IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, JUDICIAL MEMBER
AND SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

| ITA No.179/Bang/2012 |
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| Assessment year : 2008-09 |

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| The Income Tax Officer,<br>Circle 9(1),<br>Bangalore. | Vs. | M/s. India Advantage Fund-I,<br>10th Floor, Prestige Obelisk,<br>No.3, Kasturba Road,<br>Bangalore – 560 001.<br>**PAN : AAATI 3344R** |
| APPELLANT | | RESPONDENT |

| ITA No.177/Bang/2012<br>ITA No.348/Bang/2011<br>ITA No.475/Bang/2013 |
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| Assessment year : 2008-09, 2008-09 & 2009-10 |

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| The Deputy Commissioner<br>of Income Tax,<br>Circle 9(1),<br>Bangalore. | Vs. | M/s. ICICI Emerging<br>Sectors Fund,<br>10th Floor, Prestige Obelisk,<br>No.3, Kasturba Road,<br>Bangalore – 560 001.<br>**PAN : AAATI 3458A** |
| APPELLANT | | RESPONDENT |

| ITA No.347/Bang/2011 |
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| Assessment year : 2008-09 |

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| The Deputy Commissioner of Income Tax, Circle 9(1), Bangalore. | Vs. | M/s. ICICI Econet Internet & Technology Fund, 10th Floor, Prestige Obelisk, No.3, Kasturba Road, Bangalore – 560 001. **PAN : AAATI 2889M** |
| APPELLANT | | RESPONDENT |

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| Revenue by | : | Shri Farahat Hussain Qureshi, CIT-II(DR), |
| Assessees by | : | S/Shri S.E. Dastur, Sr. Advocate & Kalpesh Maroo, C.A. |

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|---|---|---|
| Date of hearing | : | 05-02-2015 |
| Date of Pronouncement | : | 13-02-2015 |

## O R D E R

*PER BENCH*

The appeals by the Revenue against orders of CIT(A) are as per the details given below:-

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| ITA No. 179/Bang/2012 | India Advantage Fund-1 | CIT(A)-V, Bangalore | Dated: 16.11.2011 |
| ITA No.177/Bang/2012 | M/S.ICICI Emerging Sector Fund | CIT(A)-V, Bangalore | Dated: 17.11.2011 |
| ITA No. 348/Bang/2011 | - Do - | - Do - | Dated: 17.01.2011 |
| ITA No. 475/Bang/2013 | - Do- | - Do- | Dated: 30-1-2013 |

| | | | |
|---|---|---|---|
| ITA No.347/Bang/2011 | M/S.ICICI Econet, Internet and Technology Fund | - Do- | Dated:18-01-2011 |

All these appeals involve identical issues and arise under identical facts and circumstances. These appeals were heard together. We deem it convenient to pass a consolidated order.

2. The Assessees in all these appeals viz., India Advantage Fund-I, ICICI Emerging Sectors Fund and ICICI Econet, Internet and Technology Fund are three different trusts constituted under different instruments of trust. These trusts were created by transfer by the author of trust a sum of Rs.10,000/- to the Trustee as initial corpus to be applied and governed by the terms and conditions of the indenture of trust by which they were created. The trustee appointed under the deed of trust was empowered to call for contributions from the contributors which will be invested by the Trustee in accordance with the objects of the trust. The objective of creation of the trust was set out in the trust deed which was to make investments in certain kind of securities and to achieve commensurate returns to the contributors. The fund collected from the contributors together with the initial corpus was to be handed over to the trustees under the provisions of the Indian Trust Act, 1882. The trust was to facilitate investment by the contributors who should be resident in India and achieve

returns to such contributors. The trust deed provides that the contributors to the fund will also be its beneficiaries. The trustees had power to appoint investment managers to manage the trust fund. The Settlor was to be appointed as the investment manager. The terms of the appointment of the Settlor as investment manager are set out in an investment management agreement between the Assessees represented by the Trustee and Settlor. The Settlor as investment manager issued memorandum to prospective investors on a confidential basis for them to consider an investment in mezzanine Fund. An investor who wishes to contribute to the fund enters into a contribution agreement with the trust, the trustees acting on behalf of the trust and the Settlor acting in his capacity as investment manager. Beneficiaries contributed to the Fund for the purpose of making investments. The Assessees claimed in their assessment that pursuant to the provisions of section 61 to section 63 of the Act, the income earned by the fund has been included in the return of income of the beneficiaries and offered to tax directly by them. Consequently, the effective income taxable in the hands of the Assessees is to be considered as NIL. Since, the provisions of the Act mandate that the income arising from revocable transfers are to be taxed in the hands of the transferors (i.e., the contributors) the Fund is income is not being offered to tax again in the hands of the Assessee as the beneficiaries have already paid taxes and were assessed in respect of the income allocated by the Assessees to the beneficiaries.

3. For AY 2008-09, the Assessee in ITA No.179/Bang/2012 viz., India Advantage Fund-I, filed return of income declaring total income of Rs.613,96,56,535/- and claimed refund of Rs.1,68,38,350 which is nothing but the TDS made by the Assessee on the interest given to the beneficiaries as set out in the last column of the chart given in the earlier paragraph. Along with the return of income the Assessee filed a letter dated 13.10.2008 intimating the AO that the income of the Assessee is included in the total income of the beneficiaries and offered to tax directly by them in their return of income. A revised return of income was filed on 30.3.2010 in which the total income declared was the same with tax liability as nil, but the request for refund of TDS as made in the original return of income was reduced to Rs.1,38,26,487.

4. For AY 2008-09, the Assessee in ITA No.177/Bang/2012, ICICI Emerging Sectors Fund, filed return of income declaring total income of Rs.346,18,77,243/-. Along with the return of income the Assessee filed a letter dated 13.10.2008 intimating the AO that the income of the Assessee is included in the total income of the beneficiaries and offered to tax directly by them in their return of income. A revised return of income was filed on 29.3.2010 in which the total income declared was reduced to Rs.343,27,09,174/- with tax liability as nil claiming refund of TDS.

5. For AY 2009-10, the Assessee in ITA No.475/Bang/2013, ICICI Emerging Sectors Fund, filed return of income declaring total income of

Rs.4,30,52,648/-. Thereafter the aforesaid ROI was revised u/s.139(5) of the Act, declaring "nil" income and claiming a refund of Rs.21,51,930/- towards tax deduction at source. Along with the revised ROI a letter dated 4.5.2011, intimating that the income of the Assessee is included in the total income of the beneficiaries and offered to tax directly by them in their return of income, was also filed.

6. In the Assessment of the Assessees in ITA No.177/Bang/12 and 179/Bang/12 for A.Y.08-09, the AO was of the view that the individual shares of the persons on whose behalf or for whose benefit income is received or receivable by the Assessee or part thereof are indeterminate or unknown. In this regard, the AO referred to the Trust Deed dated 25.9.2006 and observed that the shares of the beneficiaries are not mentioned therein. He was also of the view that the fact that the deed mentions that share of the beneficiaries would be allocated according to their investments in the fund does not make the share determinate or known. The AO was therefore of the view that the provisions of Sec.164(1) of the Act would apply and the Assessee would be liable to be assessed at the maximum marginal rate which was 30% plus surcharge, if any, and education cess, if any. The beneficiaries had however declared interest income at the applicable rates and STCG on sale of mutual fund units at 10% which is the rate as per the provisions of Sec.111A of the Act. There is no dispute with regard to the fact that the beneficiaries have declared income allocated by the Trust to them and have been assessed in respect

of the share of their income. The AO also observed that the same income cannot be taxed twice, once in the hands of the Trust and again in the hands of the beneficiaries in view of the provisions of Sec.86 of the Act which provides that where the assessee is a member of an association of persons, income-tax shall not be payable by the assessee in respect of his share in the income of the association, if the association is chargeable to tax on its total income at the maximum marginal rate or any higher rate under any of the provisions of this Act. The AO also held that the Assessee and the beneficiaries joined in a common purpose or common action, the object of which was to produce income, profits and gains and therefore constituted an AOP. The AO also referred to the fact that the Assessee had obtained PAN in the status of an AOP (Trust) and filed its E-Return of income by quoting the status as AOP/BOI. Consequently the income in question has to be brought to tax in the hands of AOP at the maximum marginal rate. In this regard, the AO made reference to the decision of the Hon'ble Supreme Court in the case of *ITO Vs. Ch. Atchaiah 218 ITR 239 (SC)* wherein, in the context of assessment of income of an AOP, it was held by the Hon'ble Supreme Court that income has to be brought to tax in the hands of right person. The Assessee had before the AO relied on the following judicial pronouncements in support of its stand that there was no AOP in existence and therefore the Assessee should not be taxed at the maximum marginal rate.

(1) Gopala Pillai A.K. Vs. ITO 75 ITR 120 (Mad);

(2) CWT Vs. Trustees of HEH Nizam's Family (remainder Wealth) Trust 107 ITR 555 (SC);

(3) CIT Vs. Shamaraju Trustees 56 Taxman 175 (Karn.); (4) Lakshmipat Singhania Vs. CIT 72 ITR 291 (SC).

7. The AO without discussing the facts of those cases and the ratio laid down in those decisions and as to how the facts of the Assessee's case are different from those cases, held that the cases cited are not applicable to the facts of the Assessee's case.

8. The AO also observed as follows:-

> "It is not denied that the business was carried on by the fund on behalf of the beneficiaries of the Trust (AOP) and that considerable profits were earned from the business. The control and management of the business was in the hands of the Fund. The control and management was a unified one. The beneficiaries had joined in a common purpose and they acted jointly. When they did so, they acted on behalf of the persons who are the owners of the business. The Fund did not and could not have represented the individual interest of the various beneficiaries. If they had done so, there would have been chaos in the business. The profits to which those owners lay claim and which they were not averse to pocked, were earned on behalf of an AOP. Reliance is placed on the decision of the Supreme Court in the case of N.V. Shanmugam & Co. Vs. CIT 81 ITR 310 (SC) and CIT Vs. Managing Trustees Nagore Durgah 57 ITR 321 (SC)."

9. The AO, for the above reasons, brought to tax the entire income in the hands of the Assessee at the Maximum Marginal Rate.

10. In AY 09-10 in the case of Assessee in ITA No.475/Bang/13, the AO followed his reasoning as given in the order of Assessment in AY 08-09 in the case of the very same Assessee, which order is subject matter of appeal for AY 08-09 in ITA No. 177/Bang/12.

11. Against the aforesaid assessments, the Assessees preferred appeals before the CIT(A), who held that :-

(i) that the assessee trust, is a revocable trust and it need not be subjected to tax, as the tax obligation have been fully discharged by the beneficiaries of the assessee trust;

(ii) The names of the Beneficiaries are identifiable and that the beneficiaries and the shares of the beneficiaries are determinable;

(iii) that the assessee trust cannot be assessed as an "AOP".

Aggrieved by the order of the CIT(A), the Revenue has filed ITA No.179/Bang/2012, ITA No.177/Bang/2012 and ITA No.475/Bang/2013.

12. 12. The grounds of appeal raised by the Revenue which is identical in all the appeals reads thus:

> "1. The Order of the CIT (A) is opposed to facts of the case.
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> 2. The CIT (A) should have appreciated the fact that the assessee, an Asset Management entity came into existence by virtue of a Trust deed.

3. The CIT(A) has erred in holding that the assessee trust , is a revocable trust and it need not be subjected to tax, as the tax obligation have been fully discharged by the beneficiaries of the assessee trust.

4. The CIT (A) ought to have appreciated the fact, that the names of the Beneficiaries are not identifiable in the original trust deed.

5. The CIT (A) ought to have appreciated the fact, that the beneficiaries and the shares of the beneficiaries are not mentioned in the trust deed.

6. The CIT (A) ought to have appreciated the fact that, the shares of the beneficiaries are not determinate on the basis of the trust deed. Hence, the income of the Trust has to be assessed in the hands of the Trust and not in the hands of the beneficiaries.

7. The CIT (A) ought to have appreciated the fact that the shares of the beneficiaries are not distributed exactly as per the formula determinable from the trust deed rather the shares vary depending upon the amount contributed by the beneficiaries for asset management.

8. The CIT (A) erred in holding that the assessee, trust cannot be assessed as an "AOP".

9. The CIT (A) ought to have appreciated the fact that Section 2(31) of the I. T. Act gives an inclusive definition for the word "Person". There is no separate status of Trust envisaged in the definition of person. All the trusts are assessed on the status of AOP. This being the case, the assessment of the assessee in the status of AOP is in order. Accordingly, whatever provisions of the Act applies to AOPs will apply to the assessee also. Hence it is not relevant whether the necessary ingredients for formation of an AOP are fulfilled by the assessee or not. The assessee who is a trust is rightly assessed in the status of AOP since there is no specific status of Trust is available in Section 2(31).

10. The CIT (A) ought to have appreciated the fact that Income tax Act envisages that the income of a person has to be assessed in the correct and appropriate status. Merely, because someone else has been assessed and has paid tax, though by

> mistake on the same income, the entity in whose hands the income is actually assessable cannot be excluded from assessment.
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> 11. The appellant craves for permission to add or delete the grounds of Appeal at the time of hearing the case."

13. At the time of hearing of these appeals, the parties agreed that identical issue on identical set of facts was considered by this Tribunal in the case of The DCIT Vs. M/S.India Advantage Fund-VII in ITA No.178/Bang/2012 for AY 2008-09 and this Tribunal by its order dated 17.10.2014 upheld identical order of the CIT(A). The parties also agreed that the terms of the trust deed are identical in substance and form in these cases as well as the case of M/S.India Advantage Fund-VII (supra) already decided by this Tribunal. The grounds of appeal raised by the Revenue in the appeal decided by the Tribunal and in these three appeals are also same.

14. The gist of the decision rendered by the Tribunal in the case of M/S.India Advantage Fund-VII (supra) are set out for ready reference:

14.1 The Tribunal firstly considered the question whether there could be a contributory trust in law as has been created by the Assessees in these cases. On the above question the Tribunal held as follows:

> "44. We were initially doubtful, whether a person who contributes to the trust in accordance with the terms of a

contribution agreement could be said to be "beneficiary" of the trust. It is no doubt true that the beneficiaries are identifiable in terms of the trust deed as persons who contribute under the contribution agreement. But can the beneficiaries be made to contribute to the trust? Beneficiaries are generally recipients of benefits under the deed of trust. Can the trust hold the money so contributed in trust for the contributors and can such contributors be called "beneficiaries"? It appeared to us to be a venture undertaken by the Trust, author of the trust and the identified beneficiary at the time of creation of the trust who happens to be the beneficiary and the Investment Manager to whom without any option the management of the trust fund had to be entrusted. It is like any other form of business organization mobilizing funds for investments and promising returns to the contributors. Can such objective be achieved by forming a trust?

45. Similar questions arose for consideration before the Authority for Advance Ruling in the case of *XYZ, In Re 224 ITR 473 (AAR)*. We need to look at the facts of the said case before we set out the ruling given by the AAR. An American company in collaboration with an Indian financial services company proposed to set up another fund. For this purpose a trust was created whereby the Indian Financial services company was the author of the trust and another Indian Trust company was appointed as Trustee. The funds of the Trust were to be invested in Indian companies and projects in India. The Indian financial service company was to act as the principal Investment Adviser in India to the trust under an advisory agreement. By an Indenture of trust, the Indian financial service company made an initial settlement of Rs. 1 lakh on the trustees on trust. This along with contributions that may be made to the trust fund by others is referred to as `Contribution Fund'. The Indian financial services company was the only contributor and also the only beneficiary under the trust deed. Clause 7 of the trust deed contains a provision to the following effect :-

> "Power of Addition
>
> 7. (a) The trustee shall have the power at any time or times during the trust period to add as beneficiaries such one or more persons or class of persons as the trustee shall in their absolute discretion determine.

(b) Any such addition shall be made by deed signed by the trustee and :

(i) naming or describing the person or persons or class of persons to be added as beneficiaries;

(ii) specifying the date (not being earlier than the date of the deed but during the trust period) from which such person or persons to be thereby added as beneficiaries; and

(c) It is hereby clarified that such beneficiaries will be entitled to only such share that is in proportion to the contribution made by them and in accordance with the Contribution Agreement."

46. On the above facts, which are on par with the facts of the present case before us, the AAR held as follows:-

"At the time of hearing, a doubt was expressed by the Authority as to how far a provision conferring an absolute discretion on the trustees to add names of beneficiaries to the trust would be justified in law. Though the authorised representative of the applicant (AR) contended that this clause was perfectly in order (citing O.P. Agarwalla on Trust, p. 220-2), he also expressed his willingness to modify cl. 7(a) as follows in order to obviate any kind of objection :-

"7.(a) The trustee shall during the trust period, have the power at their discretion to admit as beneficiary any institutional investor which agrees to enter into a contribution agreement."

and, consequent on the above, to insert a definition of the expression "institutional investor" in cl. 1 to the following effect :

"(1) `Institutional Investor' means any entity other than an individual, being a natural person including but not limited to financial institution, company or corporation, Government, State or Political sub-division or local authority, that trustees may consider a reputable investor."

After a little discussion he was willing also to drop the last seven words which were considered to be somewhat vague.

9. One may pause here to consider whether there could be any valid objections to the constitution of a trust in this manner. The authors of the trust are the IC, the Indian financial service company and others contributing to the trust by the date of the trust deed. Indeed even institutional investors contributing to the trust, in helping the CT achieve its target of 50 million dollars can be considered as supplemental authors of the trust, the CA constituting r/w the trust deed, the instruments constituting the trust in their cases. **The purposes of the trust are, as stated in the TD, to invest the trust funds and distributing the proceeds to the beneficiaries. <u>This is, in a sense, nothing more than an arrangement by which certain parties agreed to contribute funds for a common purpose and divide the profits amongst themselves. No doubt the same objective could be achieved by the constitution of a firm or a company but, equally, there seems to be no valid objection if the parties wish to do it in the form of a trust which, under the Trust Act, merely represents certain obligations annexed to the ownership of property in the form of the contributed funds.</u> The purposes of the trust cannot be said to be forbidden by law or likely to defeat the provisions of any law or fraudulent or involving injury to any person or property or opposed to public policy : vide s. 4 of the Indian Trusts Act (IV of 1882). It will appear later that, in entering into the present transactions, the parties took into account certain difficulties if the same transactions had been put through the format of a company and also took into account certain financial and tax implications. But these cannot render the purposes of the trust unlawful within the meaning of the Indian statute.** The clause which enabled the trustees to admit any one as a

> beneficiary, the Authority felt, might introduce a degree of uncertainty regarding the element of beneficiaries under the trust. The parties have agreed to modify the clause as indicated above. The result is that now the trustee's choice of beneficiaries is restricted (a) by the overall limit of the fund; (b) only to institutional investors; and (c) to persons who agree to subscribe to the CA. The criteria for persons to become beneficiaries and the shares of income they are entitled to are clearly defined in the deed. The Authority is of opinion, that with the introduction of the modifications referred to above and in the light of the statement on law contained in the passages from Agarwalla's Trust Act cited by learned counsel, there can be no objection to the validity of the modified trust deed. [Parenthetically, however, it may be observed that, in the definition in cl. (a) proposed to be inserted, the words "being a natural person" appears to be a surplusage and may be omitted without detracting from the meaning of the clause. But this has no impact on the validity of the trust deed."
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> (emphasis supplied)
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> 47. We agree with the aforesaid observations of the AAR and we proceed further to decide the various issues raised by the Revenue in its appeal."

14.2 The Tribunal thereafter examined tax implications of private discretionary trusts, and observed that it is only when trustees have discretion entirely not to distribute income to beneficiaries that the rigours of Sec.164 of the Act as amended by finance Act, 1970 would be attracted. The following were the relevant observations of the Tribunal:

“50. …….the Finance Act, 1970, has replaced s. 164 of the IT Act by a new section. Under s. 164 as so replaced, a `representative assessee' who receives income for the benefit of more than one person whose shares in such income are indeterminate or unknown, will be chargeable to income-tax on such income at the flat rate of 65% or the rate which would be applicable if such income were the total income of an AOP, whichever course would be more beneficial to the Revenue.

51. When the Explanation was added in 1980, the CBDT issued the following circular [see (1980) 123 ITR (St) 159] [The quotation has been taken from the Memorandum explaining the provisions of the Finance (No. 2) Bill, 1980 and not from the relevant circular, which is Circular No. 281 dt. 22nd Sept., 1980 reported in (1981) 131 ITR (St) 4, though the Circular uses similar language—Ed.] :

> "49. xxx xxx xxx
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> (iv) Under the existing provisions, the flat rate of 65% is not applicable where the beneficiaries and their shares are known in the previous year, although such beneficiaries or their shares have not been specified in the relevant instrument of trust, order of the Court or wakf deed. This provision has been misused in some cases by giving discretion to the trustees to decide the allocation of the income every year and in other ways. In such a situation, the trustees and beneficiaries are able to manipulate the arrangements in such a manner that a discretionary trust is converted to a specific trust whenever it suits them tax-wise. In order to prevent such manipulation, it is proposed to provide that unless the beneficiaries and their shares are expressly stated in the order of the Court or the instrument of trust or wakf deed, as the case may be, and are ascertainable as such on the date of such order, instrument or deed, the trust will be regarded as a discretionary trust and assessed accordingly."

52. From the above extracts it can be seen that the object of the amendments to the provision was only that the distribution of the income should not be entirely at the discretion of the trustees and that the trust deed should regulate the shares.”

14.3 On the issue raised by the Revenue in Ground No.3 with regard to the applicability of the provisions of Sec.60, 61 and 63 of the Act to the facts and circumstances of the case, the Tribunal held as follows:

> "53. Having noticed the tax implications of discretionary trusts, we may now revert to the various issues raised by the Revenue in the grounds of appeal and the facts of the present case. The issue raised in grounds No.1 is general, calling for no specific adjudication. The issue raised by the Revenue in Ground No.2 is with regard to the applicability of the provisions of Sec.60, 61 and 63 of the Act to the facts and circumstances of the present case. In this regard it needs to be clarified that the Assessee in its reply dated 15.12.2010 to the AO in the course of assessment proceedings pointed out the above provisions and submitted that it is only the beneficiaries who have to be assessed to tax in respect of income arising from a revocable transfer. The AO in the order of assessment did not consider the above argument nor has he given any reasons why the same are rejected. The submission made by the Assessee before CIT(A) on this aspect have been accepted by the CIT(A) but he has not discussed or given any reasons as to how the submissions are being accepted. The basic scheme of section 61 r/w section 62 and section 63 is as follows : where under a settlement any income arises to the settlor, it has to be assessed in the hands of settlor, whether the settlement is revocable or irrevocable. If under a settlement any income arises to any other person apart from the settlor such income can still be assessed in the hands of the settlor provided the settlement is revocable. Even if a settlement on the face of it is stated to be irrevocable, if the same provides for direct or indirect retransfer of income or assets of the settlement to the settlor or gives the settlor a right to resume power directly or indirectly over such income or asset, the settlement should be deemed to be revocable.
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> 54. In Chapter X of the private placement memorandum issued by the investment manager inviting contribution from investors, the tax considerations in making investments as understood by them have been set out. The contents thereof in brief are that the contribution by the contributors are akin to "revocable transfer" u/s.61 of the Act read with Sec.63 of the Act and therefore

income arising from the transfer are assessable in the hands of the contributors. The contributors are therefore informed that in respect of their pro-rata share of income received by the Fund it is the contributors who will be liable to tax and not the Trust/Fund. The nature of income that is likely to arise from the revocable transfer has also been set out therein and the same is referred to as (1) Dividend declared by companies whose shares are held by the Trust, are exempt in the hands of the shareholders and therefore the dividend earned by the Trust from investment would be exempt from tax and therefore there would be no tax implications in the hands of the beneficiary. (2) Interest on loans given by the Trust/Fund to companies would suffer tax deduction at source. Nevertheless the beneficiaries have to declare interest income and pay tax thereon but claim refund of tax paid or credit for taxes already paid. (3) Gain on sale of Portfolio Investments would be subjected to tax either as Long Term Capital Gain or Short Term Capital Gain. There is also a reference to the fact that in case the gain on sale of securities of companies held/invested by the Trust/Fund are held to be in the nature of business income then such business income would be taxable in the hands of the beneficiaries at the relevant applicable rates. (4) Gain on redemption premium of debentures/bonds will also suffer tax either as long term or short term capital gain depending on the period of holding.

55. Under clause-2 of the contribution Agreement, the contributor/beneficiary/investor agrees to contribute a specified sum to the trust/fund. Clause-2.6 of the contribution agreement specifies that the contributor/investor/beneficiary shall not have any right to demand the return of his/her/its fund contributor, other than upon dissolution of the fund. Clause-2.6.2 provides that the trustee may refund the fund contributor to the contributor, without interest, within a period of 3 months from the date hereof, in the event the minimum fund commitment is not received. Clause2.9 of the contributor agreement also lays down that the redemption of units by the beneficiary shall be at the sole discretion of the Trustees in consultation with the investment manager.

56. In the light of the aforesaid clauses in the contribution agreement, can it be said that transfer of funds by the beneficiary to the trust/fund is a revocable transfer?

57. The answer to the above question cannot be given by merely reading the clauses in the contribution agreement alone. The contention of the learned counsel for the Assessee before us was that the Contribution agreement has to be read along with the Trust Deed as well as the Investment Management agreement and offer document for private placement issued by the Investment Manager. Article-13 of the Trust Deed provides for termination of the Trust. Though such a power is not with the beneficiary/transferor, it is not the requirement of Sec.61 that the power of revocation must be at the instance of the beneficiary/transferor. The power of revocation under Clause13 of the Deed of Trust is a general power of revocation and the same would be sufficient for construing the transfer in the present case as a revocable transfer. As rightly contended by the learned counsel for the Assessee it is not necessary that the power of revocation should be at the instance of the contributors/beneficiaries/ transferor and it can be at the instance of any person either settlor, trustee, transferee or the beneficiaries. Provisions of Sec.61 of the Act do not contemplate a power of revocation only at the instance of the transferor. In this regard the reliance placed by the learned counsel for the Assessee on the observations of the Hon'ble Supreme Court in the case of *Surat Art Silk Cloth Mfrs. Association (supra)* support the plea taken by him. As rightly contended by him the existence of a power to revoke the transfer that has to be seen and not the manner in which/ or at whose instance such revocation is brought about.

58. The alternative submission of the learned counsel for the Assessee that the provisions of Sec.63(a) of the Act, which deems existence of power of revocation in certain circumstances, are also acceptable. In this regard prospectus inviting contribution from contributors clearly lay down in certain circumstances 75% of the contributors can revoke their contribution to the fund at any point of time and the trustees shall then terminate the fund. Though the above power of the transferor/beneficiary to revoke the transfer is not in the instrument of transfer but by virtue of the power conferred in a document by which the investment manager appointed by the trust by virtue of powers conferred under the trust deed, would be sufficient to conclude that the transferor/beneficiary had deemed powers of revocation. In this regard the reliance placed by the learned counsel for the Assessee

> on the ratio laid down in the decision of the Hon'ble Supreme Court in the case of *Jyothendrasinhji (supra)* is squarely applicable to the present case. In the aforesaid decision the Hon'ble Supreme Court held that Sec. 63(1) of the Act does not say that the deed of transfer must confer or vest an unconditional or an exclusive power of revocation in the transferor. It was further held that the fact that concurrence of the trustee had to be obtained by the transferor/settler for revocation will not make the trust an irrevocable transfer. In such circumstances it must be held that the deed contains a provision giving the transferor a right to re-assume power directly or indirectly over the whole or any part of income or assets within the meaning of s. 63(a)(ii) of the Act.
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> 59. For the reasons given above we hold that Sec.61 read with Sec.63 of the Act which mandates that income arising to any person by virtue of a revocable transfer of assets shall be chargeable to income tax as income of the transferor will apply to the facts and circumstances of the present case and therefore the assessment in the hands of the transferee/representative assessee was not proper."

As we have already mentioned, the terms of the Trust Deed, the Contribution Agreement and the Memorandum of private placement are identical in substance and there is no dispute on this aspect either before the Revenue authorities or before the Tribunal.

14.4 On the issue raised in Ground No.4 to 7 of the grounds of appeal in these appeals, the Tribunal dealt with identical grounds in the case of India Advantage Fund-VII (supra) and held as follows:

> "61. The general rule as laid down in Sec. 161(1) is that income received by a trustee on behalf of the beneficiary shall be assessed in the hands of the trustee as representative assessee and such assessment shall be made and the tax thereon shall be levied

upon and be recovered from the representative assessee "in like manner and to the same extent as it would be leviable upon the recoverable from the person represented by him". To the above rule, however, three exceptions have been incorporated in the Act:-

(a) Under s. 161(1A), this rule of apportionment and determination of proportionate tax attributable to the beneficiary will not apply to any income earned by the trustee as profits and gains of a business. The whole of such income shall be taxed at the "maximum marginal rate". A similar proviso occurs also in s. 164(1) restricting benefits where business income is involved.

(b) Under s. 164(1), if the beneficiaries are not identifiable or the individual shares of the persons on whose behalf and for whose benefit the income is receivable are indeterminate or unknown, such income, again, will be taxed at the "maximum marginal rate".

(c) In certain other circumstances, set out in the proviso to s. 164(1), the relevant income will be assessable not at the maximum rate but at the rate applicable to it as if it were the total income of an AOP.

62. In the present case the AO has not invoked the provisions of Sec.161(1A) of the Act or the proviso to Sec.164(1) of the Act and therefore, we need not examine those provisions. As far as identification of individual shares of the Sec.164(1) of the Act will not get attracted for the reason that the beneficiaries are not identifiable.

63. The question for our consideration therefore is regarding applicability of Sec.164(1) of the Act. There are two aspects to be noticed in the above provisions. The first aspect is the identification of the beneficiaries. The second aspect is with regard to ascertainment of the share of the beneficiaries.

64. On the aspect of identification of the beneficiaries, it is the plea of the learned counsel for the Assessee that so long as the trust deed gives the details of the beneficiaries and the description of the person who is to be benefited, the beneficiaries cannot be said to be uncertain. CBDT Circular No.281 dated 22.9.1980 wherein the CBDT has explained the scope of Sec.164 with

regard to stating the name of the beneficiaries in the trust deed. In the said circular the provisions of Expln.-1 to Sec.164 of the Act regarding identification of beneficiaries has been explained to the effect that for identification of beneficiaries it is not necessary that the beneficiary in the relevant previous year should be actually named in the order of the Court or the instrument of trust or wakf deed, all that is necessary is that the beneficiary should be identifiable with reference to the order of the Court or the instrument of trust or wakf deed on the date of such order, instrument or deed. We find that Clause 1.1.13 of the Trust Deed clearly lays down that beneficiaries means the Persons, each of whom have made or agreed to make contributions to the Trust in accordance with the Contribution Agreement. We are of the view that the above clause is sufficient to identify the beneficiaries.

65. On the aspect of ascertainment of share of the beneficiaries, we find that Article 6.5 of the Trust Deed clearly specifies the manner in which the income of the Assessee is to be distributed. The said clause details formula with respect to the share of each beneficiary. As rightly contended on behalf of the Assessee it is not the requirement of law that trust deed should actually prescribe the percentage share of the beneficiary in order for the trust to be determinate. It is enough if the shares are capable of being determined based on the provisions of the trust deed. In the case of the Assessee the trustee have no discretion to decide the share of each beneficiary and are bound by the provisions of the trust deed and is duty bound to follow the distribution mechanism specified in the trust deed. The further aspect that may require consideration in the present case is with regard to the clause in the Trust Deed which authorises addition of further contributors to the trust at different points of time in addition to initial contributors. From this clause can it be said that share income of the beneficiaries cannot be determined or known from the trust deed. On the above aspect, we find the AAR in the case of XYZ In re (supra) has considered similar clause in a trust deed with specific reference to the provisions of Sec.164(1) of the Act and has held that if the trust deed sets out expressly the manner in which the beneficiaries are to be ascertained and also the share to which each of them would be entitled without ambiguity, then it cannot be said that the Trust deed does not name the beneficiaries or that their shares are indeterminate. The persons as well as the shares must be capable of being definitely pin-pointed and

> ascertained on the date of the trust deed itself without leaving these to be decided upon at a future date by a person other than the author either at his discretion or in a manner not envisaged in the trust deed. Even if the Trust deed authorises addition of further contributors to the trust at different points of time, in addition to initial contributors, than the same would not make the beneficiaries unknown or their share indeterminate. Even if the scheme of computation of income of beneficiaries is complicated, it is not possible to say that the share income of the beneficiaries cannot be determined or known from the trust deed. In view of the aforesaid decision of the AAR, with which we respectfully agree, we hold that the provisions of Sec.164(1) of the Act would not be attracted in the present case. We also find that the Hon'ble Madras High Court in the case of *P.Sekar Trust (supra)* and *Manilal Bapalal (supra)* has taken a view that identity by reference to the terms of the trust deed is sufficient and it is not necessary that the beneficiaries should be specifically named in the deed of trust. Consequently Grounds 4 to 7 raised by the Revenue are held to be without merit."

As we have already stated the terms of the trust deed are identical in all cases and there is no dispute on this aspect.

14.5 On the issues raised in Ground No.8 & 9 by the Revenue, the tribunal in the case of India Advantage Fund-VII, held as follows:

> "66. In ground No.8, the Revenue has challenged the order of the CIT(A) whereby the CIT(A) held that the Assessee cannot be assessed as an "AOP". In Ground No.9 the Revenue has contended that there is no separate status of Trust for making assessment envisaged under the Act. In this regard the definition of person u/s. 2(31) of the Act which does not specifically refer to "Trust" is being highlighted in the grounds raised by the Revenue. These grounds can be conveniently dealt with together.
>
> 67. Sec.2(31) of the Act defines the term "Person". The definition includes "Association of Persons"(AOP). There is no definition of the expression AOP occurring in the 1922 Act. By a series of decisions, the meaning of this expression was precisely

defined and tests were laid down in order to find out when a conglomerate of persons could be held to be an AOP for the purposes of section 3 of the 1922 Act. While interpreting this expression occurring in section 3 of the Indian IT Act, 1922, the Supreme Court in *CIT vs. Indira Balkrishna (supra)* held "an AOP must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce income, profits or gains". The Supreme Court, however, administered the following caution: *''There is no formula of universal application as to what facts, how many of them and of what nature, are necessary to come to a conclusion that there is an AOP within the meaning of section 3; it must depend on the particular facts and circumstances of each case as to whether the conclusion can be drawn or not".* To the above judicial exposition of what constitutes AOP, there has been a statutory rider added. The Finance Act, 2002 has inserted w.e.f. 1st April, 2003 an Explanation to clarify that object of deriving income is not necessary for AOP, BOI, local authority or an artificial juridical person in order that such entity may come within the definition of "Person" in section 2(31). If income results than they are liable to be taxed as AOP if the other conditions laid down by judicial decisions are satisfied. In the light of the above definition of AOP, let us examine the facts of the present case.

(i) The Assessee is a trust constituted under an instrument of trust dated 25/9/2006. M/S.ICICI Venture Funds Management Company Limited (hereinafter referred to as "Settlor") by an indenture of Trust dated 25.9.2006 transferred a sum of Rs.10,000/- to M/S. The Western India Trustee and Executor Company Limited (hereinafter referred as the "Trustee") as initial corpus to be applied and governed by the terms and conditions of the indenture dated 25.9.2006. The trustee was empowered to call for contributions from the contributors which will be invested by the Trustee in accordance with the objects of the trust. The objective of creation of the trust was to invest in certain securities called mezzanine instruments and to achieve commensurate returns to the contributors. The fund collected from the contributors together with the initial corpus was to be handed over to the trustees under the

provisions of the Indian Trust Act, 1882. The trust was to facilitate investment by the contributors who should be resident in India and achieve returns to such contributors. The contributors to the fund are its beneficiaries.

(ii) The trustees had power to appoint investment managers to manage the trust fund. The Settlor was to be appointed as the investment manager. The terms of the appointment of the settlor as investment manager are set out in an investment management agreement dated 25.9.2006 between the Assessee represented by the Trustee and Settlor.

(iii) The Settlor as investment manager issued memorandum to prospective investors on a confidential basis for them to consider an investment in mezzanine Fund. An investor who wishes to contribute to the fund enters into a contribution agreement with the trust, the trustees acting on behalf of the trust and the Settlor acting in his capacity as investment manager.

68. It can thus be seen that the beneficiaries contributed their money to the Assessee and a separate agreement was entered into between the Assessee and each beneficiary. There is no inter se arrangement between one contributory/ beneficiary and the other contributory/beneficiary as each of them enter into separate contribution arrangement with the Assessee. Therefore it cannot be said that two or more beneficiaries joined in a common purpose or common action and therefore the tests for considering the Assessee as AOP was satisfied. The beneficiaries have not set up the Trust. Therefore it cannot be said that the beneficiaries have come together with the object of carrying on investment in mezzanine funds which is the object of the trust. The beneficiaries are mere recipients of the income earned by the trust. They cannot therefore be regarded as an AOP. Ground No.8 raised by the Revenue is therefore held to be without any merit.

69. Another reason assigned by the AO for treating the status of the Assessee as AOP was that in the return of income filed by the Assessee the status was shown in return of income. In this regard it is not in dispute before us that the form of return of income as it existed for the relevant assessment year did not contain a clause

for filing return of income by a "Trust" in the status other than AOP. The CBDT realised this difficulty faced by 'private discretionary trusts' having total income exceeding ten lakh rupees facing problem in filing their return of income electronically in cases where they are filing their return in the status of an individual because status of a private discretionary trust has been held in law as that of an 'individual' gave instructions in Circular No.6/2012 dated 3.8.2012 to the effect that it will not be mandatory for 'private discretionary trusts', if its total income exceeds ten lakh rupees, to electronically furnish the return of income for assessment year 2012-13. Form No.49A which was the prescribed form of application for allotment of Permanent Account Number (PAN) also did not contain a separate status "Trust" but contained a column "AOP (Trust)". The revised Form No.49A later notified contains a column for status as "Trust". Therefore the argument of the revenue that all "Trusts" are AOPs is not correct. If the contention of the Revenue as raised in Ground No.9 is accepted than the provisions of Sec.161(1) of the Act would become redundant. The charge to tax in the hands of the representative Assessee has to be in accordance with Sec.161(1) of the Act and therefore the status of the Assessee cannot be that of AOP. Ground No.9 raised by the Revenue is therefore held to be without any merit."

14.6 On the issue raised in ground No.10, this Tribunal in the case of India Advantage Fund-VII, held as follows:

"70. In ground No.10 the Revenue has raised issue that income has to be brought to tax in the hands of the right person in the right status. In this regard there are circulars dt. 24th Feb., 1967, 26th Dec., 1974 and 24th Aug., 1966 on the issue wherein it has been opined that once the choice is made by the Department to tax either the trust or the beneficiary, it is no more open to the Department to go behind it and assess the other at the same time.

71. In the case of *David Joseph (supra)* the Hon'ble Kerala High Court after making a reference to the above circulars held that once a beneficiary is assessed and his assessment is completed prior in point of time, and his assessment is an element of

finality, it is a natural consequence flowing therefrom that the Department does not get any permission to go behind it for the purpose of scrutinising the procedure, for finding out faults in regard thereto, the sole object of which is to justify the subsequent action taken by the Department. These are in fact the normal consequences that flow from the principle of finality. This principle especially emerges from three circulars and has established into a settled practice, any time a deviation therefrom cannot be permitted, even on the ground of a mistake with regard to the merits of the situation that received finality. Similar view has been taken by the Hon'ble M.P.High Court in the case of *Rai Sahe Seth Ghisalal Modi Family Trust (supra)* and Hon'ble Bombay High Court in the case of *Trustees Of Chaturbhuj Raghavji Trust (supra).*

72. The Hon'ble Bombay High Court in the case of *Trustees of Chaturbhuj Raghavji Trust (supra)* held that under sub-s. (2) of s. 41, it is permissible for the IT authorities to make direct assessment on the person on whose behalf income, profits and gains from a trust are receivable. Sec. 41 having provided for two alternative methods, namely, either to tax the income in the hands of the trustees or directly in the hands of the person on whose behalf the income was receivable under the trust, and one of them having been availed of by the IT Department in directly assessing beneficiary in respect of the income, the other was no longer available to the Department. It was contended on behalf of the Revenue that the option was of the ITO who was assessing the trust to decide whether he would assess the income in the hands of the trustees or directly in the hands of the beneficiary. This contention was rejected by the Hon'ble High Court which held that Sec. 41 was a special enabling provision which permitted the assessment in the hands of the trustees but did not preclude the direct assessment in the hands of the beneficiaries. There is nothing in s. 41 which would indicate that the choice between the alternative methods provided therein has to be made only at the time of the assessment of the trustees or that the choice only belongs to the ITO who is assessing the trust. In Circular No.157 dated 26.12.1974 of CBDT the CBDT has clarified on assessment of trust where share of beneficiaries are unknown. It has been clarified therein that the ITO should at the time of raising the initial assessment either of the trust or the beneficiaries adopt a course beneficial to the Revenue. Having

exercised his option once, it will not be open to the ITO to assess the same income for that assessment year in the hands of the other person (i.e., the beneficiary or the trustee). In CBDT Circular No.13/2014 dated 28.7.2014 the Board has however given instructions that as per the SEBI (Alternative Investment Funds) Regulations, 2012 funds which are not venture capital funds and which are non-charitable trusts where the investors name and beneficial interest are not explicitly known on the date of its creation- such information becoming available only when the funds starts accepting contribution from the investors, have to be treated as falling within Sec.164(1) of the Act and the fund should be taxed in respect of the income received on behalf of the beneficiaries at the maximum marginal rate.

73. The reliance placed on the aforesaid circular, in our view, will not be of any use for the reason that the said Circular was not in force at the relevant AY when the assessment was made by the AO on the present Assessee. Circulars not in force in the relevant Assessment year cannot be applied as held by the Hon'ble Bombay High Court in the case of *BASF (India) Ltd. & Anr. vs. W. Hasan, CIT & Ors. 280 ITR 136 (Bom)*. The decision of the Hon'ble Supreme in the case of *Ch. Atchaiah (supra)* on which the AO placed reliance in making assessment on the Assessee in our view is not applicable to the facts of the present case. In the said decision the status of the Assessee as that of an AOP was not disputed but it was argued that the ITO had option to assess either the AOP or the individual member of the AOP. The Hon'ble Supreme Court held that unlike under s. 3 of the 1922 Act, the ITO did not have an option under s. 4 of the IT Act, 1961, to assess either the AOP or the individual members thereof. If the ITO has assessed a wrong person, say individual instead of AOP, he is not precluded, in contradistinction to the 1922 Act, to seek to assess the right person under the 1961 Act. The Hon'ble Court made it clear that wherever such on option is given under the 1961 Act, it has been specifically provided, as in s.183 and that under the 1961 Act, tax has to be levied on the right person, irrespective of benefit to Revenue. In the present case, however, we are concerned with a case of assessment of representative assessee or the person in respect of whom some other person is considered as representative assessee. Sec.161(1) by implication permits assessment of either the beneficiary or the Trustee. When the Trustee is assessed as representative assessee in respect

> of income received on behalf of the beneficiary, the section provides that tax shall be levied upon and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him. In our view, therefore, the decision of the Hon'ble Supreme Court in the case of *Ch. Atchaiah (supra)* will not be of any assistance to the plea of the revenue in the present case.

15. Following the decision rendered by this Tribunal in the case of *India Advantage Fund-VII (supra)*, we uphold the order of the CIT(A) and dismiss the three appeals, viz., ITA No.177/Bang/12, ITA No.179/Bang/12 and ITA No. 475/Bang/13.

**ITA No. 348/Bang/2011 (For AY 08-09)**

16. This appeal by the Revenue arises out of an order passed u/s.154 of the Act. As we have already seen, the Assessee in ITA No.177/Bang/2013, ICICI Emerging Sectors Fund, filed return of income for AY 08-09 claiming taxable income at "Nil" as the beneficiaries have already paid taxes on the income of the Assessee. The AO issued an intimation u/s.143(1) of the Act dated 24.3.2010 in which he raised a demand for taxes without considering the claim of the Assessee that the taxable income of the Assessee was nil. The Assessee filed an application u/s.154 of the Act pointing out that as per the return of income and documents filed along with the return of income, the Assessee should be given refund of TDS as claimed. The Assessee pointed out that the tax demand as raised in the intimation was uncalled for and prayed for suitable

rectification. The said application was dismissed by the AO by order dated 25.8.2010. Against the said order the Assessee filed appeal before CIT(A), who by order dated 17.1.2011 allowed the appeal of the Assessee. The revenue has preferred the present appeal against the said order of the CIT(A).

17. At the time of hearing of the appeal, it was agreed by the parties that the assessment for AY 08-09 was later taken up for scrutiny and an order u/s.143(3) was passed. The said order is subject matter of appeal ITA No.177/Bang/2012. The issue raised in the order u/s.154 of the Act and the issue raised in ITA No.177/Bang/2012 are identical. The intimation u/s.143(1) of the Act to the extent it is modified in proceedings u/s.143(3) of the Act cannot be sustained. Therefore the intimation u/s.143(1) of the Act on passing of the order u/s.143(3) of the Act no longer survives. Therefore the order u/s.154 of the Act and further proceedings thereon are also superfluous. The appeal, therefore, has to be dismissed as infructuous and of no legal effect in view of the subsequent proceedings u/s.143(3) of the Act. Accordingly, ITA No.348/Bang/2011 is dismissed.

**ITA No. 347/Bang/2011**

18. For AY 2008-09, the Assessee in ITA No.347/Bang/2011, ICICI Econet, Internet & Technology Fund, filed return of income declaring total income of Rs.99,50,36,467/- and tax liability of Nil. The Assessee claimed that the income of the Assessee is included in the total income of the

beneficiaries and offered to tax directly by them in their return of income. The Assessee also made a request for refund of TDS of Rs.6,93,447. The AO issued an intimation u/s.143(1) of the Act dated 30.3.2010 in which he raised a demand for taxes without considering the claim of the Assessee that the taxable income of the Assessee was nil. The Assessee filed an application u/s.154 of the Act pointing out that as per the return of income and documents filed along with the return of income, the Assessee should be given refund of TDS as claimed. The Assessee pointed out that the tax demand as raised in the intimation was uncalled for and prayed for suitable rectification. The said application was dismissed by the AO by order dated 25.8.2010. Against the said order the Assessee filed appeal before CIT(A), who by order dated 18.1.2011 allowed the appeal of the Assessee. The revenue has preferred the present appeal against the said order of the CIT(A).

19. We have heard the submissions of the learned DR, who reiterated the stand of the Revenue as reflected in the grounds of appeal filed by the Revenue, viz., that the issue was debatable and therefore the issue ought not to have been decided in an application u/s.154 of the Act.

20. We have considered the submissions of the learned DR and are of the view that the stand taken by the Revenue is unacceptable. The revenue has not picked up the case of the Assessee for scrutiny assessment and therefore there is no occasion for the Assessee to raise

this issue at all. The issue, as we have already seen in the other cases, has been settled. The facts and circumstances of the case are identical to the other cases which we have decided in these group of appeals. We are of the view that the CIT(A) rightly directed the AO to allow the application of the Assessee u/s.154 of the Act. We may also point out that the Assessee has not filed any revised return in this case and had declared 'Nil" taxable income in the return of income filed and did not file any revised return of income. Therefore the issue raised by the revenue in ground no.5 does not arise for consideration at all. We therefore confirm the order of the CIT(A) and dismiss this appeal also by the Revenue.

21. In the result, all the appeals by the revenue are dismissed.

Pronounced in the open court on this 13th day of February, 2015.

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| Sd/- | Sd/- |
| ( ABRAHAM P. GEORGE ) | ( N.V. VASUDEVAN ) |
| Accountant Member | Judicial Member |

Bangalore,
Dated, the 13th February, 2015.

/D S/

Copy to:

1. Revenue
2. Assessees
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar /
Senior Private Secretary
ITAT, Bangalore.