

IN THE INCOME-TAX APPELLATE TRIBUNAL "F" BENCH MUMBAI

BEFORE SHRI G.S. PANNU, VICE-PRESIDENT AND

SHRI PAWAN SINGH JUDICIAL MEMBER

ITA No. 277/Mum/2019 (Assessment Year 2015-16)

JM Financial India Fund-Scheme B, 141, Maker Chambers III, Nariman Point, Mumbai-400021. PAN: AABTJ0401F	Vs.	ITO - 17(2)(1) Room No. 123-B, 1 st Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.
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Appellant

Respondent

Appellant by

: Shri P.J. Pardiwala

Senior Advocate with

Shri Pinak Shah, Advocate

Respondent by

: Shri S.K. Poddar (CIT-DR) with
Shri Nishant Samaiya (Sr. DR)

Date of Hearing

: 26.07.2019

Date of Pronouncement

: 20.08.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee is directed against the order of Commissioner of income tax (Appeals)-28, Mumbai, hereinafter referred as learned Commissioner (Appeals) dated 31st December 2018, which in turn arises from assessment order passed by assessing officer under section 143(3) dated 13.12.2017 for assessment year 2015-16. The assessee has raised following grounds of appeal:

Sr. No.	Grounds of Appeal	Tax Effect relating to each Grounds of appeal
1	<u>Ground NO.1: Denying exemption under section</u>	Rs.3963,89,687

	<p><u>10(23FB) of Rs.39,63,89,687 the Income-tax Act, 1961</u></p> <p>On the facts and circumstances of the case, and in law, the Commissioner of Income-tax (Appeals) ['CIT(A)'] erred in upholding the denial of the exemption under section 10(23FB) of the Income-tax Act, 1961 ('Act').</p>	
2	<p><u>Ground No.2: Assessment of alleged income as 'Income from NA other sources' instead of assessment under provisions of section 161(1) of the Act</u></p> <p>On the facts and circumstances of the case, and in law the CIT(A) having upholding the denial of exemption under section 10(23FB) of the Act, he erred in upholding that the alleged income ought to be assessed under the head 'Income from other sources' and not in terms of section 161(1) of the Act. The CIT(A) further erred in holding that the provisions of section 161(1) of the Act are not applicable to the Appellant trust.</p>	NA
3	<p><u>Ground NO.3: Taxation of income which had already been considered in the returns of income of the beneficiaries</u></p> <p>On the facts and circumstances of the case, and in law the CIT(A) erred in taxing in the hands of the Appellant, income which had already been considered in the returns of the beneficiaries of the trust.</p>	NA
4	<p><u>Ground NO.4: Denying exemption under section 10(34) of the Act</u></p> <p>On the facts and circumstances of the case, and in law the CIT(A) erred in law in upholding the denial of exemption under section 10(34) of the Act.</p>	NA
5	<p><u>Ground No.5: Denying exemption under section 10(35) of the Act</u></p> <p>On the facts and circumstances of the case, and in law the CIT(A) erred in law in upholding the denial of exemption under section 10(35) of the Act.</p>	Rs. 34,51,470
6	<p><u>Ground No.6: Status of a person under section 2f31) of the Act</u></p> <p>On the facts and circumstances of the case, and in law, the CIT(A) erred in holding that the Income-tax Officer, Ward 17(2)(1), Mumbai ('the AO') has not held in Para 7.5 of the assessment order that the Appellant is not a person. The CIT(A) ought to have held that since the Appellant is not a person as per the AO, the Appellant also did not fall within the scope of section 4 of the Act, and hence was not liable to tax under the Act.</p>	NA
7	<p><u>Ground NO.7: Without prejudice to Ground No.6 above, the status of the Appellant held as AOP</u></p> <p>On the facts and circumstances of the case, and in law</p>	NA

	the CIT(A) ought to have held the status of the Appellant as trust and not an AOP.	
8	<p><u>Ground No.8: Erroneous conclusions and assertions of facts</u></p> <p>On the facts and circumstances of the case, and in law the CIT(A) erred in making a number of erroneous assertions of facts, including, but not limited to the following:</p> <p>a) The Appellant has violated the Securities and Exchange Board of India (Venture Capital Funds) Regulations, 1996;</p> <p>b) The Appellant has violated the object clause of the trust deed by investing in units of mutual funds;</p> <p>c) Investments in units of mutual funds in which the Appellant has controlling and governing interests and common trustees would also fall within the gamut of the term "associate company";</p> <p>d) The AO has never said that the Appellant registration with SEBI is non-existent</p> <p>The AO has neither implicitly nor explicitly held that the Appellant is not a person.</p>	NA
9	<p><u>Ground NO.9: Interest under section 234B of the Act</u></p> <p>On the facts and circumstances of the case the CIT(A) ought to have held that the provisions of section 234B of the Act are not applicable in the Appellant's case.</p>	Rs.9,06,08,166
	Total Tax Effect	Rs. 49,04,49,323

2. The brief facts of the case are that assessee was set up by way of trust deed dated 18th March 2006, registered under the provisions of Indian Trusts Act 1882. The assessee is further registered under the provisions of Registration Act 1908. The assessee is also registered with Securities and Exchange Board of India (SEBI) as a Venture Capital Fund (VCF) under SEBI Venture Capital Regulations 1996, accordingly the assessee is engaged in investments activities. The assessee raised funds from investors to make investments in Venture Capital Undertakings (VCUs). For assessment year 2015-16, the assessee filed its return of income on 27th August 2015 declaring income of Rs. Nil. In the return of income

the assessee claimed exemption of its income under section 10(23FB) of the Act. The return of income was selected for scrutiny. During the assessment, the Assessing Officer made a reference of Joint Commissioner of Income tax (JCIT) under section 144A. The assessee was informed about initiation of proceeding/reference to JCIT vide notice dated 09.11.2017. The Assessing Officer completed the scrutiny assessment under section 143(3) on 13.12.2017. The Assessing Officer while passing the assessment order held that the assessee made investment in mutual funds and violated SEBI (VCF) Regulations and also violated the objects of clause of the trust deed. The Assessing Officer while passing the assessment order denied exemptions claimed by assessee under section 10(23FB) on income from VCUs. The assessing officer also denied exemption under section 10(34) and 10(35) of the Act. On appeal before the learned Commissioner (Appeals) the action of assessing officer was confirmed vide order dated 31st December 2018. Hence, further aggrieved by the order of learned Commissioner (Appeals) the assessee has filed this appeal before Tribunal.

3. We have heard the submission of Sh. P J Pardiwala, Senior Advocate with Sh. Pinak Shah Advocate for assessee and Sh. S.K. Poddar (CIT-DR) with Sh. Nishant Samaiya, Senior DR for revenue. With the active assistance of ld. representative of both the parties, we have also gone

through the orders of lower authorities. Ground No. 1 and 8 relates to denial of exemption under section 10(23FB) to the assessee. The learned Senior Counsel for assessee submits that assessee being a VCF, by its very nature, raised funds from investors and invested in Venture Capital Undertaking as per SEBI (VCF) Regulations. Assessee raised a total of Rs. 638.6 Crore of capital contribution from various investors. The assessee received this capital from the investor over a period of time to make the investments. As the investments in the VCUs made over a period of time, the surplus funds were invested by assessee in units of liquid mutual funds. Similarly, post divestments made by assessee from VCUs, the monies received by the assessee were invested into units of liquid mutual funds till its distribution to the investors. Further, certain amounts were retained by assessee for meeting the day to day expenses of the funds. For assessment year 2015-16, total investment in liquid mutual funds as on the last day of the year is merely 1.2% of the capital contribution of the assessee. Further, the total income from investments in mutual funds is 0.89% of the total income for assessment year 2015-16. As per the provisions of Act, the assessee has provided Form 64, containing, *inter alia* the share of income under each head of income with regards to each investor. The income earned by the investor, has been disclosed in their respective returns of income. The assessing officer denied the exemptions claim by assessee under

section 10(23FB) of the Act and taxed the entire income under the head 'Income from Other Sources'. The assessing officer treated the investment made by assessee in mutual funds as a violation of SEBI (VCF) Regulations. The assessing officer while denying the exemption under section 10(23 FB) took his view that the assessee has violated the object clause of the trust deed. The learned Commissioner (Appeals) confirmed the action of assessing officer.

4. The learned Sr. Counsel for assessee submits that in order to claim exemption under section 10(23FB), the assessee (VCF) needs to comply three conditions i.e. (i) the Venture Capital Fund is operating under the trust deed registered under the provisions of Registration Act, (ii) a certificate of registration should be granted to the funds by the Security and Exchange Board of India (SEBI) before 21st May 2012, and (iii) the funds should be regulated under the SEBI (VSF) Regulations. The learned Sr. Counsel submits that once these three conditions are satisfied by the assessee, there is no basis for denying the exemption under section 10(23 FB) of the Act. The assessee is operating under the trust deed which is registered under the provisions of Registration Act. A certificate of registration has been granted to the assessee by SEBI. A certificate of registration granted to the assessee is still in force and has not been revoked. Further, no questions/enquiry has been made on the assessee by SEBI. The assessee is regulated under the SEBI (VSF)

Regulations. Since all the conditions are fulfilled by the assessee, the exemption under section 10(23FB) should have been granted to the assessee. The learned Senior Counsel submits that the assessing officer is not required to go beyond the conditions required to be full as per the definition of VCF. Therefore, the assessing officer cannot enquire into the alleged violation of condition of trust deed, SEBI (VCF) Regulations etc. The learned Sr. Counsel further submits that the role of assessing officer is limited to verify whether the assessee has a valid certificate of registration by SEBI. It was further submitted that the overall supervisory and regulatory authority in order to govern VCF vests with SEBI. Regulation 22 of said SEBI regulations empower SEBI to call upon the VCF to file such report, as SEBI may desire with regard to the activities carried out on by the VCF. Further regulation 25 of the said SEBI regulations empowers the SEBI to inspect or investigate the books of account, records and documents of VCF, through an inspecting or investigating officer and on the basis of such report, the SEBI can take such measures against the VCF as per Regulation 29 or 30 of the said SEBI Regulations. The assessee has provided the registration certificate, and the condition provided in section 10(23FB) of the Act is fulfilled, the assessing officer cannot deny the exemption. It was submitted that Chapter III of SEBI (VCF) Regulation specifies the investment conditions and restriction for VCF does not any restriction

on investment in mutual funds. The learned Senior Counsel for assessee submits that the coordinate bench of the Ahmadabad Tribunal in ITO Versus Gujarat Information Technology fund (45 SOT 529 Ahmadabad Tribunal) has taken the similar view.

5. The learned Senior Counsel for the assessee submits that the power to govern the VCF is with the SEBI and not with the Income tax Authorities and in absence of any allegation or action by SEBI against the assessee toward violation of SEBI regulations or withdrawal of the certificate of registration as a VCF, the assessing officer cannot make such allegation only for the purpose of denying assessee's claim for exemptions under section 10(23 FB) of the Act. To buttress his submission the learned Sr Advocate of the assessee relied upon the following decisions:

- (a) Milestone Real Estate Fund Versus ACIT (ITA No. 2509 /Mum/2018),
- (b) DHFL capital fund Versus ITO [2016] 157 ITD 60 (Mumbai Tribunal),
- (c) G.V.K. Bioscience Private limited Vs ACIT[2014] 67 SOT 163 (Hyderabad Tribunal),
- (d) ACIT Versus Small is Beautiful (2013) 60 SOT153 (Hyderabad Tribunal),
- (e) ITO Versus Gujarat Information technology fund (supra).

6. The learned Counsel for assessee submits that on similar set of fact Mumbai Tribunal in a recent decision in HDFC Property Fund versus ITO (ITA No.7472/Mum/2017) while considering the similar

disallowances/ denial of exemption under section 10 (23FB) held that investment made by assessee in mutual funds in line with SEBI (VCF) Regulation and the same is not a non-compliance of SEBI (VCF) Regulation, therefore, assessee is entitled for exemption. The learned Senior Counsel submits that the grounds of appeal raised by assessee in the present appeal are in fact squarely covered by the decision of HDFC Property Fund (supra).

7. The learned SR Counsel for assessee invited our attention to the clause 2.1 of the object clause of assessee trust deed, which provides that assessee will carry on the activities of the Venture Capital Fund as permitted within the SEBI (VCF) Regulation. Accordingly the learned Counsel would submit that the assessee carried on the activities of a venture capital fund as permitted under the SEBI (VCF) Regulations. Even the investment in a mutual fund is in accordance with SEBI (VCF) Regulations. Further clause 2.3 of the object of the trust deed of the assessee state that assessee can invest, in accordance with the provision of this indenture and its respective Private Placement Memorandum (PPM). The PPM of the fund permits the assessee to invest in money market instruments, Banks deposits, Government securities, treasury bills, corporate bonds and deposits, short terms securities and units of mutual fund. The learned Sr. Advocate submits that relevant extract of PPM is placed on record. Further the distribution clause of PPM permits

the trust to invest in money market instruments, bank deposit government securities, treasury bills, corporate bonds and projects, short term securities and units of mutual fund. The learned counsel would submit that from a transaction reading of the trusted along with the PPM in assessee's case, it is permissible for the assessee to invest in unit of mutual funds. Therefore, the assessing officer erred in holding that assessee is in violation of trust deed by investing in mutual funds.

8. The assessee has placed on record the following documents:
 - a. Copy of SEBI (Venture Capital Funds) Regulations, 1996
 - b. Extract of SEBI (intermediary) Regulations, 2006
 - c. Copy of Registration certificate issued to the Appellant under SEBI (Venture Capital Funds) Regulations, 1996
 - d. Copy of registered trust deed
 - e. Extract of Private Placement Memorandum
 - f. Copy of interpretive letter dated 10 June 2006 issued by SEBI in case of TATA Capital
 - g. Copy of legal opinion obtained from the lawyer
 - h. Breakup of investment made in portfolio companies
 - i. Breakup of investment made in mutual fund
 - j. CBDT Circular No. 157F. No. 228/8/73-IT(A-II) dated December 26, 1974
 - k. Financial Statements for the year ended March 31, 2015
 - l. Return of Income for Assessment Year 2015-16
 - m. And copy of various written submissions filed before the Assessing Officer as well as before the Id. Commissioner (Appeals).

9. On the other hand the learned CIT-DR for the revenue supported the order of lower authorities. The learned DR for the revenue submits that the Assessing Officer identified four focal point i.e. (i) the assessee made investment in debt instruments of non-portfolio companies (Non-Venture Capital Undertaking) “J.M. Financial Mutual Fund” and violated objectives of the trust-deed, (ii) Clause 8 of Venture Capital Fund Regulations was violated by assessee which prescribed that certificate granted under Regulation 7 shall subject to main condition that the VCF shall not carry on any other activity than that of a VCF (iii) Sub-clause (c) of Clause-12 of VCF Regulations stated that VCF shall not invest in an associated company and (iv) the assessee also claimed exempt dividend income under section 10(34) & 10(35). The income of assessee cannot split taking the income partly for computation under section 10(23FB) and partly for computation/exemption under section 10(34) and 10(35) in effect allowing and granting two status for same year. It was further submitted by ld. DR for the revenue that ld. Commissioner (Appeals) in para 6.8 of his order clearly held that clause 8(b) of SEBI (VCF) Regulations is mandatory and prohibits by putting an embargo for carrying out any other activities other than VCF. The assessee has not carried out its activities in accordance with the trust-deed as per the guidelines of SEBI. The Assessing Officer has power to examine if the assessee has complied the condition laid down under the

provisions of Income-tax Act and his power is not limited in any manner, particularly to the verification of the registration under SEBI (VCF) Regulations. The ld. DR further submits that ratio of decision in Milestone Real Estate Fund vs. ACIT (supra) and HDFC Property Fund are not applicable, as there was no issue in those cases of investment in associated companies. The assessee is a big corporate entity and was duty bound to provide the complete details and evidences of taxes payable by each of the beneficiaries. The assessee has not discharged the onus lied upon it.

10. We have considered the rival submission of the learned representatives of the parties. We have also deliberated on various case laws relied by lower authorities as well as by ld. representatives of the parties and gone through the orders of authorities below. During the assessment the assessing officer denied the exemption under section 10 (23CF), holding that the assessee made investment in mutual funds and violated SEBI (VCF) Regulations and also violated the objects of clause of the trust deed. The learned Commissioner (Appeals) confirmed the action of assessing officer on similar line. We have also gone through the various documentary evidences placed on record by the assessee, which include the trust deed dated 18th March 2006, registration of assessee under registration Act and certificate of registration dated 13th October 2006 granted by SEBI (VCF) Regulations. Before discussing the issue

involved in the present appeal, we may refer the relevant provisions of section 10(23FB) and section 115U of the Act.

"**(23FB)** any income of a venture capital company or venture capital fund from investment in a venture capital undertaking.

Explanation.--For the purposes of this clause,--

(a) "venture capital company" means a company which—

(A) has been granted a certificate of registration, before the 21st day of May, 2012, as a Venture Capital Fund and is regulated under the Securities and Exchange Board of India (Venture Capital Funds) Regulations, 1996 (hereinafter referred to as the Venture Capital Funds Regulations) made under the Securities and [Exchange Board of India Act, 1992](#) (15 of 1992); or

(B) has been granted a certificate of registration as Venture Capital Fund as a sub-category of Category I Alternative Investment Fund and is regulated under the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012 (hereinafter referred to as the Alternative Investment Funds Regulations) made under the Securities and [Exchange Board of India Act, 1992](#) (15 of 1992), and which fulfils the following conditions, namely:--

(i) it is not listed on a recognized stock exchange;

(ii) it has invested not less than two-thirds of its investible funds in unlisted equity shares or equity linked instruments of venture capital undertaking; and

(iii) it has not invested in any venture capital undertaking in which its director or a substantial shareholder (being a beneficial owner of equity shares exceeding ten per cent

of its equity share capital) holds, either individually or collectively, equity shares in excess of fifteen per cent of the paid-up equity share capital of such venture capital undertaking;

(b) "venture capital fund" means a fund--

(A) operating under a trust deed registered under the provisions of the [Registration Act, 1908](#) (16 of 1908), which--

(I) has been granted a certificate of registration, before the 21st day of May, 2012, as a Venture Capital Fund and is regulated under the Venture Capital Funds Regulations; or

(II) has been granted a certificate of registration as Venture Capital Fund as a sub-category of Category I Alternative Investment Fund under the Alternative Investment Funds Regulations and which fulfils the following conditions, namely:--

(i) it has invested not less than two-thirds of its investible funds in unlisted equity shares or equity linked instruments of venture capital undertaking;

(ii) it has not invested in any venture capital undertaking in which its trustee or the settler holds, either individually or collectively, equity shares in excess of fifteen per cent of the paid-up equity share capital of such venture capital undertaking; and

(iii) the units, if any, issued by it are not listed in any recognized stock exchange; or (B) 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);

(c) "venture capital undertaking" means--

- (i) a venture capital undertaking as defined in clause (n) of regulation 2 of the Venture Capital Funds Regulations; or
- (ii) a venture capital undertaking as defined in clause (aa) of sub-regulation (1) of regulation 2 of the Alternative Investment Funds Regulations;"

"115U.(1) Notwithstanding anything contained in any other provisions of this Act, any income accruing or arising to or received by a person out of investments made in a venture capital company or venture capital fund shall be chargeable to income-tax in the same manner as if it were the income accruing or arising to or received by such person had he made investments directly in the venture capital undertaking.

(2) The person responsible for crediting or making payment of the income on behalf of a venture capital company or a venture capital fund and the venture capital company or venture capital fund shall furnish, within such time as may be prescribed, to the person who is liable to tax in respect of such income and to the prescribed income- tax authority, a statement in the prescribed form and verified in the prescribed manner, giving details of the nature of the income paid or credited during the previous year and such other relevant details as may be prescribed.

(3) The income paid or credited by the venture capital company and the venture capital fund shall be deemed to be of the same nature and in the same proportion in the hands of the person referred to in sub-section (1) as it had been received by, or had accrued or arisen to, the venture capital company or the venture capital fund, as the case may be, during the previous year.

(4) The provisions of Chapter XII-D or Chapter XII-E or Chapter XVII-B shall not apply to the income paid by a venture capital company or venture capital fund under this Chapter.

(5) the income accruing or arising to or received by the venture capital company or venture capital fund, during a previous year, from investments made in venture capital undertaking if not paid or credited to the person referred to in sub-section (1), shall be deemed to have been credited to the account of the said person on the last day of the previous year in the same proportion in which such person would have been entitled to receive the income had it been paid in the previous year.

Explanation 1.--For the purposes of this Chapter, "venture capital company", "venture capital fund" and "venture capital undertaking" shall have the meanings respectively assigned to them in clause (23FB) of [section 10](#).

Explanation 2.--For the removal of doubts, it is hereby declared that any income which has been included in total income of the person referred to in sub-section (1) in a previous year, on account of it having accrued or arisen in the said previous year, shall not be included in the total income of such person in the previous year in which such income is actually paid to him by the venture capital company or the venture capital fund."

11.A careful reading of section 10(23FB) of the Act, as provided in Chapter III of the Act, prescribed the exclusion of the income prescribed therein from the total income of an assessee subject to tax. Pertinently, it prescribes for exemption from tax in respect of income of a Venture Capital Company or a VCF registered with SEBI. Since, the assessee

before us is a Venture Capital Fund, shorn of other details; we requires to examine the provisions of [Section 10\(23FB\)](#) of the Act alone. Explanation (b) of [section 10\(23FB\)](#) gives the meaning of “Venture Capital Fund” to be a Fund which (i) operates under a trust deed registered under the provisions of [Registration Act](#), 1908; (ii) has been granted certificate of registration as a VCF before 21st May, 2012; and, (iii) is regulated by SEBI (Venture Capital Funds) Regulations, 1996.

12. Further, a careful perusal of section 115U prescribes that the income accruing or arising to the unit holders of VCF out of investments made in Venture Capital Undertakings is taxable in the hands of such unit holders in the manner as if it were the income accruing or arising to or received by such unit holders, had such unit holders made investments directly in the VCUs. Thus, so far as the assessment year under consideration is concerned, the relevant legal position can be summarised as follows. That any income of a VCF earned from investments in VCUs is exempt in the hands of the VCF, subject of course, to the conditions prescribed in [section 10\(23BF\)](#) of the Act; that such income would be taxable in the hands of the unit holders of the VCF; that such income is taxable in the hands of the unit holders in the manner as if it were the incomes accruing or arising to or received by such unit holders had the unit holders made the investments directly in the VCUs; and, that so far as the income of VCFs earned from

investments other than the investments in VCUs is concerned, the same would be taxable in the hands of VCF itself.

13. Now turning to the facts of the present case the assessing officer denied the exemption under section 10(23FB) to the assessee by holding that holding that the assessee made investment in mutual funds and violated SEBI (VCF) Regulation and also violated the objects of clause of the trust deed. The assessing officer has not disputed that the trust deed of the assessee is registered under the provisions of registration Act. Further a registration is granted to the assessee by SEBI before 21st May 2012, which is still in force. The Assessing Officer has not brought any material on record by making investigation from SEBI, if the funds are not regulated in accordance with SEBI (VCF) Regulations.

14. The coordinate bench of Ahmadabad Tribunal in ITO Vs Gujarat Information Technology Fund (supra) while considering the ground/ issue whether the assessing officer can look into whether venture capital fund fulfils conditions laid down in SEBI (Venture Capital Funds) Regulations, passed the following order:

24. ----- 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 sales-men 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 sales-men 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.

25. So far as condition laid down in sub-clause (iii) of clause (b) under *Explanation 1* is concerned what we consider appropriate for the AO is to find out whether any action for default has been taken by SEBI under regulation -30 as referred to above for default committed by the assessee trust. So far as any violation of investment pattern as laid down in regulation 12(d) is concerned it is also covered under clause (a) of regulation-30 which shows that assessee trust can be penalized for contravention of any provision of this Act or these regulations. Thus, if assessee trust contravenes regulation-12(d) then SEBI is competent to penalize assessee trust within the powers given under regulation 30. So long as SEBI does not find any default of any contravention of the provisions of the SEBI Act or SEBI (VCF) Regulation 1996 then it can be inferred that assessee trust fulfils the conditions laid down under these regulations. The AO, however, can look into the issue whether assessee trust fulfils such conditions as laid down in regulation 12(d) (and not under regulation-8) and report the matter to SEBI taking a protective view under I.T. Act, 1961. If finally SEBI does not find any default on the part of the assessee trust then view of the AO that there is violation cannot survive. In other words fulfillment of condition under sub-clause (iii) is subject to the final finding by SEBI authorities. Their final view on the alleged contravention by the assessee trust will prevail over the view of AO. Thus in our view role of the AO in examining the issue about fulfillment of conditions laid down in clause (b) is limited to the extent as described above.

15. Further the coordinate bench of Mumbai Tribunal in DHFL Capital Fund Vs ITO (supra) held that, so far 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 fulfils the

conditions laid down under these regulations. The Tribunal further expressed the view that the Assessing Officer 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 Assessing Officer that there is violation cannot survive. Thus, it is the SEBI, which has final authority to determine about the violation of the conditions, as it is the authority competent to deal with the same. It was also held that the Assessing Officer has made his own interpretation of the term 'corpus', which was found to be incorrect as per the definition given in the new regulation which is not sustainable.

16. We have noted that the coordinate bench of Mumbai Tribunal in *HDFC Property Fund Versus ITO* (supra) on similar set of facts on similar denial of exemption under section 10(23FB) passed the following order:

“12. We have carefully considered the rival submissions. Ostensibly, as our discussion in the earlier paras show, the sum and substance of the stand of Assessing Officer revolves around the manner in which assessee has made certain investments; firstly, in the units of Mutual funds; and, secondly, towards Debenture application monies. The first objection of the Assessing Officer is that such investments are not permitted in terms of the Trust Deed itself. In this context, we find that the appellant has been constituted in terms of the Trust Deed dated 06.11.2004 settled by Housing Development Finance Corporation Ltd. It has been constituted to pool together resources, both institutional and other investors, for making investment in high growth sectors including real estate sector in India. The objects of the Trust are contained in clause 6, a copy of which is placed in the Paper Book.

Though we are not reproducing the contents of the Trust Deed, its perusal shows that the investments by the appellant are required to be made in compliance with the requirements of VCF Regulations of SEBI. In terms of clause 4.1.27, the Trust Deed also envisages temporary investments which have been defined to mean, inter- alia, money market instruments, units of money market liquid mutual funds or other similar debt instruments. The said clause also brings out that the temporary investments are also to be understood as referring to short term securities issued on guarantee by the Indian Government, or its agencies or instrumentalities, overnight and short term instruments, like- bank deposits, etc. Though we are presently concerned with investments made in liquid mutual fund schemes, we are enumerating the other aspects of the expression „temporary investments“ stated in the Trust Deed only to bring out that the Trust is entitled to make such-like investments of its available funds, awaiting regular investment in the stated purposes. In fact, clause 11.1 of the Trust Deed dealing with „Investment of Trust fund“ specifically prescribes that the trust may invest the available contributions awaiting investment or realised funds awaiting distribution in temporary investments. The aforesaid clearly brings out that the appellant is empowered by its Trust Deed to make temporary investments which, inter-alia, would include within its purview the investments in question. Apart therefrom, we find enough potency in the pleadings of the appellant that there is an industry and trade practice whereby Venture Capital Funds retain certain amounts with them, pending regular investments in Venture Capital Undertakings for certain purposes, like disbursement of expenses, distribution to unit-holders, etc. Till such time the funds are not utilised for the main purposes, advisably the Venture Capital Fund would make temporary investments to earn monies. The course adopted by the assessee in this regard was by investing in units of mutual funds or even by way of fixed deposits with banks. Insofar as the objection of the Assessing Officer regarding non-compliance with the VCF Regulations of SEBI is concerned, here also we do not find any support for the stand taken

by the Assessing Officer. In fact, our attention was drawn to SEBI (Informal Guidance) Scheme, 2003 issued by SEBI with regard to VCF Regulations where the temporary deployment of funds by a Venture Capital Fund in liquid mutual funds or bank deposits or other liquid assets of high quality such as treasury bills, etc. were permissible. Moreover, we cannot lose sight of the fact that the Certificate of Registration as a Venture Capital Fund issued by SEBI continues to subsist during the period under consideration, which clearly belies the assertion of the Assessing Officer that there has been a violation of VCF Regulations of SEBI. Thus, on an overall analysis of the situation, we find that the temporary investment made in the units of mutual funds is within the ambit of appellant's Trust Deed and also within the ambit of VCF Regulations of SEBI.

13. Insofar as the investment made by the assessee in Debenture application monies is concerned, in this context also we find that appellant has a good case. At the time of hearing, our attention was also drawn to the detailed written submissions made before the lower authorities, which bring out that the investment in question were towards Optionally Convertible Debentures. The assessee asserted before the lower authorities that putting application money in Convertible Debentures is also to be understood as investment in equity linked instruments because ultimately the Debenture will be converted into equity shares. In this context, with reference to the VCF Regulations of SEBI, assessee pointed out that Regulation 12(ii) of the VCF Regulations prescribes that not more than 33.33% of investible surplus may be in debt instrument of a VCU in which the VCF has already made investment by way of equity. The learned representative has pointed out that assessee had made investment in one of the VCUs by way of equity and accordingly, even if the instant Debenture application money is considered as a debt instrument, the same is within the permissible limits though, according to him, investment in equity linked Convertible Debentures is to be understood as linked to equity shares only. All these aspects have been

time and again reiterated by the assessee before the lower authorities as well as before us and we find that in neither of the orders of the authorities below there is any negation to the same. So far as VCF Regulations of SEBI are concerned, we are in agreement with the assessee that it does envisage investments in Convertible Debenture application money as being investments which can be said to be linked to investment in equity shares. Thus, on account of the aforesaid discussion, we find that the assessee fulfils the requirements of claiming exemption under [Section 10\(23FB\)](#) of the Act so far as it is relatable to the year under consideration.

14. To reiterate, it is abundantly clear that assessee is a VCF operating in terms of a Trust Deed registered under the provisions of the [Registration Act](#), 1908; that it has been granted a Certificate of Registration as VCF by SEBI which continues to subsist; that there is no adverse action taken or contemplated by SEBI for violation of any VCF Regulations; that the targeted investment in VCUs is within the purview of VCF Regulations of SEBI; that assessee is permitted by its Trust Deed as well as by the VCF Regulations of SEBI to temporarily deploy funds in units of mutual funds as well as in Convertible Debenture application money. Thus, in our view, assessee is entitled to exemption envisaged under [Section 10\(23FB\)](#) of the Act.

17. Considering the aforesaid discussions, we find that the certificate of Registration of assessee in the capacity of a VCF with SEBI is still continues to subsist; that there is no adverse report brought by assessing officer taken or likely to be taken by SEBI for violation of any VCF Regulations; that the targeted investment in VCUs is within the purview of VCF Regulations of SEBI; wherein the assessee is permitted by its Trust Deed dated 18th March 2006 as well as by the VCF Regulations of SEBI to deploy the funds in units of mutual funds. Therefore, in our

view, the denial of exemption prescribed under [Section 10\(23FB\)](#) of the Act was not warranted, we hold so.

18. The submission of Id. DR for the revenue is not acceptable to us as the co-ordinate bench of Tribunal in HDFC Property Fund (supra) and in Gujarat Information Technology Fund (supra) has held that a VCF (assessee) operating in terms of trust-deed and has been granted a certificate of registration as VCF by SEBI which continued to subsist; and there is no adverse action contemplated or initiated by SEBI for violation of any VCF Regulations, the assessee is entitled for exemption envisaged under section 10(23FB). In Gujarat Information Technology Fund (supra) it was clearly held that role of Assessing Officer is limited to verify whether the assessee has a valid registration certificate by SEBI and condition prescribed under section 10(23FB) are fulfilled. In the result the ground No. 1 & 8 of the appeal is allowed.

19. Ground No. 2 relates to treating the income as 'income from other sources'. Considering the fact that we have allowed the exemption to the assessee under section 10(23CF) therefore, the discussion on this ground of appeal has become academic.

20. Ground No. 3 relates to taxing the income which is already considered in the return of income of the beneficiary. Considering our finding on ground No. 1 in granting full relief to the assessee for exemption under

section 10(23CF), therefore discussion on this ground of appeal has also become academic.

21. Ground No. 4 and 5 relates to denial of exemption under section 10(34) and section 10(35) of the Act. The learned Senior Counsel for the assessee submits that during the year the assessee earned dividend income of Rs. 85.38 lakhs from investments made in portfolio companies, which are qualifying as venture capital undertaking under the SEBI (VCF) Regulations. The assessee claimed the exemption on such dividend income under section 34 of the Act on the income earned by assessee is a dividend from the investment made in venture capital undertaking to list of the assessee also on income of Rs. 1.06 crore from distributions from unit held in mutual funds. The assessee claimed exemption under section 10(35) of the act on the income earned from such investment in units of mutual funds. The assessing officer denied the exemptions under section 10(34) and section 10(35) on the ground that the assessee does not qualify as VSL under the provisions of section 10(23FB) of the act. While denying the exemption the assessing officer held that the assessee is not a person as defined under section 231 of the Act and therefore, not eligible to claim exemption under section 10 of the as exemptions under section 10 is allowed to any person. The assessing officer applied the principle of doctrine of generally especially labour's known dialogue and held that section 10(23FB) of the Act is

more specific Visa with section 10(34) and 10(35) of the Act. The assessing officer held the assessee is not qualified as a BSF under the provisions of subsection 10(23FB) of the act and that it cannot be granted exemption under section 10(34) and 10(35) of the Act.

22. The learned senior counsel for the assessee further submits that the exemption under section 10(34) and section 10(35) was denied to the assessee on the ground that assessee is not eligible for exemption under section 10(23 FB) of the Act. The learned senior counsel would further submit that in case the assessee is held as eligible for claim of exemption under section 10(23FB), then the basis on which the exemption under section 10(34) and section 10(35) was denied itself would not subsist. In alternative submission the learned senior counsel would submit that there are no conditions attached with section 1034 and section 10(35) or under section 10(23 FB), which is a specific over the other. Therefore the treatment made by assessing officer is absolutely misplaced. There is no applicability of doctrine of generally especially clear bus known dialogue went. In another alternative submission will learned senior counsel would submit that the exemption claim under section 10(34) and 10(35) are not linked to section 10(23FB) as the amount claimed as exempt under section 10(23FB) is not claimed as exempt under section 10(34) and 10(35) of the Act. The exemption claimed under section 10(23FB) is with respect to the

investment in VCU, whereas exemption claimed under section 10(35) of the act or not investment in VCU, therefore there is no basis for denying exemption to the assessee. In support of his submission the learned senior counsel relied upon the decision of Bombay High Court in the ITE vs. Jassal by foundation [2015] 374 ITR 315 (Bombay), wherein it was held that while analysing the interplay between section 11 of the Act that there is nothing in the language of two provisions as to how when certain income is not to be included in computing total income of the previous year of any person, then, that which is excluded from section 10 could be included in the total income of the previous year of the assessee.

23. On the other hand the learned AR for the revenue while supporting the denial of exemption under section 10(23FB), supported the denial under section 10(34) and section 10(35) of the Act.

24. We have considered the rival submission about the parties and find that we have already allowed exemption to the assessee under section 10(23FB) of the Act, which was the basis for denying further exemption under section 10(34) and section 10(35). Considering the fact that we have already allowed relief to the assessee on the exemption under section 10(23FB) therefore, the basis on which the assessee was denied exemption under section 10(34) and section 10(35) has already been set aside therefore the discussion on the merit of these grounds of appeal

have become academic, resultantly, they assessee is also allowed exemption under section 10(34) and 10(35) of the Act.

25. Ground No. 6 relates to the status of a person under section 2(31) of the act and ground No. 8 relates to status of assessee as an AOP. Considering the fact that we have already allowed full relief to the assessee, so far as exemption under section 10(23 CF) and section 10(34) and 10(35) are concerned therefore the discussion on these grounds of appeal have also become academic. Ground No. 9 relates to levy of interest under section 234B of the Act. The learned Senior Counsel for the assessee submits that provision of section 234B of the Act are only applicable in case where in a financial year the assessee who is liable to pay advance tax under section 208 of the Act, has failed to pay such tax or has paid advance tax less than the prescribed percentage. The income earned by assessee are exempt under section 10(23FB) of the Act, 10(34) and 10(35) of the Act respectively. The assessee is not liable to pay advance tax under section 208 of the Act, accordingly the provision of section 234B of the Act should not apply to the assessee and no interest can be levied.

26. On the other the learned DR for the revenue supported the order of lower authorities.

27. We have considered the submission of the parties and have gone through the orders of assessing officer. Considering the fact that we

have already held that assessee is entitled for exemption under section 10(23FB), 10(34) and section 10(35) of the Act, therefore, we are in agreement with the submission of learned Senior Counsel for the assessee that provision of section 234B of the Act are only applicable in case where in the financial year the assessee who is liable to pay advance tax under section 208 of the Act has failed to pay such tax or has paid advance tax lesser than the prescribed percentage, is only liable to pay levy of interest. Considering the fact that entire income of the assessee is held as exempt income, therefore, the assessee is not liable to pay interest under section 234 of the act. Therefore, we direct the assessing officer not to levy interest under section 234B of the Act. In the result this ground of appeal is allowed.

28. In the result appeal of the assessee is allowed.

Order pronounced in the open court on 20/08/2019.

Sd/-
G.S. PANNU
VICE-PRESIDENT

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Mumbai, Date: 20.08.2019

SK

Copy of the Order forwarded to :

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|-------------------------------|----------------------|
| 1. Assessee | 2. Respondent |
| 3. The concerned CIT(A) | 4. The concerned CIT |
| 5. DR "F" Bench, ITAT, Mumbai | |
| 6. Guard File | |

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai