IN THE INCOME-TAX APPELLATE TRIBUNAL "G" BENCH MUMBAI
BEFORE SHRI G. MANJUNATHA, ACCOUNTANT MEMBER AND
SHRI RAVISH SOOD, JUDICIAL MEMBER

ITA No.2293/Mum/2018 (Assessment Year 2013-14)

ITO-21(3)(2) R. No. 203, 2nd Floor, Piramal Chambers, Lalbaug, Mumbai-400012	Vs.	M/s Scheme A1 of ARCIL CPS 002 XI Trust, 10th Floor, The Ruby, 29, Senapati Bapat Marg, Dadar, Mumbai- 400 028 **PAN: AAHTS8177K**

(Appellant) (Respondent)

Appellant by : Shri Amit Pratap Singh (CIT-DR)
Respondent by : Shri P.J. Pardiwalla, Senior Advocate with Shri Jitendera Jain, A.Rs

Date of Hearing : 04.09.2020
Date of Pronouncement :10.09.2020

PER RAVISH SOOD, J.M :

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-33, Mumbai, dated 03.01.2018, which in turn arises from the assessment order passed by the A.O under Sec. 143(3) of the Income Tax Act 1961 (for short 'Act'), dated 15.03.2016 for A.Y. 2013-14. The revenue has assailed the impugned order on the following grounds of appeal before us:

1. "Whether on the facts and circumstances of the case and in law, the Ld CIT(A) is justified in not appreciating the action of the AO in treating the assessee as AOP on the basis of the nature of activity carried out by the assessee and "the high yield/profit earned by it from NPA purchased at a very low/nominal cost and several other reasons discussed in the Assessment order?"

2. "Whether on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in ignoring the fact that the assessee actually earned the income on low cost NPAs purchased by it indicating thereby that it is engaged in business activity with a profit motive?"

3. "Whether on facts and circumstances of the case and in law, the Ld CIT(A) was justified in deleting the entire addition of Rs.57,56,60,600/-, made on account of surplus from income and expenditure account holding that it is a result of write-back of impairment provision of Rs.59,76,25,576/-, without appreciating the fact that there was interest income of Rs.23,90,228/- and other (income of Rs.4598/- and out of total assets of Rs.460,OO,52,378/- assets of Rs.96,91,64,749.71 were realized during AY 2013-14 and cumulatively over the years assets of Rs.248,60,41,676.40 were realized while the acquisition expense during the year under consideration was merely Rs.223.14?"

4. "Whether on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in not appreciating the action of the AO in holding that the assessee trust is not a revocable trust since contributors have practically no control over the income arising out of the activities of the fund and the contribution can be revoked only with the consent of the contributors holding 75% of the units and thus the assessee will not be eligible for the benefit of section 61 to 63 of the Income Tax Act, 1961 not being a revocable trust. The Ld. CIT(A) has also erred in not appreciating the action of the AO in regard that the section 61 to 63 of the Income Tax Act, 1961 are anti-avoidance provisions to plug any leakage or diversion of legitimate income?"

5. "Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the action of the AO in this regard that

the section 61 to 63 of the Income Tax Act, 1961 are anti-avoidance provisions to plug any leakage or diversion of legitimate income?"

6. "Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in ignoring the fact that the assessee trust and the beneficiaries have joined in a common purpose or common action, the object of which was to produce income, profit and gains and therefore, the assessee is liable to be categorized as an AOP and has to be taxed accordingly?"

7. "Whether on facts and circumstances of the case and in law, the Ld CIT(A) has erred in deleting the addition made by the AO amounting to Rs. 57,56,60,600/-, being surplus of income over expenditure in the revenue account of the assessee?"

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

2. Briefly stated, the assessee is a trust called "Scheme A1 of Arcil CPS002 xi Trust" set up by the Asset Reconstruction Company (India) Ltd. (for short 'ARCIL') on 27th December, 2007 in pursuance to the provisions of Securitization and Reconstruction of Financial Assets and Enforcement Security Interest Act, 2002 (SARFAESI Act) and the guidelines of RBI to acquire financial assets of the borrowers classified as non-performing assets (NPAs). ARCIL is registered with RBI under Sec. 3 of SARFAESI Act as a Securitization and Reconstruction Company. ARCIL acts as a trustee of the assessee in pursuance to the provisions of the aforesaid Act and the RBI guidelines. Accordingly, ARCIL acquires stressed financial assets that are classified as NPAs from the banks/FIs. The assessee had filed its return of income for A.Y. 2013-14 on 13.09.2013, declaring its total income at Rs. Nil. The return of income filed by the assessee trust was processed

as such under Sec. 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. During the course of the assessment proceedings, it was observed by the A.O that the assessee trust that was set up for the purpose of liquidating/recovering/realizing the non-performing assets (NPAs) which were taken over by the assessee was registered under Sec. 3 of the SARFAESI Act, 2002 by the RBI, and had the following partners/members/shareholders:

Sr. No.	Name of the Shareholders	Percentage of equity shares held
1.	Asset Reconstruction Company (India) Ltd.	5%
2.	ICICI Bank Ltd.	95%
	Total Shareholding	100%

As observed by the A.O, the assessee derived income from assets reconstruction activity and handling of non-performing assets of banks/financial institutions. After perusing the records the A.O called upon the assessee to explain as to on what basis it had claimed its receipts as not exigible to tax. Also, the assessee was directed to put forth an explanation as to why the income/loss derived by it may not be taxed in its hands in the status as that of a trust/AOP. In reply, it was submitted by the assessee as under:

"Background of Formation of Trusts

Asset Reconstruction Company (India) Ltd. (Arcil) is registered with Reserve Bank of India (RBI) under section 3 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 'SARFAESI Act) as a Securitization Company and Reconstruction Company (SC/RC or ARC)

SC/RCs are regulated by Reserve Bank of India. SARFAESI Act provides that no SC/RC can commence or carry on the business without obtaining a certificate of registration (license) from RBI. Further, RBI has issued guidelines to SC/RCs to regulate their functioning. Pursuant to SARFAESI Act and RBI Guidelines, SC/RCs shall acquire financial assets classified as Non-Performing Assets ('NPAs) from banks, financial institutions and housing finance companies operating in India ('collectively referred to as banks/FIs in this note). The concerned bank/FI, which intends

to transfer the financial assets to SC/RC, must ensure that the same are classified as NPA in accordance with the guidelines of RBI in this regard. Accordingly, Arcil acquires financial assets that are classified as NPAs from the banks/FIs. The stressed assets are acquired by Arcil by setting up trusts and formulating schemes there under pursuant to section 7 of the SARFAESI Act and RBI Guidelines issued to SC/RCs. Arcil declares the trusts. Arcil acts as a trustee of the trusts pursuant to provisions of the SARFAESI Act and RBI Guidelines. The trust accepts contributions from Security Receipt holders (SR holders) for acquisition of financial assets. The contributions are raised from qualified Institutional Buyers (QIBs) as defined under SARFAESI Act for which trusts issue Security Receipts SRs to QIBs. QIBs include Banks, Financial Institutions, Insurance Companies, S/RCs, mutual funds, eligible Non Banking Finance Companies ('pursuant to RBI Guidelines in this regard) and Foreign Institutional Investors. SRs represent contribution of such QIBs in the trust and are in the nature of undivided right, title and interest in the trust fund (essentially financial assets held in trust) evidenced by the SRs issued to it. Subscription to SRs are governed by the terms and conditions mentioned in the transaction document ('trust deed etc.).

The contributions of the SR holders are revocable. Therefore the income arising from revocable transfer shall be assessed in the hands of the contributors pursuant to section 61 of the Act.

As per Section 61 all income arising to any person by virtue of a revocable transfer of assets shall be chargeable to income tax as the income of the transferor and shall be included in his total income.

<u>For the above purpose, section 63 defines "revocable transfer" and read as follows:</u>

For the purposes of sections 60, 61 and 62 and of this section, -

(a) transfer shall be deemed to be revocable if-
  (i) it contains any provision for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor, or
  (ii) it, in any way, gives the transferor a right to re-assume power directly or indirectly over the whole or any part of the income or assets;

(b) "transfer" includes any settlement, trust, covenant, agreement or arrangement." (Emphasis supplied by us)

On a conjoint reading of all the provisions of section 61 to section 63, it is evident that, in case of revocable transfer of the assets by the transferor, the income is taxed in the hands of the transferor. This is based on the reasoning that if the transferor has the right to reassume the assets or the income, then

it is but natural that income should obviously be taxed in the hands of the transferor.

Thus, under these sections, where a transfer of asset (in this case - contribution by the Security Receipt holders) is made, but a power of re-assumption or retransfer of the assets or income is retained by the transferor (i.e. security holders), it is treated as a case of revocable transfer. In such a case, the income is to be assessed in the hands of the transferor i.e. the security receipt holders.

Thus, if the trust is a revocable trust, the income is taxable in the hands of the transferor (i.e. SR holders). Hence, there is no income chargeable to tax in the hands of the trust and is taxable entirely in the hands of SR Holders.

The trust deed itself mentions that the SR Holders are entitled to revoke the contribution made by them.

For the sake of Your Honour's convenience, the relevant Para of the trust deed is reproduced as under:

5. PROVISIONS RELATING TO SECURITY RECEIPT HOLDERS

5.1 Contributions

5.1.1 Upon the making of the Contribution, and within a period of ninety (90) days from the date of closure of the respective issue of Security Receipts under the relevant Offer Document, the Trustee shall credit the Depository Account of each Security Receipt Holder with, or issue physical certificates in the form prescribed in the relevant Offer Document. The Security Receipts as are issued to such Security Receipt Holder in accordance with the terms of this Deed and the relevant Offer Document, which shall be credited as fully paid and the Trustee shall enter the Security Receipt Holder's name in the Register of Security Receipt Holders as the holder of these Security Receipts.

5.1.2 Upon the making of the Contributions, each Security Receipt Holder shall be entitled to the undivided right, title and interest in the Trust Fund evidenced by the Security Receipts issued to it, on the terms and conditions contained in the Security Receipts and the relevant Offer Document.

5.1.3 The Trustee shall accept Contributions under this Deed, only from Persons who are Qualified Institutional Buyers for the purpose of SARFAESI and only upon the following conditions precedent being satisfied:

(a) All the Transaction Documents are duly and validly executed, and
(b) The Trust Account is duly established.

5. 1.4 This Deed shall take effect on the Commencement Date and continue in full force and effect until full redemption/extinguishment of all the Security Receipts issued pursuant to this Deed, in accordance with the terms.

5.2 Revocation of contributions

5.2.1 The Security Receipt Holders shall be entitled to revoke the Contributions made by them, at any time during the term of this Deed, in accordance with the terms and conditions contained therein, for any reason, including but not limited to circumstances resulting from any adverse tax consequences (for either the Trust or the Security Receipts Holders) or any direction of any Statutory Authority, provided that no such revocation shall take effect unless the consent of the Security Holders holding security Receipts representing not less than 75% of the total face value of the then outstanding Security receipts, issued pursuant to this Deed has been obtained, in this behalf, provided that a notice of not less than 60 days of the intention to revoke the contribution is given to the Trustee.

5.2.2 In the event that the Trustee, at any time during the term of this deed, faces any adverse tax consequence or upon any direction of any Statutory Authority, the Trustee shall have the right to call upon the Security Receipt Holders to revoke their Contributions and thereupon the Security Receipt Holders shall be obliged to revoke their Contribution.

5.2.3 In the event that the Contributions are revoked in terms of this Section the Trust Fund shall automatically stand transferred and shall automatically and without any further act, deed or writing, operate as an assignment vesting the Trust Fund jointly in favour of each of the Security Receipt Holders (in proportion to their Contributions) or to any person designated by the Security Receipt Holders in this behalf provided that the Trustee has received payment of all amounts due or accrued to the Trustee in full, in accordance with the terms of the Deed. Upon such transfer all the provisions of the relevant Financing Documents and the Assignment Agreements shall apply mutatis mutandis to the Security Receipt Holders or their designee, and the Security Receipt Holders or their designee shall be entitled to all rights and remedies of the Trustee and shall be obliged to perform all its duties and obligations under the relevant Financing Documents and the assignment Documents and the assignment Agreements, as if the Security Receipt Holders or their designee were party to the Financing Documents and the Assignment Agreements as the date thereof"

On the basis of the above, it can be said that the transfer is revocable in nature and accordingly, as per provisions of section 61 to 63 of the Income Tax Act as mentioned above, the income has to be taxed in the hands of the transferor i.e. in this case SR Holders.

Section 61 provides that any income arising to any person by virtue of a revocable transfer of assets shall be chargeable to income tax as the income of the transferor and shall be included in his total income.

Thus, based on the above legal position it is evident that when there is revocable transfer of asset, the income arising there on has to be assessed to tax in the hands of the transferor in view of the of the provisions of section 61 to section 63 of the Income Tax Act and plethora of decisions including the decision of the Mumbai High court.

Submission on why trust not to be considered as AOP

The word "associate" means, according to the Oxford Dictionary, "to join in common purpose, or to join in an action. " Accordingly, an association of persons is one in which two or more persons join in a common purpose or common action to earn the profit.

The assessee has been incorporated as a "trust" under the provisions of the SARFAESI Act, 2002 read with RBI Guidelines. Thus, it is a statutorily formed entity. Relevant extract of the SARFAESI Act, 2002, is enclosed herewith. Accordingly, it is submitted that the assessee is a trust and not an AOP.

The trust cannot be called an AOP as there is no inter se agreement between one contributory/beneficiary and the other contributory/beneficiary as each of them enter into separate contribution arrangement with the assessee. These Trusts have been formed under SARFAESI Act 2002 with the trustee as Arcil who has professional expertise in dealing with management and realisation of Non Performing Assets.

Further, beneficiaries do not have any say on the activities carried on by the trustee in managing the trust. The beneficiaries have only a passive role and are only entitled to the distribution of the recovery made by trust.

Without prejudice to the above, it is submitted that in case the said trust is treated as an AOP, the income of the assessee is to be computed in accordance with the provisions of the Act.

It is pertinent to note that in the Return of Income filed by the assessee trust, no Profit and Loss schedule has been filled due to the aforesaid reasons. In this regard, Your Honour might be aware that the accounts of the assessee are prepared in accordance with the guidelines prescribed by the RBI where book entries such as provision for diminution in value of investment/ impairment provision, write-back of provisions made, etc are passed. However, it is pertinent to note that such book entries are to be ignored in computing the income as per the provisions of the income Tax Act. The guidelines of the RBI cannot supersede the provisions of the Act."

However, the A.O was not persuaded to subscribe to the aforesaid claim of the assessee. Rejecting the explanation of the assessee, the A.O was of the view that the assessee was an AOP and not a trust. Alternatively, the A.O held a conviction that even if the status of the assessee was to be accepted as that of a trust, the same being in the nature of a non-revocable trust would thus not be eligible to avail the benefit of Sec. 61 to 63 of the Income Tax Act, 1961. As regards the claim of the assessee that since the income distributed to the various contributors had been taxed in their hands, taxing the same in the hands of the assessee would lead to double taxation, was rejected by the A.O as being totally baseless. Further, it was observed by the A.O that as the shares of the beneficiaries were not specified in the trust deed, and were thus indeterminate, therefore, the provisions of Sec. 164(1) of the Act would get attracted and the assessee would be liable to be assessed at the maximum marginal rate which was 30% *plus* surcharge, if any, and also education cess. Lastly, it was observed by the A.O that the claim of the assessee that there was no inter se arrangement between one contributory/beneficiary and the other contributory/beneficiary as each of them had entered into a separate contribution agreement with the assessee trust which was just a pass through entity, was merely a facade with an ulterior motive to evade taxes. The A.O was of the view that the assessee had merely relied on the 'form' of the transaction and the artificial device created by it to generate income and avoid taxability, while for the 'substance' of the transaction was that the assessee had carried on business from the contributions of various beneficiaries with a common motive to earn income, which proved beyond doubt that in sum and substance the assessee was an AOP. On a perusal of the assessment order, we find, that the A.O had rejected the contentions of the assessee by summing up as under:

"1. Whereas in the case of the trust, settlor, contributor and beneficiaries, all have to be independent and distinct. In the case of the assessee, the contributors are the beneficiaries themselves, therefore, the

assessee cannot be treated as a trust, but as an AOP having members in the form of QIBs and financial institution.

2. After its creation, the so-called trust entered into contribution assignment through offer document dated 27.12.2007 for the sole purpose of taking NPAs for sale at a profit. Such entity can at best be classified as an AOP created jointly by several persons for earning profits.

3. Capital contribution is a revocable transfer by the transferors, but the income arising out of the activities of the fund is an ascertained income and the contributors have no control over it, and in the strict sense of the terms, the provisions of Sections 61 & 63 of the Act are not applicable to the assessee's case.

4. The Clause relied upon by the assessee makes it clear that individual contributors cannot revoke their contribution on their own and revocation can occur only if the contributors holding 75% of the units consent together, then only can the contributions be revoked. Such restrictions point out to the fact that the entity is not a revocable trust. The members lack any direct power of revocation under the instrument of transfer.

5. Any claim of assessee to the effect that the income has been taxed in the hand of the beneficiaries would not help. Income has to be taxed in the right hands, at the right rates of taxation. The sums earned by the assessee on account of various investment/activities has been shown as its income, therefore, it is rightly and appropriately taxable in its own hands and the trust is legally bound to include the same in the computation of its income."

In the backdrop of his aforesaid observations the A.O assessed the income of the assessee at Rs.57,56,60,600/-.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). After deliberating on the contentions advanced by the assessee in the backdrop of the facts borne from the records, the CIT(A) was persuaded to subscribe to the claim of the assessee, and partly allowed the appeal.

5. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. Departmental representative (for short "D.R") relied upon the assessment order. It was submitted by the ld. D.R that the CIT(A)

had gravely erred in dislodging the well reasoned order of the A.O. In order to drive home his aforesaid claim the ld. D.R took us though the observations recorded by the A.O. Per contra, the ld. Authorized Representative (for short 'A.R') for the assessee relied on the order passed by the CIT(A).

6. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements that had been pressed into service by them. We shall hereinafter deal with the observations of the CIT(A) in context of the multiple issues on the basis of which the A.O had rejected the claim of the assessee and brought its surplus income to tax, as under:

(A) <u>The trust was a colourable device to evade taxes:</u>

(i) On a perusal of the records, we find that the A.O had observed, that in a trust the three constituents i.e settlor, contributors and beneficiaries should be independent and distinct, whereas in the instant case the contributors were themselves the beneficiaries. Accordingly, the A.O held a conviction that the assessee had created a smokescreen in the name of trust with an ulterior motive to evade taxes. Rebutting the aforesaid view of the A.O, we find that the CIT(A) had observed as under:

> "8.3 I have carefully considered the aforesaid arguments of the Ld AR and find merit in it. Section 9 of the Indian Trust Act. 1882 defines beneficiary as
>
> > "9. Who may be beneficiary
> >
> > Every person capable of holding property may be a beneficiary.
> >
> > Section 7 of the Indian Trust Act, states the person who can create trust as follows:
> >
> > "7. Who may create trusts
> >
> > A trust may be created-
> > (a) by every person competent to contract, and

(b) with the permission of a principal civil court of original jurisdiction, by or on behalf of a minor, but subject in each case to the law for the time being in force as to the circumstances and extent in and to which the author of the trust may dispose of the trust property.

8.4 From the above, it is clear that there is no prohibition in the Trust Act on the settlor becoming beneficiary. Every person capable of holding property may be a beneficiary. A person who transfers the asset into trust is settlor and a person can become settlor if he is competent to contract. Hence, the AO is wrong in holding that the appellant trust is not a valid trust since contributors and beneficiaries are the same. In my view, all the necessary ingredients for the formation and existence of the trust have been fulfilled and all the documents on record and processes being followed as per RBI guidelines cannot be disregarded. According to the AO, the trust is not a valid trust since the acquisition of financial assets and creation of trust are only a facade for evasion of taxes. If the argument of the AO is accepted that the trust is not valid and the whole process of acquisition of NPAs is a falsity, then it would imply that the trust does not exist. If the trust does not exist, what is the legal sanction to treat the trust as AOP? In such a situation, only transaction that subsists will be direct investment by the beneficiaries in the financial assets and therefore the question of assessing the appellant trust as AOP or any other head of income is out of question.

8.5 In this regard, I find that the reliance of the appellant on the decision of the Bangalore ITAT in DCIT vs India Advantage Fund-VII (supra) is in order. Considering the totality of the facts and the circumstances of the issue involved, it is held that the appellant Trust is a valid Trust."

We have given a thoughtful consideration to the aforesaid observations of the CIT(A), and find ourselves to be in agreement with the view therein taken by him. As observed by the CIT(A), as per Sec. 9 of the Indian Trust Act, 1882, there is no prohibition on the settlor in becoming a beneficiary of the trust. In fact, as provided in Sec. 9 of the Indian Trust Act, 1882, every person capable of holding property may be a beneficiary of the trust. Further, as per Sec. 7 of the Indian Trust Act, 1882, any person competent to contract can become a settlor of the trust. In the backdrop of our aforesaid observations we concur with the CIT(A) that the observations of the A.O that the assessee trust was not a valid trust, for the reason, that its contributors and beneficiaries were the same, clearly militates

against the express provisions of the Indian Trust Act, 1882, and thus, cannot be accepted. As a matter of fact, we find that as observed by the CIT(A), all the necessary ingredients for the formation and existence of the trust had been fulfilled, and the RBI guidelines had duly been followed by the assessee trust. Interestingly, we find that in case the claim of the A.O that the assessee is not a valid trust and its creation was only a façade for evasion of taxes was to be accepted, then it would be imply that the trust does not exist at all. If that be so, then we concur with the CIT(A) that there would be no legal sanction to treat the trust as an AOP, as had been advocated by the A.O. Under such a situation, the only transaction that would subsist will be the direct investment by the beneficiaries in the financial assets, and therefore, the question of assessing the assessee trust as an AOP or under any other head of income would be totally out of question. Accordingly, in the backdrop of our aforesaid observations, we are of the considered view that the CIT(A) had rightly dislodged the aforesaid view of the A.O, and in the totality of the facts had correctly observed that the assessee is a valid trust.

(B) <u>Holding the trust as a non-revocable trust:</u>

(i) As observed by the A.O, the assessee trust was not in the nature of a revocable trust for two fold reasons viz. (i) that, the contributions could be revoked only with the consent of the contributors holding 75% of the units; and (ii) that, contributors had practically no control over the income arising out of the activities of the fund. In the backdrop of his aforesaid conviction, the A.O was of the view that the assessee trust being an irrevocable trust was thus not eligible for the benefit of Sec.61 and Sec.63 of the Act. Rebutting the aforesaid view of the A.O, the CIT(A) had observed as under:

> "9.3 On careful consideration, I find the stand of the AO incorrect against the expressed provisions of the Act and judicial decisions laid down by the Hon'ble Courts.

The two relevant sections read as under:

Section 61:

"All income arising to any person by virtue of a revocable transfer of asset shall be chargeable to income-tax as the income of the transferor and shall be included in his total income.

Section 63:

63. For the purposes of sections 60, 61 and 62 and of this Act,—
(a) transfer shall be deemed to be revocable if—
(I) it contains any provision for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor, or
(ii) it, in any way, gives the transferor a right to re-assume power directly or indirectly over the whole or any part of the income or assets;

(b) "transfer" includes any settlement, trust, covenant, agreement or arrangement."

9.4 Thus it is seen that under section 61 of the Act all income arising to any person by virtue of a revocable transfer of assets shall be chargeable to income-tax as the income of the transferor and shall be included in his total income. Section 62 of the Act provides that if a transfer is irrevocable for a specified period then section 61 will not apply. Section 63 defines as to what is "transfer" and "revocable transfer" for the purpose of sections 61 & 62 of the Act. It provides that:- (a) a transfer shall be deemed to be revocable if: (i) it contains any provision for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor, or (ii) it, in any way, gives the transferor a right to re-assume power directly or indirectly over the whole or any part of the income or assets; (b) “transfer” includes any settlement, trust, covenant, agreement or arrangement. In this regard, I agree with the Ld. AR that the provisions of the I.T. Act nowhere state that if the transfer is 'explicitly revocable, the provisions of section 61 and section 63 would not apply. I have also carefully gone through the relevant clauses of the trust deed, as highlighted by the Ld. AR. The said clauses read as under-

5. PROVISIONS RELATING TO SECURITY RECEIPT HOLDERS

5.1 Contributions

5.1.1 Upon the making of the Contribution, and within a period of ninety (90) days from the date of closure of the respective issue of Security Receipts under the relevant Offer Document, the Trustee shall credit the Depository Account of each Security Receipt Holder with, or issue

physical certificates in the form prescribed in the relevant Offer Document, The Security Receipts as are issued to such Security Receipt Holder in accordance with the terms of this Deed and the relevant Offer Document, which shall be credited as fully paid, and the Trustee shall enter the Security Receipt Holder's name in the Register of Security Receipt Holders as the holder of these Security Receipts.

5.1.2 Upon the making of the Contributions, each Security Receipt Holder shall be entitled to the undivided right, title and interest in the Trust Fund evidenced by the Security Receipts issued to it, on the terms and conditions contained in the Security Receipts and the relevant Offer Document.

5.1 3 The Trustee shall accept Contributions under this Deed, only from Persons who are Qualified Institutional Buyers for the purpose of SARFAESI and only upon the following conditions precedent being satisfied:

(a) All the Transaction Documents are duly and validly executed: and
(b)The Trust Account is duly established.

5.1.4 This Deed shall take effect on the Commencement Date and continue in full force and effect until full redemption/ extinguishment of all the Security Receipts issued pursuant to this Deed, in accordance with the terms.

5.2 Revocation of Contributions

5.2.1 The Security Receipt Holders shall be entitled to revoke the Contributions made by them at any time during the term of this Deed, in accordance with the terms and conditions contained therein, for any reason, including but not limited to circumstances resulting from any adverse tax consequences (for either the Trust or the Security Receipts Holders) or any direction of any Statutory Authority, provided that no such revocation shall take effect unless the consent of the Security Holders holding Security Receipts representing not less than 75% of the total face value of the then outstanding Security receipts issued pursuant to this Deed has been obtained, in this behalf, provided that a notice of not less than 60 days of the intention to revoke the contribution is given to the Trustee.

5.2.2 In the event that the Trustee, at any time during the term of this Deed, faces any adverse tax consequence or upon any direction of any Statutory Authority the Trustee shall have the right to call upon the Security Receipt Holders to revoke their Contributions and

thereupon the Security Receipt Holders shall be obliged to revoke their Contribution.

5.2.3 In the event that the Contributions are revoked in terms of this Section 5.2, the Trust Fund shall automatically stand transferred and shall automatically and without any further act deed or writing operate as an assignment vesting the Trust Fund jointly in favour of each of the Security Receipt Holders (in proportion to their Contributions) or to any person designated by the Security Receipt Holders in this behalf provided that the Trustee has received payment of all amounts due or accrued to the Trustee in full, in accordance with the terms of the Deed. Upon such transfer all the provisions of the relevant Financing Documents and the Assignment Agreements shall apply mutatis mutandis to the Security Receipt Holders or their designee, and the Security Receipt Holders or their designee shall be entitled to all rights and remedies of the Trustee and shall be obliged to perform all its duties and obligations under the relevant Financing Documents and the assignment Documents and the assignment Agreements, as if the Security Receipt Holders or their designee were party to the Financing Documents and the Assignment Agreements as the date thereof."

9.5 The above clauses of the trust deed make it clear that the contribution made by the SR holders is 'revocable' and hence the income needs to be taxed in the hands of the SR holders as per the provisions of section 61 to 63 of the IT. Act. Moreover, I find that the decision of Hon'ble Mumbai Tribunal in the case of Indian Corporate Loan and Securitisation Trust- 2008 Series 14 in ITA no. ITA Nos. 3986&4343/Mum/2013 dated 17.02.2017 is fully applicable to the facts of the instant case. Even the decision of DCIT vs. India Advantage Fund VII (supra) will be applicable to the facts of the appellant case as the mechanics of the trust formation and inherent characteristics remain the same in these cases. At para 7.6 the Hon'ble Tribunal in the case of Indian Corporate Loan and Securitisation Trust-2008 Series 14 (supra) has observed as under.

7.6.4. After detailed analysis of the judgments in hand and provisions of the Act, in paras 7.6.4 and 7.6.5, Hon'ble Mumbai ITAT has come to the conclusion that: -

(i). It is the power to revoke the transfer that has to be seen and not the person at whose instance such revocation can be done.

(ii). The provisions of section 63 of the Act defining "revocable transfer" and consequently income has to be brought to tax only in the beneficiary/transferor.

> (iii) The section does not say the deed of transfer must confer or vest an unconditional or an exclusive power of revocation in the transferor. What emerges from out of the above discussion is that the beneficiaries need to be identifiable and the Trust Deed must contain provisions that vest the power of revocation. There is nothing in the section to read that such a power should be unconditional. As mentioned earlier, the Trust Deed and the Deed of Assignment contain clauses which indicate that the power of revocation has been granted. Incidentally, we find that these principles on revocable transfer have been followed by the Coordinate Bench of Mumbai Tribunal in the case of M/s. Milestone Army Navy Trust, ITA No. 4067/Mum/2014, dated 23/12/2015.
>
> 7.6.5 In view of the discussion above and respectfully following the principles laid down in the above referred decision of the Bangalore Bench of the Tribunal in the case of India Advantage Fund-VII (supra) and the Mumbai Bench of ITAT in Milestone Army Navy Trust (supra) we hold that the assessee Trust is a revocable Trust and contribution by beneficiaries is a revocable transfer. Having held thus, it follows that the income shall be taxed in the hands of the beneficiaries. i.e. the Mutual Funds who purchase the PTCs from the assessee trust.

9.6 Considering the fact as highlighted above and respectfully following the decision of superior authorities, it is held that the appellant trust is a revocable trust and the provisions of section 61 to 63 of the I.T. Act will be applicable to it. Hence, contribution by beneficiaries is a revocable transfer implying that the income will be taxed in the hands of the beneficiaries and not the appellant trust."

We have given a thoughtful consideration to the observations of the lower authorities, and concur with the view taken by the CIT(A) that the assessee trust is a revocable trust, and thus, the provisions of Sec. 61 to 63 of the Act would be applicable to it. On a perusal of Sec. 61 of the Act, we find that the same therein provides that an income arising to a person by virtue of a revocable transfer of assets shall be chargeable to income tax as the income of the transferor and shall be included in his total income. However, if the transfer is irrevocable for a specified period, then as per Sec. 62 of the Act, the provisions of Sec. 61 would be rendered unworkable. As for the definition of the terms "transfer" and "revocable transfer", the same is provided in Sec. 63 of the Act. Sec. 63 provides, that (a) a transfer shall be deemed to be revocable if, viz. (i) it contains any

provisions for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor; or (ii) it in any way gives the transferor a right to reassume power directly or indirectly over the whole or any part of the income or assets; (b) “transfer” includes any settlement, trust, covenant, agreement or arrangement. On a literal interpretation of the aforesaid statutory provision, we find that it is nowhere stated that if the transfer is explicitly revocable, the provisions of Sec. 61 and 63 would not apply. As observed by the CIT(A), we find that Clause 5 of the trust deed makes it clear beyond any scope of doubt that the contribution made by the SR holders is ‘revocable’. Accordingly, we have no hesitation in observing that the income therein arising has to be brought to tax in the hands of the SR holders, i.e as per the provision of Sec. 61 to 63 of the Act. Insofar, the view taken by the A.O, that as the revocation of the contributions is conditional upon the consent of the contributors holding 75% of the units, we are afraid that the same would not render the contributions as irrevocable. Our aforesaid view is fortified by the judgment of the **Hon’ble High Court of Bombay** in the case of **Behramji Sorabji Lalkaka Vs. CIT (1948) (16 ITR 301) (Bom)**. In the aforesaid case, it was observed by the Hon’ble High Court that the words “revocable transfer” are well understood in law and a transfer does not cease to be revocable because the power of revocation cannot be exercised by the settlor without the consent of the named individuals or any of them. As observed by the Hon’ble High Court, a transfer is nonetheless revocable even if it can be revoked only with the consent of any named person or persons. As such, on the basis of our aforesaid observations we are persuaded to subscribe to the view taken by the CIT(A), who had rightly concluded that the assessee trust is a revocable trust, and thus, the provisions of Sec. 61 to 63 of the Act would be applicable to it.

(C) Status of the trust as that of an AOP:

As is discernible from the assessment order, the A.O had observed that since the beneficiaries had associated and joined hands for a common purpose or action

through offer dated 27.12.2007 with QIBs for the sole purpose of acquisition of NPAs, and therein transferring those at a profit with a motive of earning income, profits and gains out of the same, therefore, they were liable to be assessed in the status as that of a AOP. The CIT(A) dislodging the aforesaid view of the A.O had observed as under:

> "10.3 Upon careful consideration of the facts on record and various judicial decisions, I find that a common purpose or a common action is the core strength and foundation for an AOP to come into existence with the sole objective to earn common income and profit. The Ld. AR has pointed out that there is nothing on record to suggest that the beneficiaries have agreed for any common objective. The beneficiaries do not have any control on the activities carried on by the trustee in managing the trust. The beneficiaries make investment based on the offer documents and on the basis of the investment made in the trust, they are allotted the SRs which represented the undivided and proportionate interest of the investors in the corpus of the trust. On the other hand, the AO opined that the motive behind creation of the trust is income-earning asset reconstruction activity and to handle NPAs. However, how this inference of motive akin to formation of AOP has not been elaborated in the assessment order. Upon examination of the documents before the undersigned, I find that the two beneficiaries have made investments based on the offer document separately and not together and they are allotted the Security Receipts (SRs) representing the undivided and proportionate interest of the investors in the corpus of the trust. The AO has not brought on record any material which remotely suggest that a concerted effort has been made by the beneficiaries to earn income jointly. Hence, the action of the AO in treating the appellant trust as an AOP is unsubstantiated and without any basis. Even otherwise, since it is already held in the preceding paragraphs that the appellant trust is a valid trust, the debate regarding treating the appellant as AOP does not survive."

We have given a thoughtful consideration to the observations of the lower authorities in context of the aforesaid issue under consideration before us. Admittedly, the meaning of an "Association of Persons" (for short "AOP") had witnessed a change, vide the Finance Act, 2002 w.e.f. 01.04.2002. As per the amended definition of the term AOP as contemplated in Sec. 2(31)(v) of the Act, the requirement as was earlier laid down by the Hon'ble Supreme Court in its various judgments that the various person as per their volition should have associated with the object of deriving income, profits or gains, had been

dispensed with by the legislature, vide the "Explanation" to Sec. 2(31) of the Act, as had been made available on the statute vide the Finance Act, 2002, w.e.f 01.04.2002. As per the "Explanation" to Sec. 2(31) of the Act, an AOP shall be deemed to be in existence, whether or not it was formed or established with the object of deriving income, profits or gains. However, in the case before us, we find, that the CIT(A) had rightly observed that there is nothing on record which would suggest that the beneficiary had agreed to associate for any common objective. In fact, the beneficiaries who do not have any control over the activities carried on by the trustee in managing the trust, had made their respective investments based on the offer documents, and on the basis of their investments made in the trust were allotted the SRs which represented their undivided and proportionate interest in the corpus of the trust. We are unable to comprehend as to on what basis the A.O had concluded that the motive behind creation of the trust was the income earning asset reconstruction activity and handling of NPAs. On a perusal of the records, we find that the two beneficiaries viz. (i) ARCIL; and (ii) ICICI Bank Ltd., had made investments based on the offer document separately, and not jointly, on the basis of which they had been allotted the security receipts (SRs) representing their undivided and proportionate interest in the corpus of the trust. In our considered view, as the A.O had failed to place on record any material which would even remotely suggest that there was a concerted effort by the beneficiaries to earn income jointly, therefore his unsubstantiated view that the assessee was to be treated as an AOP cannot be sustained and has rightly been vacated by the CIT(A).

(D) <u>Taxability of the Income at the right place and in right hands:</u>

As observed by the A.O, as per the mandate of law the income should be rightly taxed in the hands of the trust notwithstanding that the beneficiaries had paid taxes on it. As such, rejecting the claim of the assessee that now when the contributors had paid the taxes on their respective shares, taxing of the income

again in the hands of the assessee trust would lead to double taxation, the A.O was of the view that the payment of taxes by the contributors would have no bearing on the allowability of claim of non-taxability in the hands of the assessee. Apart from that, it was observed by the A.O that the assessee had also not demonstrated in the course of the assessment proceedings that the income earned by the beneficiaries was offered by them for tax in their respective returns of income at the correct rates. Rebutting the aforesaid view of the A.O, the CIT(A) had observed as under:

> 11.3 I have carefully considered the submission of the Ld. AR and find merit in it. I find that the argument of the AO is primarily based on the fact that the realisation is first received in the books of the appellant trust and then passed on to the SR Holders i.e. Arcil and ICICI Bank. As held by the Hon'ble Apex Court in the case of CIT vs. Tollygunge Club Ltd. (107 ITR 776), every receipt in the hands of the assessee need not be its income and it is only when it bears the character of income at the time when it reaches the hands of the assessee that it becomes eligible to tax. In the instant case, at the initial stage, even before the money flows to the assessee, it was always intended to be passed on to and only to the beneficiaries, i.e., the SR holders in proportion to their interest in the corpus of the appellant trust as per the trust deed and offer documents. Therefore, merely because the realization flows through the appellant, it does not mean that it is income in the hands of the appellant. The money was always intended to be passed on to the SR holders and therefore, it can be said that only the SR holders had a right on the realized money. Hence, in my opinion, the principle of diversion of income at the source by overriding title is attracted in this case too. Accordingly, the receivables of NPAs are the income of the SR holders, irrespective of whether it flows through the books of accounts of the appellant trust."

We have deliberated at length on the aforesaid issue and are unable to persuade ourselves to subscribe to the view taken by the A.O. In our considered view, at the initial stage, even before the money flows to the assessee, it was always intended to be passed on to and only to the beneficiaries, i.e the SR holders in proportion to their interest in the corpus of the assessee trust as per the trust deed and offer documents. We are unable to accept the claim of the A.O that as the amounts are first realized/received in the books of the assessee trust, and then passed on to the SR holders, viz. ARCIL and ICICI bank, the same therefore

was liable to be assessed as the income of the assessee trust. We concur with the view taken by the CIT(A) that merely because the realization flows through the assessee, it would not mean that it is the income in the hands of the assessee. As observed by the **Hon'ble Supreme Court** in the case of **CIT vs. Tollygunje Club Ltd. (107 ITR 776)**, every receipt in the hands of an assessee need not be its income, and it is only when it bears the character of income at the time when it reaches the hands of the assessee that it becomes eligible to tax. In our considered view, the CIT(A) in the totality of the facts involved in the case before us, had rightly concluded, that as the principle of diversion of income at the source by overriding title is attracted, therefore, the receivable of NPAs were the income of the SR holders, irrespective of the fact that the same had flowed through the books of accounts of the assessee trust.

(E) Holding assessee trust as an indeterminate Trust (discretionary trust):

As observed by the A.O, the trust deed dated 27.12.2007 did not reveal the shares of beneficiaries. In fact, it was noticed by him that the allocation of the share of the beneficiaries on the basis of their respective investments in the fund would not make their share determinate or known. Rebutting the aforesaid view of the A.O, we find that the CIT(A) had observed as under:

> "12.3 I have carefully considered the aforesaid submission of the ld. A.R and the observations of the AO. It is observed from the Trust Deed and the minutes of the meeting dated 27th December, 2007 that the names of beneficiaries of the appellant trust and their shares are known and have remained unchanged throughout. The details of the same are as under:

Sr. No.	Name of the beneficiaries	% share
1.	ICICI Limited	90% in class B SRs
2.	Arcil	5% in Class A SRs
3.	ICICI Limited	5% in class A SRs

> Hence, the appellant trust cannot be considered as indeterminate trust once the names of beneficiaries of the appellant trust and their shares are known at the inception and proceeds are distributed as per their shares. This is not a case where discretion is given to the trustee to decide the

allocation of the income every year or a right is given to the beneficiary to exercise the option to receive the income or not each year. Only in the latter situation, the trust will be regarded as discretionary trust. The AO has also mentioned that the trust cannot be considered as determinate trust because the trust can issue security receipts to any qualified institutional participants who are interested in making such investment in such business. In this regard, it is observed from the provisions of the trust deed that the beneficiaries are SR holders which are known at all times. The Ld AR has brought the attention of undersigned the clause 5.1.2 of the Trust Deed. The same is reproduced herein.

> "5.1.2 Upon the making of the Contribution, each Security Receipt Holder shall be entitled to the undivided right, title and interest in the Trust Fund evidenced by the Security Receipts issued to it, on the terms and conditions contained in the Security Receipts and the relevant Offer Document."

Thus, it is clear that each SR holder shall be entitled to the undivided right, title and interest in the Trust Fund evidenced by the SRs issued to it. Hence, the shares of the beneficiaries are determinate at the time of drawing the Trust deed. As stated above, the position as to whether the beneficiaries are identifiable or not and whether their shares are known or not are required to be seen at the time of formation of the trust. In the appellant case, the names of beneficiaries of the appellant trust and their shares are known at the time of formation of the trust as evident from the minutes of the meeting dated 27th December, 2007. Hence, in my considered opinion, there is no doubt that the appellant trust is a determinate trust i.e., non-discretionary trust.

We have deliberated at length on the issue under consideration, and find, that a perusal of the trust deed and the minutes of the meeting dated 27.12.2007, therein clearly makes a mention of the names of the beneficiaries of the assessee trust, and also, their shares which had remained unchanged throughout, as under:

Sr. No.	Name of the beneficiaries	% share
1.	ICICI Limited	90% in class B SRs
2.	Arcil	5% in Class A SRs
3.	ICICI Limited	5% in class A SRs

As the names of the beneficiaries of the assessee trust and their respective shares are known since inception and also the proceeds have been distributed as per their respective shares, therefore, we concur with the view taken by the

CIT(A) that the assessee trust could not be considered as an indeterminate trust. In fact, we are in agreement with the view taken by the CIT(A) that as neither any discretion have been given to the trustee to decide the allocation of the income every year, nor any right is given to the beneficiary to exercise an option to receive the income or not each year, therefore, it cannot be held that the share of the beneficiaries were indeterminate. In our considered view, as the names of the beneficiaries of the assessee trust and their shares were known since inception i.e at the time of the formation of the trust as is evident from the minutes of the meeting dated 27.12.2007, therefore, it can safely be concluded that the assessee trust is a determinate trust i.e a non-discretionary trust. Accordingly, finding no infirmity in the view taken by the CIT(A) who had rightly concluded that the assessee is a determinate trust, we uphold the same.

(F) <u>Treatment of Write-back of Impairment provision of Rs.59,76,25,576/-:</u>

(i) Observing, that the surplus as per the income and expenditure account of the assessee amounted to Rs.59,56,60,595/-, the same was brought to tax by the A.O, rejecting the claim of the assessee that the same represented write back of impairment provision of Rs.59,76,25,576/-. Shorn of any reasoning as to why the write-back of impairment provision was being treated as income of the assessee trust, the A.O had concluded that the same was to be assessed as the income of the assessee. In fact, as observed by the CIT(A), even in the remand report no justification was given by the A.O as to how the write-back was being treated by him as the income of the assessee trust. On the contrary, the assessee had assailed the aforesaid treatment of the impairment provision of Rs.59,76,25,576/- as its income by the A.O. It was the claim of the assessee that it had merely passed a 'book entry' for reversal of impairment provision created in the earlier years in respect of the financial asset i.e the loan taken from the banks, and the same had no bearing on its income for the year under consideration. In fact, it was the claim of the assessee that in case the income was to be taxed in the

hands of the assessee trust, then the reversal of the provision for impairment of Rs.59,76,25,576/- was also required to be reduced from the computation of income as the same represented a mere 'book entry', and was not in the nature of any 'real income'. In sum and substance, it was the claim of the assessee that the A.O by taxing the reversal of the provision for impairment of asset, had therein taxed something which was not in the nature of income at all as defined in Sec. 2(24) of the Act. To sum up, the claim of the assessee was that as the provision of impairment of asset was not an allowable deduction while computing the taxable income, hence, the write-back of such provision could also not be considered as income. Explaining the reasons for creation for such provision for impairment of asset, and writing-back of the same, it was submitted by the assessee that it was in compliance to the RBI guidelines, as per which every SC/RC was required to provide a valuation in respect of the value of the outstanding SRs to the QIBs. As submitted by the assessee, it would record a notional impairment loss or write-back of any excess impairment loss recorded in its books of accounts in any previous year, and the same had nothing to do with its taxable income. The CIT(A) after deliberating at length on the issue under consideration disagreed with the view taken by the A.O, and therein concluded, that the provision written-back in respect of the impairment of the asset would not partake the character of taxable income of the assessee trust, observing as under:

> "14.7 I have carefully considered the above arguments put forth by the ld. AR and find merit in it. It is undisputed fact that during the year under consideration, the appellant has passed a book entry for Rs.59,76,25,576/- being reversal of impairment provision created in the earlier years in respect of the financial asset. This resulted in the surplus of Rs.57,56,60,595/- in the income and expenditure account. The AO has misconstrued it as income of the appellant being reflected as surplus in the profit and loss account. Basically it is a book entry for reversal of impairment provision created in the earlier years without any corresponding amount payable by anybody or any possibility of receiving any benefit or money or money's worth. As discussed above, no reason or explanation has been given by the AO for taking this stand either in the assessment order or the remand report.

There is no doubt that such write back can be made taxable only if such provisions created and claimed as deduction in earlier years and such deduction is written back in the subsequent years. According to the Ld. AR such provision of diminution in value of asset was never allowed in any of the years. This is evident from the fact that the appellant has not claimed any carry forward of losses in any of the earlier years. The only conclusion that can be drawn from it is that the same would not be taxable in the year of reversal. The income and expenditure account of different years reflecting provisions for impairment of asset as brought on record are:

Assessment year	(Provision created/write-back)
A.Y. 2008-09	-
A.Y. 2009-10	-
A.Y. 2010-11	(944,554,938)
A.Y.2011-12	(970,821,329)
A.Y.2012-13	(495,945,440)
A.Y.2013-14	597,625,576
Total	(913,696,131)

14.8 In view of the above, it is held that the provision written back of Rs.59,76,25,576/- in respect of the impairment of the asset will not partake the character of taxable income of the appellant trust. This is notwithstanding the fact that even otherwise there is no taxable income in the hands of the appellant being a revocable and determinate trust as contemplated u/s 61 to 63 of the I.T. Act and discussed in the preceding paragraphs. Hence, the impugned addition is deleted**.** Thus ground of appeal no. 2 is allowed."

We have given a thoughtful consideration to the aforesaid issue and are persuaded to subscribe to the view taken by the CIT(A). In our considered view, the reversal of the impairment provision created by the assessee in the earlier years in respect of the financial asset was merely a 'book entry' without any corresponding amount payable by anybody or any possibility of receiving any benefit or money or money's worth. We are of a strong conviction that a write-back of a provision can be made taxable only if the same was claimed as a deduction in the earlier year when it was created. We have perused the observations of the CIT(A), and are in agreement with the view therein taken by him. Accordingly, concurring with the view taken by the CIT(A) that the write-back

of the impairment provision of Rs.59,76,25,576/- could not have been treated as the income of the assessee, we uphold the same.

7. On the basis of our aforesaid deliberations, we find no infirmity in the view taken by the CIT(A) and uphold his order.

8. Resultantly, the appeal filed by the revenue is dismissed in terms of our aforesaid observations.

Order pronounced in open court on 10.09.2020.

Sd/-	Sd/-
G. MANJUNATHA (ACCOUNTANT MEMBER)	RAVISH SOOD (JUDICIAL MEMBER)

Mumbai, Date: 10.09.2020
R. Kumar

<u>Copy of the Order forwarded to</u> :

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

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai