

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” Bench, Mumbai**

**Before Shri Ravish Sood, Judicial Member  
and Shri N.K. Pradhan, Accountant Member**

**ITA No.1675/Mum/2018  
(Assessment Year: 2013-14)**

The ITO-23(1)(2),  
Room No. 108, Matru Mandir,  
Grant Road,  
Mumbai 400 007

M/s India Innovation Fund,  
The IL & FS Financial Centre,  
Vs. Plot C-22, G-Block, BKC,  
Bandra (East), Mumbai 400 051

PAN – AAATI7083F

**(Appellant)**

**(Respondent)**

Appellant by: Shri Abi Rama Kartikiyen, D.R  
Respondent by: S/sh. Arijit Chakravarty and  
Abhishek Tilak.

Date of Hearing: 28.03.2019  
Date of Pronouncement: 03.04.2019

**ORDER**

**PER RAVISH SOOD, JM**

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-32, Mumbai, dated 28.11.2017, which in turn arises from the order passed by the A.O under Sec.143(3) of the Income Tax Act, 1961 (for short 'I.T Act'), dated 28.03.2016 for A.Y. 2013-14. The revenue assailing the order of the CIT(A) has raised before us the following grounds of appeal:

- “1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in treating the assessee as a determinate Trust instead of an AOP?
2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in ha/ding that the assessee is a revocable Trust and not the AOP?

3. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that the assessee is not an AOP since the beneficiaries had not set up the Trust, they (beneficiaries) had not come together with the object of carrying on investment in a fund which was the object of the Trust and there was no inter-se agreement between the beneficiaries of the fund.*
4. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that income of the assessee is taxable in the hands of contributors/beneficiaries as section 161(1) of the IT. Act, 1961, and not in its own hands in status of an AOP.*
5. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that income received by the assessee from complex commercial lending business is not 'Income from Business and Profession', but/Income from Other Sources.*
6. *The appellant craves leave to add, delete, alter, amend and modify any or all grounds of appeal.”*

2. Briefly stated, the assessee is a trust set up under the Indian Trust Act, 1882 by way of an Indenture of trust, dated 07.11.2008, which is registered under the Registration Act, 1908. The assessee had filed its return of income for A.Y. 2013-14 on 30.07.2013, declaring nil income. The return of income filed by the assessee was processed as such under Sec. 143(1) of the I.T Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2). During the course of the assessment proceedings it was observed by the A.O that the assessee had furnished the return of income specifying its status as “any other AOP/BOI artificial juridical person”. Further, it was noticed by the A.O that the assessee had reflected in its profit and loss account interest income of Rs. 71,47,899/- received/earned from fixed deposits. Observing, that the assessee had reflected its total income at Rs.nil in its return of income, the A.O called upon the assessee to explain as to why the interest income derived in the hands of the trust/AOP may not be brought to tax in the hands of the trust/AOP in view of the CBDT Circular No. 157, dated 26.12.1974. In reply, it was submitted by the assessee that as the fund was registered with the SEBI as a Venture Capital Fund, vide registration dated 21.04.2009. Further, it was submitted by the assessee that the contributors/beneficiaries of the fund were viz. (i).

IKP Trust; (ii). Small and Industry Development Bank Limited; (iii). Tata Consultancy Services Ltd; (iv). Department of Science & Technology; and (v) Bharti Airtel. It was submitted before the A.O that the objective of the assessee was to raise funds for the purpose of making investment in Indian unlisted companies via equity or equity related instruments or other instruments permitted under SEBI VCF Regulations. In sum and substance, it was the claim of the assessee that the key objective of the fund was to promote innovation in frontier or emerging technologies through patient investment. In the backdrop of the aforesaid facts, it was submitted by the assessee that the interest income of Rs. 71,47,899/- earned by the fund on the surplus contributions which were invested in fixed deposits was allocated to the contributors on pro-rata basis as they were entitled to the same. It was the claim of the assessee that the Fund was a “Determinate trust” and the interest income was taxable in the hands of the beneficiaries and not in the hands of the fund. It was thus the claim of the assessee that the interest income was taxable in the hands of the contributors/beneficiaries and could not be assessed in the hands of the Fund under Sec. 161(1A) of the I.T Act. Apart there from, it was submitted by the assessee that if tax was to be imposed on the income in the hands of the trust (representative assessee), it was to be done in the like manner and to the same extent as it would be leviable upon in the hands of the contributors/beneficiaries.

3. The A.O after deliberating on the contentions of the assessee was not persuaded to subscribe to the same. Insofar the claim of the assessee that its income was exempt u/s 10(23FB) of the I.T Act was concerned, it was observed by the A.O that the said exemption was available in respect of the income earned by a Venture Capital Fund, on investments made in a Venture Capital Undertaking. It was thus observed by the A.O that as the assessee had earned interest on

deposits kept with the various banks, therefore, the same not being income earned on investment in Venture Capital Undertakings was thus not eligible for exemption under the said statutory provision. Further, it was observed by the A.O that the assessee was to be treated as an AOP and not a trust. It was observed by the A.O that the assessee was not a representative assessee as claimed and therefore the income earned by it was not liable to be subjected to the provisions of Sec. 161(1). The A.O was of the view that the assessee was an AOP and was liable to be taxed accordingly. On the basis of his aforesaid observations, it was concluded by the A.O that the interest income of Rs. 71,47,899/- was to be treated as the business income of the assessee and taxed in its hands in the status as that of an AOP. Apart there from, it was observed by the A.O that even if the assessee was to be considered as a representative assessee, the taxability would fall u/s 161(1A) instead of Sec. 161 of the I.T Act. On the basis of his aforesaid observations, it was observed by the A.O that the provisions of Sec. 161(1A) which had an overriding effect on the provisions of Sec. 161(1) envisaged that where any income in respect of which the person mentioned in clause (iv) of subsection (1) of Sec.160 is liable to be assessed as a representative assessee consists of or includes profits and gains of business, tax shall be charged on the whole of the income in respect of which such person is so liable at the maximum marginal rate. In the backdrop of his aforesaid deliberations the A.O concluded that the claim raised by the assessee that its case fell within the realm of the provisions of Sec. 161(1) of the I.T Act was totally misplaced and did not merit acceptance. In fact, the A.O holding a conviction that the income derived by the assessee in the form of interest income was liable to be taxed in its hands under the head 'income from business and profession' by virtue of the provisions of Sec.161(1A) of the I.T Act, brought the amount of Rs.71,47,899/- to tax in the hands of the

assessee. Apart there from, it was observed by the A.O that the assessee was an AOP and not a trust as so claimed. Insofar the contention advanced by the assessee that it was looking into for various investments towards in favour of capital undertakings but did not find suitable investments, it was observed by the A.O that the assessee by so claiming was trying to take shelter under the garb of provision of exemptions under Sec.10(23F) which in either way did not hold in its favour. Further, it was observed by the A.O that even if the said plea of the assessee was considered, then also the tax liability of the assessee as a representative assessee would fall within the sweep of Sec.161(1A) of the I.T Act. In the backdrop of his aforesaid observations, it was concluded by the A.O that in any way the income earned by the assessee was liable to be taxed in the hands of the assessee itself.

3. Aggrieved, the assessee carried the matter in appeal before the CIT(A).The CIT(A) after deliberating on the contentions advanced by the assessee observed that the issue raised in the present appeal was allowed by the ITAT in the assesses own case for A.Y. 2011-12 in ITA No. 3827/Mum/2015, dated 04.09.2017. Observing, that there was no change in the facts and circumstances in context of the issue under consideration the CIT(A) followed the view taken by the Tribunal and allowed the appeal of the assessee. As a result, it was concluded by the CIT(A) viz. (i) that the assessee was a 'determinate trust' and could not be treated as an AOP; and (ii) that as the assessee was a representative assessee under Sec. 160 of the IT Act, therefore, the income was to be assessed under Sec. 161(1) in its hands as a 'determinate trust'.

4. The revenue being aggrieved with the order passed by the CIT(A) has carried the matter in appeal before us. The ld. Authorized

Representative (for short 'A.R') for the assessee submitted that the issue was squarely covered by the order of the Tribunal in the assessee's own case for A.Y. 2011-12 i.e ITO-23(1)(2), Mumbai Vs. India Innovation Fund (ITA No. 3827/Mum/2015, dated 04.09.2017). It was submitted by the ld. A.R that no infirmity emerged from the order of the CIT(A) who had allowed the appeal of the assessee by following the aforementioned order of the Tribunal for A.Y 2011-12.

5. Per contra, the ld. Departmental Representative (for short 'D.R') did not controvert the aforesaid claim of the assessee that the issue involved in the present appeal was squarely covered by the order of the Tribunal in the assessee's own case for A.Y. 2011-12.

6. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that the issues involved in the present appeal are two fold viz. (i) that as to whether the CIT(A) is right in treating the assessee as a 'determinate trust' instead of AOP; and (ii) that as to whether the CIT(A) is right in holding that the income of the assessee is taxable in the hands of the contributors/beneficiaries as per Sec. 161(1) of the I.T Act, and not in its own hands in the status as that of an AOP.

7. We find that the aforesaid issues involved in the present appeals were also there in the appeal of the assessee for A.Y. 2011-12 i.e ITO-23(1)(2), Mumbai, Vs. India Innovation Funds (ITA No. 3827/Mum/2015, dated 04.09.2017). The Tribunal while disposing off the aforementioned appeal of the assessee had observed, as under:

*"4. We have heard the counsels for both the parties and we have also perused the material placed on record as well as the orders passed by revenue authorities.*

*Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A). The Ld. CIT(A) has dealt with the above grounds raised by the revenue in para no. 4 to 4.13 of its order. The operative portion of the order of Ld.*

CIT(A) is contained in para no. 4.9 to 4.13 of its order and the same is reproduced below:-

“4.9. I have carefully considered the facts and circumstances of the case. In this case, the appellant has been formed as a Trust vide agreement dated 07.11.2008 for the purpose of making investments in companies promoting innovation in emerging technologies in India. The appellant Trust would issue units to various contributors and invest the moneys collected. As per para 2.4 at page 13 of the Trust Deed dated 07.11.2008, the object and purpose of the Trust is to raise resources through the Fund to make Portfolio Investments. Further, the appellant has entered into various Contribution Agreements with the Investors wherein the Class A Units have been issued and subscribed. I find that all the ingredients that constitute the appellant being a Trust have been satisfied. The appellant is a trust set up under the Indian Trusts Act, 1882 by way of an Indenture of Trust which is registered under the Registration Act, 1908. Merely since the contributors to the trust are the same as the beneficiaries will not prejudice the fact that the appellant is a Trust.

4.10. In the decision of Bangalore ITAT in the case of M/s India Advantage Fund - VII (ITA 178/Bang/2012), the Hon'ble ITAT held that income earned by a fund set up as a revocable trust is to be taxed only in the hands of the beneficiaries as per the provisions of sections 61 to 63. It also held that for a trust to be a determinate trust would be sufficient if the trust deed laid down that the beneficiaries would be the persons who had made or had agreed to make, contributions to the trust in accordance with the contribution agreement, and their shares were capable of being determined based on the provisions of the trust deed. Further, the Trust could not be regarded as an Association of Persons (AOP) as the 6 beneficiaries had not set up the trust; they had not come together with the object of carrying on investment in a mezzanine fund, which was the object of the trust; and there was no inter se agreement between the beneficiaries of the fund.

4.11. In the present case also, the Trust Deed mentions that Units shall be issued to the Contributors.-who are entitled to a specific share of the profits. As per para 2.6 of the Trust Deed on page 15, the Trustee shall invite capital commitments of minimum Rs.5 Crore and receive capital contributions only by way of private placement of the units in the fund to the target investors. Hence, it is a case of a determinate Trust:

4.12. It needs to be examined whether the transaction constitutes a revocable transfer u/s 61-63 of the Act. A transfer is deemed revocable if It contains a provision for the retransfer of, or gives the transferor a right to reassume power over the whole or any part of any income or assets to the transferor, i.e., whether directly or indirectly, As per clause 2.9(c)(i)(c) on page 16, the Trust Deed states that the Contributors may Pass a resolution calling for the winding up of the Fund by majority vote. As per clause 2.9(d), in the even of winding up, the remaining proceeds shall be distributed to the Contributors. This shows that the Contributors can revoke the Trust at any time. Hence, it is a revocable Trust which is subject to the provisions of Section 61 to 63 of the Act. As per the provisions of section 61 any income arising from a revocable transfer is chargeable to tax in the hands of the transferor. Hence, I am of the view that the income from contributions made by the beneficiaries of the Trust is taxable only in their hands and not in the hands of the appellant.

4.13. The A.O. was of the view that the appellant constitutes an AOP. I am of the view that the Trust could not be regarded as an Association of persons (AOP) as the beneficiaries had not set up the trust: they had not come together with the object of carrying on investment in a fund which was the object of the trust; and there was no inter se agreement tent between the beneficiaries of the fund. The fact that the appellant filed its return of income with status of AOP is a mere technical defect and cannot vitiate the fact of the appellant being a Trust. I am of the view that the appellant is a revocable Trust and the income is taxable in the hand of the contributors/beneficiaries. Hence, no part of the interest income could be taxed in the hands of the appellant Trust. In view of the above discussion, ground No. 1 of the appeal is allowed.”

After analyzing the facts, arguments, and orders passed by revenue authorities, we find that the Ld. CIT(A) was satisfied from the fact that the assessee possessing all the ingredients that constitute the assessee as a trust. The Ld. CIT(A)

while coming to the conclusion had relied upon the order passed by Hon'ble ITAT in the case of M/s India Advantage Fund-VII, ITA 178/Bang/2012 wherein it has been held that the income earned by a fund set up as a revocable trust is to be taxed only in the hands of the beneficiaries as per the provisions of section 61 to 63. It was further held in the said order that the trust could not be regarded as an AOP, as the beneficiaries had not set up the trust, they had not come together with the object of carrying on investment in a mezzanine fund, which was the object of the trust and there was no inter se agreement between the beneficiaries of the fund. The Ld. CIT(A) while appreciating the facts of the present case has rightly held that the trust deed mentions that units shall be issued to the contributors who are entitled to the specific share of the profits.

No new facts or contrary judgments have been brought on record before us in order to controvert or rebut the findings so recorded by Ld CIT (A). Since the Ld. CIT(A) while deciding these grounds have relied upon the orders passed by Hon'ble ITAT in identical circumstances and even on the principle of consistency also, the Ld. CIT(A) has rightly held that the income from the contributions made by the beneficiaries of the trust is taxable only in their hands and not in the hands of the assessee. Therefore, there are no reasons for us to interfere into or deviate from the findings recorded by the Ld. CIT (A).

Hence, we are of the considered view that the findings so recorded by the Ld. CIT (A) are judicious and are well reasoned. Resultantly, these grounds raised by the revenue stands dismissed.

**Ground No. 5.**

5. This ground raised by the revenue is against challenging the order of Ld. CIT(A) in holding that income of the assessee is taxable in the hands of contributors/beneficiaries as per section 161(1) of the I.T. Act, 1961, and not in its own hands in status of an A.O.P.

6. We have heard the counsels for both the parties and we have also perused the material placed on record as well as the orders passed by revenue authorities.

Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A). The Ld. CIT(A) has dealt with the above grounds raised by the revenue in para no. 5 of its order wherein the Ld. CIT(A) has categorically held that as per the facts of the case, the assessee was having ideal funds which were temporarily earning interest income, therefore Ld. CIT(A) after appreciating the facts of the case had concluded that such interest ought to be taxed under the head income from other sources. In support of its finding, Ld. CIT(A) relied upon section 161(1A) and held that this section does not create a charge of tax on the representative assessee, but only provides the rate of tax on its income where the same consists of business income and since it was held that the income is taxable in the hands of the contributors/beneficiaries, so the treatment of interest income as business income or income from other sources is not relevant.

No new facts or contrary judgments have been brought on record before us in order to controvert or rebut the findings so recorded by Ld CIT (A). Therefore, there are no reasons for us to interfere into or deviate from the findings recorded by the Ld. CIT(A).

Hence, we are of the considered view that the findings so recorded by the Ld. CIT (A) are judicious and are well reasoned. Resultantly, this ground raised by the revenue stands dismissed.”

We find that as the facts and the issues involved in the present appeal which has been assailed by the revenue before us viz. (i) that as to whether the CIT(A) has erred in holding that the assessee is not an AOP since the beneficiary has not set up the trust, and had thus not come together with the object of carrying on investments in a fund which was the object of the trust and there was no *inter-se* agreement between the beneficiaries of the fund; and (ii) that as to whether the CIT(A) had erred in holding that the income of the assessee was liable to be taxed in the hands of the contributors/beneficiaries as per Sec.161(1) of the I.T Act and not in its own hands in the status of an AOP had been deliberated upon and adjudicated in favour of the assessee, wherein the Tribunal has upheld the view taken by the CIT(A) in context of both of the said issues. We thus respectfully following the view taken by the Tribunal in the case of the assessee for the preceding year viz. A.Y 2011-12, thus dismiss the appeal filed by the revenue.

8. The order of the CIT(A) is upheld and resultantly the appeal filed by the revenue is dismissed.

Oder pronounced in the open court on 03.04.2019

Sd/-  
(N.K. Pradhan)  
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक 03.04.2019  
Ps. Rohit

Sd/-  
(Ravish Sood)  
JUDICIAL MEMBER

**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)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /  
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**

**आयकर अपीलीय अधिकरण, मुंबई / ITAT,  
Mumbai**