

**IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH
MUMBAI**

**BEFORE SHRI M.BALAGANESH, AM
&
SHRI AMARJIT SINGH, JM**

**ITA No.4792/Mum/2017
(Assessment Year :2010-11)**

The ITO-23(1)(2) Room No.18, Matru Mandir Grant Road Mumbai – 400007	Vs.	M/s. IL And Orix Trust The IL & FS Financial Centre Plot No.C-22, G-Block Bandra Kurla Complex Bandra East Mumbai - 400051
PAN/GIR No. AAAT16277K		
(Appellant)	..	(Respondent)

Revenue by	Shri S.K. Jain
Assessee by	Shri Sandeep Bhalla
Date of Hearing	13/01/2020
Date of Pronouncement	15/01/2020

आदेश / ORDER

PER M. BALAGANESH (A.M):

This appeal in ITA No.4792/Mum/2017 for A.Y.2010-11 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-32, Mumbai in appeal No.CIT(A)-32/ITO-19(3)(2)/IT-120/2013-14 dated 24/04/2017 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 24/04/2017 by the Id. Income Tax Officer – 19(3)(2), Mumbai (hereinafter referred to as Id. AO).

2. Revenue has raised the following grounds of appeal before us.

"1. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in treating the assessee as Trust and not as AOP, merely following the decision of the Hon'ble ITAT in the case of Indian Corporate Loan Securitization Trust 2008-Series 14 vide order No. ITA 3986/Mum/2013 & ITA No, 4343/Mum/2013 passed on 17.02.2017.

2. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in deleting the addition of Rs. 7,95,15,873/- merely following the decision of the Hon'ble ITAT in the case of Indian Corporate Loan Securitization Trust 2008-Series 14 (Supra) vide order No. ITA 3986/Mum/2013 & ITA No. 4343/Mum/2013 passed on 17.02.2017 without discussing the matter on merits.

3. Without prejudice to the above, on the facts and in the circumstances of the case and in law, even if the trust is held to be valid as claimed by the assessee, whether, still the income liable to be taxed at the maximum marginal rate in view of section 161(1 A) of the I T Act as the captioned income is evidently business income?.

4. "The appellant prays that the order of the Ld. CIT (A) on the above grounds be set aside and that of the A.O. be restored."

5. "The appellant craves leave to add, delete, alter, amend and modify any or all grounds of appeal."

3. The brief facts of this appeal are that the assessee received interest income of Rs.8,630/- and profit on sale of investments of Rs.7,95,07,243/- as per books. The assessee did not offer any income to tax in its own hands and instead offered the income in the hands of the beneficiary of the trust. The assessee is a revocable trust with name of the beneficiary i.e. IL & FS Financial Services Ltd., as Class P beneficiary and it is the sole beneficiary having 100% share. The trust was formed with the object of making investment to achieve substantial long term capital appreciation primarily through privately negotiated equity and equity linked investments. The trust has made only two investments in the shares of two unlisted companies namely Multi Commodity Exchange Ltd. and Maithan Ispat Limited. Other than making in investment in

shares of these two private limited companies, no other activity was carried out. Out of two investments, only one investment was sold in AY. 2010-11 and other investment was retained.

3.1. The trust had obtained registration from SEBI as Venture Capital Fund. The total contribution received from IL & FS being the sole contributor was Rs.96,68,88,357/- and out of these funds, investments were made in shares of two unlisted companies amounting to Rs.96,68,88,357/-. The trust has not borrowed any money nor has received any contribution from any person. For AYs. 2008-09 & 2009-10 the trust filed the return and the Income Tax department has accepted the status as trust. In both the returns, it was clearly mentioned that the income is taxable in the hands of IL & FS being the sole contributor and they are liable to pay tax on the income of the trust. For AY 2008-09, the trust did not earn any income. However, for AY. 2009-10, the trust earned interest income of Rs. 11,434/- and dividend income of Rs. 8,10,913/- which were both distributed to IL & FS and the same were included in the total income by IL & FS while filling the return of income. Dividend income was exempt and the interest income was offered for tax. The income tax department has passed the order in the case of IL & FS for AY. 2009-10 and has taxed the income received from the assessee trust.

3.2. The assessee pleaded before the Id. AO that the provisions of Section 61 to 63 of the Act are applicable to the facts of the case. IL & FS being the sole contributor is entitled to the income and has offered the income for A.Y.2009-10 and 2010-11 and taxed in their hands. Accordingly, it was pleaded that no income could be taxed in the hands of the assessee trust. It was specifically pleaded that the provisions of

Section 164(1) of the Act are not applicable to the facts of the case. The assessee submitted that the three constituents of the assessee trust are as under:-

- a. Settlor - Infrastructure Leasing and Financial Services Ltd.,
- b. Trustee- IL & FS Trust Co. Ltd.
- c. Beneficiary – IL & FS Financial Services Ltd.,

3.3. The assessee pleaded that it satisfies the test of above three constituents of a trust to be three different entities and hence, it has to be assessed as a trust only. The assessee also submitted that the beneficiary has included the income received for AY.2010-11 in their total income. This is evident from the return of income acknowledgement enclosed by the assessee together with the computation of income. In the said computation, under the head Capital Gains, the beneficiary has offered for tax Rs. 2,56,11,938/-. In the total of Rs. 2,56,11,938/- the long term capital gain received from the assessee trust on sale of the shares of Multi Commodity Exchange Ltd is included and the capital gains after indexation is offered for tax of Rs. 27,38,484/- which is the capital gain distributed by the assessee to the beneficiary. The computation of income of the assessee trust is given and the same amount of Rs. 27,38,484/- is duly reflected. The trust had 'distributed the dividend income of Rs. 40,54,565/-, long term capital gain of Rs. 27,38,484/- and interest of Rs. 8,630/-. The said income is also included by the beneficiary in the computation of income and offered for tax under the head income from other sources. This clearly proves that the income distributed by the assessee trust is included by the beneficiary and the same is offered for tax. The said income is also taxed in the hands of IL & FS being the beneficiary while passing order u/s. 143(3) of the Act on 12.3.2013.

3.4. The Id. AO disregarded the aforesaid facts and proceeded to treat the status of the assessee as AOP and passed an order accordingly on 18/03/2013 u/s.143(3) of the Act despite the fact that the entire income has already been taxed in the hands of the beneficiary and the same has been assessed as such u/s.143(3) of the Act dated 12/03/2013. The Id. AO was conscious of the fact of assessment being framed in the hands of the beneficiary on 12/03/2013 while framing the assessment in the hands of the assessee on 18/03/2013.

3.5. The assessee raised various grounds before the Id. CIT(A) challenging the status of the assessee i.e not to be taxed as AOP; non-applicability of provisions of Section 161(1A) of the Act; income that has already been taxed in the hands of the beneficiary pursuant to applicability of provisions of Section 61 to 63 of the Act and thereby the same cannot be taxed again in the hands of the assessee. The Id. CIT(A) addressed each and every item independently and allowed the appeal of the assessee.

4. Aggrieved the revenue is in appeal before us.

5. We have heard rival submissions and perused the materials available on record. We find that the crucial questions that are to be decided in this appeal are (a) whether assessee should be assessed in the status of trust or AOP (b) whether profit on sale of shares should be treated as long term capital gains or business income (c) in whose hands, the said gain is to be taxed.

5.1. We find that the present appeal is the second round of proceedings before this Tribunal. In the first round, this Tribunal had remanded the matter to the file of the Id. CIT(A) for denovo adjudication. We find that in the second round of proceedings, the Id. CIT(A) had addressed each and every aspect in the light of directions of this Tribunal. The elaborate adjudication of each and every direction of the Id. CIT(A) are reproduced hereunder for the sake of convenience:-

“a) Whether the Settlor & Beneficiary are different in present case:

The Hon'ble ITAT has pointed out to the confusion arisen due to the similar confusing names of Settler & Beneficiary in the Indenture of Trust. As rightly observed by Hon'ble ITAT, the Settler in this case is "Infrastructure Leasing & Financial Services Ltd.", whereas the Beneficiary under Class "P" in Schedule A of the Indenture of Trust is "IL&FS" which as per the definition clause of indenture of trust means "IL&FS Financial Services Limited". I have gone through the Indenture of Trust and find that the clause 1.1.20 reads as "IL&FS means IL&FS Financial Services Limited", hence naturally the "IL&FS" mentioned in Schedule A thereof is to be read as "IL&FS Financial Services Ltd." only. It is therefore clear that the observation of CIT(A)-30 that the name of said investor & sole beneficiary "IL&FS Financial Services Ltd." was not appearing in the Indenture of Trust seems misconceived. I have also made an internet search about the status of IL&FS Financial Services Limited at its website www.ilfsifin.com , and find that the said company is a 100% subsidiary of Infrastructure Leasing and Financial Services Limited, hence these two are distinct legal entities. From the above, it can be inferred that the Settlor "Infrastructure Leasing & Financial Services Ltd.", and the Beneficiary "IL&FS Financial Services Ltd." are two distinct entities, as also observed by Hon'ble ITAT.

b) Whether the appellant is a Trust or an AOP:

In para 6 of the assessment order, the AO has stated that "The fundamental principle of a trust is that the Trustees of the Trust acts in a fiduciary capacity for the benefit of the beneficiaries. In an ideal condition Trusts are created by a settler and he or she contributes his/her assets/property in the Trust for the benefits of the persons called the beneficiaries. A trustee is appointed to manage the affairs of the trust. Thus in a true trust settler, trustee and the beneficiaries are not the same. In the instant case, the settler and the beneficiaries are the same.

It is true that the three constituents of a true Trust are Settler, Trustees and Beneficiary. In present case, the Hon'ble ITAT has cited names of such constituents as under:

I. Settler: Infrastructure Leasing & Financial Services Ltd.

II. Trustee: IL&FS Trust Co. Ltd.

III. Beneficiary: As per Schedule A (IL&FS Financial Services Ltd. as Class Beneficiary)

Since the appellant satisfies the test of above three constituents of a trust to be three different entities, the appellant has to be assessed as a Trust only.

Also, once the appellant is accepted to be a Trust, the question of treating it as an AOP would be irrelevant. Moreover, while holding it to be an AOP, the AO's observation in para 6 of assessment order that it is coming together of two or more financial institutions to takeover a loan creditor, seems to be factually incorrect. In fact, the appellant trust is formed with a distinct objective, i.e. for the purpose of making available financial assistance to Portfolio Companies and operating within the investment focus of the Trust and to achieve substantial long term capital appreciation, primarily through privately negotiated equity and equity-lined investments in these Portfolio Companies. Therefore, the objective of appellant trust is to make investments with a view to get long term capital appreciation.

Taxability of Trust:

*The appellant has claimed that it is covered under the provisions of Section 61 to 63 wherein the income of appellant trust would be clubbed with the beneficiary. The appellant has relied upon the decision of Hon'ble ITAT, Bangalore in the case of **India Advantage Fund-VII (ITA No. 178/Bang/2012)**. I have gone through said decision. In that case, the Trust was held to be a "revocable " trust on given facts, and hence it was held that Section 61 read with section 63 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 case. I further find that the revenue's appeal in said case has been dismissed by Hon'ble High Court of Karnataka in recent order dated 01.02.2017 reported in [2017] 78 taxmann.com 301 (Karnataka).*

*Now, to examine whether the facts of appellant's case suffice to treat it as a "revocable" trust, the clause 12 of the Indenture of Trust is reproduced below: "12 Term and termination of the **Trust***

12.1 Term: The term shall terminate at the end of 15 years from the date of creation of this Trust unless extended with the Majority of the Contributors.

12.2 Extension of term: the Trustee may extend the Term for an additional period of 24 months upon the prior recommendation of the Investment Manager.

12.3 Premature termination of the Trust:

12.3.1 The trustee may at any time before the expiry of the Term, terminate this Indenture With the prior written recommendation of the Invest Manager and upon obtaining the consent of Majority of the Contributors for such termination.

12.3.2 The Majority of the Contributors can vote to terminate the Trust, if the Investment Manager is adjudged in a final determination of a court of competent jurisdiction to have engaged in gross negligence, will full misconduct or criminal or unlawful conduct.

12.4 Procedure on termination: In the event of the Trust being terminated in the circumstances above mentioned, the Trustee shall:

12.4.1 Take all practical steps to sell all the non-cash assets of the Trust Fund in the manner the Trustee deems fit or advisable;

12.4.2 Shall commence arrangements to pay all the liabilities of the Trust;

12.4.3 Return to the extent of the available cash in the Trust Fund, all outstanding interests in the Trust as per **Clause 6; and .**

3.2.4.4 Distribute the Initial Settlement and accretions thereto as provided in **Clause 6.8,"**

In my opinion, the aforesaid arrangement as per Indenture of Trust clearly points to a "revocable" trust, and hence provisions of section 6] to 63 would apply as claimed by the appellant, relying upon the decision in case of India Advantage Fund-VII (supra). In such case, the discussion of taxability in hands of the Trust under section 160(1)7 161(1 A)/ 164(1) as made in assessment order/previous appellate order would be irrelevant.

Whether income already offered to tax in hands of beneficiary:

I find that the CIT(A)-30 seems to have mistakenly observed in previous appellate order that the said income was claimed exempt by the beneficiary u/s 10(38). The appellant has stated that the income of appellant Trust is already offered to tax in hands of the beneficiary "IL&FS Financial Services Ltd.". The relevant proof showing that the said company has offered to tax the income on sale of investments of Rs. 7,95,07,2437- as LTCG (after indexation) computed at Rs, 27,38,4847-, and also the Interest income of Rs. 8,6307- is submitted by the appellant

on Page 79-87 of the paper book, which is verified. The relevant working of above LTCG is as under:

<i>Sale consideration</i>	<i>Rs. 97,30,95,600</i>
<i>Indexed Cost</i>	<i>Rs. 97,03,57,116</i>
<i>(89,35,88,357 *632/582)</i>	<i>-----</i>
<i>LTCG</i>	<i>Rs. 27,38,484</i>
	<i>=====</i>

e) Treatment of Income on sale of investments as LTCG/Business Income:

The appellant has offered to tax the income on sale of investments as LTCG, whereas the assessing officer has treated it as Business Income. The AO in para 12(111) of the assessment order observed that in this case financial institution(s) came together and subscribed certain amount of money in the trust for earning profit is nothing but close y association of two or more persons for earning profit. However, I find that the appellant trust has got contribution only from one institution namely "IL&FS Financial Services Ltd." as Class P Beneficiary, and also there is only one transaction of sale of shares of Multi Commodity Exchange. In my opinion, such investment in a single company held for long term cannot be assessed as business income, hence the treatment of such income as LTCG is accepted.

In view of above, the additions made in assessment order are deleted, and therefore the grounds of appeal are allowed.

6. In the result, the appeal is *Allowed*.

5.2. We find from the elaborate observations of the Id. CIT(A) above that Settler, trustee and beneficiary are three separate and distinct entities. Hence, we hold that the assessee should be assessed in the capacity of trust only. We also find that the settler i.e Infrastructure Leasing and Financial Services Ltd. and beneficiary i.e. IL & FS Financial Services Ltd. are two separate and distinct entities in the present case. We find that the observations of taxability of trust and income being offered to tax in the hands of the beneficiary are all inter-dependent based on the outcome of the status of the assessee which we have already held to be taxed only in the status of trust and not as AOP. There is no dispute with regard to the fact that the long term capital gain of subject mentioned shares of Rs.27,38,484/-has been duly offered to tax in the hands of the

beneficiary i.e. IL & FS Financial Services Ltd., and the same has been assessed accordingly by the Income Tax department u/s.143(3) of the Act vide order dated 12/03/2013. Similarly, the interest income of Rs.8,630/- was also duly offered to tax in the hands of the beneficiary and assessed as such. Hence, both these incomes cannot be taxed in the hands of the assessee. With regard to taxable of income on sale of investments as long term capital gains / business income, we find that the same had been elaborately dealt hereinabove by the Id. CIT(A) in para 'e' above which does not require any interference.

5.3. In view of the aforesaid observations, we do not deem this as a fit case to interfere with the findings recorded by the Id. CIT(A), which in our considered opinion, is very elaborate and no infirmity is found thereof. Accordingly, the grounds raised by the revenue are dismissed.

6. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on this 15/01/2020

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Mumbai; Dated
KARUNA, *sr.ps*

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

15/01/2020

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai