

IN THE INCOME TAX APPELLATE TRIBUNAL, 'A' MUMBAI

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.889/Mum/2020
(Assessment Year :2014-15)**

Income Tax Officer - 22(1)(6) 104, First Floor Piramal Chambers Parel, Mumbai – 12	Vs.	M/s. Arcil Asset Reconstruction Fund II Trust 10 th Floor, The Ruby, 29, Senapati Bapat Marg Dadar (W), Mumbai – 400 028
PAN/GIR No. AACTA8781C		
(Appellant)	..	(Respondent)

**ITA No.887/Mum/2020
(Assessment Year :2015-16)**

Income Tax Officer - 22(1)(6) 104, First Floor Piramal Chambers Parel, Mumbai – 12	Vs.	M/s. Arcil Aarf I Trust-Scheme A 10 th Floor, The Ruby, 29, Senapati Bapat Marg Dadar (W), Mumbai – 400 028
PAN/GIR No. AACTA0755C		
(Appellant)	..	(Respondent)

Revenue by	Shri Mehul Jain
Assessee by	Shri Jitendra Jain
Date of Hearing	20/01/2022
Date of Pronouncement	28/01/2022

आदेश / ORDER

PER M. BALAGANESH (AM):

These appeals in ITA Nos.889/Mum/2020 & 887/Mum/2020 for A.Y.2014-15 & 2015-16 arise out of the order by the Id. Commissioner of Income Tax (Appeals)-33, Mumbai in appeal No.33/10753/2016-17 & 33/10394/2017-18 dated 27/11/2019 & 20/11/2019 respectively (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 22/12/2016

& 18/12/2017 respectively by the Id. Income Tax Officer-21(1)(2) / 21(1)(4), Mumbai (hereinafter referred to as Id. AO).

Identical issues are involved in both these appeals and hence they are taken up together and disposed of by this common order for the sake of convenience.

2. With the consent of both the parties, the appeal for Asst Year 2015-16 in ITA No. 887/Mum/2020 is taken up for adjudication first.

3. The revenue has raised the following grounds of appeal before us :-

1."On the facts and circumstances of the case and in law , the Ld CIT (A) erred in changing the status of assessee as 'TRUST and not an AOP and allowing expense of 7,74,25,409 which was made by the assessee for protection, preservation , insurance expenses and management fees from such investment activity upon redemption of the principal amount of Security Receipts (SR).

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in considering that assessee is a trust which does not fall within the meaning of section 61 to 63 of the IT.Act, 1961.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in considering that the assessee trust, set up and functioning in accordance with the mechanism of the SARFAESI Act, 2002 and under guidance of RBI whereas it is clear that trust is a smoke screen and colourable device to evade taxes.

4.On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in considering that assessee has carried on business from the contribution of various beneficiaries as per common motive to earn income and hence, it is an AOP."

4. We have heard the rival submissions and perused the materials available on record. We find that the assessee trust had been set up pursuant to the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short

SARFAESI) and the guidelines of Reserve Bank of India (RBI) to acquire financial assets of the borrower classified as Non-Performing Assets (NPA) of banks and financial institutions. The trust receives contribution from the Security Receipt Holders (SR Holders) as per the offer document issued. The contributory SR Holders do not have any inter se agreement between them but only with the Trust. These contributions are revocable within the meaning of section 61 read with section 63 of the Income Tax Act, 1961. These contributions are utilised for acquiring financial assets. These financial assets are realised over a period of time and distributed among the SR Holders as per the provisions of offer document / trust deed after adjusting the management fees and other expenses incurred by the trust. As per the trust deed, the beneficiaries are the persons who are SR Holders and are identified on the date of the trust deed. In the case of the assessee trust, the share of each SR Holder is determined and is based on the proportionate holding of each SR Holder. Accordingly, it was clarified by the Id AR that the beneficiaries are identifiable and their shares are known.

4.1. The trust has the following partners / members / shareholders:-

S. No.	Name of Share Holders	Percentage of equity shares held
1.	Allahabad Bank	5%
2.	Asset Reconstruction Company (India) Ltd.,	43%
3.	Bajaj Allianz Life Insurance Company	5%
4.	Bank Muscat	10%

5.	HDFC Ltd.,	5%
6.	HDFC Standard Life Insurance Co. Ltd.,	5%
7.	Qatar Insurance Company	2%
8.	Union Bank of India	25%
	Total Shareholding	100%

4.2. The assessee derives income from asset reconstruction activity and handling of NPAs of banks and financial institutions. The claim of the assessee was that it is a pass through entity / trust and the income is not taxable in its hands. Based on these primary facts and the legal position emanating from section 61 to 63 of the Income Tax Act , the assessee took the view that the income in respect of the financial assets realised will be taxable in the hands of the transferor i.e in the hands of Security Receipt Holders (SR Holders) . The assessee accordingly filed its return of income declaring Nil income. It was also clarified by the Id. AR that the SR Holders offer the income realised from the trust in their return of income. A confirmation to this effect was also filed in the course of assessment proceedings which had been ignored by the Id. AO.

5. The Id AO rejected the contentions of the assessee on the following grounds :-

a) The assessee has declared itself as a private trust created through a trust deed dated 26.04.2010 by its trustee ARCIL. Subsequently by a contribution agreement dated 26.04.2010, it has entered into the activity of asset reconstruction and handling of NPAs of banks/Financial Institutions by Issuing SRs only to QIBs.

- b) During the year under consideration, the assessee has received income/(Loss) of Rs.4,67,65,656/- after claiming a total expenses of Rs.4,68,11,986/- on account of protection, preservation & insurance expenses and management fees from Such investment activity upon redemption of the principal amount of Security Receipts(SR).
- c) As per trust deed, AARF I1 has been appointed as a Settlor as well as trustee also and beneficiaries in this rust are the various QIBS/persons who contributed funds in the trust and are also the beneficiaries.
- d) The Indian Trusts Act, 1882 defines "Trust as an obligation annexed ownership of property and arising out o a confidence reposed in and accepted by the owner or declared and accepted by him, for the benefit of another or of another and the owner. The fundamental principle of a trust is that the Trustees of the Trust act in a fiduciary capacity for the benefit of the beneficiaries. In an ideal condition, trusts are created by a Settlor and the settlor ought to contribute its assets/property in the Trust called the trust property for the benefit of the persons, referred to as beneficiaries. Here, there is no trust property to which the trustee needs to manage. A trustee is appointed to manage the affairs or the trust.
- e) In the case of a real trust, the three constituents i.e. Settlor, trustee and beneficiaries would never be the same persons. in the instant case, the settlor and the beneficiaries are the same and identical.
- f) A Trust has three constituents 1.e Settlor, Contributor and Beneficiaries and all the three constituents are independent and distinct whereas in the present case contributors are also the beneficiaries themselves.
- g) This so-Called Trust has been created for the sole motive to the benefit of the Settlor/contributor. Therefore, the plea made by the assessee that it is a trust completely erroneous.
- h) The assessee is only an AOP as per section 2(31) having 8 QIBs as members. It is not a Trust within meaning of section 61 to 63. The motive

behind creation of this Trust is income-earning asset reconstruction activity. After creation, it entered into contribution agreements with QIBs for sole purpose of acquisition of NPAs, transferring those at a profit and earning profit/income out of the same. Hence, it is like coming together of the two or more persons by way of contribution of sufficient funds into an entity in order to invest in the specified entities with a sole intention to earn profits and the same can only be termed as AOP as per provisions of section 2(31). Hence, the assessee was held as AOP and income arising to the assessee by way of application of funds of investors was taxed in the hands of the assessee. The AO also held that the activities of the assessee are commercial transactions.

i) The AO relied on the decision of the Madras High Court in the case of Indo Tech Electric Co. Vs. Deputy Commissioner of Income Tax and contended that the appellant has created a smokescreen in the name of trust in order to evade taxes.

j) The AO explained the meaning of an AOP by discussing several judicial pronouncements.

k) There is in fact de facto inter se arrangement between one contributor / beneficiary and the other as each or them entered into contribution arrangement with the assessee Keeping in view the presence and involvement of other contributor/beneficiary. Hence, it can be said that the beneficiaries have joined in a common purpose

l) The revocable clause 5.2.1 relied on by the assessee clearly say that individual contributor cannot revoke their contributions, it can be done only when 75% of the contributors consent together.

m) Even if the capital contribution is treated as revocable, the contributors have practically no control over the income arising out of the activities of the fund and thus sections 61 and 63 of the Act are not applicable to the appellant trust.

n) The claim of the 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 the taxation. The sums earned by the assessee on account of various investment/activities has been shown as its income, hence is rightly and appropriately taxable in its own hands and the trust is legally bound to include the same in the computation of income.

o) The assessee has not established that the income earned by the have been offered for taxation by each of the beneficiaries in their respective return of income at the correct rates.

p) Even if it is presumed that the assessee is a representative assessee not liable to be taxed in view of the provisions of section 161(1). However, in view of provisions of section 161(1A), the same is liable to be taxed in the hands of the assessee at maximum marginal rate.

q) The trust deed shows that the shares of the beneficiaries are not mentioned and hence section 164 will get attracted for the reason that the beneficiaries are not identifiable. Hence assessee would be assessed at maximum marginal rate.

r) Beneficiaries are not identified on the dale of the trust deed.

s) The case of the assessee falls under CBDT circular No. 13/2014 related to alternative investment funds which are subject to the SEBI Regulations which are not venture capital funds and which are non-charitable Trust where investors name and beneficial interest are not explicitly known on the date of its creation have to be treated as falling within section 164(1).

t) The 'substance' of the transactions is that the assessee has carried on from the contributions of various beneficiaries as per common motive to earn income and hence it is an AOP,

5.1. The Id AO based on the above observations treated the assessee as an Association of Persons (AOP) and taxed the income in hands of the assessee.

6. The assessee before the Id. CIT(A), apart from reiterating its submissions made before the Id. AO also placed reliance on the decision of Hon'ble Karnataka High Court in the case of India Advantage Fund –VII wherein it was held that once the beneficiaries were identifiable and their shares were known, section 164 of the Act cannot be applied. The assessee also placed reliance on numerous tribunal decisions in support of its contentions. It was also submitted that the assessee trust was set up pursuant to section 7 of SARFAESI Act and RBI guidelines issued thereon. It was specifically submitted that the trust was not created as a smokescreen to evade tax. Hence the assessee trust cannot be construed as an AOP as there is no inter se agreement between the names of the beneficiaries and their shares were known and have remained unchanged. Beneficiaries and each of them enter into separate contribution agreement with the assessee. It was also submitted that Circular No. 13/2014 issued by CBDT applies to Alternate Investment Funds only.

7. The Id. CIT(A) by placing reliance on the order of his predecessor in the case of Scheme A1 of ARCIL CPS 002 XI Trust for Asst Year 2013-14 dated 03.01.2018 and also having given a finding that the facts are

identical to the present case, decided the issue in favour of the assessee. Aggrieved, the revenue is in appeal before us.

8. We find that the issue in dispute is no longer res integra in view of the decision of this Tribunal in the case of ITO vs ARCIL AARF –I -1 Trust for Asst Year 2013-14 in ITA No. 7353/Mum/2019 dated 15.09.2021, wherein this tribunal by placing reliance on its earlier order passed in the case of CIT vs Scheme A1 of ARCIL CPS 002 XI Trust in ITA No. 2293/Mum/2018 dated 10.09.2020 had decided the issue in favour of the assessee. The relevant operative portion of the tribunal order dated 15.09.2021 is reproduced hereunder:-

“4. We find that the prime case law being relied upon by the Ld. CIT(A) came up in further appeal by revenue before this Tribunal. The coordinate bench, in revenue’s appeal ITA No. 2293/Mum/2018 order dated 10/09/2020 titled as CIT vs Scheme A1 of ARCIL CPS 002 XI Trust, dismissed the appeal with the findings that the assessee was a valid trust. Since it was revocable Trust, the provisions of Sec. 61 to 63 were applicable and the assessee could not be assessed as AOP. The income was to be taxed in the hands of the SR holders. Since the respective shares were known since inception, it could not be considered as indeterminate Trust. Finally the appeal of the revenue was dismissed.

5. We find that factual matrix is quite identical in present appeal before us. Therefore, respectfully following the same, we confirm the appellate order and dismiss the appeal of the revenue.

8.1. Respectfully following the same, the grounds raised by the revenue are dismissed in the instant case.

9. The same decision shall apply for ITA No. 887/Mum/2020 for Asst Year 2015-16 in the case of ITO vs ARCIL AARF I Trust Scheme A in view of identical facts.

10. In the result, both the appeals of the revenue are dismissed.

Order pronounced on 28/01/2022 by way of proper mentioning in the notice board.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Mumbai; Dated
KARUNA, *sr.ps*

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

28/01/2022

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