

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ “डी” मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI

सर्वश्री बी.आर.बास्करन, लेखा सदस्य एवं संदीप गोसाई, न्यायिक सदस्य के समक्ष
BEFORE S/SHRI B.R.BASKARAN, ACCOUNTANT MEMBER AND
SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.8475/Mum/2010
(निर्धारण वर्ष / Assessment Year :2007-08)

M/s DHFL Venture Capital Fund, 4 th Floor, HDIL Tower, Anant Kanekar Marg, Bandra (E), Mumbai-400051	बनाम/ Vs.	Income Tax Officer, Ward 19 (3)(4), Mumbai
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN. :AAATD8633

अपीलार्थी की ओर से / Appellant by :	Shri Vijay Mehta
प्रत्यर्थी की ओर से/ Respondent by :	Shri Uday B Jakke

सुनवाई की तारीख / **Date of Hearing** : **10.12.2015**
घोषणा की तारीख / **Date of Pronouncement** : **08.01.2016**

ORDER

PER B.R.BASKARAN,AM:

The assessee has filed this appeal challenging the order dated 15.09.2010 passed by Id. CIT(A)-30, Mumbai and it relates to the assessment year 2007-08.

2. The assessee is aggrieved by the decision of Id. CIT(A) in confirming the action of AO in rejecting the claim of exemption u/s 10(23FB) of Income Tax Act, 1961 and accordingly assessing the entire income of the assessee.

3. We heard the parties and perused the record. The assessee is a venture capital fund and it is registered with the Securities Exchange Board of India (SEBI). The assessee has been formed as a private trust and the income earned by it is allocated amongst the beneficiaries in the specified ratio. In the return of income filed for the year under consideration, the assessee claimed exemption u/s 10(23FB) of the Act in respect of its entire income. The AO examined the claim of the assessee and also SEBI Guidelines given in SEBI (Venture Capital Fund) Regulations, 1996. The Clause 12(b) of the SEBI guidelines provided that "Venture Capital Fund shall not invest more than 25% corpus of the fund in one venture capital undertaking". The AO noticed that from the Balance sheet of the assessee that it has held Total unit contribution of Rs.61,64,31,028/- as on 31.3.2007 and the same was invested as under :

S.No.	Venture Capital Undertaking	Amount invested	% of available corpus funds
1	M/s J S T Reality Pvt Ltd.	25,25,00,000	40.96%
2.	Proficient Reality Pvt Ltd.	3,01,00,000	4.88%
3	Blue Star Realtors Pvt.Ltd	24,99,66,470	40.55%
	Total	53,25,66,470	

Since the assessee had invested more than 25% of the contributions in the above said Venture Capital Undertaking, the AO held that the assessee has violated the provisions of Clause 12(b) of SEBI Guidelines (Venture Capital Fund) Regulations, 1996. The assessee contended before the AO that the term "corpus fund" should be taken as the amount committed by the investors and not actual contribution made by them. However, the AO took the view that "corpus" literally means collection and in financial terms, it means collection of funds. He further held that "Collection" means what you are having in your possession at the moment and not something which you are expecting to get in future. Accordingly he did not agree with the contention of the assessee that the "Corpus" would

mean the amount committed by the investors. It is pertinent to note that gross amount committed by the investors was Rs.101.02 crores as on 31.3.2007, even though the amount actually contributed by them was Rs.61.64 crores as on 31.3.2007. Accordingly, the assessee contended that the investment made in each of the above said Venture Capital undertaking does not exceed 25% of the 'committed corpus fund'. The same was not acceptable to the AO and accordingly he denied the claim of the assessee for exemption u/s 10(23FB) of the Act. The assessee had also claimed exemption on the interest income earned from Bank deposits. The AO took the view that the exemption u/s 10(23FB) shall be available only in respect of income earned from investments made in a Venture capital undertaking. Since the banks in which the assessee had made deposits cannot be considered as "Venture capital undertakings" and since the interest income is required to be assessed under the head Income from other sources, the AO held that the assessee cannot claim exemption u/s 10(23FB) of the Act on the interest income. Accordingly, the AO assessed the entire income of the assessee by determining the total income at Rs.1.10 cr. The Id. CIT(A) also confirmed the same. Hence, the assessee has filed this appeal before us.

4. The Ld A.R advanced his arguments supporting the claim made by the assessee and the Ld D.R placed strong reliance on the order of Ld CIT(A). The Id. A.R submitted that the AO has placed reliance on SEBI (Venture Capital Fund) Regulations, 1996 (hereinafter "old regulation"), which has since been repealed and replaced by Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012 (hereinafter "New Regulation"). He submitted that the term "Corpus" has not been defined under the old regulation, but the same has been defined as under in Clause (h) of section 2 of the new Regulation:-

“Corpus” means the **total amount of funds committed by investors** to the Alternative Investment Fund by way of a written contract or any such document as on a particular date.”

The Id. AR submitted that, as per the above said definition of the term “Corpus” would mean the total amount of funds committed by investors to the Alternative Investment Fund and not the actual contribution made by the investors. He submitted that the venture capital undertakings would also require funds in a phased manner in accordance with the pace of execution of projects and hence the contributions shall also be collected in a phased manner from the investors. Hence, the new Regulations have provided the definition of the term “Corpus” as the total amount of funds committed by investors, keeping in view the practicalities of the situation discussed above.

5. We have gone through the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012 and section 39 contains the provisions relating to “Repeal and Saving” and the same reads as under:-

“39 (1) The Securities and Exchange Board of India (Venture Capital Funds) Regulations, 1996 hereby shall stand repealed.

(2) Notwithstanding such repeal:

(a) Anything done or any action taken or purported to have been done or taken, including suspension or cancellation of certificate of registration, any inquiry or investigation commenced or show cause notice issued under the repealed regulations, shall be deemed to have been done or taken under the corresponding provisions of these regulations.

(b) & (c)

(3) After the repeal of Securities and Exchange Board of India (Venture Capital Funds) Regulations, 1996, any reference thereto in any other regulations made, guidelines or circulars issued there under by the Board shall be

deemed to be a reference to the corresponding provisions of these regulations.”

We have earlier noticed that the assessing officer has placed reliance on the provisions of sec. 12(b) of the Securities and Exchange Board of India (Venture Capital Funds) Regulations, 1996 to deny the exemption u/s 10(23FB) of the Act. The SEBI (Venture Capital funds) Regulation, 1996 has since been repealed by Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012 (referred above). We further notice that the term “Corpus” has not been defined under the old regulation, but the same has been defined in the new regulation as under:-

“Corpus” means the total amount of funds committed by investors to the Alternative Investment Fund by way of a written contract or any such document as on a particular date.”

Since the new regulation has defined the term “Corpus” and since under the provision relating to “Repeal and Saving” (referred above), the reference to SEBI (Venture capital funds) Regulations shall be deemed to be a reference to the new regulation, we are of the view that the definition given to the term “Corpus” under the new regulations can be applied under the repealed old provision also. Accordingly, we are of the view that the assessee is justified in contending that the total amount of funds committed by investors shall be taken as “Corpus” for the purpose of section 12(b) of the old regulations also.

6. The assessee has submitted that the amount committed by the investors stand at Rs.101.02 crores and as per the definition referred above, the same should be considered as “Corpus”. Accordingly, the investment made by the assessee in each of the venture capital undertakings would work out to less than 25% of the corpus and hence it

cannot be said that the assessee has violated the provisions of 12(b) of SEBI (Venture Capital Funds) Regulation, 1996.

7. The Id. AR submitted that the assessee has not violated any of the conditions prescribed in sec. 10(23FB) of the Act and hence it is entitled to claim exemption under that section. He submitted the sec. 10(23FB) has defined 'venture capital fund' as under as per the provisions existing at the relevant point of time:-

"venture capital fund" means such fund—

- (i) operating under a trust deed registered under the provisions of the Registration Act, 1908 (16 of 1908) or operating as a venture capital scheme made by the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963);
- (ii) which has been granted a certificate of registration under the Securities and Exchange Board of India Act, 1992 (15 of 1992), and regulations made thereunder;
- (iii) which fulfils the conditions as may be specified, with the approval of the Central Government, by the Securities and Exchange Board of India, by notification in the Official Gazette, in this behalf;

The Ld A.R submitted that the assessee is registered as a trust under the provisions of Registration Act, 1908 and it has been granted a certificate of registration under the SEBI Regulations. Further, there is no allegation made by the SEBI that the assessee has not fulfilled any of the conditions specified by it. He submitted that the registration granted by SEBI has not been cancelled till date. Accordingly, he submitted that the assessee has fulfilled the conditions prescribed under sec. 10(23FB) for availing the exemption.

8. He further submitted that the AO was not justified in presuming that the assessee has violated the provisions of SEBI Regulations, when there is no such allegation made by the SEBI, i.e., the authority administering

the SEBI Act. In this regard, the Ld A.R drew support from the decision dated 27.5.2011 rendered by the Ahmedabad Bench of the Tribunal in the case of ITO V/s Gujarat Information Technology Fund in ITA No.2264/Ahd/2007 (AY-2003-04), wherein the Tribunal held that the AO was not required to go into the violation of conditions, if any, pertaining to matters of grant of such certificate of Registration. The Id. AR further submitted that the Hyderabad Bench of the Tribunal has also considered an identical issue in the case of ACIT V/s Small is Beautiful in ITA No.1004 and 1005/Hyd/2012 (AY-2006-07 and 2007-08) order dated 4.7.2013, wherein it has followed the decision of Ahmedabad Bench of the Tribunal rendered in the case of Gujarat Information Technology Fund (supra).

9. We notice that the issue, viz., whether the assessing officer can look into the violation of the conditions, if any, prescribed in the SEBI (Venture capital fund) Regulations was considered by the Ahmedabad Bench of the Tribunal in the case of Gujarat Information Technology Fund (supra) wherein it has been held as under :

“(5) `Whether AO can look into whether venture capital fund fulfills conditions laid down in SEBI (Venture Capital Funds) Regulations, 1996.

24. In our considered view the AO is duty bound to enquire whether the assessee trust is registered under the Registration Act, 1908 and has been granted certificate of registration by SEBI under SEBI (Venture Capital Funds) Regulations, 1996. But his role is confined to satisfy himself with such certificates granted and not beyond. Sub-clause (i) and sub-clause (ii) of clause (b) under Explanation 1 only requires to ensure that assessee trust has certificates as mentioned therein. Even if certificates are granted under misrepresentation of facts then it is for the concerned authorities to look into the matter and take action under the provisions of the concerned statute under which certificates are granted. In this regard the observations of the Hon. Supreme Court in the case

of Gestetner Duplicators (P.) Ltd. (supra) are very relevant. In that case the Commissioner had granted recognition to the P.F. as far back as 1937. The assessee a private limited company paid to salesmen a fixed monthly salary and commission at fixed percentage of turnover and also paid employer's contribution to the P.F. on the basis of monthly salary as well as commission and credited them into individual account of these salesmen in P.F. maintained and recognized by the Commissioner. A part of such commission and consequently provident fund on such commission was sought to be disallowed. The matter went up to the Hon. Supreme Court. It observed as under:-

"It would be conducive to judicial discipline and the maintaining of certainty and uniformity in administering the law that the taxing authorities should proceed on the basis that the recognition granted and available for any particular assessment year implies that the provident fund satisfies all the conditions under rule 4 of Part A of the Fourth Schedule to the Act, and not sit in judgment over it."

Thus it was held that it was not open to the AO to take the view contrary to the registration already granted by the CIT and therefore disallow a part of the contribution. It was pointed out that when recognition continues in operation it would be implied that the conditions laid down there-under are satisfied and any part of disallowance would tantamount to questioning the recognition. In other words entries made in the register of independent body should be accepted as true and they should not be questioned while deciding the issue relating to the matters concluded by the entries made in such registers. From this it follows that if assessee trust is registered with SEBI as per certificate granted under Regulation 7(3) then it should be accepted that such certificate is granted after ensuring that conditions laid down before granting of such certificate are fulfilled. In other words conditions laid down in sub-clause (i) and sub-clause (ii) are deemed to be fulfilled under explanation-1(b) to section 10(23FB), the moment relevant certificates are produced before the AO. Therefore, he is not required to go into violation of conditions, if any, pertaining to the matters of grant of such certificates."

The Ahmedabad bench of Tribunal further observed that, so long as SEBI does not find any default of any contravention of the provisions of the SEBI Act or SEVI (VCF) Regulation 1996 then it can be inferred that the assessee trust fulfills the conditions laid down under these regulations.

The Tribunal further expressed the view that the AO may report the matter of violations, if any, to the SEBI and if finally SEBI does not find any default, then the view of the AO that there is violation cannot survive. We agree with the view taken by the Ahmedabad bench of Tribunal in the case cited above. It is the SEBI, which has final say to determine about the violation of the conditions, as it is the authority competent to deal with the same. In the instant case, the AO has made his own interpretation of the term "corpus", which we have found to be incorrect as per the definition given in the new regulation.

10. In the instant case, there is no dispute with regard to the fact that the Registration granted to the assessee as Venture Capital Fund has not been withdrawn by the SEBI. Further, there is no material to show that the SEBI has alleged or stated that the assessee has not fulfilled any of the prescribed conditions. Hence, we are of the view that the tax authorities are not justified in rejecting the claim for exemption u/s 10(23FB) of the Act.

11. We have noticed that the tax authorities have taken the view that the interest income earned from fixed deposits in banks shall not be entitled for exemption u/s 10(23FB) of the Act, since the banks cannot be considered to venture capital undertakings. For adjudicating this issue, we shall first examine the provisions of Section 10(23FB), which (as applicable to the year under consideration) reads as under:-

"10 In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included---

.....
 (23FB) any income of a venture capital company or venture capital fund **set up to raise funds for investment** in a venture capital undertaking."

The words in bold letters were replaced by the words "from investment" by Finance Act, 2007 w.e.f. 1.4.2008. The scope of exemption available under this section as well as the date of applicability of amendment brought into the above section by Finance Act, 2007 were examined by the co-ordinate Mumbai bench of Tribunal in the case of ITO Vs. M/s Kshitij Venture Capital Fund in its order dated 9th March, 2011 passed in ITA No.2147/Mum/2010 relating to assessment year 2006-07. The relevant observations made by the Mumbai bench of Tribunal are extracted by the Hyderabad bench of Tribunal in the case of Small is Beautiful (supra) as under:-

"12. The ITAT Ahmedabad Bench in the said case of Gujrat Information Technology Fund (supra) followed the decision of ITAT Mumbai 'A' Bench in the case of ITAO vs. M/s Kshitij Venture Capital Fund in ITA No.2147/Mum/2010 Asst. Year 2006-07 pronounced on 9th March, 2011 wherein on similar facts held as under :-

"13. We heard both the parties. The issue is whether interest on temporary investments of Rs. 16,09,900/- and profit on sale Units of Mutual fund of Rs 1,00,91,000/- is entitled to exemption u/s. 10(23FB). [Section 10\(23FB\)](#) as applicable to the year under appeal is as under:

'Any income of venture capital company or venture capital fund set up to raise funds for investment in a venture capital undertaking.'

14. Thus the exemption in the case of Venture Capital Fund was in respect of any income. There is no restriction or requirement regarding the source of income for grant of exemption u/s. 10(23FB). It is only by [Finance Act, 2007](#), w.e.f.1st April, 2008, an amendment to [section 10\(23FB\)](#) was brought about restricting the exemption under that section to income from Investment by the Venture Capital Fund in a venture capital undertaking. For this purpose, the said clause (c) of Explanation 1 has also been amended to define "Venture Capital Undertaking". This amendment was made effective from 1.4.2008. By no stretch of imagination can this amendment can be considered as clarificatory applicable to earlier Assessment Year. The memorandum explaining the

amendment to the Finance Bill, 2007 as well as the CBDT circular explaining the provisions of the [Finance Act, 2007](#) clarify that the amendment proposed to [section 10\(23FB\)](#) was to restrict the scope of income for which exemption under that section was available. Hence this amendment cannot be considered as clarificatory but must be considered as prospective in effect. It is not in ITA Nos. 1004 & 1005/Hyd/12 Small is Beautiful dispute that the assessee is otherwise eligible for exemption u/s.10(23FB). Hence for the year under appeal, as per the provisions of [section 10\(23FB\)](#) as applicable to the assessment year, any income of the venture capital Fund is exempt. Hence we confirm the order of the CIT(A) and uphold his direction that that interest on temporary investments of Rs. 16,09,900/- and profit on sale Units of Mutual fund of Rs 1,00,91,000/- is entitled to exemption u/s.10(23FB).

15. In the result, the appeal filed by the revenue is dismissed."

13. The above view is also supported by CBDT Circular of 2008 which clarifies the position as under :-

"The CBDT Circular No.3 of 2008 this case has been clarified. Exemption for certain income of a venture capital company or venture capital fund.

14.2 Clause (23FB) of [section 10](#) provides exemption in respect of any income of a venture capital company or venture capital fund set up to raise funds for investment in a venture capital undertaking. Such Venture capital undertaking has been defined in clause(c) of explanation 1 to clause (23FB) to mean a venture capital undertaking referred to in the Securities and Exchange Board of India (Venture Capital funds) Regulations, 1996, made under the Securities and [Exchange Board of India Act, 1992](#), and notified as such in the Official gazette by the Board for the purposes of the clause. With a view to make the tax benefit more focused and to channelize existing as well as future investments in key, risk prone thrust areas clause (23FB) has been amended whereby such exemption will now be available only in respect of income of a venture capital company or venture capital fund from investment in a venture capital undertaking

.....

14.3 Applicability : This amendment will take effect from the 1st day of April, 2008, and will accordingly apply in relation to the assessment year 2008-09 and subsequent assessment year”.

12. Following the decisions rendered by the co-ordinate benches of Tribunal, we also hold that the amendment brought into section 10(23FB) by the Finance Act, 2007 with effect from 1.4.2008 shall have prospective operation. In our view, it may not be appropriate to examine the scope or effect of amendment brought in the above section w.e.f. 1.4.2008. Suffice to say that the interest income of the assessee shall also be entitled to exemption u/s 10(23FB) of the Act for the year under consideration. Hence any income of the venture capital fund set up to raise funds for investments shall be exempt for the year under consideration.

13. In view of the foregoing discussions, we are of the view that the assessee cannot be denied exemption u/s 10(23FB) of the Act and further the entire income of the assessee shall be exempt under that section. Accordingly, we set aside the order of Id.CIT(A) and direct the AO to grant exemption u/s 10(23FB) of the Act.

14. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court 8th Jan, 2016.

Sd	sd
(संदीप गोसाईं/ SANDEEP GOSAIN)	(बी.आर.बास्करन/ B.R.BASKARAN)
न्यायिक सदस्य/ Judicial Member	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated.. 8th, Jan 2016

व.नि.स./ **SRL, Sr. PS**

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

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

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