

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

**BEFORE SHRI M.BALAGANESH, AM**

**&**

**SHRI AMARJIT SINGH, JM**

**ITA No.320/Mum/2016  
(Assessment Year :2009-10)**

**&**

**ITA No.3740/Mum/2014  
(Assessment Year: 2010-11)**

**&**

**ITA No.322/Mum/2016  
(Assessment Year : 2011-12)**

ITO- 23(1)(2) Room No.108, Matru Mandir Tardeo Road Grant Road, Mumbai-400007	Vs.	M/s. IL & FS Investment Trust-V The IL & FS Financial Centre Plot C-22, G-Block Bandra Kurla Complex Bandra (East) Mumbai – 400 051
<b>PAN/GIR No. AAATI5996B</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

**CO No.82/Mum/2018  
(Arising out of ITA No.320/Mum/2016)  
(Assessment Year :2009-10)**

**CO No.04/Mum/2016  
(Arising out of ITA No.3740/Mum/2014)  
(Assessment Year: 2010-11)  
&**

**CO No.83/Mum/2018  
(Arising out of ITA No.322/Mum/2016)  
(Assessment Year : 2011-12)**

M/s. IL & FS Investment Trust-V The IL & FS Financial	Vs.	ITO- 23(1)(2) Room No.108, Matru Mandir
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Centre Plot C-22, G-Block Bandra Kurla Complex Bandra (East) Mumbai – 400 051		Tardeo Road Grant Road, Mumbai-400007
<b>PAN/GIR No. AAATI5996B</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Revenue by	Shri S.K. Jain
Assessee by	Shri Sandip Bhalla
<b>Date of Hearing</b>	<b>14/01/2020</b>
<b>Date of Pronouncement</b>	<b>14/01/2020</b>

**आदेश / O R D E R****PER BENCH:****ITA No.320/Mum/2016 (Revenue appeal) & CO No.82/Mum/2018 (by assessee) – (A.Y.2009-10)**

This appeal in ITA No.320/Mum/2016 and cross objection No.82/Mum/2018 for A.Y.2009-10 arise out of the order by the Id. Commissioner of Income Tax (Appeals)-32, Mumbai in appeal No.CIT(A)-32/IT-488/19(3)(2)/11-12 dated 19/10/2015 (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 12/12/2011 by the Id. Income Tax Officer – 19(3)(2), Mumbai (hereinafter referred to as Id. AO).

**ITA No.3740/Mum/2014 (Revenue appeal) & CO No.04/Mum/2016 (by assessee) – AY 2010-11**

This appeal in ITA No.3740/Mum/2014 and Cross Objection No.04/Mum/2016 for A.Y.2010-11 arise out of the order by the Id.

Commissioner of Income Tax (Appeals)-32, Mumbai in appeal No.CIT(A)-30/ITO-/19(3)(2)/IT-194/12-13 dated 06/03/2013 (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 14/12/2012 by the Id. Income Tax Officer – 19(3)(2), Mumbai (hereinafter referred to as Id. AO).

**ITA No.322/Mum/2016 (Revenue appeal) & CO  
No.83/Mum/2018 (by assessee)– A.Y.2011-12**

This appeal in ITA No.322/Mum/2016 & Cross Objection No.83/Mum/2018 for A.Y.2011-12 arise out of the order by the Id. Commissioner of Income Tax (Appeals)-32, Mumbai in appeal No.CIT(A)-32/IT-81/19(3)(2)/13-14 dated 19/10/2015 (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 22/01/2014 by the Id. Income Tax Officer – 19(3)(2), Mumbai (hereinafter referred to as Id. AO).

2. With the consent of both the parties, the cross objections of the assessee and appeal of the revenue for the A.Y.2010-11 are taken as a lead case and the decision rendered thereon would apply with equal force for A.Yrs.2009-10 and A.Yrs 2011-12 also except with variance in figures.

2.1. The cross objections preferred by the assessee are time barred by 102 days for which the affidavit has been filed by the assessee. We find that the assessee has raised only a legal ground in its cross objections which goes to the root of the matter and would have a complete bearing on the outcome of the revenue appeals also. Hence, in the interest of substantial justice, we deem it fit and appropriate to condone the delay in

filing of cross objections by the assessee for all the three years before us and admit the same for adjudication.

3. The brief facts of this appeal for the Assessment Year 2010-11 are that assessee had filed its return of income on 28/07/2010. The assessee had disclosed interest income in its profit and loss account to the tune of Rs.4,36,99,596/-. The taxable income was declared at Rs. nil. The Id. AO during the course of assessment proceedings vide letter dated 21/06/2011 show-caused the assessee to explain as to why the interest income should not be taxed in the hands of the assessee in the capacity of AOP. The assessee vide reply dated 31/10/2012 stated that it is a private trust having one beneficiary only i.e. Infrastructure Leasing and Financial Services Ltd and that the share of the said beneficiary is determinate and IL & FS Trust Co. Ltd. is a trustee and representative of the assessee. Based on the reply, the Id. AO observed that assessee's case is covered under the provisions of Section 161 of the Act. Even though the assessee was constituted as a trust vide creation of trust deed dated 28/03/2007 as a private trust, the Id. AO observed that subsequently, it had entered into a subscription agreement on 28/03/2007 with M/s. MPPL Enterprises Pvt. Ltd. and M/s. Ovira Logistics Pvt. Ltd. companies through its trustee M/s. IL & FS Trust Co. Ltd. for the purpose of acquiring the bonds. It was also found that in the above deed of subscription, M/s. MPPL Enterprises Pvt. Ltd., (sellers), companies incorporated in the companies Act 1956, have sold bonds to various persons, pursuant to various agreements and the above sellers have securitized the debt amount receivable under the bonds along with all rights and the security documents in favour of the assessee, as a result, the assessee becomes the lender by substituting itself in place of M/s. MPPL Enterprises Pvt. Ltd. and M/s. Ovira Logistics Pvt. Ltd., Accordingly

during the year, the assessee as a lender, had received interest of Rs.4,36,99,596/- from different borrowers. In the light of these facts, the Id. AO examined entire submissions of the assessee under two heads i.e. (i) as a representative assessee and (ii) it is a determinate trust where income belongs to the beneficiary and not liable to pay any tax on the income accrued to it. The Id. AO after analysing the provisions of Section 160 of the Act relating to "representative assessee, held that the assessee is not falling under any of the status defined u/s.2(31) of the Act and assessee had to be categorised as an AOP and taxed accordingly. The Id. AO further observed that a smoke screen in the name of the trust is created wherein the trust issues namesake securities such as Pass Through Certificates (PTCs) to the persons subscribing the money required by the trust for purchase of bonds. The Id. AO observed that this is the case where a special purpose vehicle i.e. a trust is created for taking over a commercial data instrument and mechanism of PTCs are issued to the subscriber and the main purpose of securitization is to leverage the funds so as to free the lender of his debts and re-deploy the realised funds and also separate the risks for the persons. Accordingly, the Id. AO had taken a view that the important question is of securitization of transactions, which are intricate money market instruments that cannot be anything, but commercial transaction. Accordingly, he held that the trust is not a representative assessee and cannot be taxed as per the provisions of Section 161 of the Act, whereas infact it is an AOP, whose income is liable to be taxed like an AOP. The Id. AO further held that in the Act, AOPs are not exempt entities, notwithstanding the fact whether it has been created by two or more taxable entities or by two or more exempt entities or by taxable and exempt entities. With these observations, the Id. AO taxed the interest income of Rs.4,36,99,596/- as business income by treating the assessee

as an AOP. The AO, without prejudice to the above finding, has also invoked Section 161(1A) of the Act, to dismiss the assessee's argument that in the case of a determinate private trust, income is taxable in hands of the beneficiary as provided u/s 161(1) of the Act, and, if the same is to be taxed in the hands of the assessee, it would be levied in the like manner and to the same extent as it would be leviable in the hands of the beneficiary, for the reason that u/s 161(1A) of the Act, where income consists of or includes profits and gains of business and profession, tax shall be charged on the whole of the income in respect of which such person is so liable at the maximum marginal rates and from the words and phrases used in the deed of agreement to assign receivables by way of securitization/assignment agreement have been defined in the assignment agreement, and under the above deed, the "Seller" has issued bonds and the assessee trust approached the beneficiary, who subscribed an amount of Rs.90 crs. and it has been issued a certificate for such investment known as 'PTC'. According to him, it is a purely business transaction of M/s. MPPL Enterprises Ltd. and M/s. Ovira Logistics Ltd., by the assessee which has substituted itself in place of M/s MPPL Enterprises Ltd. & M/s. Ovira Logistics Ltd. through the deed of subscription and purpose of the same is to earn profit out of the lending of funds and, further, all provisions under the above deed of subscription clearly show that the transactions entered into the between the assessee and the other party is nothing, but a finance/debt transaction with the prime motive to earn profit and after considering the assessee's reply dtd. 31.10.2012, vide paras 14 to 26 of the order concluded that the assessee is an AOP and not a trust and not falling u/s 161 of the Act, as a representative assessee, and, even if, it is considered to be a representative assessee, the tax liability of the assessee would arise u/s 161(1A) of the Act. The

AO, has therefore, brought to tax income of Rs.4,36,99,596/- under the head income from business and profession.

3.1. We find that assessee had raised a specific ground questioning the status of the assessee before the Id. CIT(A) vide ground No.2 & 3 which are as under:-

**“Ground No.2**

*“On the facts and circumstances of the case, the Id. Assessing Officer ought to have held that the status of appellant is a trust”.*

**Ground No.3**

*“On the facts and circumstances of the case and assuming that the Id. Assessing Officer was not justified in determining the status of the appellant as association of person, as there is a single beneficiary entitled to 100% of the income, he ought to have applied the provisions of Section 67A and income should have been taxed in the hands of single beneficiary.”*

3.2. We find that assessee made the following submissions before the Id. CIT(A). IL&FS Trust Co. Ltd. created a trust on 28/3/2007 viz. IL&FS Investment Trust - V for the benefit of the contributors. IL&FS Trust Co. Ltd. is the trustee of the said trust. The sole contributor is Infrastructure Leasing & Financial Services Ltd (IL&FS). The object of the trust was to subscribe to the bonds to be issued by Ovira Logistics Pvt. Ltd. and MPPL Enterprises Pvt. Ltd. IL&FS contributed the amount to the Trust for the purpose of investment in the bonds to be issued by Ovira Logistics Pvt. Ltd. and MPPL Enterprises Pvt. Ltd.

3.3. The assessee issued PTCs to IL&FS under which the sole contributor invested the funds. As per the arrangement, the contributor was entitled to the income arising from the contributions. Other than this,

no PTCs were issued as contribution was received by the assessee. The PTCs were issued to IL & FS and the details of the same were furnished before the lower authorities.

3.4. IL&FS contributed the amounts against which the PTCs were issued to IL&FS, which were utilised for making investments in the bonds to be issued by Ovira Logistics Pvt. Ltd. and MPPL Enterprises Pvt. Ltd :

Year	Amount (Rs.)	End use of funds
2007-08	18,69,15,000	Contribution for investment in the redeemable optionally convertible bonds of MPPL Enterprises Pvt. Ltd.
2007-08	46,25,20,000	Contribution for investment in the redeemable optionally convertible bonds of Ovira Logistics Pvt. Ltd.
Total	64,94,35,000	

3.5. The sole contributor being the beneficiary of the assessee trust, being IL&FS, made the investment of Rs. 65.49 crores and the said investment was directly utilized for making investments in the bonds of two unlisted companies. The said investments are reflected in the balance sheet of assessee company as on 31/3/2008, 31/3/2009 and 31/3/2010.

3.6. During A.Y. 2010-11 the assessee has received the interest on the investments in the bonds and the said interest is distributed to the sole beneficiary viz. IL&FS.

3.7. According to the assessee the income belongs to a single identified beneficiary and the income is distributed to the single identified

beneficiary viz. IL&FS, the income is chargeable to tax in the hands of the beneficiary. In the computation of income, the assessee on the face of it, clearly disclosed that income is distributed to the sole beneficiary and hence the same is taxable in the hands of the beneficiary viz. IL&FS. The confirmation of IL&FS to the effect that the income earned as a sole beneficiary is offered for tax with necessary relevant documents was filed. IL&FS is assessed to tax by Dy.Commr. of Income Tax - 10(I), Mumbai under PAN AAACI0989F. In the assessment order passed for A.Y. 2010-11 the Assessing Officer has taxed the said income received from the assessee trust in the hands of IL&FS while passing the order u/s 143(3) of Income Tax Act, 1961. The income is already taxed in the hands of the sole beneficiary and the said income is once again taxed by the Assessing Officer in the hands of the assessee trust.

3.8. We find that the Id. AO had rejected various claims of the assessee as under:-

- a. The status of the trust is held as AOP.
- b. Invoked the provisions of Section 161(1 A) and held that the long term capital gain earned by the assessee is chargeable to tax as business income.
- c. Rejected the claim of the assessee that provisions of Section 61 to 63 are applicable and the income should be taxed in the hands of the contributor being the beneficiary.
- d. Rejected the claim that the income is already taxed in the hands of IL&FS and hence the same income cannot again be taxed in the hands of the assessee trust.

3.9. With regard to the same, the assessee made various factual and legal submissions before the Id. CIT(A). The Id. CIT(A) merely placed reliance

on the order passed by another CIT(A) in the case of Indian Corporate Securitization Trust 2008 series – 14 for A.Y.2009-10 in CIT(A)-30/ITO-19(3)(3)/IT-158/11-12 dated 30/03/2013, observed as under:-

**6. Decision :**

*6.1 I have duly considered the submission of the appellant and from the appellant's reply dtd. 1.3.14, find that interest accrued and due during the F.Y. 2009-10 (A.Y.2010-11) is Rs.4,37,27,719. In the return of income, the appellant has declared interest income of Rs.4,36,99,596. I, therefore, on the basis of decision given in other group cases, hold that the entire interest income on mercantile basis is to be taxed in the hands of the appellant while interest paid during the year only is allowable as expenditure. In other group cases, the CIT(A) vide the appellate orders in A.Y. 2009 being followed in this Order has rejected their contention that interest expenses too should be allowed on mercantile basis on the ground that interest payable to the beneficiaries under PTC, is as per the deed of assignment, which shows interest received shall be paid to the beneficiaries. In other words, the interest accrued to the beneficiaries is what is received by the appellant during the year. The appellant's liability to pay interest, therefore, is only to the said extent. I, therefore, do not find any merit in the above argument of the appellant and dismiss the same.*

*6.2 The income of the appellant therefore, is determined at Rs.4,37,27,719 and after reducing the interest distributed of Rs.4,36,99,596, an amount of Rs.28,123 is taxable during the year. I, therefore, direct the AO to assess the income of the appellant at Rs.28,123.*

*7. Grounds of appeal No. 1 to 9 are disposed of in terms of the above direction and treated as partly allowed with enhancement of income.*

4. We find from the cross objection raised by the assessee for the A.Y.2010-11, the crucial question to be decided is with regard to the status of the assessee i.e. whether the assessee is to be assessed as 'trust' or as an 'association of persons' (AOP).

5. We have heard rival submissions and perused the materials available on record. We find that the Id. CIT(A) had not decided the issue

of status of the assessee i.e. whether the assessee is to be assessed as a trust or as AOP despite specific grounds raised by the assessee before him. We find that the outcome of this decision by the Id. CIT(A) would have a bearing on determination of other grounds raised by the revenue in its appeal on merits. Hence, we deem it fit and appropriate in the interest of justice and fair play, to remand the issue of determination of status of the assessee to the file of Id. CIT(A) as the same would have a bearing on other grounds raised by the revenue before us. Accordingly, the cross objections of the assessee and the appeal of the revenue are remanded to the file of the Id CIT(A) for de novo adjudication in accordance with law for all the three assessment years.

**6. In the result, appeals of the revenue and cross objections of the assessee are allowed for statistical purposes for all the three years.**

Order pronounced in the open court on this 14/01/2020

**Sd/-**  
**(AMARJIT SINGH)**  
JUDICIAL MEMBER

Mumbai; Dated 14/01/2020  
KARUNA, *sr.ps*

**Sd/-**  
**(M.BALAGANESH)**  
ACCOUNTANT MEMBER

**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