in the doctrine of equality; the Appellants' case that, every participating member or Contributor is entitled to rights and returns as agreed at the stage of contribution; there is no mandate or requirement under law for equal treatment of unequal; even in the case of s club membership, rights are issued to different classes of members who pay differential fees in exchange of differential access to amenities and privileges.

8.4. Shri Nankani submits that the respondent has stated that the AMC has been given status of special contributors and accorded undue high returns and that as per Section 17 of the Trusts Act; trustee is bound to be impartial. He submits that impartiality is not "equality" of treatment but means that a trustee's treatment of beneficiaries or conduct in administering a trust is not to be influenced by the trustee's personal favoritism or animosity toward individual beneficiaries, even if the latter results from antagonism that sometimes arises in the course of administration; Nor is it permissible for a trustee to ignore the interests of some beneficiaries merely as a result of oversight or neglect, or because a beneficiary has more access to the trustee or is more aggressive; therefore, in short, it is the trustee's duty, reasonably and without personal bias, to seek to ascertain and to give effect to the rights and priorities of the various beneficiaries or purposes as expressed or implied by the terms of the trust; the trustee has acted impartially. The distribution of the surplus has been

done as per the manner laid down in the Private Placement Memorandum; the contention of the Respondent that trustee has acted partially is grossly misconceived and erroneous.

8.5. Learned senior counsel submits on the third criterion that No scope of profiteering by the contributors from a fund made by them which could only be expended or returned to themselves; the Respondent has stated that had the contributions to the Appellants been returned to the Contributors or spent on them, without profiteering, the principles of mutuality would have been satisfied and that the principle of mutuality has been ruptured by the trust upon generation of profits on the investments made by the trust. He submits that the Respondent has erred in understanding the condition laid out in the ruling of Bangalore Club v. CIT (Supra); the said condition has been applied in respect of interest earned on fixed deposits made with third parties/ corporate members i.e. commercial banks, whereas, the Respondent has applied the ruling to conclude that this condition has not been satisfied by the Appellants in respect of the relationship between the Appellants and Contributors; Respondent failed to note that it is not the case of the Appellants that the doctrine of mutuality is applicable on income earned on investments made in portfolio companies; therefore, such income earned on investment had been put to income tax in the hands of Contributors or the trustee as a representative assessee; Appellant's case is that in respect of the relationship between the trust and the Contributors, wherein the contributions received have been returned to the Contributors along with capital appreciation received on the investments made out of the pooled money; it has been held in Hon'ble Madras High Court ruling in case of CIT v. Madras Race Club (Supra) that the application of the principle of mutuality is not destroyed by the presence of transactions with, or profits derived from non-members; Appellant Trusts have not profiteered, and the contributions made are returned to the Contributors along with capital appreciation; hence, the judgement relied by the Respondent will not be applicable in case of the Appellants.

8.6. Learned senior counsel submits that the case of M/s Yum Restaurants (Marketing) Private Limited v CIT 2020 SCC On Line SC 388 should not be relied in the instant case, In case of Yum! Restaurants (*Supra*), the appellant company was incorporated by YRIPL as its fully owned subsidiary for the purpose of economisation of the cost of advertising and promotion of the franchises as per their needs; essential requirement that of the contributors to the common fund are either to participate in the surplus or they are beneficiaries of the contribution is missing; through the common AMP activities no benefit accrues to Pepsi Food Ltd. or YRIPL; accordingly the principles of mutuality cannot be applied. Apex Court clearly stated (Para 16) that Whereas the legal position on what amounts to a mutual concern stands fairly settled, the factual determination of the same on a case to case basis poses a complex issue that requires deeper examination. Such examination ought to be conducted in the light of the tests enunciated above. Significantly, the judgement in Calcutta Club is not even referred to in M/s Yum Restaurant's case. The judgement in Calcutta Club being directly on the point in relation to the same provisions of service tax, and that too for the same period, must prevail and be preferred. Further he relies on CCE Vs Al Noori Tobacco Products and Others (2004) 6 SCC 186 and submits that in CCE Vs Ramesh Food Products (2015) 15 SCC 132, it was held that the judicial propriety demands that when a Larger Bench judgment holds the field, Smaller Bench is bound to follow it.

8.7. Shri Nankani further submits that the fact that each Contributor is also the beneficiary of the Trust proves beyond doubt that there is complete and/or total mutuality of interest between the same person, who is contributing and also receiving the benefits; in other words, the Contributors, who are the owners of the property (the amount of investment) reposes confidence in a Trustee, who has the obligation to manage the property (amount of investment) for the benefit of the contributor or the subscriber; accordingly, there is no separate identity between the contributor and the Trust; Trust is nothing, but confidence reposed by the contributor into the Trustee to manage the contributor's

property for the benefit of the contributor; hence, the Trust and the contributor are not distinct; the fact that there is a distinction between the Trust and the Trustee cannot be mixed up or confused in defining the relationship between the contributor or the subscriber and the Trust; after the Settlor has set up the Trust, each time a contributor or a subscriber puts his money (property) into the hands of Trustee, each such contributor or subscriber gives rise to a Trust. There is, therefore, a complete and/or total mutuality of interest; since there is no distinction between the Contributors on the one hand, and the Appellants on the other; question of Appellants rendering a "service" to the Contributors, does not arise at all. there is no discretion vested with the Trust/ Trustee with respect to the manner of disbursement of the returns; the Contributors/ Beneficiaries subscribe to specific class of units and associated rights as set out in the underlying documentation; appellants/ Trusts being regulated entities, all of the arrangements as above are subject to the scrutiny of SEBI / other regulators; he places reliance on Hon'ble Supreme Court Ruling (Para 12, 13, 15, 16 and 17) in case of Bangalore Club (Supra); present case squarely falls within the above principles as all participating Contributors including the AMC (where relevant) contribute monies and receive a return as laid down in the various documents; as per above judgment, doctrine of mutuality does not mean equality in treatment; it merely means that there should be a complete identity between the participants and contributors and the contributors should have right of disposal over the surplus; accordingly, the entire presumption that certain class of unit holders enjoy specific privileges and incremental returns despite joining at the last minute is unfounded and called for.

8.8. Shri Nankani further avers that the relationship between the Appellants and the Contributors is akin to the relationship between a Company and its shareholders; understanding in the impugned orders that the Contributors are only subscribers to schemes floated by the Appellants, and are not a part of the Appellants unlike shareholders, is fallacious. He submits that the promoters of the company are similar to a settler of a

Trust; the Trustees manage the affairs of the Appellants, just as Board of Directors manage the affairs of a company; courts have often compared Directors of a company to Trustees since they have a strict fiduciary obligation thereby preventing them from profiting from their fiduciary relationship with the company; just a company cannot be said to be providing a service to its shareholders, it cannot be said that the Trust is providing services to its Contributors.

9. Senior Counsel submits that the fact that the Trust is registered with SEBI or governed by the Indian Trusts Act is immaterial and does not negate the applicability of doctrine of mutuality; vide Finance Bill 2021, specific provisions have been sought to be introduced in Section 7 of Central Goods and Services Tax Act, 2017, with effect from 1 July 2017; the intent of these provisions appears to be to tax activities carried out by a club, association or such other person for its members by deeming the same to be a supply for the purpose of levy of goods and services tax; the amendment appears to be aimed to overcome the principle of mutuality upheld by the Supreme Court in various rulings till date in the context of clubs and such other similar bodies; it is moot as to whether the said amendment shall apply to Trusts that are nothing but pooled vehicles which are not engaged in any activities/ services as such and there is no provision of services to the contributors; the absence of any corresponding provisions under the service tax law during the relevant period, there is no scope for any tax to be levied up to 30 June 2017.

Submissions on service provider-receiver relationship

10. Shri Vikram Nankani avers that there is no service provider-service recipient relationship between the Appellants and the Contributors; just as expenses incurred by a company cannot be held to be providing service to its shareholders; it also can't be held that the Trust is providing any services to the Contributors. Quoting from paragraphs of different documents

executed, like The Trust Deed; IMA executed between the Trustee and the Investment Manager; The Contribution Agreement and the Private Placement Memorandum, Senior Counsel affirms that they do not establish or recognize a service provider-service recipient relationship which is a *sine qua non* for any levy of service tax; Trust per se is incapable of entering into such transactions as a service. The Appellants is not a party to this basic document (ie, Contribution Agreement) through which the Contributors contribute money to the Appellants; the intention of the Contributors is only to invest/ contribute to the corpus and not to receive asset management services from the Trust.

Submissions- whether expenses incurred- Carry Interest and performance fee amount to consideration for a service- whether tax liability arises

11. The senior counsel submits that no consideration under the alleged activities charged by the Appellants from the Contributors; as per Explanation (a) to section 67 of the Finance Act, consideration, for service tax purposes, should be an amount payable for provision of services. As per Section 2(d) of the Indian Contract Act, 1872, "*When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing, something, such act or abstinence or promise is called a consideration for the promise*". As per Black's Law Dictionary "*Consideration is not to be confounded with motive, consideration means something which is of value in the eye of the law, moving from the plaintiff, either of benefit to the plaintiff or of detriment to the defendant.*" In the instant case neither the Appellants nor the Contributors have any intention to treat the expenses as "consideration" from the Contributors to the Appellants; Thus, there is no link between provision of services and payment for the same; nowhere in the documents, the expenses incurred by the Appellants, are treated as consideration between the Contributors and the Appellants; consideration cannot be deemed or derived and there needs to be an express agreement between the parties to pay/ receive consideration for an activity that is

carried out by one for the other.; none of the parties recognised expenses as consideration. He relies on

(i). Madras Fertilizers Limited v Assistant Commissioner (Assessment) Special Circle-II, Agricultural Income-tax and Sales Tax Department, Ernakulum & Anr 95 STC 134 (Kerala).

(ii). Food Corporation of India v. State OF AP 1997 (4) TMI 483- Andhra Pradesh High Court (Para 3)

(iii). Shiridi Sainadh Industries Vs Deputy Commissioner ST INT in W.P. No. 45971 of 2018 (Para 20)

11.1. Learned Senior Counsel submits that even assuming the amounts incurred by the Appellants are to be treated as consideration, at best, they qualify as reimbursement of expenses, which do not attract service tax in terms of Section 67(1) (i) of the Finance Act, during the period under dispute. He submits that Service tax is charged on gross amount charged by the service provider for such services (being taxable services under the Finance Act) provided or to be provided; Rule 5 of the Service Tax Valuation Rules, 2006, which provides that any expenditure incurred by a service provider in the course of providing taxable services, such costs or expenditure shall be treated as consideration of taxable services has been struck down by Hon'ble Delhi High Court in the case of Intercontinental Consultants and Technocrats (P.) Ltd. vs. Union of India MANU/DE/6376/2012 and affirmed by Hon'ble Supreme Court MANU/ SC/0229/2018. There was no provision for any service by the appellants; there was no consideration agreed upon for any service; even assuming that the expenses incurred with respect to services provided by various service providers to the Trust, the Appellants incur these expenses on behalf of the individual Contributors; incurring of expenses in the capacity of/ at the behest of the recipients of service cannot be considered or equated to consideration for provision of services.; there would be no levy in the hands of the Contributors in their capacity as recipient of services corresponding to the expenses.

11.2. Shri Vikram Nankani submits that for service tax to apply consideration should be received by a "taxable person" with respect to a "taxable service" ; gleaning through the provisions of service tax during the

relevant period, he submits that levy of service tax on banking and other financial services is on a "banking company or a financial institution including a non-banking financial company or any other body corporate or commercial concern"; A Trust does not have any such general legal identity. In fact even the Department has conceded that the Trust shall not qualify as a banking company or a financial institution, non-banking financial company or any other body corporate; Appellants do not engage in any business or trade themselves, and merely invests the contributions received from its Contributors; Appellants do not retain any amounts as income for providing services, and act as a pass through with respect to expenses incurred in relation to investment activities; Appellants do not have any intention of earning a profit for itself as they are only a pooled investment vehicle; Contributors do not have any intent of receiving any services from the Appellants; service tax law does not recognize the association between a Trust and its Contributors/ Beneficiaries to be a relationship between a service provider and the recipient of his services.. He submits that while determining the existence of a service provider-service recipient relationship, the intention of the parties to a contract, gathered from the documents executed by such parties is of utmost importance. If such documents bring about a conclusion that the dominant intention or purpose is not to avail services, no such relationship can be assumed. The following cases demonstrate the importance of "intention of parties":

- (i). *ASL Motors Private Limited v Commissioner of Central Excise & Service Tax, Patna 2008 (9) STR 356 (Kolkata Tribunal)*
- (ii). *NM Goel & Company v Sales tax Officer 1988 (38) ELT 733 (Supreme Court)*
- (iii). *KV Nagarajan v Deputy Commercial Tax Office 2007 (208) ELT 165 (Madras High Court)*

11.3. Shri Vikram Nankani submits that the scope of the definition of banking and other financial services does not cover facilitation services in relation to investments; impugned Orders seeks to demand service tax from the Appellants by stating that the services rendered by the Appellants to the Contributors are in the nature of "Facilitation Services under BOFS". Quoting from the impugned order (Para 34 Appeal No. ST/2900/2012 and Para 34 of

of Appeal No. ST/2900/2012) he submits that Commissioner concluded that they are rendering facilitation services; definition of "banking and other financial services" contains specific activities that are carried out by specific entities but does not cover any "facilitation services"; the Impugned Order admits that the Appellants does not manage any assets for the Contributors; hence, the demand of service tax is incorrect and needs to be set aside.

11.4. The learned Senior Counsel submits that the amounts considered in the Impugned Order includes notional expenses relating to accounting entries "loss on sale of investments", "accrued interest considered doubtful", "loss on revaluation of assets", etc; these amounts are not actual expenses but are only accounting adjustments which are required to be made to reflect the true and correct financial status of the Appellants as mandated under accounting principles; these cannot be treated as amounts "retained" by the Appellants from the Contributors for providing any "services" to the Contributors; out of the total amount of INR 28,51,49,62,689 treated as "consideration" received by the Appellants in the Impugned Orders, an amount of INR 12,37,36,99,793, is towards these accounting entries, which should clearly be excluded from the amounts under dispute, as these cannot be treated as amounts "retained" by the Appellants for providing "services" to the Contributors; unless there is an actual flow of consideration for an agreed service, no service tax liability can arise.

11.5. The learned Senior Counsel submits that Revenue entirely alleges that the Appellants retain amounts distributable to class B/ C unit holders; it was submitted in their written arguments and rejoinders that the carried interest paid as return on investments (Class B/C units) to the AMC or its affiliates is a performance fee paid to the AMC ; it was alleged that in the case the returns on Class B/C units had been paid in form of performance fee, the same would have been reflected as part of expense in the hands of the Fund(s). Learned senior counsel submits that this contention is not applicable in case of all the Fund(s) as its factually incorrect; return on investment in case of class B/C unit holders is made in respect of India Advantage Fund – I & II; ICICI Econet Internet and Technology Fund and

ICICI Emerging Sectors Fund; the carried interest in case of above-mentioned Appellants is distributed to Class B/ C unit holders as return on investments made by such unit holders; such carried interest paid the Appellants has been put to income tax in the hands of Class B/C unit holders; assuming but not admitting that such return on Class B/C units is an expense incurred by the Fund(s), such expense incurred by the Appellants cannot be construed as value of taxable services as these are neither received nor retained by the Funds; out of the total demand of INR 321 Crores, an amount of INR 54.76 Crores relates to the service tax demanded on Carry Interest paid to Class B/C unit holders; in case of one of the fund (by the name of ICICI Strategic Investment Fund), there are no Class B/C unit holders and the fund is having only one class of units, i.e. Class A; however, the Respondent has treated Class A distributions as Class B/ C distributions and raised service tax demand thereon; an amount of INR 1,40,22,14,630 paid to Class A unit holders has been erroneously treated as an amount distributed to Class B/ C unit holders service tax of INR 17,33,13,728 should anyway be excluded from total service tax demand in the instant appeals; Carry Interest cannot be confused with performance fee.

11.6. The learned Senior Counsel submits that wherever performance fee has been paid, service tax has been also paid by the recipient viz., AMC as borne out by the Statement dated 28 May 2009 of Mr. Jayatheeratha. Learned Counsel submits that there were some mistakes in showing the performance fee as follows.

(i). in case of ICICI Emerging Sectors Fund, the amount of INR 6.80 Crores has been inadvertently shown as performance fee, whereas by nature, the same is distributions made to another Class B unit holder (and not AMC); since, the same is in nature of return on investments, service tax has been not been paid on the same.

(ii). in case of ICICI Equity Fund, during the period under dispute, an amount INR 21.34 Crores has been paid as performance fee to the AMC, on which AMC discharged service tax; as can be seen from above, the AMC has already discharged applicable service tax on the performance fee received

from the fund; hence, the said performance fee has already been subjected to service tax in the hands of AMC.

(iii). the income from investments has been inadvertently shown as performance fee in the AMC's director's report for FY 2007-08 in respect of India Advantage Fund - Series 1 (IAF Series 1); it was shown that they earned Rs. 578.6 million as performance fee; subsequently it was rectified in the AMC's director's report for financial year 2008-09. He submits that as can be seen from above, the amount alleged by the Respondent to be in nature of performance fee, is in fact, in the nature of income from investment in venture capital fund, which is not liable to service tax.

11.7. The learned Senior Counsel submits that Carry Interest is paid to Class B/C unit holders in return of the investment made by them; it is only in case of those Funds where the AMC also makes an investment in the Fund as a contributor, that the AMC also receives a return on investment which is colloquially called the Carry Interest; the mere fact that AMC is also a Contributor cannot be confused to equate Carry Interest to performance fee; AMC wears two hats; as a Contributor the AMC gets a return based on a pre-agreed formula, which in absolute terms is less than the amount distributed to Class A unit holders; revenue alleges that Carry Interest is like a performance fee; Carry Interest is disproportionate to the investment made by Class B/C unit holders and that it is reflective of the performance of the AMC. He submits that any return, on investment to Class B/C unit holders is based on prior disclosures made in the PPF as also in the IOT; carry Interest is paid after first return of capital to Class A unit holders and after payment of the preferred rate of interest (return) to Class A unit holders (e.g. 15%); it is thereafter that 20% of the balance remaining is distributed to Class B/C unit holders and finally, the balance remainder, if any, is once again distributed in the ratio of 80:20 to Class A unit holders and Class B/C unit holders respectively; in the present case, out of the total 11 Funds, Class B/C unit holders exist in case of 6 Funds; out of these 6 Funds, Carry Interest was paid to Class B/C unit holders in only 3; there is a loss in the other 3 cases; since Carry Interest is part of the share of profits received by

Class B/C unit holders, service tax is not leviable thereon; performance fee is not contingent upon an investment by the AMC and not related to units held by AMC; it is therefore, erroneous to equate performance fee with Carry Interest; amount retained for payment of carried interest to Class B/ C unit holders cannot be treated as consideration and is liable to be set aside; this is not an income in the hands of the Funds for service tax liability to arise thereon.

Submissions on limitation

12. Learned Senior Counsel Shri Vikram Nanakani, submitting on the extended period, submits that the impugned Orders have invoked the extended period of limitation alleging that the Appellants has suppressed the material facts from the department wilfully; failed to make payment of service tax and to file service tax return as well; Impugned Order has not however, made any reference as to how "suppression of facts with intention to evade" tax is established. He submits that the Appellants is under the firm belief that the intention of the Government has never been to tax VCFs set up as Trusts under the category of "banking and other financial services"; the appellants exercised bona fide belief that Trusts are not specifically included in the list of such institutions/ entities for "banking and other financial services"; it was clarified by CBEC vide Circular No 94/05/2007-ST dated May 15, 2007 that entry load and exit load charged by the mutual funds from investors shall not be liable for payment of service tax under fund management services (banking and financial services).; as evident from the circular, expenses retained by a Fund are not liable to tax; the artificial distinction sought to be made by the Respondent on entry/ exit load covered in the above Circular and expenses incurred by the Funds is neither supported by law or fact; therefore, no suppression much less any wilful suppression can be alleged; there is no dispute that the issue is interpretative in nature; no similar demands have been raised by the Revenue on any other Fund; extended period of limitation has been invoked mechanically, It is a settled principle that extended period cannot be invoked in case of interpretational issues. Reliance is placed on ruling in case of Saint

Gobain Glass India Ltd Vs CCE& ST LTU, Chennai 2016 (9) TMI 368 - CESTAT CHENNAI. He also relies on CCE, Jaipur Vs Alcobex Metals 2003 (153) ELT 241 (SC) and states that it was held that once the notice is issued under the proviso invoking the larger period, later it cannot be treated as notice issued under the main section for shorter period; a specific provision was incorporated under section 73 of the Act to sustain the demand pertaining to normal period of limitation when the extended period invocation failed; being an amendment that occurred post the periods under dispute; in the instant case, the entire demand fails on account of extended period of limitation not being liable to be invoked in the instant case.

Submissions on alleged computation errors

13. Learned Senior Counsel Shri Vikram Nanakani submits on the Cum tax benefit and states that notwithstanding earlier submissions, the Appellants would like to submit that service tax demand should be determined on the total receipts (in this case, expense retained) by treating them as inclusive of the service tax; as per Section 67(2) of the Finance Act, *Where the gross amount charged by a service provider for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged*; he relies upon CCE&C, Patna Vs Advantage Media Consultant 2008 (10) STR 449 (Kolkata Tribunal); Trade Notice No 20/2002, dated May 23, 2002, issued by the Delhi Commissionerate, categorically provides that in the event of any failure to collect service tax, the amount collected in lieu of having rendered the services would be taken to constitute amounts inclusive of service tax; since service tax is not payable for reasons stated above, interest is also inapplicable and places reliance on *Pratibha Processors case* 1996 (88) ELT 12 (SC).

Submissions on penalty

14. On the issue of Penalties, Learned Senior Counsel Shri Vikram Nanakani avers that Section 76 of the Finance Act is applicable only when an

assessee has failed to pay service tax; as the Appellant is not liable to service tax, there is no failure on the part of the Appellants to pay service tax; he submits that Section 77 of the Act provides for levy of penalty on an assessee where he fails to obtain registration and defaults in any provisions of the Act, where such default has no provision with regard to levy of penalty; as the Appellants believes that it does not provide taxable services, there is no requirement to file returns and hence no penalty can be levied. He submits that Section 78 of the Finance Act provides for penalty for suppressing the value of taxable service, where any person has not paid service tax due to suppression of value of taxable service with intent to evade service tax; in the instant case the appellants had no intent to evade service tax as due to the definition of "banking and other financial services" and circulars issued by the CBEC clearly state that the intention of the government is not to levy service tax on such amounts retained by the Appellants; the Appellant does not function with any profit motive; Trust Deed clearly states that the Appellants shall not engage in any trade or business; intention to evade service tax can exist only in a situation where the Appellants stands to benefit from such evasion; no such benefit is foreseeable in the appellants case; as it is only a pass through and does not retain any amounts from amounts invested by the Contributors; most of the expenses sought to be covered under the proposed demand have already suffered service tax; even the industry practice is in conformity with the Appellant's position; there is no suppression of facts with intent to evade tax. Hence, no penalty can be imposed under section 78. He relies upon

- (i). *CCE, Chandigarh Vs Pepsi Food Ltd - 2010-TIOL-109-SC-CX-LB*
- (ii). *CCE Mumbai-II Vs Hindustan Petroleum Corporation Ltd, 2017 (347) ELT 229 (Bom)*
- (iii). *Pfizer Ltd Vs CCE & C 2009 (236) E.L.T. 559 (Tri - Ahmd)*

15. Learned senior counsel submits that assuming without admitting that the Appellants is liable to service tax on the services, the Appellants has not suppressed the value of taxable service; Appellants has co-operated at every stage of the investigation and provided necessary information/ documents as and when requested. Learned Counsel submits that it is a well settled legal proposition that penalties under section 76 and 78 cannot be imposed

simultaneously i.e, where penalty under section 76 has been levied, penalty under section 78 cannot be imposed as held in CCE v First Flight Courier Ltd 2011-VIL-06-Punjab & Haryana High Court - ST) and Opus Media and Entertainment v CCE [2007] 10 STJ 259 (CESTAT-New Delhi)

16. Learned senior counsel submits that penalty imposable on applying the provisions of Section 80, which states that no penalty is imposable on the assessee for any failure under section 76, 77 and 78, if it is proved that there was reasonable cause for such failure; this provision is a non-obstante provision, having overriding effect over the other provisions that are in conflict with it; Section 80 of the Act; the Appellant has established its *bona fides* that it was under the belief that no service tax was payable and the master circular also states that similar expenses incurred by a mutual fund are not chargeable to service tax on amounts demanded; Appellant's case is well covered by the exception provided under section 80 of the Act, which primarily is meant to protect genuine and reasonable situations. He relies upon the following cases.

- (i). *ETA Engineering Limited Vs CC - (2004) 174 ELT 19 (Tribunal)- Para 80*
- (ii). *Oriental Insurance Co Ltd 1998 (103) ELT 459 (Commr-Appeals)- Para 13*
- (iii). *Addl. CIT Vs Mohammed and Sons 1985 (154) ITR 220 (Rajasthan High Court)-Para 12 and CWT V S.L. Khunna 1989 (180) ITR 340 (Allahabad High Court -Para 10 and 11*
- (iv). *CCE Vs Milan Tent Palace -2001 (131) ELT 274 (CEGAT Delhi)-Para 2*
- (v). *CCE Vs AB International- 2007-TIOL-1561-CESTAT-MUM (Mumbai CESTAT) Para 3*

Submissions on Revenue Neutrality

17. Shri Vikram Nankani submits that the issue is Revenue neutral as the Appellant is also eligible to claim CENVAT Credit of the Service tax paid on input services in terms of Rule 3 of the CENVAT Credit Rules, 2004 read with Rule 2(1) thereof; the expenditure incurred by the Appellants as shown in the Revenue Account discloses actual expenses incurred by the Appellants and the accounting provisions created by the Appellants. He submits a chart

showing duty demanded, allowance for write off on the loss of sale of investments and class B/C, actual demand, service tax available etc and submits that Total demand is Rs 3,21,24,64,061, actual demand after allowing the wrong figures taken by department/losses would be Rs 1,31,74,18,678 and CENVAT availability would be Rs 1,29,57,64,253 which is 98 percent of the demand; principle of allowing the demand to be paid net of CENVAT credit that is otherwise eligible has been expressly recognized in the interim order passed by this Hon'ble Bench; he also relies upon.

(i). Formica India Division Vs CCE - 2002 -TIOL -599-SC-CX Para 2 and 3

(ii). Dineshchandra R Agarwal Infracon Private Limited v CCE, Ahmedabad- 2010 (18) STR 39 (Tribunal - Ahmedabad) Para 3

(iii). Shah Yarn Tex P Ltd vs CST -2008-TIOL-1975-CESTAT-MAD Para 2

(iv). Shah Yarn Tex P Ltd vs CST - 2016-TIOL-351-HC-MAD-CX Para 9, 11

(v). OK Play India Ltd vs CCE - 2017-TIOL-4054-CESTAT-CHD Para 6

18. Learned senior counsel submits that notwithstanding the submissions made above where they are of the strong belief that service tax shall not be payable by the Appellants; in case the service is held to be taxable, CENVAT credit shall be eligible to be taken with respect to the services provided by the Appellants and provisions should be excluded from the demand; the adjudicating authority has not provided any opportunity to the Appellants seeking submission documents for the purpose of claiming CENVAT credit; the Appellants had filed detailed year wise listing of expenses at the time of investigation itself. Learned Senior Counsel has submitted a summary of grounds and rested his arguments.

Submissions by Shri P.R.V. Ramanan, Special Counsel for Revenue

19. Shri PRV Ramanan, Special Counsel, appearing for the respondents i.e the department submitted, brief details of the Funds, including break-up of tax demands, covering the period from 2005-2006 to 2011-2012, in respect 31 Appeals, for each of the 11 Funds i.e. Appellants. He gives brief introduction of the issue involved and states that various entities involved in

the commercial transaction of investing funds by ICICI Econet Internet and Technology Fund (hereinafter called 'the Fund) for achieving long- term capital appreciation by generating profits on investments made are (a) India Econet Fund (IEF)–A trust settled by ICICI Ltd, through Indenture of Trust (IOT) dated 16.10.2000 (b).ICICI Econet Internet and Technology Fund, a scheme floated by the IEF in terms of Article 1.1 of IOT; (c) ICICI Trusteeship Services Ltd- A company registered under the Companies Act, 1956, appointed as 'Trustee' of the Fund and (d) Asset Management Company (AMC) - ICICI Venture Funds Management Company [IVEN] with whom the Trustee entered into an Investment Management Agreement for the purpose of managing the Scheme. He submits that AMC has a delegation of Asset management duties from the Trustee representing the Fund for the benefit of the Contributor /Subscriber /Investor (collectively referred to as 'Investors') through the IMA executed on 2nd April 2001; any/all duties responsibilities/ powers of the AMC are primarily that of the IEF; a Contribution Agreement (CA) is also entered into with each investor and The Private Placement Memorandum (PPM) prepared by the Fund, as required under the relevant SEBI Regulations, apprising the intending Investors of the details of the Fund.

Submissions by Shri P.R. V. Ramanan, Special Counsel for Revenue

20. Shri PRV Ramanan, Special Counsel, appearing for the respondents i.e the department submitted two paper books, one containing the Written Submissions with Annexures, I, II and III and another containing 25 Exhibits; copy of the VCF Regulations 1996, Exhibits 25A, 26 and 27 and a case law compilation of 4 judgments. Learned Special Counsel gives brief details of the Funds, including break-up of tax demands, covering the period from 2005-2006 to 2011-2012, in respect of 31 Appeals, for each of the 11 Funds i.e. Appellants. He gives brief introduction of the issue involved and states that various entities involved in the commercial transaction of investing funds by ICICI Econet Internet and Technology Fund (hereinafter called 'the Fund) for achieving long- term capital appreciation by generating profits on investments made are (a) India Econet Fund (IEF)–A trust settled by ICICI Ltd, through Indenture of Trust (IOT) dated 16.10.2000 (b).ICICI

Econet Internet and Technology Fund, a scheme floated by the IEF in terms of Article 1.1 of IOT; (c) ICICI Trusteeship Services Ltd- A company registered under the Companies Act, 1956, appointed as 'Trustee' of the Fund and (d) Asset Management Company (AMC) - ICICI Venture Funds Management Company [IVEN] with whom the Trustee entered into an Investment Management Agreement for the purpose of managing the Scheme. He submits that AMC has a delegation of Asset management duties from the Trustee representing the Fund for the benefit of the Contributor /Subscriber /Investor (collectively referred to as 'Investors') through the IMA executed on 2nd April 2001; any/all duties responsibilities/ powers of the AMC are primarily that of the IEF; a Contribution Agreement (CA) is also entered into with each investor and The Private Placement Memorandum (PPM) prepared by the Fund, as required under the relevant SEBI Regulations, apprising the intending Investors of the details of the Fund.

20.1. Learned Special Counsel submits also that Preamble of IOT read with Article 6, makes it clear that the objective of the Fund is that of achieving long term capital appreciation by investment of the monies raised from Contributors/Subscribers/Investors and subsequent management of the same; the definition of 'Scheme' explains the process adopted by the Fund; from these provisions, it is seen that the Fund floats schemes under which Units are issued/sold to Investors with a view to providing facilities to such investors to participate in the income, profits and gains arising out of the acquisition, holding or disposal of portfolio investments, property or rights or any other benefits under such schemes; the Fund represented by the trustee is thus engaged in providing services of long-term management of the investments; the activities reflect a systematic process and an organized and regular business of accepting monies from investors, using the same for making profits /gains by re-investing in portfolios or extending loans and distributing the proceeds received by way of dividends or interest on loans.

The impugned funds- legal implications as Venture Capital Fund 21.

21. Shri PRV Ramanan submits that these Funds are registered under VCF Regulations, 1996 issued under the SEBI Act, 1992; Section 11(2) (c);

Section 12 (1-B) of the said Act provides for mandatory registering of and regulation of VCFs.; Regulation (2) (k) defines that 'trust' means a trust established under the Indian Trusts Act, 1882 (2 of 1882) or under an Act of Parliament or State Legislature; since all the 11 funds are registered under VCF Regulations and are bound by the provisions of the same, and the said provisions are enacted under the SEBI Act, particularly in terms of section 11(2) (c) and section 12(1-B) of the said Act, these VCFs are to be taken as established under an Act of Parliament viz. SEBI Act, 1992; Regulation (2) (m) defines that 'VCF' means a fund established in the form of a trust or a company including a body corporate and registered under VCF Regulations; no distinction is made between the 3 entities specified therein and are juridical persons and hence they ought not to be regarded as distinct for tax purposes; SEBI Act and the Regulations, being special laws governing VCFs, prevail over the general law, namely, Indian Trusts Act, 1882; Revenue relies on the judgment of the Hon'ble Allahabad High Court in the case of Paramount Biotech Industries vs. Union of India, 2004(49)zxc SCL 77 Allahabad The petitioner had contended that the Regulations were violative of the SEBI Act and other Acts such as Companies Act and Indian Trusts Act; the Hon'ble Court ruled that *"71. As regards the allegation that the impugned Regulations are contradictory to the Companies Act or other Acts, in our opinion the SEBI Act and the impugned regulations are special laws and will prevail over the provisions of the Companies Act and other Acts which lay down the general law. It is well settled that the special law prevails over the general law."* He submits that provisions of VCF Regulations such as the Fund being a legal entity should prevail over the trust being a mere obligation as per the Indian Trusts Act; Section 12 (1B) of the SEBI Act provides that, 'No person shall sponsor or cause to be sponsored or carry on or cause to be carried on any venture capital funds or collective investment scheme including mutual funds, unless he obtains a certificate of registration from the Board in accordance with the regulations; regulation 3 provides that a company or trust or a body corporate proposing to carry on any activity as a VCF shall apply to the Board for grant of a certificate; the certificate is issued in the name of the VCF; sub- regulation

(4) also provides that if no such application is made an existing VCF shall cease to carry on any activity as VCF; Regulation 20 relating to 'Maintenance of Books of account and records' and Regulation 21 relating to 'Power to call for information' are responsibilities enjoined on the Fund; according to these provisions, a VCF is regarded as a legal entity.

21.1. Learned Special Counsel submits also that as per Regulation 30, 'Liability for action in case of default' is fastened on the VCF; Default, if established, may result in suspension or cancellation of certificate of registration to carry on as VCF; under sections 15A to 15HB of the SEBI Act, penalties, up to Rs.1 Cr, are imposable for defaults on the part of any person or entity, including an intermediary; clause (iii) of Ex.1 clearly states that the powers of the trustee shall not be deemed to be curtailed, restricted or otherwise limited by, under or in pursuance of the provisions of section 20 or any other provision of the Indian Trusts Act, 1882, in regard to investment of trust monies; thus, a VCF is a trust only in form not in content; a VCF is not a mere obligation but a legal entity, with its own rights and duties; the exclusion sought from the Indian Trusts Act and the resultant deviation is not limited to section 20 alone. By setting up a special class of investors and providing them with privileges adverse to the regular Class A investors; provisions of Section 14 and specially, Section 17 of the Act which requires the trustees to be impartial stand violated; it is apparent that ICICI VCFs have taken refuge under the Indian Trusts Act only to cover up the tax evasion unearthed by the Revenue.

VCF established in the form of a trust –with all 11 VCFs is not an amorphous entity

22. Shri PRV Ramanan submits that ICICI VCFs are governed by the SEBI Act and Regulations; as no VCF can function without registration under the said Regulations, the Regulations would prevail over the general law on trusts as per the Indian Trusts Act; VCF regulations regard them as legal entities; hence, it would not be correct to say that a VCF is an amorphous entity, which cannot be proceeded against. He submits that a VCF established in the form of a trust, being essentially a public trust, is

undoubtedly a 'juridical person'; he relies on the judgment of the Hon'ble Madras High court in the case of M/s Abraham Memorial Education Trust vs. C. Suresh Babu (pages 36 to 53 of the Case Law compilation); in that case, petitioner's foremost contention was that the Trust in question was neither a 'person' nor a 'company' as per section 141 of the Negotiable Instruments Act; the Court has discussed in detail the concept of an 'artificial person' or 'juridical person' and held in clear terms that a public charitable trust falls within the definition of the term 'person' as defined in section 11 of IPC and section 3(42) of the General Clauses Act; this ratio applies to the definition of 'person' as per the Finance Act, 1994 as it stood between May, 2006 and 31/5/2007.

22.1. Learned Special Counsel submits also that as per IOT and CA of all 7 India Advantage Funds- I to VII and ICICI Strategic Investment Fund, "Person" includes a Hindu Undivided Family, an individual, corporation, partnership, limited liability company, body of individuals, association, trust, institutional investor or other entity or organization whether incorporated or not, including a Government(Central or State) or an agency or instrumentality thereof."; in the case of ICICI Equity Fund and ICICI Emerging Sector Fund, the definition of 'person' means any natural or juridical person or any body of persons corporate or incorporate" ; in the case of Econet Fund, the definition of 'person' is again wide enough to cover trusts. In any case, no exclusion is provided for trusts from the definition of 'person' in respect of any of these 11 Funds; the very fact that in their own key documents, the subject VCFs have regarded a 'trust' as a 'person' goes to show that, in the reckoning of the ICICI VCFs themselves, a trust is without doubt a legal entity or a person.

22.2. Learned Special Counsel submits further that following further facts support the view that the Funds herein are legal entities/persons:

- The Fund has obtained a Service Tax registration on 28.05.2008 for banking and financial services of its own volition and continued to hold; it also availed CENVAT credit of Rs.17.04 Cr. to be used on

taxable services provided by Trust/Fund, during the period from 4/2015 to 9/2015 IEIT;

- The Fund/Trust has a bank account, prepares profit and loss accounts, files balance sheet, deduct TDS wherever applicable, obtain approvals and registration from SEBI.
- The Fund has, even before the date of its formation /inception allowed invoices to be raised on it by various service providers (including service tax value) and has duly paid the same; Fund, which qualifies as a legal entity or person” for having received such services, is not right in making a claim that it is an amorphous entity.
- The Fund has an experienced auditor who has raised an invoice INL0200012303 dated 30.1.2008; the Auditor has deemed it correct to charge service tax on Rs. 27.50 which is merely a recovery of expenses and was paid; M/s BMR Associates the legal consultants to the Appellants have similarly raised invoices on the Funds indicating the S tax payable by the Fund.

22.3. Learned Special Counsel in addition submits that clarifications were sought on whether a trust or a trustee representing a trust in the case of "Real Estate Investment Trust" (REIT) or "infrastructure Investment Trust" (InvITs) or such other Trusts (registered under The Indian Trust Act, 1882) set up under the regulations prescribed under the Securities & Exchange Board of India Act, 1992, can become a partner in an LLP; the matter was examined by the Ministry of Corporate Affairs and after due consultation with the Law Ministry, has clarified (vide Circular 37/2014 dated 14th October, 2014) that for the purposes of these trusts it is not barred for a trustee, being a body corporate, to hold partnership in an LLP in its name. The above facts and submissions would place the Fund, in the category of a 'person' or a legal entity and not an amorphous entity as claimed by the appellant.

All the 11 ICICI VCFs are the primary providers of services under 'banking and other services' to investors

23. Shri PRV Ramanan submits that a conjoint reading of the IOT, IMA, CA and the PPM shows that the Econet Fund has, in a systematic process, been

providing the facility of long-term maintenance of the assets or property of the investors in the Fund; primary responsibility of fund management of the Trust rests with the Trustee, who is empowered to delegate his powers and responsibilities for the purpose of management and administration of the Trust Fund. The following factors establish this fact:

- Article 1-Page 4 (Ex.1) 'scheme' is said to be 'providing facilities' to persons, i.e. investors, to participate in the income, profits and gains arising out of the acquisition, holding or disposal of portfolio investments, property or rights or any other benefits under such schemes;
- Articles 3.1, 5 and 10 (Page 8 & 9 of Ex.1) indicate that the Trust Fund shall be held in trust by the trustee and managed in accordance with the IOT; this means that the primary responsibility to manage the Trust Funds lies on the Fund and its trustee.
- As per Article 34.1 (EX.1 -Page 20), the Fund represented by the trustee can terminate or dissolve the Fund if AMC resigns or the services of AMC are discharged; in such an event, the trustees have the liberty to appoint a new AMC within a period not exceeding six months (180 days); this would mean that the Fund represented by the trustee would manage the Fund in the interregnum. This is indicative of the fact that the Fund is the fall back entity for managing the trust funds; Ex. 3A (Page-1 India Advantage Fund -V) and Ex.3 B (India Emerging Sectors Fund -pages 1 & 2) also have similar provisions.
- Statements (Exhibit- 4, 5, 6, and 7) of IVEN's Senior Vice-President, Finance, Shri Jayatheertha, also show that the Fund represented by the trustee is the primary fund manager and the primary service provider of taxable services, with the Asset management company being only a sub-delegate of the Fund.

23.1. Learned Special Counsel also submits that the Econet Fund is fully responsible for holding, and using for gain, the assets of the investors during the lifetime of the Scheme, for financing which the funds have been contributed by the latter; this fact emerges out clearly from the PPM; under 'Fees and Expenses' therein, it is stated that the Fund, (i) will pay the AMC

an annual management fee of two and half percent of the aggregate capital commitments of the Fund.; (ii) will be responsible for all other costs and expenses associated with the organization, establishment and offering of the Fund , and will bear all costs and expenses that are incurred in the operation of the Fund, including Trustee fees, regulatory fees, custodial charges, brokerage, fees for professional advisors, travel expenses of the AMC and Trustee and others, auditing expenses etc.[Pages 31 and 32 of Ex. 3]; thus, undoubtedly, the primary responsibility towards the investors in respect of their assets in the form of contributions or funds, devolves on the Fund. In discharging this responsibility, the Fund incurs the aforesaid costs, including the costs of the activity of asset management carried out by the AMC on its behalf.

23.2. Learned Special Counsel further submits that the excerpts at 'Fees and expenses' in the PPM relating to the ICICI Emerging Sectors Fund, (Exhibit 3C-Pages 30 & 31), indicate three elements of fees and expenses borne by the Fund, namely, (i) Management Fee payable to the AMC, (ii) Performance Fee payable to the AMC and (iii) Fund Expenses; if these expenses are to be borne by the Fund, naturally the question that arises is for what activity these costs are incurred by the Fund; the unequivocal answer is that the costs are incurred for the asset/ fund management of the contributions of the investors to the Fund; the Units purchased by the investors under the IOT entitles them to the beneficial interest flowing from their investment in the Trust Fund; Fund uses for gain, the assets of the investors during the lifetime of the Scheme and makes good the beneficial interest due to the investor.

23.3. Learned Special counsel submits moreover that Learned Special Counsel submits that Black's Law Dictionary defines beneficial interest as "profit, benefit or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control."; a beneficial interest is also "distinguished from the rights of someone like a trustee or official who has responsibility to perform and/or title to the assets but does not share in the benefits; Section 3 of the Indian Trust, Act 1882, defines

both a beneficiary and beneficial interest to be "the person for whose benefit the confidence is accepted is called the "beneficiary": the subject-matter of the trust is called "trust-property" or "trust-money": the "beneficial interest" or "interest" of the beneficiary; therefore, two conclusions emerge: (i) Beneficial interest is nothing but a right; Property does not only include what is tangible, but rights too; this would imply that beneficial interest does fall within the ambit of the term "property", as defined and contemplated by Indian laws, judicial interpretations; in the instant case, the investor has the right to get beneficial interest from the Units purchased from or issued to him by the Fund; this calls for performance of activities from the Fund; the Fund is, therefore, bound by the IOT to perform to the benefit of the investors; this is done by them by appropriate asset management services; thus, the service of 'asset/ fund management' to the investors' contributions is primarily rendered by the Fund; in the course of such management they engage the services of the AMC, the Trustee and several other professional service providers; no direct payment is made by the investors to the aforesaid service providers; in sum, the service rendered is 'Fund /Asset management', the 'service provider' is the Fund and the 'service recipient' is the investor; Providing a facility to a person is a form of providing service. Going by the activities of the Fund it is clear that it provides a service which is akin to the service provided by a banking company or a financial institution to its customers. Providing a facility to a person is a form of providing service. Going by the activities of the Fund it is clear that it provides a service which is akin to the service provided by a banking company or a financial institution to its customers.

Applicability of the 'doctrine of mutuality' to the Fund and the investors

24. Shri PRV Ramanan submits that appellants argue that the investors and the Funds are one and the same and Venture Capital Funds are in a pooled or collective format and the Trust is merely a pooled vehicle for the collective name and funds of the contributors and therefore, the question of Trust rendering the service to its own contributors or members does not

arise at all, since no person can render service to itself. Learned Special Counsel submits that the claim that the Fund and the investors are one and the same is not supported by clause 1.1 of IOT the definitions given in (Exhibit 1) of the Fund in regard to the following terms, which defines that *"commitments" mean the subscription commitments of the Subscribers to purchase Units of a Scheme in one or more tranches pursuant to a Contribution Agreement and "contribution" means the amount paid to the Trust towards the purchase price of Units pursuant to a Contribution Agreement;* similar definitions are to be found in the Contribution Agreement with reference to the Fund in the IOT and CA of ICICI Equity Fund and ICICI Emerging Sectors Fund; these definitions clearly indicate that the relationship between the Subscribers or Investors and the various Funds is actually a relationship between a vendor and a customer as the terms used are 'purchase of Units' and 'amount paid to the Trust towards the purchase price of Units'.

24.1. Learned Special Counsel submits that the powers of the Trustee listed in the schedule of the IOT, and clauses 10, 20 and 32, of thereof are totally contrary to the principle of mutuality in the service flow between the Fund and the contributors /subscribers/investors; if, the contributors and the Trustee representing the Fund are same and if the relationship is based on mutuality, Clause 32.1 has no meaning; such non-existence of mutuality between the Trustee representing the Fund and the investor is well known and accepted by the Trustee represented by the Fund; as it comes out even at the time of incorporation of the IOT itself, the rights of the contributor or investor are highly restricted; contributors have no say when it comes to investment policies and decisions of the Fund; the Trustee and the AMC's decisions are final in all key matters. Given this position, it would be a misnomer to say that the Fund and the investors are one and the same.

24.2. Learned Special Counsel submits also that articles 6.4 and 6.5 of the IOT relating to India Advantage Fund-I (Ex.- 26 - page 269 and 270) sets out the provisions relating to proceeds distributable to contributors/

investors w.r.t the Fund investments; it is envisaged that out of CI, 'C' class unit holders may allocate up to a max of 30% of such CI for any person nominated by the Investment Manager; all the balance CI will be deemed to accrue to ICICI Bank, one of the Contributors who may agree to share a portion of the balance CI accruing to itself with the holders of Class A unit holders; thus, C Class unit holders and ICICI bank are differentiated from other Investors by providing privileged treatment in the matter of distribution of proceeds; this is totally repugnant to the concept of mutuality.

24.3. Learned Special Counsel submits further that the claim of mutuality between the Fund and contributor or investor does not stand in the wake of the Know Your Customer (KYC) related due diligence conducted by Fund either by itself or through its delegate, the AMC; as per the regulations of the Prevention of Money laundering Act, 2002 (PMLA, 2002) which came into effect on 1st July, 2005, extend to Trustee to the Trust deed, which would be, in this case, the Trustee representing the Fund; the Fund has accepted the mandate to conduct such KYC due diligence on its customers / clients, who are, in this case, the contributors or subscribers/investors; such due diligence would be conducted by the Trustee representing the Fund or its delegate, the AMC; thus inferring that contributor/investor are indeed the customers / clients as the case may be to the trustee represented by the Fund; the principle of mutuality, as claimed between the Fund and the contributor / investor does not arise when the investor is customer / client; as per 1.1 of IOT, trustee representing the Fund is not the same as contributors; it says "*subscriber*" means any person who is eligible to hold a unit in the trust and who has made a commitment". [This implies that Fund is different from the subscriber]; clauses (b) and (c) 9 which provide for winding up say

b) If it is the opinion of the Trustee that the scheme should be wound up in the interest of the contribution; or

c) If holders of more than seventy-five percent of the outstanding units under the scheme determine that the scheme should be wound up,"

from a reading sub-clauses (b) and (c) of Clause 35.1 together, it emerges that the Trustee can wind up the scheme even when all the contributors

want to continue the Scheme; even when 74% of the total Unit holders desire winding up of the Scheme, unless the Trustee also agrees, the Scheme cannot be wound up; this implies that the Trustee representing the Fund is not equal with the contributors; further, the CA is a tripartite agreement, wherein the Fund is differentiated from a contributor or investor.

24.4. Learned Special Counsel submits that Hon'ble Supreme Court, in a Landmark Judgment passed on 14-January-2013 in CIVIL APPEAL NO. 124,125 OF 2007, 272-278 of 2013 arising out of S.L.P.(Civil) No. 16880 - 16884 of 2010 and 16879 of 2010 of M/s Bangalore Club Vs. Commissioner of Income Tax gives greater clarity on "Principles of Mutuality", under which the Tax Exemption of Societies /Trusts is also justified; Supreme Court has laid down three conditions (i) there must be a complete identity between the contributors and participators (ii). the actions of the participators and contributors must be in furtherance of the mandate of the association and (iii). there must be no scope of profiteering by the contributors from a fund made by them which could only be expended or returned to themselves. He submits that in the case of the Funds which have filed the present appeals none of the three conditions are met for the Fund to claim the consideration received by it as exempt from income due to services provided on principal of mutuality; the Service Tax from such an income arising out of a taxable service is, hence, not exempt from tax; the arrangement lacks complete identity between the investor and the Fund; till the stage of generation of surplus funds (profits), the setup resembled that of mutuality; the flow of money, to and fro, would have been maintained within the closed circuit formed by the Fund and the contributor/ subscriber/investor, and to that extent, nobody who was not privy to this mutuality, benefited from the arrangement; however, as soon as these funds were placed in various investments (as explained in Trust Deed), the closed flow of funds between the Funds and the investor suffered from deflections due to exposure to commercial investing and profit generating operations; during the course of their investment management business, the Trust/Funds used such contributions to advance loans to their portfolio companies/buy equity/quasi

equity etc. as per Trust Deed; hence, in the present case, the Funds being engaged in commercial operations with third parties (investee portfolio companies/body corporate), ruptures the principle of 'privity of mutuality', and consequently, violates the one-to-one identity between the investor and Fund; thus, the first condition of mutuality is not satisfied.

24.5. Learned Special Counsel submits that further there is a fundamental difference between the mandate of a Members' Club and that of a VCF; the arrangement of a Club is essentially a single closed circle comprising its members and the Club; the arrangement of a VCF is like two circles; one circle comprises the Investors and the Fund and the other comprises the Fund and the Investee Companies; while the investors make a capital contribution, collectively called 'Unit Funds' which goes into the Trust Fund, the investees use the monies in the Trust Fund made available to them by the VCF, to generate profits for themselves, a part of which is passed on to the VCF as dividends or interest; the mandate of a VCF is such that it can never satisfy the second condition; on the other hand, in the case of a club, as far as supplies of food and other items to permanent members are concerned, the second condition gets satisfied and the mutuality principle becomes applicable; in the case of Calcutta Club, the facts met this criterion as the Hon'ble SC found; significantly, the facts involved only the Club and its permanent members and the subject matter was supplies of food and other items to permanent members; thus, the relationship between an investor and the VCF is not at all comparable to the relationship between a member and his Club, which is founded primarily on the principle of mutuality.

24.6. Learned Special Counsel submits that the actions of the Fund and the investor must be in furtherance of the mandate of the Venture fund; the Venture Funds mandate of generating long term capital appreciation on investments by profit generations on such investments for the investor is to be considered along with the fact that the Fund is a trust under Indian Trusts Act; the mandate is incomplete by just generating profits without

distribution of generated profits/surplus; the Fund being a Trust under Indian Trusts Act, such distribution has to be impartial, in line with the Act, for the completion of mandate; however in this case, the AMC and its employees/consultants have been given the status of a special contributor and have been accorded unduly high returns categorized as investment returns at the cost of other contributors; the irony is that such so-called "investment returns" are itself being accepted as performance fee in its annual reports; the Fund cannot claim its activity as that of furthering the mandate of the venture Fund in the light of unequal treatment of its "majority Investors " (Class A Unit investors) by benefitting the minority investors (Class B unit holders); this is to conceal the operative expenses of the Fund as return to investors; therefore, the second condition of the principle of mutuality as held by the Hon'ble SC is also violated in this case.

24.7. Learned Special Counsel submits that thirdly, there must be no scope of profiteering by the contributors from a Fund made by them which could only be expanded or returned to themselves; in the context of this case, had the investor's contribution to the Fund been returned back to them or spent on them, without profiteering by the contributors, the principles of mutuality would have been satisfied because the funds just flowed to and fro between the Fund and Investor; however, the principle of mutuality has been ruptured by the Fund, generating profits on these investments, expanded on third party entities, service compensations made in the guise of investment returns to service provider turned investors and the remaining funds distributed back among the investor; third condition of the mutuality principle requires that the funds must be returned to the contributors as well as expended solely on the contributors; in the present case, the funds do return to the contributor /subscriber/investor; however, before that, they have been invested in third party companies, Trust/Fund generate revenue/profits by, loaning out money to portfolio companies or by investing in equities of the portfolio company; this loaning out of funds and equity investments on outsiders for commercial reasons, and snaps the link of mutuality and thus, breaches the third condition.

VCFs not equal to Clubs

25. Shri PRV Ramanan submits that as per of the Judgment of the Hon'ble SC in the case of Yum Restaurants! (Para 35), clubs operate for the common benefit of the members wishing to enter into a social exchange with no commercial content; in the present case, however, the Funds are formed only for undertaking a commercial activity with a view to realizing profits /gains; the funds of the Club have to be necessarily expended on the members by providing services and facilities or returned to them if any unused surplus remains; only then the mutuality principle is satisfied; *Per contra*, in the case of a VCF, the contributed funds have to be necessarily expended on third parties first to generate gains/profits, so that the capital appreciation envisaged in the IOT and PPM, in respect of contributions received from investors, is achieved;

25.1. Learned Special Counsel submits that firstly, the flow of money, to and fro, was not maintained within the closed circuit formed by the Fund and the Investor; as soon as the contributions were placed in various investments as also loans, the closed flow of funds between the Fund and the investor suffered from deflections due to exposure to commercial investing and profit generating operations and secondly the contributions were expended on third parties, who benefited from the VCF activity of the Funds without any contribution to the Trust funds. The commonality of identity between contributors and participators got impaired when the third-party investee companies derived benefits without being contributors at the first instance.

25.2. Learned Special Counsel submits that the mandate is incomplete by just generating profits without distribution of generated profits/surplus; the Fund being in the form of a Trust under Indian Trusts Act, such distribution has to be impartial, in line with section 17 of the Act, for the completion of mandate; in this case, the AMC and its employees/consultants have been given the status of a special investor and have been accorded unduly large

returns categorized as investment returns at the cost of other contributors; the irony is that such so-called "investment returns" are itself being accepted as performance fee in its annual reports; fund cannot claim its activity as that of furthering the mandate of VCF in the light of the unequal treatment of its "majority Investors "(Class A Unit investors) by disproportionately benefitting the minority investors (Class B or C unit holders). He submits that (iii)The entire activity of the ICICI VCFs was aimed at generating profits and gains which flowed back to the Company which sponsored the trusts. The activity was undoubtedly a commercial activity, which is, as observed by the Hon'ble SC in the Bangalore Club decision "fatal to the principle of mutuality".

Coverage of the services rendered under 'Banking and other financial services'

26. Shri PRV Ramanan submits that to decide whether the appellants are rendering any taxable services to the contributors, the questions that would arise for consideration are (i) Whether the subject Trusts/Funds can be regarded as 'commercial concern' or not for the period 4/2005 to 30/4/2006 and 6/2007 to 3/2012? (ii) Whether the subject Trusts/Funds can be regarded as 'person' or not during 5/2006 to 31/5/2007? and (iii) Whether the activities of the Fund fall under "asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services. He submits that the expression 'commercial concern' has not been defined in the Finance Act, 1994; hence, resort has to be had to the common understanding of the expression; the term 'commercial concern' would, in general, denote an entity, like a firm or company or organization engaged in commercial activities like sale, purchase or providing services for consideration and having profit motive; however, decisions of several Courts and the Tribunal have provided different perspectives on this issue; in general, charitable institutions, entities which are not engaged in commercial activities in a regular manner, training entities that charge a fee have been regarded as other than a 'commercial concern'; some Courts have held that profit motive is not a necessary

condition for an entity to be called a 'commercial concern'; on examination, one finds that after the establishment of a VCF in the form of a Trust, the Fund appoints an AMC to formulate and devise schemes and invest the Trust fund in accordance with the objects and provisions of the IOT and SEBI regulations; an IMA is entered into between the Trustee and the AMC for this purpose; a PPM is prepared outlining the features of the Scheme; based on the PPM, contributions are sought from intending Investors; due diligence checks are exercised before acceptance of contributions; the monies so collected are invested in companies and like entities in terms of the IOT and the IMA; on conclusion of the Scheme, by redeeming the Units, income generated through investments is distributed to the investors based on a formula after setting off certain expenses; VCFs may be close or open ended.

26.1. Learned Special Counsel submits that a conjoint reading of the IOT, IMA, CA and the PPM shows that the activities of the Fund reflect a systematic process and an organized and regular business of accepting monies from investors, using the same for making profits /gains by re-investing in portfolios or extending loans and distributing the proceeds received by way of dividends or interest on loans among investors and retaining some portion of the same in consideration of the facility of asset management services provided to the investors; the Fund is fully responsible for holding, and using for gain, the assets of the investors during the lifetime of the Scheme, for financing which the funds have been contributed by the latter; the Fund is not a charitable institution; they function and act like a financial institution, using the monies of Contributors to make profits. Thus, undoubtedly, they are a 'commercial concern'.

26.2. Learned Special Counsel submits also that the question comes next is whether the Fund can be regarded as a 'person', as is relevant for the period from 1/5/2006 to 31/5/2007; the expression 'person' was not defined under the S tax law then; accordingly, the adjudicating authority has adopted the definition of 'person' as per clause (42) of section 3 of the General Clauses Act, 1897 to interpret the term 'any other person'. According to the

definition in the said Act, 'person' shall include any company or association or body of individual, whether incorporated or not. Thus, it follows that the expression 'any other person' used herein would include both a natural and juridical person. This being an inclusive definition is not exhaustive; accordingly, an entity in the form of a trust, like the subject Funds, would be covered within the scope of the expression 'any other person'; as seen above, definition of a 'person' in IOT and CA of all 7 India Advantage Funds- I to VII and in ICICI Strategic Investment Fund, the definition of 'person' is again wide enough to cover trusts; in any case, no exclusion is provided for trusts from the definition of 'person' in respect of any of these 11 Funds; the very fact that in their own key documents, the subject Funds have regarded a 'trust' as a 'person' goes to show that a trust is without doubt a legal entity and gets covered within the expression 'any other person'; moreover, with effect from 1/7/2012, the term "person" has been defined vide section 65B (37), which is very wide in its coverage and specifically includes every artificial juridical person; as per Wikipedia 'A juridical person is a non-human legal entity, in other words any organization that is not a single natural person but is authorized by law with duties and rights and is recognized as a legal person and as having a distinct identity'; According to 'Legal terms dictionary', a juridical person means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association; the subject Funds, which are VCFs, are given a distinct legal identity under SEBI (Venture Capital Fund) Regulations, 1996 and is authorized by law with duties and rights; hence, the Funds herein are squarely covered under the definition of 'person' vide section 65B (37) of the FA, 1994; funds clearly get covered under the description, "asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust service; asset management services provided by them to the investors who contributed towards Trust funds of these VCFs, are squarely covered under the description of 'Banking and other Financial services' and are exigible to S

Tax.

Sl. No	Item	Amount (Rs in Cr)
(a)	Amount of expenses in respect of all 11 Funds	2410.39
(b)	Amount of S Tax demanded on (a) above	266.48
(c)	Surplus amount distributed to Class C Unit holders	447.52
(d)	Amount of S Tax demanded on (c) above	54.77
(e)	Amount of total Tax demand [(b) + (d) above	321.25

Validity of the value taken for the purposes of working out the S Tax demand

27. Shri PRV Ramanan submits that appellants argue that the amounts withheld from income generated by the Funds are akin to expenses incurred by a company to meet its objectives and that as the expenses incurred by a company are not deemed to be consideration for providing services to its shareholders; expenses cannot be held as consideration for providing facilitation services; consideration as understood in law is absent in the relationship between appellants and investors; no consideration is received by the appellants from the investors towards asset management services. He submits that the overall picture presented in the Statement submitted by the Appellants (Appendix 2); the following shows the status for the period from 2005-2006 to 2011-2012:

Note: Class C unit holders were the AMC and its nominees]

27.1. Learned Special Counsel submits that the value adopted for arriving at the quantum of tax demand comprises two elements, namely, Fund expenses incurred by the 11 VCFs as enumerated (Ex-3C) and Carried interest (referred to as 'Performance Fee' in Ex-3C) paid to the AMC and its nominees; as may be seen from Appendix 5; this is a unique case where the

service provider himself holds the entire proceeds- i.e. profits and gains from investments/ loans etc. made by the Fund- which are due to the investors who are the recipients of the service as per the definition of the term 'Scheme' ' in Article 1-Page 4 of Ex.1- wherein the expression used is 'providing facilities' to persons, i.e. investors, to participate in the income, profits and gains arising out of the acquisition, holding or disposal of portfolio investments, property or rights or any other benefits under such schemes; the Fund incurs several costs and expenses, such as, Management fee, Performance fee and Fund expenses and meets them by retaining a portion of the proceeds before making over the balance of proceeds to the investors; such retention of the proceeds is the consideration for the services rendered by the Fund to the investors.

27.2. Learned Special Counsel submits also that the he Appellants claim that the funds distributable to the investors held back by the Fund do not constitute the value of the taxable service is not in conformity with the Service Tax (Determination of Value) Rules, 2006; explanation to Section 67, includes 'any amount payable' for deriving the valuation of taxable services; explanation states that *"consideration" includes any amount that is payable for the taxable services provided or to be provided and (c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any;*

27.3. Learned Special Counsel submits further that in terms of the provisions of Rule 1 and 2 read with Rule 5 of Service Tax Determination of Value Rules, all and any expenses incurred by the trust/fund during the due course of providing taxable services to the contributor is to be treated as value of taxable service where value shall not be less than the cost of provision of taxable service; the only exemption for treating expenses as value of the service is provided only to pure agents; the trust/fund does not

qualify for a “pure agent” going by Rule 5 of the Valuation Rules; Circular No. 94/5/2007-Service Tax dated 15.05.2007 categorises the expenses of mutual funds as (i) Initial issue expenses: incurred on initial brochures, SEBI approvals, advertisement, registrars, preparation of certificate, postage, distribution and broker, etc. and (ii) The recurring expenses : incurred on fund management fee to Asset Management Company, brokerage, trustees fee, expenses on account of stationery, postages, advertisements, listing on exchanges, publishing of Net Asset Value (NAV), distribution charges, custodian charges, audit fee, etc. ; while the initial expenses not being integral to the nature of primary service (banking and financial) have been exempt from being included in the value of the service, the recurring expenses being integral to the nature of primary service have not been exempted; the Trust / Fund has an experienced auditor who has raised an invoice INL0200012303 dated 30.1.2008; their auditor deemed it correct to charge service tax on Rs. 27.50, as recovery of expenses and the Trust/fund pays with service tax; the Appellant cannot claim that the amount represents expenses and cannot be held liable to tax.

Inclusion of Carry Interest

28. Replying to the contention that ‘Carried Interest’ is interest or return on investment, it does not amount to service and hence, it is not taxable, Shri PRV Ramanan submits that ‘Carried Interest’ (CI) is neither an interest nor a return on investment but a compensation/performance fee paid to the AMC or any person /entity designated by the it, the latter, as a special class of investors/ Unit holders; CI is contingent to payouts (realizations Generated by exiting portfolio investments) by the fund; such Carried interest is credited to the class B (special Units holders) only when the net realization recognized by selling and exiting portfolio investments exceeds the sum total of the capital committed and the appreciation gained as per the pre-agreed preferred rate of return; CI is a function of the profitable exits during a given year; which means it is a profit sharing mechanism , which defines carried interest; it clearly indicates that the profit sharing is 20% of the net realizations (sale value of portfolio investments); perusal of Exhibit 14 pages 1 & 2, reveals that the 20 percent sharing to the special class unit

holders (Class B unit holders) happens even when the capital contribution from these unit holders are only 0.0003 percent to the total capital committed for investment; this is only because of the performance related incentive for being associated with managing the Fund; it can be seen from the IOT, IMA and PPM, the fact that class B unit holders are investment manager and its employees or any trust set up for the benefit of employees, or such other person as the investment manager may in its own discretion appoint; it is important to note that the term "Appointment "is used for the class B unit holders; in respect of 10 out of the 11 Funds, the amounts as 'CI' have flown back to the Settlor and his nominees.

28.1. Learned Special Counsel submits further that by way of CI large amounts are paid disproportionate to their investment, showing the same as 'return on investment'; for example Ex. 25A, shows the investment made in the India Econet Fund and the distribution of profits and gains for the period from 2000-2001 to 30/6/2008; amount invested in this Fund in 2000-2001 was Rs.100 Cr. by two A Class investors, namely, ICICI Bank Ltd. and Compaq Mauritius; as of 30/6/2008 capital returned to them by redemption of units was Rs. 13.08 Cr; surplus returned to them from 29/6/2007 to 30/6/2008 was Rs.113.82 Cr; ICICI Econet Carried Interest Fund, a B Class investor comprising the AMC and its nominees, invested Rs. 10 Lakhs in June 2006 and received Rs. 38.37 Cr. from 13/5/2007 to 30/6/2008 without any redemption of units. He submits another example Ex.-26 [pages 416 to 421], showing distribution of proceeds after redemption of units, in respect of India Advantage Fund I for the period from 1/4/2005 to 31/3/2010, total amount of capital raised from 'A' Class unit holders was Rs.564.53 which was returned in full and in addition, surplus made over to such unit holders amounted to Rs.588.13 Cr; total amount of capital raised from 'B' Class unit holders was Rs.353.63 Cr; the capital was returned in full and in addition, surplus made over to such unit holders amounted to Rs.439.34 Cr; total amount of capital raised from 'C' Class unit holders was Rs.10 Lakhs but surplus made over to such unit holders was Rs.135.61 Cr without redemption.

28.2. Learned Special Counsel submits also that holders of 'A' and 'B' Class units were regular investors such as LIC, ICICI Bank, PNB, Andhra Bank and Dynamic India fund and also some Employees; 'C' Class unit holders were namely, India Advantage Fund I and II and ICICI Venture i.e. the AMC as well as the Settlor for the India Advantage Fund I; India Advantage Fund I and II and ICICI Venture together had only invested Rs.10 Lakhs that too on 30 & 31/3/ 2006; they were given from the profits and gains a sum of Rs.109.11 Cr. on 31/3/2008 (i.e. in 2 years' time) and an amount of Rs.26.49 Cr. on 22/3/2010 without redemption of units; thus as against an investment of Rs. 10 Lakhs, these two 'C' class unit holders received purportedly as 'income from investment' Rs.135.61 Cr., i.e. 1356 times the investment. He gives a contra example (page 416) stating LIC, an 'A' class unit holder had an opening balance of Rs.67.50 Cr. by 2005-2006 and had added a further investment of Rs.37.50 Cr by August 2006; total amount invested by LIC was, thus Rs.105 Cr; a sum of Rs.58.81 Cr was redeemed and returned against on 28/3/2008; LIC was paid from profits and gains a sum of Rs.152.33 Cr up to 31/3/2008 and Rs.15.76 Cr. by 22/3/2010; thus LIC received on redemption of units valued at amount of Rs.58.81 Cr and a surplus of Rs.168.09 Cr. i.e. 2.86 times the investment. He submits that thus, in the case of India Advantage Fund –I, two C class investors, namely, India Advantage Fund –I & II and the AMC earned a whopping return of 1356 times their investment without redemption of units, while a major 'A' class investor like LIC received, upon redemption of units worth Rs. 58.81 Cr., a return of 2.86 times the investment; the contrast is too glaring to be ignored. He submits that IOT, IMA and PPM clearly highlight the fact that class B unit holders are investment manager and its employees or any trust set up for the benefit of employees, or such other person as the investment manager may in its own discretion appoint; it is important to note that the term "Appointment" is used for the class B unit holders.

28.3. Learned Special Counsel submits also that Annual reports (Exhibits 11, 12, 14 & 15) clearly show that performance fees/carried interest are

contingent to the pay out and are a function of the profitable exits (a fixed percentage) but the Fund reports the same as Income from investments only to evade taxes on service; the Annual report of the ICICI Emerging Sectors Fund (**Ex.-14**), reports a performance fee of 6.8 Cr; same Annual report (Page 3) mentions the amount paid to the AMC in the related party transaction as Rs. 205,521,347 being management fee only without a performance fee component; 6.8 Cr.is not shown as a payment to the AMC which clearly infers that this performance fee was paid to another Entity which could have only been the holders of the special class units who are none other than the investment manager, employees of the investment manager, any trust set up for the benefit of employees, or such other person as the investment manager may in its own discretion appoint; this income to the class B unit holders (special class of unit holders), which is actually a taxable service, is masked as income from Investments and not shown as a performance fee in all the ICICI VCFs; this is the crux of the evasion; it is also seen from the exhibit 14 that while the capital committed and subscribed by Class A units was in 2002 , the Class B (special class) unit holders subscribe to the units only in 2006, when the Fund was ready to pay carried interest after returning capital and realization of Preferred rate of return to the Class A investors.

28.4. Learned Special Counsel submits that a perusal of the Annual report of IVEN (fund manager of all the 11VCFs) for 2007- 2008, shows that it earned a performance fee of Rs 530.7 million (page 1 **Ex.-19**) and then reports the same amount as income from investments in page 2 of the Exhibit; it clearly points to the intent of tax evasion by describing in a misleading manner, the performance fees as income from investments; it also proves the fact that the " income from investments" otherwise called "carried interest" earned by the AMC is nothing but a performance related payment. He submits that perusal of Ex.-20, shows provisions of the IOT talk about withdrawal and mandatory redemption for the Class B unit holders (investment managers and affiliates/ associates) in case of their termination; it also mentions either transfer or re-allotment of the same units to the new asset managers and

their designated partners on appointment. This is a common feature in all Funds and clearly highlights the performance related and incentive nature of the Class B units (special units). No Class A (regular class of units) will be subjected to this treatment (forced redemption) after the initial investment. This highlights the fact that the special class of units called Class "B" units are for the service providing AMC and in specific terms for the current AMC providing management services. It also underlines the facts that the gains made by the Class B unit holders are in lieu of their services which will be stopped when their services are terminated and the same allotted to the new service provider.

28.5. Learned Special Counsel submits that Ex.-21 clearly highlights the fact that the amount earmarked as CI (performance related incentive) in the Class B units is held under Escrow and only credited into the Class B units upon achieving capital return along with the preferred rate of return for the regular investors (Class A); if it was a gain on investment, such gains should have directly been credited to the Class B unit holders (Investment manager AMC and his affiliates) unconditionally; this feature is common to all the Funds under consideration and clearly highlights the performance related nature of the considerations credited into the class B units; this shows that the amount credited in the Account of Class B units (CI) is supposed to be withdrawn by the unit holders only upon achieving a gain equal to the Capital and the preferred rate of return for the Class A unit holders; CI is nothing but a performance related payment; it is beyond doubt that a regular investor would not cede his/her/it's gains to make good the gain of other investors unless any investor's gains made were due to performance parameters and the same was found short of; holding of the gains of the Class B unit holders in Escrow to compensate any shortfall in the agreed upon returns to the Class A unit holders clearly underlines the performance nature of the gains made by Class B investors; Ex-13 clearly shows the extraordinary income garnered by the Class B unit holders in comparison with Class A unit holders, who having invested in the ICICI Econet Fund in the year 2000 get Rs 970.13 for every Rs 100 invested, the Class B units holders get Rs 38371 for every Rs 100 invested in the year 2006 even

without redemption of the units, purely through CI; statements (Exhibits 4, 4A, 6,7A and 7B) of Shri Jayatheertha Senior Vice-President, Finance, IVEN and Shri Anselm Pinto, Legal and Company Secretary clearly show the acceptance of the fact that CI is of the nature of Performance fee.

28.6. Learned Special Counsel submits that articles 6.4 and 6.5 of the IOT relating to India Advantage Fund-I (Ex-26 269 and 270) set out the provisions relating to proceeds distributable to contributors/ investors w.r.t the Fund investments; the amounts distributed to Class C unit holders pursuant to clauses 6.4.3 and 6.4.4 are referred to as 'Carried Interest'; in clause 6.5 (page 270), it is envisaged that out of CI, 'C' class unit holders may allocate up to a max. of 30% of such CI for any person nominated by the Investment Manager; all the balance CI will be deemed to accrue to ICICI Bank, one of the Contributors who may agree to share a portion of the balance CI accruing to itself with the holders of Class A unit holders; the provisions reflected in Ex.-22, is very important in understanding the concept of CI, its performance related incentivization nature and how the AMC distributes the carried interest among its employees; it states that "The Board of directors of ICICI Venture Funds Management Company Ltd. at its meeting held on October 30, 2002 approved a carry plan for its employees; the carry plan envisages that the said Company will arrange to directly pay 'carry' from the performance fee earned by it from its Funds to its employees through a special trust created for the purpose in the following manner"; it is crystal clear, therefore, that CI which is paid out to the AMC and its affiliates, thus deducting the CI from the income of the Fund which is otherwise distributable to the common investors/unit holders (Class A in the case of Econet Fund) is nothing but a performance related payment or fee camouflaged as return on investment.

28.7. Learned Special Counsel submits that the Fund deducts a significant portion of the investors' funds, pays it to the AMC and its affiliates in an alternate form, so designed, such that neither the Fund /Trust nor the AMC and its affiliates have to pay any tax; The Econet Fund through its Trustee allows the AMC to make a significantly small investment in the fund (10,000

units in this case as against 1 crore units of Class A investors) and allow AMC to appropriate staggering returns to these 10,000 units; it also allows the AMC to term it as "income from investments"; by keeping the AMC out of the service tax net and most importantly, the Fund itself stays out of the S Tax net, having paid a consideration to the AMC out of the consideration received by the Trustee (deductions made from investors' distributable funds); in sum, the value taken for the purposes of arriving at the S Tax demand in the present cases, which includes expenses incurred and Carried Interest paid to 'C class unit holders is correct, legal and proper.

Applicability of extended period of limitation

29. Shri PRV Ramanan submits that the appellants have argued that there was no intention on their part to suppress any facts as (a) All the Funds were registered with SEBI from the beginning;(b) All the Offer documents issued by the Funds were available in public domain;(c) The Annual reports and Accounts were also available in public domain and (d) The basic activity of the Appellant is similar to that of Mutual funds wherein also, there are expenses pooled. He submits that reasons adduced at (a), (b) and (c) above bank on the availability of information about the subject ICICI VCFs such as, registration with SEBI and offer documents and annual reports being in public domain; these do not amount to disclosure to the Department as clearly brought out in OIO (Para 49.1 and 49.2-OIO No.36/2012 dated 31/7/2012 in the case of ICICI Econet Fund -Pages 200 to 202 in the Appeal file relating to appeal no.ST/2900/2012); as rightly observed, 'the theory of universal knowledge cannot be attributed to the department in the absence of any declaration'; ICICI Venture as the AMC was fully in the know of the requirements under the S Tax law; reading together section 70(1) and section 73 of the Finance Act, 1994, make it clear that under the S Tax law, self-assessment and remittance of tax are the statutory responsibility of an assessee; non- compliance with this basic requirement cannot be wished away by stating that there was no intention to evade tax; prior to following the above procedure, all the 11 Funds ought to have registered with the concerned/proper officer of the S Tax department and made a true declaration of the material particulars; further,

no evidence of diligent conduct has been adduced to substantiate *bona fide* belief on the part of the said Funds or its Trustees. He relies upon the case of Kala Sagar Vs CST Tax, Mumbai [2015(138) STR 1015 (T-Mum)].

29.1. Learned Special Counsel submits that the Econet Fund began in year 2000 with a Trust fund of Rs.100 crores contributed by two investors (Ex-23 and Ex- 25A); a new class of investment was allowed to become a part of the fund with 10,000 units of Rs.100 each, thus investing Rs.10 Lakhs; the investor "ICICI ECONET CARRIED INTEREST FUND" made an investment of Rs. 10,00,000 in 2005-06 but had only a cash or cash equivalent of Rs.7,96,30,647 as on 31st March 2005; there was no need for Econet Fund to have a cash investment/contribution of Rs.10 Lakhs in a Rs.100 Cr fund, from the point of requirement of funds; it is clear that this arrangement was put in place to divert a portion of the profits/gains to the AMC and its nominees as income from investments; it is also important to note that while a single distribution has been made on 29/6/2007 to the Class A Unit holders, the special Class B Unit holder has been paid thrice on 13/5/2007, 29/6/2007 and 30/6/2008; the first payment to Class A units for having invested in year 2000 was made on 29th June 2007, whereas the first payment to class B unit holders was made in May 2007 itself, though investments were made in June 2006; if the Trustee had not allowed these 10,000 units to be allotted and be part of the corpus / fund and had not accepted the capital contribution of Rs.10 Lakhs, which it did not require, the entire Rs. 38.37 crore would have automatically been distributed among the 1 crore units of Class A unit holders, who would have earned an extra amount of Rs.38.37 for each unit in excess of what they actually received. By the sheer act of allowing the Carried Interest Trust to subscribe to 10,000 units for an un-required contribution of Rs.10 Lakhs, the Trustee has caused an additional Rs.38 Crores to be deducted from the amounts otherwise meant to be distributed among the 1 crore Class A units.

29.2. Learned Special Counsel submits that distributions to Class B Unit holders is not even reflected as an expense on the Fund balance sheet, as it is shown as income distributed to Unit holders (to be read as distributions to

special class of Unit holders) for the only reason that the beneficiaries are affiliates of AMC; it is noteworthy to keep in mind that in the case of Econet Fund, the Trustee and the AMC are subsidiaries of ICICI Bank, who is the Settlor.; a similar distribution has happened in all other Venture funds of the ICICI group; in the remaining 10 VCFs, in fact, the Settlor i.e. ICICI Venture Fund Management Company Ltd (IVEN) being the AMC the proceeds have flown back to him; only in respect of Econet Fund, the settlor is ICICI Bank Ltd and the AMC is IVEN; such an arrangement has enabled the ICICI group to conveniently suppress material facts from the department.

29.3. Learned Special Counsel submits that the Annual report of ICICI Venture Fund Management Company Ltd [Ex-15] while managing India Advantage Fund-I allotted 5,000 units under the same modus operandi with the full knowledge of Trustee of IAF- I (A Trust); while page 1 of this Exhibit shows that these 5,000 units have generated an income of Rs.53.70 Cr as an income from investment in venture capital units, in page 2 of the same annual report the same amount of Rs.53.70 Crores is shown as performance fees earned by the ICICI Venture Fund Management Company; this astronomical return is earned by the AMC for these 5,000 units, while the normal unit holders in the same fund earn Rs.1611 Crores for 1090 crore units; IVEN, in its filing to Security Exchange Commission (SEC) USA [Ex.-22] has highlighted the performance nature of the fees earned through a special trust formed to itself and its employees; such special trusts are the privileged class of unit holders earning astronomical returns over that of normal investors, disguising the same as income from investments of these special trusts called carried interest trusts.

29.4. Learned Special Counsel submits that had the Trust paid this as "performance fee", the same would have been reflected as part of expenses of the fund in the Fund's balance sheet; being the service provider of taxable services to the investors and expenses being integral to the offering of the taxable services, these so called expenses would have to suffer service tax; the Trustee has cleverly disguised this as a return on investment from venture capital units to the AMC and its affiliates and kept the consideration

received out of its own expenses as well as the service income of the AMC and has played a very crucial role in perpetrating this tax evasive action; if it was an "income from investment" for the beneficiaries of the carried interest trust, such return of income per unit, should have been the same as that of the common investors (Class A investors); anything paid more than what was paid to normal investors (Class A unit holder) is only because of the privilege enjoyed as an AMC and being its fellow subsidiary of the ICICI group. Any other entity would not get this preferential treatment.

29.5. Learned Special Counsel submits that further, in the case of Econet Fund [Exhibit 25], the Carried Interest Fund by becoming a 0.001% holder of the total corpus of Rs.100 Crores, has been the recipient of the preferential treatment where once the sales realization of invested capital reaches Rs.25 Cr every one lakh distributed thereon will have Rs.20,000 divided among the 10,000 unit holders and Rs. 80,000 divided among one crore unit holders; extending the above mathematically every Rs.10 Crore distributed over and above Rs.25 Crores up to Rs.50 Crores, will have Rs. 1 Cr distributed to the 10,000 unit holders (who have invested Rs.10 Lakhs) and Rs. 9 Crores among the 1 Crore unit holders (who have invested Rs.100 Crores); the above undisputable facts clearly show that there was a deliberate default on the part of the aforesaid 11 Venture Capital Funds established by the ICICI group, with ICICI Venture Management Co. Ltd. as the Settlor and the AMC; therefore, invoking of the extended period of limitation is fully justified; since S Tax liability stands established, demand of interest under section 75 of FA, 1994 becomes payable. As regards the reliance of appellant on the Supreme Court's decision in the Alcobex Metals, he relies upon decision in Shree Ranees Gums and Chemicals Pvt. Ltd. vs. CCE ,Jaipur [2017 (4) GSTL 340 (Tri-Del)], which clearly settles the issue in favour of Revenue, wherever the SCN has covered extended period as well as normal period.

Imposition of penalties

30. Shri PRV Ramanan submits that the penalties were imposed on under section 77 and 78 of the Finance Act, 1994, wherever deliberate default has

been established; under section 76 penalty is imposable for default in payment of service tax and mens rea is not required to be proved and mere contravention of statutory provisions would suffice; as per discussion above, there are sufficient grounds to hold that the conduct of the subject 11 ICICI Funds and the Trustees representing the said Funds was clearly not above board; there was suppression of the material facts and non-declaration of the same to the Department with intention to evade due S Tax; he relies upon Gujarat Travancore Agency Vs Commissioner of Income -tax: [1989] 177 ITR 455 (SC) AIR 1989 SC 1767 and Chairman, SEBI Vs Sriram Mutual Fund : [2006] 131 Comp Cas 591 (SC) : ([2006] TIOL 72 SC SEBI). He submits that Honourable High Court of Kerala in the case of Assistant Commissioner of Central Excise Vs V. Krishna Poduval [2006] 3 VST 21 (Ker) [2006] 1 SIR 185 (Ker) held that penalties under both sections 76 and 78 can be imposed as the incidence of imposition of penalty are distinct and separate under the two provisions and even if offences are committed in the course of same transaction or arise out of the same act, penalty would be imposable; thus, for the period prior to May 10, 2008, the appellant would be liable to penalty both under sections 76 and 78 and for the period thereafter, only penalty under section 78 would apply.

Cum Duty Benefit- Cenvat admissibility - Revenue Neutrality

31. Shri PRV Ramanan submits that aspect of cum duty benefit was dealt with at Para 50 of the OIO at Page 202 of Appeal file No. ST/2900/12 and it was observed that no documents were produced to substantiate the claim; however, for verification of facts and quantification, the matter may have to go back to the adjudicating authority. He submits regarding admissibility of Cenvat that the adjudicating authority has dealt with this argument at Paras 51.1 to 51.4 of the OIO (at Pages 201 to 205 of Appeal file No. ST/2900/12) and it is observed therein that no evidences were produced regarding payment of S Tax in respect of invoices against which the Appellant intended to avail CENVAT credit; no evidence was produced to establish nexus between output services and input services, in respect of which credit was sought to be availed of; hence, this claim of the appellant has to be

examined with supporting documents, before it can be accepted; amounts representing 'Carried Interest' would however stand on a different footing as the same is, in real terms, a performance based payment which has not suffered any S Tax; However, for quantification purposes, the matter may have to go back to the adjudicating authority. On the plea that amounts representing Write-offs and provisions should be excluded from the value taken for calculating the tax demand, he submits that this claim of the appellant was not raised before the adjudicating authority; the appeal memorandum also does not make a mention of this aspect; the present argument being on facts ought not to be entertained; if, however, the Hon'ble Bench is inclined to allow the plea, still it has to be substantiated before it can be accepted; for quantification purposes, however, the matter may have to go back to the adjudicating authority.

32. Summing up, Shri PRV Ramanan submits that the 11 Venture Capital Funds formed by the ICICI group, who are the Appellants herein are legal entities and are juridical persons; they come within the definition of 'commercial concern'; the said Funds , through their Schemes, provide facilities of asset management to investors to realize profits and gains by efficiently managing the monies/funds invested by the latter and in this process engage the services of the AMC, Custodians, Legal and other consultants etc; they are, thus, the principal service providers to investors in the Schemes floated by them; these 11 Funds did not disclose the fact of providing the said services to the department and had suppressed the fact of making performance based payments called 'Carried Interest' to privileged special Class of unit holders and showed the same to be 'return on investment' to evade tax; hence, the invoking of extended period of limitation for arriving at the tax demand for certain periods stands justified and penalties under section 78 of FA, 1994 also stand justified as a sequel. Demands within normal period of limitation are also just and proper.

33. Heard both sides and perused the records of the case. Issues that require consideration in the instant case are as follows:

(i) Does the doctrine of mutuality of interest exist between the trust and the contributors/beneficiaries.

(ii) Is there any service, classifiable under "banking and other financial services" (BOFS), in terms of Section 65(105)(zm) of the Finance Act, 1994 as covered under Section 65(12)(a)(v) of the Finance Act, 1994 rendered by the Trust to the contributors/beneficiaries.

(iii) Do the expenses incurred by the Trust, performance fee paid to the Investment Manager and carry interest paid to certain class of members and provision for losses and impairment of investment debited to financial constitute consideration for "services" to the contributors/beneficiaries.

(iv) Is invocation of extended period in the facts and circumstances of the case justified?

(v) Whether imposition of penalty is correct.

Mutuality of Interest

34. Coming to the first issue of whether a Trust and their beneficiaries thereof have separate existence and whether there is mutuality of interest between these two, the learned Senior Counsel for the appellants submits that Trust *per se* not being recognised as a separate legal entity does not qualify to be a person liable to service tax, He submits that "Trust" has been defined under Section 3 of the Indian Trust Act, 1882 to be "an obligation annexed to ownership of property and arising out of confidence reposed in and accepted by the owner or declared and by him, for the benefit of another, or of another and the owner; simply put, a Trust is an arrangement whereby property is held by a person (the "trustee") for the benefit of specific people (the "beneficiaries") or for some object permitted in law. He submits that various judgments of the Hon'ble Supreme Court and High Court established that the Trust and the beneficiaries thereof are not different from one another. On the other hand, the learned Special Counsel for the appellants submits a reading of the Indenture of Trust (IoT) shows

that the Trust is distinct from the contributors/beneficiaries; this is supplemented by the fact that the Trust undertakes KYC or due diligence of the contributors/beneficiaries; the Trust is registered under SEBI (Venture Capital Fund Regulations, 1996) as well as under the Income Tax and Service Tax Laws.

34.1. Learned Senior Counsel referred to some cases in the appellant's favour. We turn our attention to the various judgements. We find that Hon'ble Bombay High Court in the case of Homi Nariman Bhiwandiwalla Vs Zoroastrian Co-operative, AIR-2007-BOM-267, 2001 (3) BOMCR 352 held that

16. Issue Nos. 13, 15 & 21: Defendant No. 2 is a trust and in case of a trust which is not a legal entity, all the trustees should be joined if a legal action is initiated against a trust. This view is taken by a Full Bench of the Gujarat High Court, reported in AIR 1978 Guj. 113, Atmaram Ranchhodbhai v. Gulamhussain Gulam Mohiyaddin. Same view is also taken by this Court in a decision reported in AIR 1998 Bom 373, Venkatesh Iyer v. Bombay Hospital Trust. The suit is also not maintainable for want of notice under Section 164 of the Maharashtra Co-operative Societies Act. The notice is mandatory which is clear from the provisions of Section 164 of the M. C. S. Act. This is laid down by the Division of this Court in the judgment reported in 1987 Mah.L.J. 503. Mohan Meakin Ltd. v. The Pravara Sahakari Sakhar Karkhana Ltd. and in head note (b) the Court has held:

"that the defendant was a society which was carrying on the business of manufacturing Alcoholic products viz. Whisky and that being the business of the Society it was clear that the provisions of Section 164 of the Maharashtra Co-operative Societies Act were attracted. One of the objects of the society in addition to manufacture of sugar was the manufacture of complementary products and in that behalf to erect the necessary machinery. The alcoholic products manufactured out of molasses by the defendant co-operative society was a complementary product and the said business fairly and squarely fell within the ambit of the Bye-laws of the society. The provisions of the Maharashtra Co-operative Societies Act, and in particular Section 164 of the said Act must apply and in the absence of statutory notice under Section 164 the suit was not maintainable".

Head Note (C) of the above judgment also mentions the same position. Thus the suit is not maintainable in the absence of notice and notice given after filing of the suit by the plaintiff makes no difference in the situation as the suit as filed was not maintainable and the defect is not curable by giving notice on presentation of the plaint. Issues Nos .13, 15 and 21 are therefore answered accordingly.

34.2. Hon'ble Delhi High Court in the case of National Thermal Power Corporation Vs Canara Bank and Others, 1999 IVAD (Delhi) 847 held that

18. From the deed of trust dated 31 January, 1990 it appears that the Canara Bank as a settlor, constituted a trust under the aforementioned name "Can Bank Mutual Fund", with itself as the principal trustee of the fund for doing mutual fund business. The Trust Deed declares that the settlor has decided that the Can Bank Mutual Fund shall be vested in the Canara Bank as trustees for the benefit of the persons participating in the scheme to be framed by the Canara Bank as trustee of the Can Bank Mutual Fund (Preamble (iii) ; the Canara Bank declared to hold as trustees in trust for the subscribers to such schemes, the moneys, contributed by the settlor and the persons participating in such schemes for the Can Bank Mutual Fund [preamble (iv)]; for managing and administering the trust, the deed provides that the settlor shall constitute a Board of trustee [Article 7(1)] : the Canara Bank as trustee of the existing mutual fund and acting thereunder as the principal trustee shall be the legal owner in whom all the assets of the existing funds and all the funds which may be set up in future shall vest and the management and administration of all such funds shall vest in the Board [Article 7(2)]; the Board is to consist of the Chairman and the Managing Director for the time being of the Canara Bank, the Executive Director of Canara Bank, an officer of the settlor shall be the Executive trustee and two more other individuals are to be appointed by the settlor in its discretion [Article 7(3)].

19. It is true that a trust registered under the Trusts Act not being a separate legal entity, has to act through its trustees and to that extent the Canara Bank may be justified in contending that it is acting on behalf of the mutual fund in that capacity, and, strictly speaking the Trust by itself may not be a public sector enterprise but in the present case, having perused some of the Articles of the Deed of trust, in particular the one noticed above, I feel that Canara Bank has a pervasive control on the mutual fund. It is the Canara Bank as settlor and principal trustee and its other functionaries who are in effective control of the mutual fund and that being so the Canara Bank cannot be heard to say that affairs of the trust may not fall within the domain of the High Powered Committee and further its transactions with the appellants have no connection whatsoever with transactions between the appellants and Canfina, a subsidiary of Canara Bank.

34.3. Hon'ble Bombay High Court in the case of Venkatesh Iyer Vs Bombay Hospital Trust and Others MANU/MH/0198/1998, held that

72. The plaintiff in fact, in Para 2 of the plaint, has averred that the plaintiff is not aware of the names of the trustees and as and when he became aware of the same, he would join the trustees as defendants. Thereafter M/s. Kanga & Co. who are Solicitors for defendant Nos. 1 and 2 communicated to the Advocate of the plaintiff, the names of trustees of Bombay Hospital Trust. There is clear cut admission on this point which appears in Para 113 on page 121 of the plaintiff's cross-examination. Thus, in spite of having come to know the names of all the trustees of the Bombay Hospital Trust, the plaintiff did not take any step by way of amendment to join the trustees to the proceedings as defendants. This was certainly a procedural lacuna of a serious nature on the part of the plaintiff and he has to face the consequences for the same. He cannot blame defendant Nos. 1 and 2 because they did inform the names of the trustees to the plaintiff for enabling him to take prompt necessary steps in

the matter. It was, however, the inaction on the part of the plaintiff himself who failed to take necessary steps.

78. Thus, in view of the foregoing discussion, I hold that not joining the Trustees of the Bombay Hospital Trust and also Tata Memorial Hospital is a serious lacuna and the suit certainly is bad for non-joinder of necessary parties. Issue No. 2 is, therefore, answered in the affirmative.

34.4. Hon'ble Supreme Court in the case of Bangalore Club Vs Commissioner of Income Tax, 2013-5-SCC-509 and Others, held that

11. One of the first Indian cases that dealt with the principle was *Commissioner of Income-Tax, Bombay City Vs. Royal Western India Turf Club Ltd.*[6]. It quoted with approval three conditions stipulated in *The English & Scottish Joint Co-operative Wholesale Society Ltd. (supra)*, which were propounded after referring to various passages from the speeches of the different Law Lords in *Styles case (supra)*. Lord Normand, who delivered the judgment of the Board summarized the grounds of the decision in *Styles case (supra)* as follows:

"From these quotations it appears that the exemption was based on (1) the identity of the contributors to the fund and the recipients from the fund; (2) the treatment of the company, though incorporated, as a mere entity for the convenience of the members and policy holders, in other words, as an instrument obedient to their mandate; and (3) the impossibility that contributors should derive profits from contributions made by themselves to a fund which could only be expended or returned to themselves."

12. We will consider each of these conditions in detail before proceeding to the facts of the case. The first condition requires that there must be a complete identity between the contributors and participators. This was first laid down by Lord Macmillan in *Municipal Mutual Insurance Ltd. Vs Hills* [7] wherein he observed:

"The cardinal requirement is that all the contributors to the common fund must be entitled to participate in the surplus and that all the participators in the surplus must be contributors to the common fund; in other words, there must be complete identity between the contributors and the participators."

13. On this aspect of the doctrine, especially with regard to the non-members, *Halsbury's Laws of England*, 4th Edition, Reissue, Vol. 23, Paras 161 and 162 (pp. 130 and 132) states:

"Where the trade or activity is mutual, the fact that, as regards certain activities, certain members only of the association take advantage of the facilities which it offers does not affect the mutuality of the enterprise.

* * * Members' clubs are an example of a mutual undertaking; but, where a club extends facilities to non-members, to that extent the element of mutuality is wanting...."

14. *Simon's Taxes*, Vol. B, 3rd Edn., Paras B1.218 and B1. 222 (pp. 159 and

167) formulate the law on the point, thus:

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

proved to be in excess of requirements. Such a surplus is regarded as their own money and returnable to them. In order that this exempting element of mutuality should exist it is essential that the profits should be capable of coming back at some time and in some form to the persons to whom the goods were sold or the services rendered....

** * * It has been held that a company conducting a members' (and not a proprietary) club, the members of the company and of the club being identical, was not carrying on a trade or business or undertaking of a similar character for purposes of the former corporation profits tax.*

** * * A members' club is assessable, however, in respect of profits derived from affording its facilities to non-members. Thus, in Carlisle and Silloth Golf Club v. Smith, (1913) 3 K.B. 75, where a members' golf club admitted non-members to play on payment of green fees it was held that it was carrying on a business which could be isolated and defined, and the profit of which was assessable to income tax. But there is no liability in respect of profits made from members who avail themselves of the facilities provided for members." (Emphasis supplied)*

15. In short, there has to be a complete identity between the class of participators and class of contributors; the particular label or form by which the mutual association is known is of no consequence. Kanga & Palkhivala explain this concept in "The Law and Practice of Income Tax" (8th Edn. Vol. I, 1990) at p. 113 as follows:

"...The contributors to the common fund and the participators in the surplus must be an identical body. That does not mean that each member should contribute to the common fund or that each member should participate in the surplus or get back from the surplus precisely what he has paid." The Madras, Andhra Pradesh and Kerala High Courts have held that the test of mutuality does not require that the contributors to the common fund should willy-nilly distribute the surplus amongst themselves: it is enough if they have a right of disposal over the surplus, and in exercise of that right they may agree that on winding up the surplus will be transferred to a similar association or used for some charitable objects...." (Emphasis supplied)

16. British Tax Encyclopedia (I), 1962 Edn. (edited by G.S.A. Wheatcroft) at pp. 1201, dealing with "mutual trading operations", the law is stated as under:

"For this doctrine to apply it is essential that all the contributors to the common fund are entitled to participate in the surplus and that all the participators in the surplus are contributors, so that there is complete identity between contributors and participators. This means identity as a class, so that at any given moment of time the persons who are contributing are identical with the persons entitled to participate; it does not matter that the class may be diminished by persons going out of the scheme or increased by others coming in...." (Emphasis supplied)

17. In Jones Vs. South-West Lancashire Coal Owners' Association Ltd.[8], Viscount Cave LC held that "sooner or later, in meal or in malt, the whole of the associations' receipts must go back to the policy holders as a class, though not precisely in the proportions in which they have contributed to them and the association does not in any true sense make any profit out of their contributions.

18. Therefore, in the case of Royal Western India Turf Club Ltd. (supra), since the club realized money from both members and non- members, in lieu of

the same services rendered in the course of the same business, the exemption of mutuality could not be granted. This Court held thus:

"As already stated, in the instant case there is no mutual dealing between the members inter se and no putting up of a common fund for discharging the common obligations to each other undertaken by the contributors for their mutual benefit. On the contrary, we have here an incorporated company authorised to carry on an ordinary business of a race course company and that of licensed victuallers and refreshment purveyors and in fact carrying on such a business. There is no dispute that the dealings of the company with non-members take place in the ordinary course of business carried on with a view to earning profits as in any other commercial concern." (Emphasis supplied)

19. The second feature demands that the actions of the participants and contributors must be in furtherance of the mandate of the association. In the case of a club, it would be necessary to show that steps are taken in furtherance of activities that benefit the club, and in turn its members. Therefore, in *Chelmsford Club (supra)*, since the appellant provided recreational facilities exclusively to its members and their guests on "no-profit-no-loss" basis and surplus, if any, was used solely for maintenance and development of the club, the Court allowed the exception of mutuality.

20. The mandate of the club is a question of fact and can be determined from the memorandum or articles of association, rules of membership, rules of the organization, etc. However, the mandate must not be construed myopically. While in some situations, the benefits may be evident directly in the short-run, in others, they may be accruable to an organization indirectly, in the long-run. Space must be made for both such forms of interactions between the organization and its members. Therefore, as Finlay J. observed in *National Association of Local Government Officers Vs Watkins [9]*, where member of a club orders dinner and consumes it, there is no sale to him. At the same time, as in case of *Commissioner of Income Tax, Bihar Vs. Bankipur Club Ltd.[10]*, where a club makes 'surplus receipts' from the subscriptions and charges for the various conveniences paid by members, even though there is no direct benefit of the receipts to the customers, the fact that they will eventually be used in furtherance of the services of the club must be considered as a furtherance of the mandate of the club.

21. Thirdly, there must be no scope of profiteering by the contributors from a fund made by them which could only be expended or returned to themselves. The locus classicus pronouncement comes from Rowlatt, J's observations in *Thomas Vs. Richard Evans & Co. Ltd.[11]* wherein, while interpreting *Styles case (supra)*, he held that if profits are distributed to shareholders as shareholders, the principle of mutuality is not satisfied. He observed thus:

"But a company can make a profit out of its members as customers, although its range of customers is limited to its shareholders. If a railway company makes a profit by carrying its shareholders, or if a trading company, by trading with the shareholders - even if it limited to trading with them - makes a profit, that profit belongs to the shareholders, in a sense, but it belongs to them qua shareholders. It does not come back to them as purchasers or customers. It comes back to them as shareholders, upon their shares. Where all that a company does is to collect money from a certain number of people - it does not matter whether they are called members of the company, or participating policy holders - and apply it for the benefit of those same people, not as shareholders in the company, but as the people who

subscribed it, then, as I understand the New York case, there is no profit. If the people were to do the thing for themselves, there would be no profit, and the fact that they incorporate a legal entity to do it for them makes no difference, there is still no profit. This is not because the entity of the company is to be disregarded, it is because there is no profit, the money being simply collected from those people and handed back to them, not in the character of shareholders, but in the character of those who have paid it. That, as I understand it, is the effect of the decision in the New York case."

34.5. Hon'ble Supreme Court in the case of State of West Bengal and Others Vs Calcutta Club Ltd, 2008 (2) TMI 837 held that:

17. We have thus to discover for ourselves whether the doctrine of mutuality has been done away with by Article 366(29-A)(e), and whether the ratio of Young Men's Indian Association (supra) would continue to operate even after the 46th Amendment.

18. At this juncture, it is important to set out the two pillars, so to speak, on which the Young Men's Indian Association (supra) is largely based. In Graff v. Evans (1882) 8 Q.B. 373, the Grosvenor Club was incorporated in the form of a trust, the Appellant Graff acting as Manager of the club, for and on behalf of a Managing Committee, which conducted the general business of the club. Food and refreshments such as wine, beer and spirits were served to members on payment for the same. The question was whether a license was required under the Licence Act, 1872, to sell liquor by retail. In this context, the Queen's Bench Division held:

"I think the true construction of the rules is that the members were the joint owners of the general property in all the goods of the club, and that the trustees were their agents with respect to the general property in the goods, although they had other agents with respect to special properties in some of the goods. I am unable to follow the reasoning of the learned magistrate in saying that the question depends upon whether or not a profit was made upon the sale of the liquors. It appears to me immaterial whether the sum a member pays for the liquor is equal to or more or less than the cost price. The transaction does not become the more or the less a sale on that account.

It cannot be the true view that if the member pays a sum exactly equal to the cost price there is no sale within the section, but that if he pays more than the cost price there is. The section must be construed by looking at the language used, and taking a large view of the object of the legislation. The legislature have come to the conclusion that it is inadvisable that intoxicating liquors should be sold anywhere without a license. The enactment is limited to "sales" of intoxicating liquors, and only seems aimed at sales by retail traders, because the wholesale trader is not touched. The question here is, Did Graff, the manager, who supplied the liquors to Foster, effect a "sale" by retail? I think not. I think Foster was an owner of the property together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here, nor any contract with Graff with respect to the goods. Foster was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of association by which he subscribed a sum to the funds of the club, and became entitled to have ale and whisky supplied to him as a member at a certain price. I cannot conceive it possible that Graff could have sued him for the price as the price of goods sold and

delivered. There was no contract between two persons, because Foster was vendor as well as buyer. Taking the transaction to be a purchase by Foster of all the other members' shares in the goods, Foster was as much a co-owner as the vendor."

34.6. Hon'ble Supreme Court in the case of the Joint Commercial Tax Officer, Harbour Division, II-Madras Vs the Young Men's Indian Association, MANU/SC/0472/1970 (Regd.), Madras and Others, held that

11. The essential question, in the present case, is whether the supply of the various preparations by each club to its members involved a transaction of sale within the meaning of the Sale of Goods Act, 1930. The State legislature being competent to legislate only under Entry 54, List II, of the 7th Schedule to the Constitution the expression "sale of goods" bears the same meaning which it has in the aforesaid Act. Thus in spite of the definition contained in Section 2(n) read with Explanation I of the Act if there is no transfer of property from one to another there is no sale which would be exigible to tax. If the club even though a distinct legal entity is only acting as an agent for its members in matter of supply of various preparations to them no sale would be involved as the element of transfer would be completely absent. This position has been rightly accepted even in the previous decision of this Court.

34.7. Hon'ble Delhi High Court in the case of Duli Chand Vs Mahabir Parshad Trilok Chand Charitable Trust, AIR 1984 Delhi 144 held that

"16. It is well-known that a Trust is not a legal entity as such. In fact, a Trust may be defined as an obligation imposed on the ostensible owner of property to use the same for a particular object for the benefit of a named beneficiary or a charity. Thus all Trustees in law are owners of the property but they are obliged to use the same in a particular manner. If a number of trustees exist, they are joint owners of the property. It is not like a Corporation which has a legal existence of its own and therefore can appoint an agent. A Trust is not in this sense a legal entity. It is the trustees who are legal entities. Section 48 of the Indian Trusts Act, 1882 States:-

"When there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides."

35. In reply the learned Special counsel for Revenue submits that in the Calcutta Club and YMIA cases the basic issue was whether sales tax was leviable on the supplies of food, drinks and refreshments by the petitioner clubs, which were incorporated entities under the Companies Act, or otherwise, to their permanent members by treating such supplies as 'deemed sales'; the Apex Court, held that (Para 49) the doctrine of mutuality continues to apply to both incorporated and unincorporated member's clubs, that the judgment in the case of YMIA which applied this doctrine still holds

the field even after the 46th Amendment and sales tax on supply of food items made by way of or part of service or in any other manner where such supply or service, is for cash, deferred payment or other valuable consideration has no application to members' clubs; the Hon'ble Apex Court upheld the decisions of Hon'ble Jharkhand High Court and the Hon'ble Gujarat High Court (which followed the Hon'ble Jharkhand High Court decision) to the effect that service rendered by a club founded on the principle of mutuality would not attract Service Tax levy. Further, it was held that the exclusion clause in the definition of a club or association namely, "anybody established or constituted by or under any law for the time being in force" would cover even a Club registered as a Company under the Companies Act and registered co-operative societies under various State Acts as a body constituted by or under any law for the time being in force. the second part of the judgment however, relates to levy of service tax relating to such supplies and the Apex Court held, after taking note of the definition of 'club or association' under the S tax law- particularly, the exclusion thereunder- viz. "anybody established or constituted by or under any law for the time being in force"- that from 2005 onwards, the Finance Act, 1994 does not purport to levy service tax on members' clubs in the incorporated form. Learned Special Counsel submits that in the case of Venkatesh Premises Co-op Society, the issue was about certain charges collected by a society resulting in surplus, which were subsequently utilized for mutual benefit towards maintenance of the premises, repairs, infrastructure and provision of common amenities and such surplus was held to be increase in the common fund and not as business income.

35.1. Learned Special Counsel strongly urges that the decisions rendered in the context of Members' clubs ought not to be applied to the case of an ICICI VCF, whose prime purpose is one of generation of profits from monies raised from several investors, which included PSUs, PSBs, LIC and other high net-worth organizations/individuals and employees of AMC, by providing facilities to achieve capital appreciation of the investors' monetary assets; activities of a VCF are very much akin to the activities of a Bank or a

Financial Institution and bears no comparison to a Members' club, which, by its very composition, is a grouping of individuals who have chosen to be members of a particular institution like a Club for fulfilment of certain human needs, social, sporting, recreational, etc that cannot be fulfilled except in such organized collectives.

35.2. He relies on Hon'ble Supreme Court's observations in the case of Yum! Restaurants and submits that while the Clubs operate for the common benefit of the members wishing to enter into a social exchange with no commercial content, the Funds are formed only for undertaking a commercial activity with a view to realizing profits /gains for Investors as well as Investee companies; there are structural differences between a VCF and a Club or Association;

(i). in VCFs the arrangement lacks complete identity between the investor and the Funds; till the stage of generation of surplus funds (profits), the setup resembled that of mutuality; the flow of money, to and fro, would have been maintained within the closed circuit formed by the Fund and the investor, and to that extent, nobody who was not privy to this mutuality, benefited from the arrangement; however, as soon as these funds were placed in various investments (as explained in Trust Deed), the closed flow of funds between the Funds and the investor suffered from deflections due to exposure to commercial investing and profit generating operations.

(ii). during the course of their investment management business, the Funds used such contributions to advance loans to their portfolio companies/buy equity/quasi equity etc. as per Trust Deed; hence, in the present case, the Funds being engaged in commercial operations with third parties (investee portfolio companies/body corporate), ruptures the 'privity of mutuality', consequently, violating the one-to-one identity between the investor and Fund.

35.3. Learned special Counsel submits that in this case, Bangalore Club, an unincorporated Association of Persons (AOP), sought exemption from income tax on the interest earned on fixed deposits with certain banks which were

corporate members of that club on the basis of doctrine of mutuality; however, tax was paid on the interest earned on fixed deposits kept with non-member banks; the Apex Court identified three grounds for grant of tax exemption, on the principle of mutuality, namely (i). There must be a complete identity between the contributors and participators. (ii). The actions of the participators and contributors must be in furtherance of the mandate of the association. (iii) There must be no scope of profiteering by the contributors from a fund made by them which could only be expended or returned to themselves. He submits that applying the aforesaid criteria, the Court held that when the Club placed the surplus funds in the hands of corporate member banks, who used such deposits to advance loans to their clients, the funds of the mutuality were put into commercial operations with third parties outside of the mutuality; this meant that the first condition was not satisfied; secondly, while the mandate of the club was to provide facilities/service to its members, the surplus funds of the club came to be used for a totally different purpose as the said funds were placed at the disposal of third parties; this, the Court held, cannot be categorized as an activity of the club; hence, the Court ruled that the second condition was violated; though surplus funds come back to the club along with interest thereon, it does not satisfy the third requirement, because, before that happens the surplus funds gets used by third parties and the member banks also derive profits by lending the funds to their clients. He submits that the Apex Court also referred to the earlier judgment of rendered in the case of Kumbakonam Mutual Fund (Para 30); in that case, the assessee ran a banking business restricted to its shareholders, i.e. the shareholders were entitled to participate in its various recurring deposit schemes or obtain loans on security; these recurring deposits were the main source of funds for advancing loans; the Apex Court held that the position of the assessee was no different from an ordinary Bank except that it lent money and received deposits from shareholders; its income lent it the character of an income from business and hence, it was ruled that the principle of mutuality was not applicable; following the same the Hon'ble Apex Court held that the interest earned by the Club even from the member banks on the surplus funds

deposited with them had the taint of commerciality, fatal to the principle of mutuality.

35.4. Special Counsel for Revenue argues that the appellants have registered themselves under Venture Capital Fund Regulations, 1996 issued under SEBI Act, 1992; SEBI Act being a special law, the provisions should prevail over the general law i.e. Indian Trusts Act, 1992. He relies upon the judgment in the case of Paramount Biotech Industries 2004(49) SCL 77 Allahabad wherein it was ruled that: *"71. As regards the allegation that the impugned Regulations are contradictory to the Companies Act or other Acts, in our opinion the SEBI Act and the impugned regulations are special laws and will prevail over the provisions of the Companies Act and other Acts which lay down the general law. It is well settled that the special law prevails over the general law."* He submits that the Trusts dealing with Venture capital funds have to follow the Regulations in respect of maintenance of books of accounts etc. He submits that the VCF is a Trust only in form and not in content; a VCF is not mere obligation but a legal entity with its own rights and duties; it can be penalized and registration given can be suspended or cancelled.

35.5. Relying on the case of Hon'ble Madras High Court in the case of M/s Abraham Memorial Education Trust Vs Shri C. Suresh Babu, he submits that the Trust falls within the definition of the term "Person" as defined in Section 11 of IPC and Section 3(42) of General Clauses Act; applying the ratio Trust is a person as per Finance Act, 1994 as it existed between May 2006 and 31.05.2007. He submits that in the IoT and CA of all Seven India Advantage Funds- I to VII and ICICI Strategic Investment Fund, "Person" means any natural or juridical person or any body of persons corporate or incorporate and in the case of ICICI Equity Fund and ICICI Emerging Sector Fund, "Person" means any natural or juridical person or any body of persons corporate or incorporate and in the case of Econet Fund, the definition is wide enough to cover Trusts. Learned Counsel submits that in documents of the appellants VCFs have regarded Trust as person. He also submits that the appellants themselves have obtained Service Tax Registration for banking

and financial services; they availed CENVAT credit of Rs.17.04 crores during the period 04/2015 to 09/2015; the Fund has a bank account and prepares profit and loss accounts and registers themselves with SEBI etc; providers of service tax, CAs and legal consultants to the Fund, have raised invoices on them including service tax; Ministry of Corporate Affairs vide Circular No.37/2014 dated 14th October, 2014 clarified that Trusts are not barred to hold a partnership in an LLP in its name.

35.6. Relying on Hon'ble Supreme Court in the case of Yum! Restaurants (marketing) Pvt. Ltd. Vs commissioner of Income Tax, he submits that the assessee therein was a Section 25 Company, set up for carrying on advertising, marketing and promotion for brands owned by its parent company; assessee received contributions from members i.e franchisees as well as two non-members; non-members did not get any monetary benefit from the surplus but only contributed some sums; Hon'ble Court has observed that (Para 14) "The doctrine of mutuality traces its origin from the basic principle that a man cannot engage into a business with himself for that reason, it is deemed in law that if the identity of the seller and the buyer, or the vendor and the consumer or the contributor and a participator is marked by oneness then a profit motive cannot be attached to such a venture. In other words, the basic requirement is the absence of profit for claiming mutuality as in the case of Bangalore Club The existence of profit-making objective as shown in the IOT, IMA, CA, PPM and established by revenue neutralizes the claim of mutuality in this appeal. He submits that Apex Court (in Para 18) highlights the need to go beyond the periphery of the concern and undertake an examination akin to the lifting of the veil in order to discern the real nature thereof; this is exactly what the Revenue has sought to do in highlighting the lack of completeness of identity in the wake of the non-equal metrics of contribution and profit sharing by the Contributors of Class A and Class B units and has also lifted the veil on completely different profit sharing formulae between the contributors with the Class B units receiving exponential returns. He submits that the Hon'ble Court underlines (Para 17) the need for class of members (Investors, in this appeal) to stay intact as the transaction progresses from the stage of

contributions to that or returns/surplus; in the instant case Revenue has clearly established the deviations from equality in profit sharing among the Class A and Class C Unit holders in this case as the transaction progresses from investment stage to achieving different benchmarks of returns, thus establishing the non-existence of mutuality between the Investors themselves and then between the Investors and the Fund at large. He submits that further the Apex Court (in Para 24) states that "The mutuality and non-profiteering character of a concern are to be determined in light of its actual working structure and the factum of corporation or incorporation or the form in which it is clothed is immaterial. It is therefore imperative to examine the actual functional framework of the assessee company". This is imperative to this appeal; Revenue's contention that the assessed entity, by whatever name it calls itself (i.e. a Trust or a Company) or seeks refuge in, is a commercial "juristic/ juridical person" carrying on asset management activities for the Investors for profiteering, delivering taxable services either by itself or through its delegates, retaining a portion of the surplus money, otherwise distributable to investors, is not different from the view of the Hon'ble Supreme Court in this judgment.

35.7. Replying to the reliance on the Judgment rendered by the Hon'ble SC in the case of GSFC vs. CCE, Special Counsel submits that Court Ruled that the setting up of the common facility at the GSFC premises with contribution from GACL and GSFC and the sharing of expenses of handling did not amount to providing the service of 'Storage and Warehousing' under the Service tax law by GSFC to GACL; while the GSFC case concerned mere sharing of expenses, the present cases involves receiving of monies and deploying the same in VCF activity, which is a typical activity of a financial institution; there is no joint venture between contributors; the facts of this case stand no comparison with the facts of the present appeals.

35.8. Learned special Counsel for summarises the following factors noticed in the facts of present case clearly point to absence of mutuality:

(i) The flow of money, to and fro, was not maintained within the closed circuit formed by the Fund and the investor; after contributions were placed in various investments, the closed flow of funds between the Fund and the

investor suffered from deflections due to exposure to commercial investing and profit generating operations. This ruptured the privity of mutuality.

(ii) The contributions were expended on third parties, who benefited from the VCF activity of the Funds without any contribution to the Trust funds, contrary to the principle that any surplus over contributions should either be expended on the contributors or returned to them; importantly, the commonality of identity between contributors and participators got impaired when the third-party investee companies derived benefits without being contributors at the first instance.

(iii) Though the investors received capital appreciation on their investment, and also received a surplus, the special class of investors with a very small contribution got disproportionately large benefits purportedly as 'income from investment' though the payment was in the nature of performance fee.

(iv) The entire activity of the ICICI VCFs was aimed at generating profits and gains which flowed back to the Company which sponsored the trusts. The activity was undoubtedly a commercial activity, which is, as observed by the Hon'ble SC in the Bangalore Club decision "fatal to the principle of mutuality".

36. In reply, learned Senior Counsel for the appellants submits that obtaining Service Tax Registration cannot lead to fastening of service tax liability on the contributions received as there is no service provider-service recipient relationship; obtaining registration in compliance to other laws should not be interpreted to mean that the appellants are a legal entity; compliance to other laws does not change the fact that appellants are amorphous entity not qualifying to be a taxable person under Service Tax Law; the observation that as per the Circular issued by Ministry of Corporate Affairs, Trust can become a partner in an LLP and therefore is a legal entity is incorrect as the Trustee (not the Trust) can become a partner in LLP; therefore it furthers the appellant's stand that a Trust is incapable of carrying out any activity on its own. He submits that the conclusion drawn by the Department on the basis of the definition in IoT are incorrect as the services provided by the appellant to the contributors are covered under the principle of mutuality; the Trust satisfies the conditions laid down by the

Hon'ble Supreme Court in the case of Bangalore Club; the formulation of KYC policy and mandated by PMLA cannot be used against the appellants to establish a deemed service provider-recipient relationship; the amounts retained by the Trust are towards the expenses incurred on behalf of the contributors and not towards any service fee; Service Tax Circular No.94/5/2007-ST dated 15th May 2007 clarified that service tax will not apply to amounts retained by mutual funds towards expenses collected as entry load and exit load. Regarding the alleged partiality towards AMC, learned Senior Counsel submits that impartiality is not equality of treatment but means that a Trustee's treatment of beneficiaries or conduct in administering a Trust is not to be influenced by Trustee's personal favoritism; distribution of surplus was done in the manner laid down in the private placement memorandum which was circulated well before to the contributors.

37. Before discussing the merits of rival contentions, we find that it is expedient go through the scheme of the Trust. Ongoing through the Articles of IoT dated 16th October 2000, the following are manifest:

- As per Article-1, the objective of the Trust will be to achieve long-term capital appreciation by providing financial and other assistance to such persons as is permitted under the Regulations.
- As per the definitions in 1.1, contributor/beneficiary means a subscriber who becomes registered holder of a unit issued any scheme and subscriber means any person who is eligible to hold a unit in the Trust and who has made a commitment.
- As per 3.1, the Trust fund shall be held by the Trustee upon Trust and for the purposes herein specified or declared by the instrument and managed in accordance with the instrument.
- As per Article 6, the object of the Trust shall be to carry on the activity of a Venture Capital Fund
- As per Article 10, the Trust Fund shall be under the control of the Trustee and the Trustee shall, in its absolute discretion inter alia determine: (i) to what extent the Trust Fund is to be applied to all or any of the objects of the Trust; (ii) to what extent any part of the

income of the Trust Fund is to be accumulated for any specific object; and (iii) to what extent the Income of the Trust Fund is to be distributed to the Contributors.

- As per Article 12.1, distribution to contributors or subscribers of any scheme shall be either in the form of dividend or by way of redemption of units or otherwise as provided in the private placement memorandum and/or scheme document. The Trustee shall decide the appropriate percentage of profits earned to be distributed in any given year to the contributors.
- Article 16 lays down the duties of the Trustee which *inter alia* include to ensure that the AMC and custodian duly fulfills the functions assign to them from time to time; to take reasonable care, to ensure the funds are managed by the AMC in accordance with the instrument; to supervise the investments of the Trust Fund.
- In terms of 18.1, Immediately after executing this Instrument, the Trustee shall enter into the Investment Management Agreement. Thereafter, the Trust Fund shall be managed by the AMC pursuant to the Investment Management Agreement. The Trustee may, subject to Article 16, delegate to the AMC such duties of the Trustee, and also grant to the AMC such powers of the Trustee, under this instrument as per specified in the Investment Management Agreement.
- In terms of Article 20, the Trustee shall have the power to make such results out of income or capital as the Trustee deems proper for expenses, taxes and other liabilities.
- In terms of Article 32, The contributors of the Trust shall have no right to make decisions with regard to the Trust, save and except to the extent provided in the Contribution Agreement; the contributors shall not participate or take part in the control of the Trust's affairs and shall have no right or authority to act for, or bind, the Trust save and except to the extent provided in the Contribution Agreement; in no event shall a Contributor have or acquire any rights against the Trustee except as expressly conferred on such Contributor hereby and in the Contribution Agreement, nor shall the Trustee be bound to

make payment to any Contributors, except out of funds held by it for that purpose under the provisions of this Instrument; notwithstanding anything contained in this Instrument, the rights of the Subscriber's shall be as specified in the Contribution Agreement.

- As per Article 33.2, during mandatory redemption, the appellants in its absolute and sole discretion based on among other things market data available at the time of valuation, will decide upon the terms and conditions of redemption after deduction of all expenses of the Trust/Fund including the performance, on a *pro rata* basis up to the date of redemption; the contributor whose units are subject to redemption will not gain on the gross realization made by liquidation of assets created out of his contribution; it will be net of expenses of the fund including performance

37.1. A typical Investment Management Agreement has, *inter alia* provides as follows:

- In terms of Article 3.1, the AMC shall exercise the powers and privileges subject to the superintendence, control and direction of the Trustees.
- In terms of Article 11, the AMC shall be entitled to remuneration as stated in the relevant private placement memorandum and/or scheme document; AMC shall be entitled to reimbursement of all costs and expenses incurred by it on way of the Trust.

37.2. We turn our attention now as to how the issue was treated in the SCN as well as the Order-in-Original (the appeal No. ST/2900/2012). We are given to understand that barring minor variations all the SCNs and OIOs are similar in lines. The SCN alleges that going by the facts of the case, the appellant floats schemes and collects funds from contributors/ Subscribers/ Investors and facilitates them to earn profits/gains/income out of acquisition/ holding/ disposal of portfolio investments of the Trust which are controlled by the Trustees for contributors/ Subscribers/ Investors; the mere title given as expenses to the amount withheld from contributors/ Subscribers/ Investors entitled income cannot take away the fact that a

consideration is being charged by the appellant on annual basis from the gains out of the portfolio investments; the payment of service tax by the entities like AMC, Custodian, R&T Agent, Brokers, selling agents employed by the assessee through their Trustee (Power of Attorney Holders of the Trust) does not absolve the assessee from being a principal Service provider to the contributors/ Subscribers/ Investors and also does not waive off of its statutory liability to pay Service Tax on the Assets Management Services it has provided to the contributors/ Subscribers/ Investors. The SCN alleges that Venture Capital Fund is a pooled investment vehicle where various persons pool their money for the purpose of taking investments in companies or assets. The OIO contending the claim of the appellants that the Fund is neither a corporate entity nor does it have a personality distinct from Contributors/ Subscribers/ Investors, records that the arguments of the appellants is not acceptable as per the facts of the case which indicate that the main object of the assess is capital appreciation through the investment of contributors/ Subscribers/ Investors in the schemes devised by the appellants to gain profits/income; the motive of the fund is purely commercial; the Fund has independent identity and distinct personality of its own which is evident from the fact that the Fund is established as a Trust by ICICI Ltd. and is registered with SEBI; the Fund made investment in various companies; only a legal obligation with respect of ownership of property rests with the Fund is not true as the appellant is involved in the activity of capital invested by Contributors/ Subscribers/ Investors; the Fund also collects KYC Forms from the Contributors; therefore the Fund acts as a commercial concern.

37.3. Ongoing the rival submissions and the facts of the case, we find that a Trust are essentially mutual funds engaged in Portfolio management etc. It could be seen that though these mutual funds are named Trusts, the essential function of the Trust was of commercial concerns that is maximizing the profit. It is clearly stated in the IoT that the objective of the Trust is:

"ICICI desires to provide financial and other assistance by setting up a venture capital fund. The objective of the Trust (as defined herein below)

will be to achieve long term capital appreciation by providing financial and other assistance to such persons as is permitted under the applicable regulations (including SEBI Regulations)”

37.4. Similarly, it is mentioned clearly in various places that the Trust Fund shall be managed by the Trust and the object of the Trust is to carry on the activity of a Venture Capital Fund. It is interesting to notice that to enable the funds, to distribute the dividends and other amounts payable on or in respect of Units, a mechanism in the form of Private Placement Memorandum and/or Scheme Document are created. Thus, the profit motive of the Trust is evident. All these Trusts have registered themselves under VCF Regulations, 1996 issued under SEBI Act, 1992. We find that in terms of Regulation 2(m), VCF means a fund established in the form of a Trust or a Company including a body corporate registered under VCF Regulations. As the Trusts are treated as juridical persons for the purposes of SEBI Regulations, we do not find any reason as to why they should not be treated so for the purpose of taxation. Taxation Law being a specific legislation just as the SEBI Act, 1992 should prevail over the general Trust Act and the definition given thereof. As submitted by learned Special Counsel for the Respondents, we find that Hon'ble High Court of Allahabad in the case of Paramount Biotech Industries (supra) has held that:

"71. As regards the allegation that the impugned Regulations are contradictory to the Companies Act or other Acts, in our opinion the SEBI Act and the impugned regulations are special laws and will prevail over the provisions of the Companies Act and other Acts which lay down the general law. It is well settled that the special law prevails over the general law."

37.5. We find that in Paramount Bio-Tech Industries Vs UOI, Allahabad High Court {2004 120 Comp Cas 18 All, (2004) 2 Comp LJ 446 All, 2004 49 SCL 77 All} observes that

91. [In R.K. Garg v. Union of India](#) [1998] 4 SCC 675 (690) a Constitution Bench of the Supreme Court observed:

"8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It has been said by no less a person than Holmes, J. that the Legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing

with economic matters, where, having regard to the nature of the problems required to be dealt with greater play in the joints has to be allowed to the Legislature. The Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in *Morey v. Doud* 354 US 457 where Frankfurter, J. said in his inimitable style:

"In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The Legislature after all has the affirmative responsibility. The Courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the Judges have been overruled by events all these show that self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability." (p. 690)

37.6. In the case of *Yum! Restaurants (Marketing) Private Ltd. Vs. Commissioner of Income Tax, Delhi*, [Civil Appeal No. 2847 of 2010], Hon'ble apex Court observes that

18. Coterminous with the requirement of common identity, as discussed above, the law also contemplates a completeness of identity between the contributors and participators. The theory of completeness of identity presupposes the contributors and participators to be two separate classes, but there is oneness or equality in the matter of sharing of surplus/profits.

This is to ensure that there is no interference of any alien commercial entity in the transaction. With the interference of any alien entity, the idea of conducting business with oneself is defeated and any profits or gains accruing therefrom become subject to tax liability. This proposition of law is succinctly predicated in *British Tax Encyclopaedia*⁷, which reads thus:

"For this doctrine to apply it is essential that all the contributors to the common fund are entitled to participate in the surplus and that all the participators in the surplus are contributors, so that there is complete identity between contributors and participators. This means identity as a class, so that at any given moment of time the persons who are contributing are identical with the persons entitled to participate; it does not matter that the class may be diminished by persons going out of the scheme or increased by others coming in"

It is pertinent to note that in order to determine the breach in mutuality, the court is well within its powers to go beyond the periphery of the concern and undertake an examination akin to the lifting of the veil in order to discern the real nature thereof.

37.7. A conjoint perusal of the records, facts of the case with above judicial pronouncements, would lead us to the conclusion that the impugned trusts have violated the principles of mutuality by concerning themselves in commercial activities and by using the discretionary powers to benefit a certain class of investors or nominees or employees or subsidiaries. They can no longer be treated as trusts for the purposes of taxation statutes at least. We find that the funds have been paying huge amounts to the AMCs in the form of Performance Fee and carry interest to the AMCs or their nominees. Thus, as far as the distribution of dividends/ profit is concerned, the Trusts made provisions to act in a manner which is beyond the interest of the Subscribers/ Investors/ Contributors. The funds, as can be seen from the records of the case, have reserved to themselves certain powers to utilize the dividends or profits in a manner which could benefit ultimately the entities which are not Subscribers/ Investors/ Contributors. This Act in itself negates the principle of mutuality of interest. Therefore, we come to a conclusion that though the funds are named as Trusts, by not adhering to the principle of mutuality of interest and by carrying out commercial activities have failed a test laid down by Hon'ble Supreme Court in the case of Bangalore Club (supra). We also find that those appellants have relied upon various cases, mostly drawing the analogy of the clubs to the funds. We find that there is basic difference between these funds and clubs. The trusts as seen above have been initiated with a profit motive, and the activities are akin to those of a Bank or financial Institution. The clubs on the other hand have no or minimal commercial interest and basically are formed to share facilities, which would normally be inaccessible or unaffordable at an individual level. We find that the learned special counsel has rightly submitted that VCFs bear no comparison to members of club, which, by its very incorporation, is a grouping of individuals who have chosen to be members of a particular institution or club for fulfilment of certain human needs social, sporting, recreational etc that cannot be fulfilled except in such organised collectives. Moreover, if we consider the understanding these VCFs in common parlance, it would be clear that no common man considers these VCFs to be like clubs as such not to talk of Trusts as o common. Such

common understanding cannot be wished away. Learned Senior Counsel for the appellants relied upon various case law to argue that the trusts are amorphous and are governed by the principle of mutuality of interest. As per our discussion above and the case records we find that these trusts are VCFs and are not Trusts as such to draw the analogy of different cases cited. We find that each case rests on its own facts and comparison of cases and following the ratio when facts are not comparable would lead to bizarre results. We find that Hon'ble Supreme court in the case of Al Noori Tobacco Products (supra) observed that

13. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

Whether the appellants Rendered Taxable Services

38. Coming to the question as to whether the services rendered by the funds to investors within the definition of banking and other financial services, learned Senior Counsel for the appellants submits that in terms of Section 67A of Finance Act, 1994 consideration for the service tax purposes should be an amount payable for the services and in the instant case, the same is absent; even if the amounts retained by the Trustee and paid to Management Investment Company is understood to be a reimbursement, there was no provision or scope for levy of service tax on the expenses reimbursed during the period in view of the Hon'ble Delhi High Court's decision in the case of Intercontinental Consultants also affirmed by Hon'ble Supreme Court. He also submits that Trust does not have a legal entity and therefore cannot be treated as a "Person" or "commercial concern" or "body corporate" liable to service tax. He submits that while determining the existence of a service provider-recipient relationship, the intention of the parties to contract, gathered from the documents executed by such parties is of utmost importance. He further submits that scope of the definition of "Banking and Other Financial Services" does not cover facilitation services in relation to investments; there can be no demand on notional expenses in the form of accounting entries/provisions/ loss on sale of investments.

38.1. Regarding the amounts considered for calculating service tax in the impugned order, learned Senior Counsel for the appellants submits that the entire demand in relation to carry income pertaining to Class-B/C unit is incorrect; the contention of the Department that the carried interest paid as return on investments (Class-B/C units) to the AMC and its affiliates is a performance fee is incorrect; carried interest is not applicable in case of all the funds; return on investment in case of Class-B/C unit holders was made in respect of India Advantage Fund- I & II, ICICI Econet Internet and Technology Fund and ICICI Emerging Sectors Fund; such carried interest has been charged to income tax in the hands of Class-B/C holders; it cannot be assumed to be an expense incurred by the Funds and cannot construe as value of taxable services. He submits that in case of ICICI Strategic Investment Fund, there are no Class-B/C unit holders; however, the Department has treated Class-A distributions and raised service tax of Rs.17,33,13,728/-. Learned Special Counsel further submits that carry interest cannot be confused with performance fee; wherever performance fee has been paid, the recipient AMC has discharged service tax liability. He further submits that an amount of Rs. 6.80 crores has been inadvertently shown as performance fee under Expenditure Head in Revenue account for the financial year 2006-07; it is in the nature of return on investments. He further submits that in case of ICICI Equity Funds during the period under dispute, a sum of Rs.21.34 crores was paid as performance fee to the AMC who discharged service tax on the same; similarly amounts alleged to be performance fee during the years 2007-08 and 2008-09 was in the nature of income from investment in Venture Capital Fund and is liable for service tax.

38.2. Learned Senior Counsel for the appellants further submits that carry interest is paid to Class-B/C unit holders in return of the investment made by them; the return on the investment is called carry interest and the same cannot be equated to performance fee. Regarding the allegation that the return is disproportionate to investment, learned Special Counsel submits that it is based on prior disclosure made in the PPF and IoT; it is paid after first return of capital to Class-A unit holders and after payment of preferred rate of interest to Class-A unit holders (15%); thereafter 20% of the balance

remaining is distributed to Class-B/C holders and finally remained is again distributed in the ratio of 80:20 to Class-A and Class-B/C holders. He submits that since carry interest is part of the profit received by Class-B/C holders, service tax is not leviable.

39. On the other hand, learned Special Counsel for the Department submits that the questions that would arise are as to whether the Funds can be regarded as "commercial concern" for the period 04/2005 to 04/2006 and 06/2007 to 03/2012; be regarded as "Person" during the period 05/2006 to 05/2007 and whether the activities of the Fund fall under "asset management including portfolio management, he submits that the expression "commercial concern" has not been defined in the Finance Act, 1994; therefore the term should be understood as per common parlance; the term "commercial concern" would in general denote an entity or a juridical person like a company or organisation engaged in commercial activities like sale, purchase or providing services for a consideration and having a profit motive; in general charitable institutions, entities which are not engaged in commercial activities in a commercial manner are not to be treated as "commercial concern"; therefore the appellant is rightly considered a "commercial concern". He submits that a conjoint reading of the IOT, IMA, CA and the PPM shows that the activities of the Fund reflect a systematic process and an organized and regular business of accepting monies from investors, using the same for making profits/ gains by re-investing in portfolios or extending loans and distributing the proceeds received by way of dividends or interest on loans among investors and retaining some portion of the same in consideration of the facility of asset management services provided to the investors. The Fund is fully responsible for holding, and using for gain, the assets of the investors during the lifetime of the Scheme, for financing which the funds have been contributed by the latter. He submits that similarly, Fund can be regarded as a "Person" (for the period 01.05.2006 to 31.05.2007) though the same is not defined in the Finance Act, 1994. The adjudicating authority has rightly adopted the definition as per Section 3(42) of General Clauses Act, 1897; according to the said Act, person shall include any company or association or

body of individual whether incorporated or not; being an inclusive definition, the subject funds would be covered within the scope of the expression "any other person". He further submits that w.e.f. 01.07.2012 in terms of Section 65B (37) of Finance Act, 1994 "Person" includes ----(x) every artificial juridical person, not falling within any of the proceedings clauses; the activities of the Funds clearly get covered under the description Asset Management, including Portfolio Management, All Forms Of Fund Management, Pension Fund Management, Custodial, Depository and Trust Service.

40. We find that it will be beneficial to note the provisions of Service Tax Law. The definition of Banking and other financial services during the period of dispute were as follows:

Section 65(12) of the Finance Act, 1994 ("the Act") defined "banking and other financial services as follows:

- Definition from April 1,2005 to April 30,2006

"Banking and other financial services" means

(a) the following services provided by a banking company or a financial institution including a non-banking financial company or any other body corporate or **commercial concern**, namely:-

.....

(v) asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services, but does not include cash management"

- Definition from May 1,2006 to May 31,2007

"banking and other financial services" means

(a) the following services provided by a banking company or a financial institution including a non-banking financial company or any other body corporate or **any other person**, namely:-

.....

(v) asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services, but does not include cash management"

- Definition from June 1, 2007 onwards

"Banking and other financial services" means

(a) the following services provided by a banking company or a financial institution including a non-banking financial company or any other body corporate or **commercial concern**, namely:-

(v) asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services, but does not include cash management"

40.1. We find that the records of the case make it clear that the Trusts carried out activity of Venture Capital Funds. They managed the amounts invested by Contributors/ Subscribers/ Investors. They had discretion over the distribution of dividend/ profit to entities other than subscribers. They received the amounts in the form of dividend/ profit and held the same in Escrow accounts to be distributed later to the AMCs and their nominees (Class-C Investors) at their discretion. We find that learned Senior Counsel for the appellants has vehemently argued that it is the AMCs who were managing the portfolios/ funds on behalf of the Trusts and the said AMCs are paying service tax as applicable. Notwithstanding this argument, we find that in a chain of commercial activity different entities perform their functions. As an example, general public may invest their money in the banks, which in turn may invest certain amounts in other entities or concerns for further managing the funds. The argument that the banks need not pay service tax as the entities where they are further investing their monies are paying service tax. In a typical commercial activity various entity in the chain of activity needs to pay service tax and the subsequent entity may however, avail the credit of tax paid by the preceding entity. As long as the Trusts are performing the taxable services, they are liable to pay service tax. It has been demonstrated above by the learned Special Counsel for the Department and also found by us that the funds are managing the money invested by Subscribers/ Contributors/ Investors.

40.2. We find that Shri Jayathertha, Senior Vice-President, Finance, ICICI Venture Funds Company Ltd. in his statements accepted that the Trustee shall manage such Trust Fund/ property held by the Trustee on behalf of the Trust in accordance with the indenture of Trust instrument for the benefit of contributors; the responsibilities/ duties of fund management towards contributors primarily relies with the Trustees on behalf of the Trust in line with the indenture of Trust instrument until subsequently delegated to the Asset Management Company by virtue of Investment Management Agreement and that the fund is engaged in Asset Management. Therefore, there is no doubt in our minds that the Trust is managing the funds of the contributors and thereby are rendering a service to the contributors and the

said service squarely falls under Asset Management as applicable under Banking and Other Financial Service. Regarding the remuneration for the service, we find that the remuneration is not charged to the contributors but is retained from the amounts that are duly distributable to Subscribers/ Contributors/ Investors. It was argued by the learned Senior Counsel for the appellants that three distinct elements i.e. Service Provider, Service Recipient and Consideration are absent in the instant case. As found above, the Trusts are not amorphous entities and the mutuality of interest is no longer applicable in the instant case; Funds are rendering the service of Portfolio Management or Asset Management under BOFS to the Subscribers/ Contributors/ Investors and the consideration is in the form of withholding the dividends/ profits distributable Subscribers/ Contributors/ Investors.

40.3. We find that out of the eleven funds, for the ten funds, the settlor and the AMC is same i.e. ICICI Venture Ltd. (IVEN) and the Trustee was Western India Trustee and Executor Company Ltd. or ICICI Trusteeship Company Ltd. In the Econet Fund, the settlor was ICICI Bank Ltd. and Trustee was ICICI Trusteeship Services Ltd and ICICI Venture Ltd was the AMC. Learned Special Counsel for the Department argued the case saying that different entities of ICICI Ltd were used as a camouflage to avoid payment of taxes and now the corporate veil has been pierced. We find that we are not concerned with the same and in the case before us is limited to whether or not the Trusts in question were rendering taxable services to the Subscribers/ Contributors/ Investors. In view of our discussion above, the answer is in affirmative.

40.4. In view of the above discussion, it is evident that the appellant trusts have performed commercial operations/functions i.e. an economic activity. The concept of trust is only a façade. Even otherwise, Hon'ble High Court of Judicature at Madras in Crl. OP Nos.12630 & 12661 of 2012 and M.P.Nos.1, 1, 2 & 2 of 2012 observes that trust is juridical person. It held that

27. From the foregoing discussions, it is manifestly clear that the moment a Trust (organisation) is formed with an obligation attached to the same, an artificial person is born and because such artificial person is recognised by law, conferring upon such artificial person right to own property, to enjoy certain other rights and also to discharge certain obligations, it attains the status of a

juristic person. Thus, a Trust whether private or public, is a juristic person who can sue/be sued or prosecute/be prosecuted.

40.5. We find that learned special counsel for the Revenue submits that terms like commercial concern etc are not defined in Service Tax Law. Hence, their understanding in the common parlance is to be taken. We find that not only the definition of the terms but the activities themselves of the trusts should be understood in common parlance. In common parlance, these funds are to be understood as Venture Capital Funds (VCFs). Common parlance wisdom has been stressed upon by various courts from time to time. In *Mukesh Kumar Aggarwal & Co Vs State of Madhya Pradesh* 2004 (178) E.L.T. 3 (S.C) Hon'ble Supreme Court held that

4. In a taxing statute words which are not technical expressions or words of art, but are words of everyday use, must be understood and given a meaning, not in their technical or scientific sense, but in a sense as understood in common parlance i.e. "that sense which people conversant with the subject-matter with which the statute is dealing, would attribute to it". Such words must be understood in their 'popular sense'. The particular terms used by the legislature in the denomination of articles are to be understood according to the common, commercial understanding of those terms used and not in their scientific and technical sense "for the legislature does not suppose our merchants to be naturalists or geologists or botanists".

We find that as per various cases cited above, have been held to be juridical persons as far as taxation is concerned. For this reason, there is nothing illegal or illogical in holding that trusts do exist and function as juridical persons as far as they are rendering services exigible to Tax as per the provisions of Finance Act, 1994 notwithstanding the treatment meted out to them under different statutes. We have no doubt whatsoever as regards the nature of the impugned trusts and the nature of services rendered by them to the subscribers.

40.6. we find that the Appellants have relied on Circulars No. 94/5/2007-Service Tax dated 15.05.2007 and Circular No. 96/7/2007-ST dated 23.08.2007 which is claimed to have clarified that the entry load and exit load charged by mutual fund being for management of asset or not liable to service tax. We find that the Circular dated 15.05.2007 categorises the expenses of mutual funds as (a) Initial issue expenses and (b). Recurring expenses; Initial expenses are incurred on initial brochures, SEBI approvals,

advertisement, registrars, preparation of certificate, postage, distribution and broker, etc and recurring expenses are incurred on fund management, fee to Asset Management Company, brokerage, trustees fee, expenses on account of stationery, postages, advertisements, listing on exchanges, publishing of Net Asset Value (NAV), distribution charges, custodian charges, audit fee ,etc. We find merit in Revenue contention that while the initial issue expenses are exempt, recurring expenses were not. We find that in the instant case, the payments made by the appellant are not in the nature of entry and exit expenses. These are huge amounts retained and distributed to the AMCs or their nominees subject to achieving certain levels of performance thus it is a variable expenditure and cannot be equated to entry or exit load. Moreover, we find that the appellant's Trusts are managing Venture Capital Fund and not the mutual funds therefore the Circular is not applicable.

40.7. We find that the appellants have also relied upon Board's Circular No. 86/04/06 stating that they are not a commercial concern. It can be seen from the said circular that the CBEC has clarified that it is not a single activity but the totality of activities and the objectives of its existence that determines the commercial nature of an institution as an 'entity' or a 'concern'. In the case at hand, it is seen that the totality of the activities and objective of the assessee is to effect capital appreciation of the investments of the consumers/ subscribers/ investors who are mentioned as customers in terms of their policies. Further, schemes are devised to generate income/ profit/ gains to the benefit of the consumer/ subscribers/ investors. Therefore, the said Circular is not applicable in the instant case.

Quantification of Demand

41. Coming to the issue of quantum of consideration and quantification of tax, the senior counsel submits that no consideration under the alleged activities charged by the Appellants from the Contributors; as per Explanation (a) to section 67 of the Finance Act, consideration, for service tax purposes, should be an amount payable for provision of services. As per Section 2(d) of the Indian Contract Act, 1872, "*When at the desire of the*

promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing, something, such act or abstinence or promise is called a consideration for the promise". As per Black's Law Dictionary "Consideration is not to be confounded with motive, consideration means something which is of value in the eye of the law, moving from the plaintiff, either of benefit to the plaintiff or of detriment to the defendant."

41.1. He submits that the carried interest paid as return on investments (Class B/C units) to the AMC or its affiliates is a performance fee paid to the AMC; it was alleged that in the case the returns on Class B/C units had been paid in form of performance fee, the same would have been reflected as part of expense in the hands of the Fund(s). Learned senior counsel submits that this contention is not applicable in case of all the Fund(s) as its factually incorrect; return on investment in case of class B/C unit holders is made in respect of India Advantage Fund – I & II; ICICI Econet Internet and Technology Fund and ICICI Emerging Sectors Fund; the carried interest in case of above-mentioned Appellants is distributed to Class B/ C unit holders as return on investments made by such unit holders; such carried interest paid the Appellants has been put to income tax in the hands of Class B/C unit holders; assuming but not admitting that such return on Class B/C units is an expense incurred by the Fund(s), such expense incurred by the Appellants cannot be construe as value of taxable services as these are neither received nor retained by the Funds; out of the total demand of INR 321 Crores, an amount of INR 54.76 Crores relates to the service tax demanded on Carry Interest paid to Class B/C unit holders; in case of one of the fund (by the name of ICICI Strategic Investment Fund), there are no Class B/C unit holders and the fund is having only one class of units, i.e. Class A; however, the Respondent has treated Class A distributions as Class B/ C distributions and raised service tax demand thereon; an amount of INR 1,40,22,14,630 paid to Class A unit holders has been erroneously treated as an amount distributed to Class B/ C unit holders service tax of INR

17,33,13,728 should anyway be excluded from total service tax demand in the instant appeals; Carry Interest cannot be confused with performance fee.

41.2. He submits that the amounts considered in the Impugned Order includes notional expenses relating to accounting entries "loss on sale of investments", "accrued interest considered doubtful", "loss on revaluation of assets", etc; these amounts are not actual expenses but are only accounting adjustments which are required to be made to reflect the true and correct financial status of the Appellants as mandated under accounting principles; these cannot be treated as amounts "retained" by the Appellants from the Contributors for providing any "services" to the Contributors; out of the total amount of INR 28,51,49,62,689 treated as "consideration" received by the Appellants in the Impugned Orders, an amount of INR 12,37,36,99,793, is towards these accounting entries, which should clearly be excluded from the amounts under dispute, as these cannot be treated as amounts "retained" by the Appellants for providing "services" to the Contributors; unless there is an actual flow of consideration for an agreed service, no service tax liability can arise.

41.3. The learned Senior Counsel submits that Revenue alleges that the Appellants retain amounts distributable to class B/ C unit holders; it was submitted in their written arguments and rejoinders that the carried interest paid as return on investments (Class B/C units) to the AMC or its affiliates is a performance fee paid to the AMC ; it was alleged that in the case the returns on Class B/C units had been paid in form of performance fee, the same would have been reflected as part of expense in the hands of the Fund(s). Learned senior counsel submits that this contention is not applicable in case of all the Fund(s) as its factually incorrect; return on investment in case of class B/C unit holders is made in respect of India Advantage Fund – I & II; ICICI Econet Internet and Technology Fund and ICICI Emerging Sectors Fund; the carried interest in case of above-mentioned Appellants is distributed to Class B/ C unit holders as return on investments made by such unit holders; such carried interest paid the

Appellants has been put to income tax in the hands of Class B/C unit holders; assuming but not admitting that such return on Class B/C units is an expense incurred by the Fund(s), such expense incurred by the Appellants cannot be construed as value of taxable services as these are neither received nor retained by the Funds; out of the total demand of INR 321 Crores, an amount of INR 54.76 Crores relates to the service tax demanded on Carry Interest paid to Class B/C unit holders; in case of one of the fund (by the name of ICICI Strategic Investment Fund), there are no Class B/C unit holders and the fund is having only one class of units, i.e. Class A; however, the Respondent has treated Class A distributions as Class B/ C distributions and raised service tax demand thereon; an amount of INR 1,40,22,14,630 paid to Class A unit holders has been erroneously treated as an amount distributed to Class B/ C unit holders service tax of INR 17,33,13,728 should anyway be excluded from total service tax demand in the instant appeals; Carry Interest cannot be confused with performance fee.

41.4.The learned Senior Counsel submits that wherever performance fee has been paid, service tax has been also paid by the recipient viz., AMC; in case of ICICI Emerging Sectors Fund, the amount of INR 6.80 Crores has been inadvertently shown as performance fee, whereas by nature, the same is distributions made to another Class B unit holder (and not AMC); since, the same is in nature of return on investments, service tax has been not been paid on the same; in case of ICICI Equity Fund, during the period under dispute, an amount INR 21.34 Crores has been paid as performance fee to the AMC, on which AMC discharged service tax; income from investments has been inadvertently shown as performance fee in the AMC's director's report for FY 2007-08 in respect of India Advantage Fund - Series 1 (IAF Series 1); it was shown that they earned Rs. 578.6 million as performance fee; subsequently it was rectified in the AMC's director's report for financial year 2008-09. He submits that as can be seen from above, the amount alleged by the Respondent to be in nature of performance fee, is in fact, in the nature of income from investment in venture capital fund, which is not liable to service tax.

41.5. The learned Senior Counsel submits that Carry Interest is paid to Class B/C unit holders in return of the investment made by them; it is only in case of those Funds where the AMC also makes an investment in the Fund as a contributor, that the AMC also receives a return on investment which is colloquially called the Carry Interest; the mere fact that AMC is also a Contributor cannot be confused to equate Carry Interest to performance fee; AMC wears two hats; as a Contributor the AMC gets a return based on a pre-agreed formula, which in absolute terms is less than the amount distributed to Class A unit holders; revenue alleges that Carry Interest is like a performance fee; Carry Interest is disproportionate to the investment made by Class B/C unit holders and that it is reflective of the performance of the AMC. He submits that any return, on investment to Class B/C unit holders is based on prior disclosures made in the PPF as also in the IOT; carry Interest is paid after first return of capital to Class A unit holders and after payment of the preferred rate of interest (return) to Class A unit holders (e.g. 15%); it is thereafter that 20% of the balance remaining is distributed to Class B/C unit holders and finally, the balance remainder, if any, is once again distributed in the ratio of 80:20 to Class A unit holders and Class B/C unit holders respectively; in the present case, out of the total 11 Funds, Class B/C unit holders exist in case of 6 Funds; out of these 6 Funds, Carry Interest was paid to Class B/C unit holders in only 3; there is a loss in the other 3 cases; since Carry Interest is part of the share of profits received by Class B/C unit holders, service tax is not leviable thereon; performance fee is not contingent upon an investment by the AMC and not related to units held by AMC; it is therefore, erroneous to equate performance fee with Carry Interest; amount retained for payment of carried interest to Class B/ C unit holders cannot be treated as consideration and is liable to be set aside; this is not an income in the hands of the Funds for service tax liability to arise thereon.

42. On the other hand, Learned Special Counsel for the Revenue submits that the appellant's claim that the funds distributable to Contributors/

Subscribers/ Investors held back by the Fund/Trust do not constitute value of taxable service; this argument is not in line with Service Tax (Determination of Values) Rules, 2006; Explanation to Section 67 of the Finance Act 1994 sets out that "Gross Amount Charged" and "Consideration" as follows:

- (i) Consideration includes any amount that is payable for the taxable services provided or to be provided.
- (ii) Gross amount charged includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any".

42.1. He further submits that in terms of provision of Rule 1&2 read with Rule 5 of Service Tax Rules, all and any expense incurred by the Trust Fund during the course of providing taxable service to the contributor is to be treated as value of taxable service where value shall not be less than the cost of provision of taxable service. He submits that the only exemption for treating expenses as value of the service is provided only to pure agents; the Trust/Fund does not qualify to be a pure agent; the Circular dated 15.05.2007 exempts only initial expenses and reimbursement and not the recurring expenses being integral to the nature of service of BOFS to the Contributors/ Subscribers/ Investors; it is pertinent to note that auditor has deemed it correct to charge service tax from the Fund.

42.2. Learned Special Counsel submits with reference to the carried interest (CI) that it is neither interest nor return on investment; it is a compensation/ performance fee paid to the AMC or any person/ entity designated by them, as a special class investor/ unit holders. CI is contingent to pay outs (realizations generated by exiting portfolio investments) by the Fund; such carried interest is credited to Class-B (Special Unit Holders) only when the net realization recognized by selling and exiting portfolio investment the sum total of the capital committed and

the appreciation is gained as per the pre-agreed preferred rate; CI is a function of profitable exits during a given year which means it's a profit sharing mechanism; it indicated that the profit sharing is 20% of net realization and it happens even when the capital contribution from these unit holders (Class-B) is only 0.0003% of the total capital commitment. He further states that it is clear from IoT, IMA and PPM that Class-B unit holders are Investment Manager and its employees or any Trust set up for the benefit of the employees, or such other person as the Investment Manager may in its own discretion appoint; he points out that the key word is "Appointment". He submits that from the Annual Report of the Trust/Fund, their Investment Managers and the Investment Management Company IVEN, it is clear that Performance Fee/ Carried Interest are contingent to pay out and are a function of profitable exit. He further submits that from the Annual Report of ICICI Emerging Sectors Fund, it is seen that a Performance Fee of 6.8 crore is reported; it also reports that amount paid to the AMC in the related party transaction to be Rs.205,521,347/- being management fee without performance component; the 6.8 crore is not shown as payment to AMC thereby indicating that the Performance Fee was paid another entity which could only be holders of special Class Units i.e. Investment Manager, their employees or any Trust for the benefit of the employees or any such person designated by the Investment Manager. He submits that this income to the Class-B Units is masked as income from investments and not shown as Investment Fee; similarly Annual Report of IVEN for the year 2007-08 shows a Performance Fee of 530.7 million at one place and as income from investments in some other place. Learned Special Counsel further submits that IoT of India Advantage Fund V, highlights the fact that the amount earmarked as CI to the Class-B Units is held under Escrow account and credited to Class-B Units only after achieving capital return along with the preferred rate of interest for the regular investors; had it been a gain from the investment, it should have been directly credited to the Class-B Unit holders; this is the feature in respect of all funds; it indicates that amount credited in Class-B Units (also called CI) is supposed to be withdrawn by the unit

holders upon achieving the performance only; therefore, this CI is nothing but Performance Fee.

42.3. He further submits that Shri Jayathertha, Senior Vice President, Finance, IVEN accepted that CI was in the nature of Performance Fee. Learned Special Counsel submits that from the distribution made by ICICI Econet Internet Technology Fund as on 29th July, 2007, it is clear that Class-B Unit holders garnered extraordinary income in comparison to Class-A Unit holders whereas Class-A Unit holders got Rs.970.13 for every 100 rupees invested; Class-B Unit holders got Rs.38,371/- in 2006 even without redemption. He submits that from the Minutes of the Meeting, held on 30th October, 2002, of the Board of Directors of ICICI Venture Funds Management Company Ltd. approved a carry plan for the employees; the carry plan envisages that the said company will arrange to directly pay carrying from the Performance Fee earned by it from its funds to the employees through a special Trust created for the purpose in the manner mentioned therein. Learned Special Counsel submits that the above documentary proof makes its crystal clear that the entire scheme was devised to allow AMC to appropriate staggering returns and it allows the AMC to term the income as Performance Fee; in fact, the fund is paying the consideration to the AMC from the amounts that could have been otherwise distributed to the Class-A Unit holders.

43. We find in the Director's Report (14th Annual Report and Accounts 2001-02 of ICICI Venture Funds Management Company Ltd.), it is stated that [under (a) revenue analysis] "carried interest is paid to AMC only when the capital committed and preferred rate of return are returned to the investors after actual divestment has been done. It is also stated (under the outlook) that a successful VC and PE practice is one that ensures continuity (and a lower degree volatility) of annual cash flows to the asset management company; a large part of our Revenue is derived from the carried interest, which is a function of the returns generated by the funds, number and nature of funds being managed and the profitable exits during the year. In the Schedule-XIV at 3 Income Recognition, it is stated that as

Fund Manager, the Company is entitled to an annual management fee and a performance fee, which is contingent on the payouts to the Fund investors, in respect of the Private Equity Funds advised by the Company, the Company is entitled to any advisory fee. The annual management fee, performance fee and the advisory fee are recognized as revenue when they contractually accrue except where the management believes that the collectability is in doubt. We find from the IoT of India Advantage Fund-V that the distribution would be as follows:

6.4.1. First, 100% to all holders of Class-A Units and Class-B Units in proportion to their Capital Contributions until the cumulative amount distributed pursuant to this Clause 6.4.1 to each Contributor is equal to its respective Capital Contribution.

6.4.2. Second, 100% to all holders of Class-A Units and Class-B Units in proportion to their Capital Contributions until the cumulative amount distributed pursuant to this Clause 6.4.2 to each Contributor is equal to a preferred return on the amounts distributed pursuant to Clause 6.4.1 to such Contributor at the Preferred Rate of Return;

6.4.3 Third, subject to Clause 6.5 below, 100% to the holders of Class-B in proportion to the Class-B Units held by them until the cumulative amount distributed pursuant to this Clause 6.4.3 to all holders of Class-B Units is equal to 20% of the sum of distributions made pursuant to Clause 6.4.2 and the Clause 6.4.3 and

6.6. The Trustee may in consultation with the Investment Manager and in accordance with the terms of the Contribution Agreement executed by a Contributor make any additional distributions to the Class-A Units held by a Contributor in respect of any sharing of any Carried Interest and such portion of Carried Interest shall be distributed to the Class-A Contributor along with distribution under Clause 6.4.4 above.

43.1. From the above, it appears that Carried Interest is an additional income to Class-B Unit holders other than *pro rata* income. From the Revenue account for the year ending March 31, 2007 of ICICI Emerging Sectors Fund, it is clear that capital was committed by Class-A Units in 2002 whereas Class-B Units subscribed in 2006 when the Fund was ready to pay Carried Interest after returning capital and realization of preferred rate of return to the Class-A investors. We find that in the Director's Report Annual Report of IVEN for the year 2007-08 states under analysis of financial performance that Rs.530.7 million was a Performance Fee earned whereas under Schedule-VIII, it is shown as income from investment in Venture Capital Fund. It is seen in the IoT of India Advantage Fund (Article 12.6) that:

12.6 Escrow

Each holder of Class-B Units will by acquiring such Class-B Units, undertake to deposit 100% of all receipts by it of Carried Interest into an escrow account maintained by the Investment Manager and for such receipts to remain in such deposit account in order to satisfy and claw back obligation under Clause 12.5 above.

43.2. We find that the Trusts are floated for drawing Contributors/ Subscribers/ Investors and to facilitate such persons to earn profits or gains out of the acquisition, holding and subsequent disposal of assets by the Trust/ Fund. The principal liability and responsibility of managing the Trust/ Fund rests with the appellants. Any amount retained out of income distributable to subscribers is nothing but charge or fee for the services rendered. We find that it is nothing but gross consideration in service tax parlance. We find that 'Carried Interest' (CI) is neither interest nor return on investment as claimed by the Appellants; revenue successfully demonstrated that it is a portion of the consideration retained by the Funds for the services rendered by them to the investors and passed on, in the disguise of return on investments, to the so called 'special class of investors' called as 'C' class Unit holders, who are none other than the AMC and or its nominees and that in respect of 10 out of the 11 Funds, the amounts as 'CI' have flown back to the Settlor and his nominees. We are in agreement that CI is paid subject to realizations generated by exiting portfolio investments and credited to the class B or C (special Units holders) only when the net realization recognized by selling and exiting portfolio investments exceeds the sum total of the capital committed and the appreciation gained as per the pre-agreed preferred rate of return.

43.3. In view of the above, we find that the appellants have devised the structure of the fund in such a manner that the AMC and/or their nominees would get huge sums of money in the guise of Performance fee, carried Interest, with the twin motives of benefitting the AMC and/or their nominees at the expense of the subscribers and avoiding the taxes. The fact that the AMC, Settlers and Trustees are all ICICI Group concerns would further give credence to the inference. It is also seen the roles of different companies are rotated. One company is AMC in one Trust and a settlor in other funds.

Thus we find that service tax has been rightly demanded on the amounts shown as performance fee, carried interest and other expenses. The appellants have taken a plea that some of these are expenses which are reimbursed. However, it is alleged in the Show Cause Notice dated 22-10-2010 that such expenses are not reflected in the Revenue expense for the year 2006-2007.

43.4. Learned senior counsel for the appellants has argued that some amounts on account of 'Loss of sale of investment', "Accrued interest considered doubtful", "Loss on revaluation of assets", etc, are not actual expenses but are only accounting adjustments which are required to be made to reflect the true and correct financial status of the Appellants as mandated under accounting principles; these cannot be treated as amounts "retained" by the Appellants from the Contributors for providing any "services" to the Contributors; out of the total amount of INR 28,51,49,62,689 treated as "consideration" received by the Appellants in the Impugned Orders, an amount of INR 12,37,36,99,793, is towards these accounting entries, which should clearly be excluded from the amounts under dispute, as these cannot be treated as amounts "retained" by the Appellants for providing "services" to the Contributors. We find that the bench cannot decide over such calculations. It will be in the fitness of the things to remand the matter to the adjudicating authority to verify the veracity of the claims.

Limitation

44. Learned Senior Counsel for the appellants, making his submissions on the issue of limitation submits that the impugned Orders have invoked the extended period of limitation alleging that the Appellants has suppressed the material facts from the department wilfully; failed to make payment of service tax and to file service tax return as well; Impugned Order has not however, made any reference as to how "suppression of facts with intention to evade" tax is established. He submits that the Appellants is under the firm belief that the intention of the Government has never been to tax VCFs set up as Trusts under the category of "banking and other financial

services”; the appellants exercised bona fide belief that Trusts are not specifically included in the list of such institutions/ entities for “banking and other financial services”; it was clarified by CBEC vide Circular No 94/05/2007-ST dated May 15, 2007 that entry load and exit load charged by the mutual funds from investors shall not be liable for payment of service tax under fund management services (banking and financial services).; therefore, no suppression much less any wilful suppression can be alleged.

44.1. He submits that there is no dispute that the issue is interpretative in nature; no similar demands have been raised by the Revenue on any other Fund; extended period of limitation has been invoked mechanically, It is a settled principle that extended period cannot be invoked in case of interpretational issues and Reliance is placed on ruling in case of Saint Gobain Glass India Ltd Vs CCE& ST LTU, Chennai 2016 (9) TMI 368 - CESTAT CHENNAI. He also relies on CCE, Jaipur Vs Alcobex Metals 2003 (153) ELT 241 (SC) and states that it was held that once the notice is issued under the proviso invoking the larger period, later it cannot be treated as notice issued under the main section for shorter period; a specific provision was incorporated under section 73 of the Act to sustain the demand pertaining to normal period of limitation when the extended period invocation failed; being an amendment that occurred post the periods under dispute; in the instant case, the entire demand fails on account of extended period of limitation not being liable to be invoked in the instant case.

45. On the other hand, Learned Special Counsel for the Revenue, submits that in the present case involving 11 ICICI VCFs, sufficient grounds have been placed before the Hon’ble Bench for sustaining the demand invoking the extended period of limitation; the appellants claim that there was no intention on their part to suppress any facts as (a) All the Funds were registered with SEBI from the beginning;(b) All the Offer documents issued by the Funds were available in public domain;(c) The Annual reports and Accounts were also available in public domain and (d) The basic activity of the Appellant is similar to that of Mutual funds wherein also, there are expenses pooled. He submits that reasons adduced at (a), (b) and (c)

above bank on the availability of information about the subject ICICI VCFs such as, registration with SEBI and offer documents and annual reports being in public domain; these do not amount to disclosure to the Department as clearly brought out in OIO; 'the theory of universal knowledge cannot be attributed to the department in the absence of any declaration'; ICICI Venture as the AMC was fully in the know of the requirements under the S Tax law; reading together section 70(1) and section 73 of the Finance Act, 1994, make it clear that under the S Tax law, self-assessment and remittance of tax are the statutory responsibility of an assessee; non-compliance with this basic requirement cannot be wished away by stating that there was no intention to evade tax; prior to following the above procedure, all the 11 Funds ought to have registered with the concerned/proper officer of the S Tax department and made a true declaration of the material particulars; further, no evidence of diligent conduct has been adduced to substantiate *bona fide* belief on the part of the said Funds or its Trustees. He relies upon the case of Kala Sagar Vs CST Tax, Mumbai [2015(138) STR 1015 (T-Mum)].

45.1. He further submits, countering the appellants reliance on the case of Alcobex Metals, that the issue involved and decided by the Apex Court related to jurisdiction; the ratio flowing from it is that once a SCN is held to be invalid due to lack of jurisdiction, it cannot be held to be valid for a shorter period; in the present case, the SCN having been issued by the Commissioner, there is no dispute about jurisdiction; Grounds for invoking the proviso were never ever discussed by the Hon'ble Tribunal or the Apex Court in the context of Alcobex. The ratio of the aforesaid decision of the Apex Court does not apply to the present case. Revenue would rely on the decision of Hon'ble Tribunal in the case of Shree Ranee Gums and Chemicals Pvt. Ltd. vs. CCE ,Jaipur [2017 (4) GSTL 340 (Tri-Del)].

46. We find that the appellants have argued that this is a matter of interpretation and all the information being in public domain, suppression of any material fact with intent to evade payment of duty cannot be alleged. The appellants have relied upon this Bench's decision in the case of Gateway

Hotels, 2020 (37) G.S.T.L. 210 (Tri. - Bang.). We find that in that case, the fact was that the appellants have been filing the returns regularly and there was a confusion regarding the correct position of law during the relevant time. The facts of the case are different. It cannot be argued that suppression cannot be alleged as the information is in the public domain. Information being in the public domain is not of any consequence. The information should be in the knowledge or made available to the authorities concerned who need to take a certain decision depending on such information. It is not the case of the appellants that they have been paying applicable service tax on getting registered and have been submitting regular returns to service tax authorities. It is not the case of the appellants that the material information available in the form of various contracts/ agreements and balance sheets/ ledgers have been submitted to the Department *suo moto* by the appellants. It is only after investigation has been initiated, the necessary documents were submitted. Thus, the information available in the public domain is of no avail. We find that learned adjudicating authority has rightly relied upon in the case of CCE, Calicut Vs Steel Industries Kerala Ltd, 2005 (188) ELT 33 (Tri. Bang.) wherein it is held at Para 3 as under:

3. We find that in the case of Maruti Udyog Ltd. Vs CCE, New Delhi, 2001 (134) ELT 269, the Tribunal has upheld the invocation of the extended period of limitation when the assessee did not declare waste and scrap of iron and steel and aluminium and avilment of credit therein either in their classification list or modvat declaration or in the statutory records. The Tribunal held that the theory of universal knowledge cannot be attributed to the department in the absence of any declaration.

46.1. We also find that the appellants relied upon the Hon'ble Supreme Court's decision in the case of Collector of Central Excise, Jaipur v. Alcobex Metals reported in 2003 (153) E.L.T. 241 (S.C.). However, we find that in that case as submitted by learned Special Counsel for Revenue, the issue of jurisdiction of the issuing authority was under consideration. We find that Hon'ble Supreme Court held that:

"13. one of the plea agitated before the Supreme Court was whether the show cause notices can still be treated as invalid for the period which is within the normal period of limitation. The Apex Court did not lay down the law on the above subject but proceeded to declare the show cause notice

as invalid on the ground that the same was issued by an authority not competent under the relevant statute. The aforesaid judgment, in my view, is not pointer to an issue whether the show cause notice can still be validated for a period which is within the normal period enshrined under the statute."

Therefore, we find that the facts of the case cannot be compared to the case before us and hence the reliance would not be of any help to the appellants. In view of the discussions, we find that the Department was in its right to invoke the extended period for the issue of SCN.

Penalties

47. Coming to the issue of imposition of penalty under different sections, Learned Senior Counsel Shri Vikram Nankani avers that the Appellant is not liable to pay penalty under Section 76 as there is no failure on the part of the Appellants to pay service tax; as the Appellants believes that it does not provide taxable services, there is no requirement to register and file returns and hence, no penalty can be levied, no penalty under Section 77 can be imposed; the appellants had no intent to evade service tax and no penalty can be imposed under Section 78.

47.1. Learned senior counsel submits that assuming without admitting that the Appellants is liable to service tax on the services, the Appellants has not suppressed the value of taxable service; Appellants has co-operated at every stage of the investigation and provided necessary information/ documents as and when requested. Learned Counsel submits that it is a well settled legal proposition that penalties under section 76 and 78 cannot be imposed simultaneously i.e, where penalty under section 76 has been levied, penalty under section 78 cannot be imposed as held in CCE v First Flight Courier Ltd 2011-VIL-06-Punjab & Haryana High Court - ST) and Opus Media and Entertainment v CCE [2007] 10 STJ 259 (CESTAT-New Delhi). He submits that applying the provisions of Section 80, if it is proved that there was reasonable cause for such failure no penalty can be imposed; this provision being a non-obstante provision, has overriding effect over the other provisions that are in conflict with it; the Appellant has established its *bona fides* that it was under the belief that no service tax was payable and the

master circular also states that similar expenses incurred by a mutual fund are not chargeable to service tax on amounts demanded; Appellant's case is well covered by the exception provided under section 80 of the Act, which primarily is meant to protect genuine and reasonable situations.

47.2. On the other hand, learned Special Counsel for the Revenue submits that there was a deliberate default by the appellants and thereby extended period has been rightly invoked; Section 76 penalty is for default in payment of duty and Section 78 penalty is for deliberate default of penalty. Relying upon the Hon'ble High Court of Kerala decision in the case of Krishna Poduval, 2006 (1) STR 185 (Kerala). He submits that prior to May 10, 2008, penalty under both sections is imposable and after May 10, 2008, penalty under Section 78 would apply.

48. We find that in the instant case, the appellants have not obtained registration; have not paid applicable service tax and have not filed due returns. Therefore, we find that penalty under Section 77 is imposable. We also find that extended period is invokable; material facts have been deliberately suppressed by the appellants before the jurisdictional service tax authorities. Therefore, we find that imposition of penalty under Section 78 of the Finance Act, 1994 is justified. Coming to the imposition of penalty under both Sections 76 & 78, we find that Hon'ble Karnataka High Court in the case of Motor World, 2012 (27) STR 225 (Kar.) have held that simultaneous penalty cannot be imposed under Section 76 and Section 78 of Finance Act, 1994. Revenue relies upon Hon'ble Kerala High Court judgment in the case of Krishna Poduval (supra). However, with due regards to Hon'ble Kerala High Court, we find that Hon'ble Karnataka High Court in the judgment cited above, have distinguished the judgment of Hon'ble Kerala High Court. We further find that Hon'ble Kerala High Court's judgement was in a writ appeal whereas, Karnataka High Court's order was in a Central Excise Appeal. Moreover, being the jurisdictional High Court, we are bound by the decision of the Hon'ble Karnataka High Court in the instant case. Therefore, we hold that penalty

under Section 78 is sustained before or after 10.05.2008 in the instant case. The appellants have taken a plea that in terms of the *non ostante* provisions of Section 80 of the Finance Act, 1994, penalty cannot be imposed. We find that as discussed above in view of the facts of the case, provisions of Section 80 are not attracted. Therefore, we are not inclined to accept the submissions of the appellant in this regard.

Revenue Neutrality

49. Shri Vikram Nankani submits that the issue is Revenue neutral as the Appellant is also eligible to claim CENVAT Credit of the Service tax paid on input services in terms of Rule 3 of the CENVAT Credit Rules, 2004 read with Rule 2(1) thereof; the expenditure incurred by the Appellants as shown in the Revenue Account discloses actual expenses incurred by the Appellants and the accounting provisions created by the Appellants. He submits a chart showing duty demanded, allowance for write off on the loss of sale of investments and class B/C, actual demand, service tax available etc and submits that Total demand is Rs 3,21,24,64,061, actual demand after allowing the wrong figures taken by department/losses would be Rs 1,31,74,18,678 and CENVAT availability would be Rs 1,29,57,64,253 which is 98 percent of the demand; principle of allowing the demand to be paid net of CENVAT credit that is otherwise eligible has been expressly recognized in the interim order passed by this Hon'ble Bench; he also relies upon.

- (i). *Formica India Division Vs CCE - 2002 -TIOL -599-SC-CX Para 2 and 3*
- (ii). *Dineshchandra R Agarwal Infracon Private Limited v CCE, Ahmedabad- 2010 (18) STR 39 (Tribunal - Ahmedabad) Para 3*
- (iii). *Shah Yarn Tex P Ltd vs CST -2008-TIOL-1975-CESTAT-MAD Para 2*
- (iv). *Shah Yarn Tex P Ltd vs CST - 2016-TIOL-351-HC-MAD-CX Para 9, 11*
- (v). *OK Play India Ltd vs CCE - 2017-TIOL-4054-CESTAT-CHD Para 6*

49.1. Learned senior counsel submits that notwithstanding the submissions made above where they are of the strong belief that service tax shall not be payable by the Appellants; in case the service is held to be taxable, CENVAT credit shall be eligible to be taken with respect to the services provided by the Appellants and provisions should be excluded from the demand; the

adjudicating authority has not provided any opportunity to the Appellants seeking submission documents for the purpose of claiming CENVAT credit; the Appellants had filed detailed year wise listing of expenses at the time of investigation itself. He relies upon the following cases:

- (i) Formica India Division Vs CCE, 2002-TIOL-599-SC-CX.
- (ii) Dineshchandra R Agarwal Infracon Pvt. Ltd. Vs CCE, Ahmedabad, 2010 (18) STR 39 (Tri. Ahm.)
- (iii) Shah Yarn Tex P Ltd. Vs CST, 2008-TIOL-1975-CESTAT-MAD.
- (iv) Shah Yarn Tex P Ltd. Vs CST, 2016-TIOL-351-HC-MAD-CX
- (v) OK Play India Ltd. Vs CCE, 2017-TIOL-4054-CESTAT-CHD.

Relying on CCE & C, Patna Vs Advantage Media Consultants, 2008 (3) TMI 59 (CESTAT Kolkatta), he submits that cum duty benefit needs to be allowed and CENVAT available needs to be permitted to be set off.

49.2. In reply, learned Special Counsel for the Department submits that no evidences were produced regarding payment of service tax against which the appellant intends to avail CENVAT credit; no evidence was produced to establish nexus between output services and input services for availing of credit; the claim of the appellant has to be examined with supporting documents. On cum duty benefit, he submits that during the course of adjudication, no documents were produced to substantiate the claim. However, he concedes that for sake of verification, the matter may have to go back to adjudicating authority.

50. Regarding the submissions of the appellants on revenue neutrality, we find that payment of service tax by one entity and availment of CENVAT credit by another entity on the basis of such payment is not a criteria to determine the exigibility of a particular service rendered. The argument goes against the general scheme of service tax and CENVAT credit. If one entity has to pay service tax, it has to pay the same notwithstanding the fact that credit will be availed by a subsequent user. The scheme of CENVAT credit is to lessen the cascading effect of taxation and cannot be a reason for not paying taxes. We find that the appellant's submissions on revenue neutrality are not convincing. We find that both, the appellant and Revenue are in agreement in principle about the admissibility of the CENVAT credit and cum

duty benefit. The only difference of opinion is with reference to submission of documents and verification thereof. We find that learned Senior Counsel for the appellants submits that in respect of certain accounting Heads which were considered as expenses were submitted to the adjudicating authority and no finding has been given in the OIO. We find that the cases relied upon by the appellants support their claim both for CENVAT credit and cum duty benefit. We find that Kolkata Bench of CESTAT in the case of Advantage Media Consultants (supra) has held as follows:

"3. Service tax is an indirect tax. As per this system of taxation, tax borne by the consumer of goods/ services is collected by the assessee (manufacture/ service provider) and remitted to the Government. When the amount is collected for the provision of services, the total compensation received should be treated as inclusive of service tax due to be paid by the ultimate customer of the services unless service tax is also paid by the customer separately. So considered, when no tax is collected separately, the gross amount has to be adopted to quantify the tax liability treating it as value of taxable service plus service tax payable. We find that this principle has been legislated in the following terms with effect from 18.04.2006 in Section 67 (2) of the Finance Act, 1994 as amended:

"67(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as with the addition of tax payable, is equal to the gross amount charged."

50.1. Therefore, we are inclined to allow the request of the appellants for re-calculation of the gross value of the taxable services (taking into account the appellant's submissions on amounts under different Heads of accounts were wrongfully considered as expenses); availability of CENVAT credit and cum duty benefit. We find that for achieving the above object, the issue needs to go back the adjudicating authority for computation of the same. During the course of arguments, Shri Nankani learned counsel for the appellants raised the issue that the Adjudicating authority has traversed beyond the SCN as far as the demand on Carry Interest is concerned. On-going through the concerned records we find that all the SCNs and annexures mention carried Interest to be includible in the Gross Consideration for the demand of duty. Therefore, we find that the OIO has not traversed beyond the SCN. Learned Counsel for the appellants also raised an issue that this is a standalone Show Cause Notice issued to the appellants alone, though there are many similar funds floated by others

during the relevant time. We find that the objection is not relevant; we have neither the mandate nor sufficient data or information to come to a conclusion and moreover, we are not sitting in judgement to decide such an averment. The issue before us is as to whether the impugned order and Show Cause notice are maintainable under Law. The same has been answered by us in view of the discussion above.

51. In view of the above, all the appeals are disposed of, by way of remand to the adjudicating authority, subject to the following conditions:

(i). Penalties imposed under Section 76 of Finance Act, 1994 are dropped.
(ii). the adjudicating authority shall verify the following claims of the appellants, with documentary proof that may be submitted by the appellants, and give due allowance to the same, if found otherwise in order as per law, while computing the duty liability.

(a). the claim that the amounts on account of 'Loss of sale of investment', "Accrued interest considered doubtful", "Loss on revaluation of assets", etc, are not actual expenses but are only accounting adjustments; and allow deduction if found in order.

(b) claim of the appellants on the admissibility of the CENVAT

(c) claims of the appellants on the cum duty benefit.

(iii). The appellants shall submit necessary documentary proof with reference to the above claims within 4 weeks of the receipt of this order and the adjudicating authority shall complete the exercise within further 12 weeks of receipt of the documents from the appellants.

(Order pronounced in the open court on 01/07/2021)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER