IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI

BEFORE SHRI NARENDRA KUMAR CHOUDHRY, HON'BLE JUDICIAL MEMBER

AND

SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA NO.91/MUM/2024 (A.Y. 2016-17)

Aditya Birla Private Equity Trust A1, Aditya Birla Centre S.K. Ahire Marg, Worli Mumbai - 400030 **PAN: AACTA4226E**	*v.*	National Faceless Appeal Centre, Delhi [Income Tax Officer – 20(1)(1)] Room No. 124, 1st Floor Piramal Chambers, Lal baugh Mumbai - 400013
(Appellant)		**(Respondent)**

Assessee Represented by	**:**	**Shri Yogesh Thar, Ms. Sukanya Jayaram & Shri Urvish Shah**
Department Represented by	**:**	**Shri Ajay Chandra**
Date of Conclusion of Hearing	**:**	**29.01.2024**
Date of Pronouncement	**:**	**29.02.2024**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of Learned Commissioner of Income-Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld. CIT(A)"] dated 28.11.2023 for the A.Y.2016-17.

2. Brief facts of the case are, Assessee is a trust established under the Indian Trust Act, 1882 on 03.12.2008. Further, Assessee is also registered as a Venture Capital Fund with Securities and Exchange Board of India ("SEBI") under the SEBI (Venture Capital Fund) Regulation, 1996 ("SEBI VCF Regulations"). The registration certificate issued by SEBI is placed on record.

3. Assessee filed its return of income u/s. 139(1) of the Income Tax Act, 1961 ("the Act") for the assessment year declaring total income of ₹.NIL after claiming exemption of ₹.47,76,75,319/-. The breakup of exempt income is as under: -

Sr No.	Nature of Income	Amount	Exempt u/s
1	Dividend from investments in mutual funds	1,68,97,076	10(35)
2.	Dividend from venture capital undertaking	8,23,05,575	10(34)
3.	Interest from Venture Capital Undertaking.	37,84,72,668	10(23FB)
	Total	47,76,75,319	

4. The case of the assessee was selected under complete scrutiny through CASS and assessment was completed by the Assessing Officer under section 143(3) on 30.12.2018 after due enquiry and accepting the returned income.

5. Subsequently, Assessee's case was reopened by issuance of notice u/s. 148 of the Act on 31.03.2021. It was brought to the notice of the

Assessing Officer the decision of ITAT and after acknowledging at Para No. 4.23 of the reassessment order that an identical issue has been decided in favour of the Assessee by the Coordinate Bench in A.Y.2017-18, Assessing Officer has still disallowed the exemption claimed u/s. 10(23FB), 10(34) and 10(35) in the order passed u/s. 147 of the Act. At para 4.24 of the order, Assessing Officer observed that "it is not ascertainable whether the Department has accepted the decision of ITAT or has filed appeal in the High Court in the case of the assessee for AY 2017-18. Therefore, to keep the matter alive, it is proposed that the exemption u/s 10 at ₹.47,76,75,319/- claimed by the assessee be disallowed and added back to the income of the assessee".

6. Assessing Officer made disallowance in the order u/s. 147 broadly on the following grounds: -

- *The Assessee has violated the Regulation 8(b) of the SEBI VCF Regulations by making investments in mutual funds:*
- *such investment in mutual fund is not permitted as per the trust deed of the Assessee;*
- *the Assessee has violated the Regulation 12(c) of the SEBI VCF Regulations by making investments in mutual funds of associate companies.*

7. Aggrieved, assessee preferred appeal before Ld. CIT(A) and filed detailed submissions before him. After considering the detailed

submissions of the assessee, Ld. CIT(A) sustained the action of the Assessing Officer and dismissed the appeal filed by the assessee.

8. Aggrieved, assessee is in appeal before us raising following grounds in its appeal: -

> ***"GROUND NO. 1: NOT FOLLOWING THE ORDER OF HON'BLE TRIBUNAL IN APPELLANT'S OWN CASE ON AN IDENTICAL ISSUE IS BAD IN LAW:***
>
> *1.1 On the facts and in the circumstances of the case and in law, the ld. CIT(A) was not justified and grossly erred in upholding the order of the Ld. AO without appreciating that the identical issue is decided in Appellant's favour by the Hon'ble Tribunal in its own case in AY 2017-18 Vide order dated October 22, 2020.*
>
> *The Appellant therefore prays the impugned order is bad in law and hence be quashed.*
>
> ***WITHOUT PREJUDICE TO ABOVE GROUND***
> ***GROUND NO. II: REOPENING IS BAD IN LAW:***
>
> *2.1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of Ld. AO in reopening the reassessment u/s. 147 of the Act.*
>
> *2.2 The Appellant prays that the notice u/s. 148 of the Act as well as consequent order be quashed.*
>
> ***WITHOUT PREJUDICE TO THE ABOVE GROUNDS***
> ***GROUND NO. III: DENIAL OF EXEMPTION US. IO(23FB) OF THE ACT:***
>
> *3.1 On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of the Ld. AO of denying the exemption under section I O(23FB) of the Act on the alleged ground that the Appellant had violated the terms of the Trust Deed and also the SEBI (Venture Capital Fund) Regulations, 1996.*
>
> *3.2 The Ld. CIT(A) failed to appreciate that the amendment to section 10(23FB) only restricts the deduction to income from investment in a venture capital undertaking ("VCU") and does not*

grant any powers to the Ld. AO to determine any violations by the Appellant as a Venture Capital Fund ("VCF").

3.3 The Ld. CIT(A) also failed to appreciate and ought to have held that in any case there is no violation and that the said practice has been consistently followed by the Appellant and there being no change in the facts in the current year, exemption u/s. IO(23FB) of the Act ought to be granted.

3.4 The Appellant prays that the Ld. CIT(A) be directed to allow the exemption u/s. IO(23FB) of the Act.

WITHOUT PREJUDICE TO THE ABOVE GROUNDS

GROUND NO. IV: SAME INCOME CANNOT BE SUBJECT TO TAX TWICE:

On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of the Ld. AO in taxing the income received from VCU in the hands of the Appellant despite the fact that the Appellant has discharged its obligation of issuing Form 64 to the persons who are liable to tax (i.e. the investors) and to the prescribed Income-tax Authority as required in section 115U(2) and consequently the said income is presumed to have been already taxed in the hands of the investors, thereby taxing the same income twice.

The Ld. CIT(A) erred in holding that the distribution ofincome is only an application ofincome ignoring the fact that a pass-through status is granted to Venture Capital Funds in accordance with the provision of section IO(23FB) r.w.s. 115U of the Act and there is no denial of the Department of having taxed the investors.

The Appellant prays that the addition on account of denial of exemption u/s. 10(23FB) of the Act be deleted.

WITHOUT PREJUDICE TO THE ABOVE GROUNDS

5. ***Ground No. V: Denial of Exemption under section 10(34) and 10(35) of the Act***

5.1 On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming the action of the Ld. AO in denying the exemption u/s. 10(34) and 10(35) of the Act on the ground that the Appellant is a VCF, which is a status "beyond a person" as defined u/s. 2(31) and accordingly the Appellant is ineligible to claim exemption u/s. 10(34) and (35).

5.2 The Appellant prays that the exemption u/s. 10(34) and 10(35) of the Act be allowed to it.

WITHOUT PREJUDICE TO THE ABOVE GROUNDS

6. ***GROUND NO. VI: LEVY OF INTEREST UIS. 234A AND 234B OF THE ACT:***

On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming the action of the Ld. AO in levying interest u/s. 234A and 234B of the Act.

The Appellant prays that the interest levied u/s. 234A and 234B be deleted."

9. At the time of hearing, Ld.AR of the assessee brought to our notice relevant facts relating to grounds on merits i.e., Ground No. 1, 3 to 6 and filed its written submissions. Ld.AR of the assessee contended the finding of the Ld. CIT(A) in sustaining the action of the Assessing Officer. For the sake of clarity, the contents of the written submissions relating to Ground No. 1, 3 to 6 are reproduced below: -

"2.1 At the outset, it is submitted that the issue is squarely covered in favour of the Appellant Assessee by the order of the coordinate bench in its own case for AY 2017-18 in ITA No. 1635/Mum/2020 (Copy of the Tribunal order is placed at page no. 274 of the FPB). The relevant findings of the Hon'ble Tribunal in the said order are as under:

> *2.2.1. Short term investment in mutual funds is authorized by the Private Placement Memorandum ("PPM") which in turn is in accordance with the trust deed of the Appellant Assessee,*
>
> *2.2.2. The allegation that the Appellant Assessee has violated the SEBI VCF Regulations is only contended by the departmental authorities, whereas there is absolutely not even a whisper of any such allegation by SEBI regarding any violation committed by the Appellant Assessee of the Regulations;*
>
> *2.2.3. The clarification issued by SEBI in the case Tata Capital Ltd. states that VCFs registered with SEBI can make*

investment of the un-invested portion of their investible funds in liquid mutual funds or bank deposits or other equity assets of higher quality, such as treasury bills, CBLOs, commercial papers, certificate of deposits, etc. till deployment of funds as per investment objective. In the said clarification, SEBI has referred to all SEBI registered VCFs and permits short term investment of idle funds in mutual funds and other short term investments;

2.2.4. The role of a VCF is only that of a pass-through entity which receives contributions from others and invests in portfolio companies. The income earned therefrom is distributed to the investors, being the ultimate beneficiaries, and is taxed in their hands as per section 115U. Accordingly, such income is exempt in the hands of the VCF u/s. 10(23FB);

2.2.5. Identical nature of dispute relating to exemption u/s. 10(23FB) involving similar facts has been decided by the Coordinate Bench in favour of J.M. Financial India Fund Scheme B;

2.2.6. Exemption claimed u/s. 10(34) and 10(35) is valid in absence of any restriction u/s. 10(23FB) for claiming exemption under any other section of the Act.

2.2 Attention is also invited to the "Interpretative letter under the SEBI (Informal Guidance) Scheme, 2003 in connection with SEBI (Venture Capital Funds) Regulations, 1996" placed at page no. 273 of FPB dated December 26, 2018 issued by SEBI to the Ld. AO on a query made by him, wherein SEBI has inter alia stated that registered Venture Capital Funds may deploy the un-invested portion of the investible funds in liquid mutual funds or bank deposits or other liquid assets of higher quality till investment of funds as per the investment objective. The Appellant Assessee was unaware about this letter of SEBI when the Hon. Tribunal decided the issue for AY 2017-18 and hence was not pointed out to the Hon. Tribunal.

2.3. When asked by the Hon'ble Members during the course of hearing as to whether the fact of the investment being made by the Appellant Assessee in short-term mutual funds was communicated to the Ld. AO, it was submitted that the same was indicated in reply dated March 9, 2022 which is placed at page no. 52 of the FPB, relevant extracts of which are as under

"Further, the Fund has also earned dividend income from temporary investment in Mutual Fund units which is a non-VCU income." (Emphasis supplied)

Similarly, even in the reply to notice u's. 142(1) dated March 16, 2022 placed at page no. 70 of the FPB, the said fact has been informed to the Ld. AO. The relevant extract of the response is reproduced as under:

> *"2.1.16. Thus, the Assessee has invested in mutual funds for temporary purposes, and is duly permitted to do such investments and has not violated any conditions of its Trust deed by making such investments in mutual funds." (Emphasis supplied)*

Infact, even during the course of assessment proceedings u/s. 143(3), the Appellant Assessee vide its letter dated December 28, 2018 (given at page no. 113 of FPB) had submitted before the then Ld. AO complete details of the temporary investments made in mutual funds and that the said temporary investment is made in accordance with the Private Placement Memorandum and Trust deed.

2.4 The Appellant Assessee also submits that the interest income which has been claimed exempt u/s. 10(23FB) has already been subject to tax in the hands of the investors, which can be seen from Form 64 (refer FPB page no. 303). Therefore, taxing the same income in the hands of the Appellant Assessee would amount to taxing the same income twice.

2.5 Basis the above, the Appellant Assessee submits that the issue involved in the captioned assessment year is duly covered by the order of the Hon'ble Tribunal for AY 2017-18."

10. In view of the above submissions, Ld.AR of the assessee prayed that the order of the Ld. CIT(A) be set-aside by following the decision of the Tribunal in assessee's own case for the A.Y. 2017-18.

11. On the other hand, Ld. DR relied on the order of the lower authorities and submitted that the assessee does not have mandate to make any investments.

12. Considered the rival submissions and material placed on record, On identical facts, the Coordinate Bench in assessee own case in ITA No. 1635/MUM/2020 dated 22.10.2020 for the A.Y. 2017-18, decided the issue in favour of assessee and observed as under: -

> *"10. We have carefully considered the rival submissions in the light of the decisions relied upon and perused the orders of the departmental authorities as well as the material placed on record. The Assessing Officer and learned Commissioner (Appeals) have disallowed ESOP'S OF LAW L claim of exemption under section 10(23FB) of the Act broadly on the following grounds:-*
>
> *i) RIBL Investment made in mutual fund is not authorised by the trust deed;*
>
> *ii) The assessee has violated venture capital fund regulation framed by the SEBI; and*
>
> *iii) The assessee has violated the terms on the basis of which registration as a venture capital fund was granted by the SEBI.*
>
> *11. Further, learned Commissioner (Appeals) has said that after amendment to section 10(23FB) of the Act by Finance Act, 2007, w.e.f. 1st April 2008, only income earned from investment in a VCU is exempt. Therefore, the Assessing Officer can disallow claim of exemption under section 10(23FB) of the Act, if income is not earned from Investment in VCU.*
>
> *12. Before we proceed to examine the correctness of the aforesaid reasoning of the Departmental Authorities, it is necessary to look into the provisions of section 10(23FB) of the Act as it stands after amendment by Finance Act, 2007, w.e.f. 1st April 2008. As per the said provision, any income of a venture capital company or venture capital fund from investment in a VCU is exempt from taxation. The expression 'venture capital fund (VCF)' has been defined in Explanation-(b) under section 10(23FB) of the Act. As per the said definition, to qualify as a VCF, two conditions have to be fulfilled. Firstly, the fund must have been created under a trust deed registered under the provisions of The Registration Act, 1908, and secondly, it have been registered as a VCF with the competent authority, which, in the present case is SEBI. There is no dispute that the qualifies the conditions of VCF as provided in Explanation-(b) to section 10(23FB) of the Act.*

13. Having held so, it is necessary to look into the reasoning of the Departmental Authorities for denying assessee's claim of exemption under section 10(23FB) of the Act. The first allegation is, investment in mutual fund is not authorised by the trust deed. Elsewhere in this order, while referring to the submissions of the learned Sr. Counsel for the assessee, we have referred to certain clauses of the trust deed. It Is the case of the assessee that the investment in mutual fund is authorised by PPM which is in terms of the trust deed. On a perusal of the trust deed, a copy of which is at Page-42 of the paper book, it is seen, as per clause 2.2 of the trust deed, the contributions received is to be invested in equity/quasi equity and equity related investment including preference shares, warrants for equity conversion, debt Instruments etc. However, clause 2.3 of the trust deed provides that the contribution received under a scheme can be invested in accordance with the provisions of the trust deed and the respective memorandum. The expression 'memorandum' has been defined in clause 1.1.23 of the trust deed. As per the said definition, memorandum means PPM and all supplements thereto issued by the manager/trustee for the respective schemes. On a perusal of the PPM, a copy of which is placed at page-69 of the paper book, it is investmentor distribution or as reserve, in bank deposits, government securities, treasury bills, corporate bonds and deposits, mutual funds etc. Thus, there cannot be any doubt that the PPM issued by the assessee authorizing short term investment in mutual funds is in accordance with clause 2.3 r/w clause 1.1.23 of the trust deed. However, clause 2.1 of the trust deed makes it clear that the primary objective of the trust will be to float various schemes for raising resources for venture capital assistance to portfolio companies so as to achieve long term capital appreciation for the contributors of the schemes. 14. Thus, as could be seen, the primary objective of the trust is to safeguard the interest of the contributors. Thus, as could be seen from the aforesaid facts, the investment in mutual funds is not only in terms of the trust deed but such investment is purely for the purpose of safeguarding the interest of contributors. Thus, the allegation of the Departmental Authorities that the assessee has violated the terms of the trust deed is unacceptable. Further, the contention of the learned Sr. Counsel for the assessee that the investment in the mutual fund is for safeguarding the interest of the contributors to the schemes is acceptable considering the fact that the contribution received cannot be kept idle till its investments in portfolio companies, as otherwise, interest of contributors would be hampered. Therefore, for sensuring that the contributors get good return for their investment, the available fund is put in short term investment in mutual funds. It is worth mentioning, in case of Tata Capital Ltd. which provides Investment management services to several SEBI

registered VCFs, on a query made, SEBI has issued a clarification, a copy of which is at Page-228 of the paper book, stating that VCFs registered with SEBI can make investment of the un-invested portion of their Investible funds in liquid mutual funds or bank deposits or other equity assets of higher quality, such as, treasury bills, CBLOS, commercial papers, certificate of deposits, etc., till deployment of funds as per investment objective. Thus, the aforesaid clarification issued by the SEBI also permits short term investment of idle funds in mutual funds and other short-term investments. The reasoning of the Departmental Authorities that the clarification Issued by SEBI is in case of another assessee is of little consequence as in Para-(d) of the aforesaid letter dated 10th June 2016, SEBI has referred to to all SEBI registered VCFs and not simply limited to Tata Capital Ltd. Therefore, the allegation of the Departmental Authorities that the assessee has violated the terms of trust deeds by investing in mutual funds has no reasonable basis.

15. The other allegation of the Departmental Authorities is that the assessee has violated the VCF regulations framed by SEBI and thereby has violated the conditions of registration granted by the SEBI. In this the only thing we want to say is, it is only the departmental authorities who are alleging violation of SEBI (VCF) Regulations and the terms of registration granted by SEBI. There is absolutely not even Whisper of allegation by SEBI regarding any violation committed by assessee. At least, nothing to that effect is available on record. Thus, when the competent authority i.e., SEBI has not found any violation of either VCF regulations or the conditions of registration granted as on date, the Departmental Authorities cannot presume or allege such violation.

16. One more aspect which needs to be considered is, why legislature thought it appropriate to grant exemption to VCF under section (23FB) of the Act? It is simply for the reason that the income earned by the VCFs from VCUs and distributed to the contributors is taxable at the hands of the contributors under section 115U of the Act. Thus, the role of the VCF is only that of a pass-through entity which receives contributions from others and invests in portfolio companies. Likewise, the income earned from the investment in portfolio companies, in turn, is distributed to the contributors. That being the case, the legislature had thought it appropriate to tax the income at the hands of the contributors who are the ultimate beneficiaries. Thus, the basis on which assessee's claim of exemption under section 10(23FB) of the Act has been disallowed, in our view, is unsustainable. Notably, while considering identical nature of dispute involving facts in case of J.M. Financial India Fund Scheme B (supra), the Co-ordinate Bench while dealing with the issue of disallowance of exemption claimed under section

10(23FB) of the Act on identical reasoning by the Assessing Officer and learned Commissioner (Appeals) held as under:-

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

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

"(23FB) any income of a venture capital company or venture capital fund from investment in a venture capital undertaking Explanation.- For the purposes of this clause,-

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

(B) has been granted a certificate of registration as Venture Capital Fund as a sub-category of Category | Alternative Investment Fund and is regulated under the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012 (hereinafter referred to as the Alternative Investment Funds Regulations) made under the Securities and Exchange Board of India Act, 1992 (15 of 1992), and which fulfils the following conditions, namely:-- (i) it is not listed on a recognized stock exchange,

(ii)it has invested not less than two-thirds of its investible funds in unlisted equity shares or equity linked instruments of venture capital undertaking, and it has not invested in any venture capital undertaking in which its director or a substantial shareholder (being a owner of equity shares exceeding ten per cent share capital) holds, either individually or coactively, equity shares in excess of

fifteen per cent of the paid-up equity share capital of such venture capital undertaking. operating under a trust deed registered under the provisions of the Registration Act, 1908 (16 of 1908), which- (1) has been granted a certificate of registration, before the 21st day of May, 2012, as a Venture Capital Fund and is regulated under the Venture Capital Funds Regulations; or (II) has been granted a certificate of registration as Venture Capital Fund as a sub-category of Category / Alternative Investment Fund under the Alternative Investment Funds Regulations and which fulfils the following conditions, namely:-

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

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

(iii) the units, if any, issued by it are not listed in any

recognized stock exchange, or (B) operating as a venture capital scheme made by the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963),

(c) "venture capital undertaking" means-

(i) a venture capital undertaking as defined in clause (n) of regulation 2 of the Venture Capital Funds Regulations; or

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

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

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

income paid or credited during the previous year and such other relevant details as may be prescribed.

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

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

(5) the income accruing or arising to or received by the venture capital company or venture capital fund, during a previous year, from investments made in venture capital undertaking if not paid or credited to the person referred to in sub-section (1), shall be deemed to have been credited to the account of the said person on the last day of the previous year in the same proportion in which such person would have been entitled to receive the income had it been paid in the previous year. Explanation 1.--For the purposes of this Chapter, "venture capital company", "venture capital fund" and "venture capital undertaking shall have the meanings respectively assigned to them in clause (23FB) of section 10.

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

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

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

12. Further, a careful perusal of section 115U prescribes that the income accruing or arising to the unit holders of VCF out of investments made in Venture Capital Undertakings is taxable in the hands of such unit holders in the manner as if it were the income accruing or arising to or received by such unit holders, had such unit holders made investments directly in the VCUs. Thus, so far as the assessment year under Consideration is concerned, the relevant legal position can be summarised as follows. That any income of a VCF earned from investments in VCUs is exempt in the hands of the VCF, subject of course to the conditions prescribed in section 10(23BF) of the Act, that such income would be taxable in the hands of the unit holders of the ✓ VCF; that such income is taxable in the hands of the unit holders in the manner as if it were the incomes accruing or arising to or received by such unit holders had the unit holders made the investments directly in the VCUs; and, that so far as the income of VCFs earned from investments other than the investments in VCUS is concerned, the same would be taxable in the hands of VCF itself. 13. Now turning to the facts of the present case the assessing officer denied the exemption under section 10(23FB) to the assessee by holding that holding that the assessee made investment in mutual funds and violated SEBI (VCF) Regulation and also violated the objects of clause of the trust deed. The assessing officer has not disputed that the trust deed of the assessee is registered under the provisions of registration Act. Further a registration is granted to the assessee by SEBI before 21 May 2012, which is still in force. The Assessing Officer has not brought any material on record by making investigation from SEBI, if the funds are not regulated in accordance with SEBI (VCF) Regulations. 14. The coordinate bench of Ahmadabad Tribunal in ITO Vs Gujarat Information Technology Fund (supra) while considering the ground/ issue whether the assessing officer can look into whether venture capital fund fulfils conditions laid down in SEBI (Venture Capital Funds) Regulations, passed the following order:

24. the AO is duty bound to enquire whether the assessee trust is registered under the Registration Act, 1908 and has been granted certificate of registration by SEBI under SEBI (Venture Capital Funds) Regulations, 1996. But his role is confined to satisfy himself with such certificates granted and not beyond. Sub-clause (i) and sub-clause (ii) of clause (b) under Explanation 1 only requires to ensure that assessee trust to look into the matter and take action under the provisions of the concerned statute under which certificates are granted. In this regard the observations of the Hon. Supreme Court in the case of Gestetner Duplicators (P) Ltd. (supra) are very relevant. In that case the Commissioner had granted recognition to the P.F. as far back as 1937. The assessee a private limited company paid to sales-men a fixed monthly salary and

commission at fixed percentage of turnover and also paid employer's contribution to the P.F. on the basis of monthly salary as well as commission and credited them into individual account of these sales-men in P.F. maintained and recognized by the Commissioner. A part of such commission and consequently provident fund on such commission was sought to be disallowed. The matter went up to the Han. Supreme Court. It observed as under- would be conducive to judicial discipline and the maintaining of and uniformity in administering the law that the taxing should proceed on the basis that the recognition granted and available for any particular assessment year implies that the r fund satisfies all the conditions under rule 4 of Part A of Fourth Schedule to the Act, and not sit in judgment over it." Thus it was held that it was not open to the AO to take the view contrary to the registration already granted by the CIT and therefore disallow a part of the contribution. It was pointed out that when recognition continues in operation it would be implied that the conditions laid down there-under are satisfied and any part of disallowance would tantamount to questioning the recognition. In other words entries made in the register of independent body should be accepted as true and they should not be questioned while deciding the issue relating to the matters concluded by the entries made in such registers. From this it follows that if assessee trust is registered with SEBI as per certificate granted under Regulation 7(3) then it should be accepted that such certificate is granted after ensuring that conditions laid down before granting of such certificate are fulfilled. In other words conditions laid down in subclause (i) and sub-clause (ii) are deemed to be fulfilled under explanation-1(b) to section 10(23FB), the moment relevant certificates are produced before the AO. Therefore, he is not required to go into violation of conditions, if any, pertaining to the matters of grant of such certificates.

25. So far as condition laid down in sub-clause (iii) of clause (b) under Explanation 1 is concerned what we consider appropriate for the AO is to find out whether any action for default has been taken by SEBI under regulation-30 as referred to above for default committed by the assessee trust. So far as any violation of investment pattern as laid down in regulation 12(d) is concerned it is also covered under clause (a) of regulation-30 which shows that assessee Trust can be penalized for contravention of any provision of this Act or these regulations. Thus, if assessee trust contravenes regulation-12(d) then SEBI is competent to penalize assessee trust within the powers given under regulation 30. So long as SEBI does not find any default of any contravention of the provisions of the SEBI Act or SEBI (VCF) Regulation 1996 then it can be inferred that assessee trust fulfils the conditions laid down under these regulations. The AO, however, can look into the issue whether assessee trust fulfils such conditions as laid down in regulation

12(d) (and not under regulation-8) and report the matter to SEBI taking a protective view under IT Act, 1961. If finally SEBI does not find any default on the part of the assessee trust then view of the AO that there is violation cannot survive. In other words fulfilment of condition under sub-clause (m) is subject to the final finding by SEBI authorities. Their final view on the alleged contravention by the assessee trust will prevail over the view of AQ. Thus in our view role of the AO in examining the issue about fulfillment of conditions laid down in clause (b) is limited to the extent as described above.

15. Further the coordinate bench of Mumbai Tribunal in DHFL Capital Fund Vs ITO (supra) held that, so far as SEBI does not find any default of any contravention of the provisions of the SEBI Act or SEVI (VCF) Regulation 1996, then it can be inferred that the assessee-trust fulfils the laid down under these regulations. The Tribunal further expressed the view that the Assessing Officer may report the matter of, if any. to the SEBI and if finally SEBI does not find any default, then the view of the Assessing Officer that there is violation Cannot survive. Thus, it is the SEBI, which has final authority to determine about the violation of the conditions, as it is the authority competent to deal with the same. It was also held that the Assessing Officer has made his own interpretation of the term 'corpus', which was found to be incorrect as per the definition given in the new regulation which is not sustainable.

16. We have noted that the coordinate bench of Mumbai Tribunal in HDFC Property Fund Versus ITO (supra) on similar set of facts on similar denial of exemption under section 10(23FB) passed the following order: 12. We have carefully considered the rival submissions. Ostensibly, as our discussion in the earlier paras show, the sum and substance of the stand of Assessing Officer revolves around the manner in which assessee has made certain investments; firstly, in the units of Mutual funds, and, secondly, towards Debenture application monies. The first objection of the Assessing Officer is that such investments are not permitted in terms of the Trust Deed itself. In this context, we find that the appellant has been constituted in terms of the Trust Deed dated 06.11.2004 settled by Housing Development Finance Corporation Lid It has been constituted to pool together resources, both institutional and other investors, for making investment in high growth sectors including real estate sector in India. The objects of the Trust are contained in clause 6, a copy of which is placed in the Paper Book.

Though we are not reproducing the contents of the Trust Deed, its perusal shows that the investments by the appellant are required to be made in compliance with the requirements of VCF Regulations of SEBI. In terms of clause 4.1.27, the Trust Deed also envisages

temporary investments which have been defined to mean, inter-alia, money market instruments, units of money market liquid mutual funds or other similar debt instruments. The said clause also brings out that the temporary investments are also to be understood as referring to short term securities issued on guarantee by the Indian Government, or its agencies or instrumentalities, overnight and short term instruments, like-bank deposits, etc. Though we are presently concerned with investments made in liquid mutual fund schemes, we are enumerating the other aspects of the expression temporary investments" stated in the Trust Deed only to bring out that the Trust is entitled to make such-like investments of its available funds, awaiting regular investment in the stated purposes. In fact, clause 11.1 of the Trust Deed dealing with Investment of Trust fund" specifically prescribes that the trust may invest the available contributions awaiting investment or realised funds awaiting distribution in temporary investments. The aforesaid clearly brings out that the appellant is empowered by its Trust Deed to make temporary investments which, inter-alia, would include within its purview the investments in question. Apart therefrom, we find enough potency in the pleadings of Venture the appellant that there is an industry and trade practice whereby Capital Funds retain certain amounts with them, pending secular investments in Venture Capital Undertakings for certain purposes, like disbursement of expenses, distribution to unit-holders, Till such time the funds are not utilised for the main purposes, in this advisably the Venture Capital Fund would make temporary to earn monies. The course date temporary regard was by investing in units of mutual funds or even by way of fixed deposits with banks. Insofar as the objection of the Assessing Officer regarding non-compliance with the VCF Regulations of SEBI is concerned, here also we do not find any support for the stand taken time and again reiterated by the assessee before the lower authorities as well as before us and we find that in neither of the orders of the authorities below there is any negation to the same. So far as VCF Regulations of SEBI are concerned, we are in agreement with the assessee that it does envisage investments in Convertible Debenture application money as being investments which can be said to be linked to investment in equity shares. Thus, on account of the aforesaid discussion, we find that the assessee fulfils the requirements of claiming exemption under Section 10(23FB) of the Act so far as it is relatable to the year under consideration. 14. To reiterate, it is abundantly clear that assessee is a VCF operating in terms of a Trust Deed registered under the provisions of the Registration Act, 1908, that it has been granted a Certificate of Registration as VCF by SEBI which continues to subsist, that there is no adverse action taken or contemplated by SEBI for violation of any VCF Regulations; that the

targeted investment in VCUs is within the purview of VCF Regulations of SEBI, that assessee is permitted by its Trust Deed as well as by the VCF Regulations of SEBI to temporarily deploy funds in units of mutual funds as well as in Convertible Debenture application money. Thus, in our view, assessee is entitled to exemption envisaged under Section 10(23FB) of the Act.

17. Considering the aforesaid discussions, we find that the certificate of Registration of assessee in the capacity of a VCF with SEBI is still continues to subsist, that there is no adverse report brought by assessing officer taken or likely to be taken by SEBI for violation of any VCF officer Regulations, that the targeted investment in VCUs is within the purview of VCF Regulations of SEBI, wherein the assessee is permitted by its Trust Deed dated 18th March 2006 as well as by the VCF Regulations of SEBI to deploy the funds in units of mutual funds. Therefore, in our view, the denial of exemption proscribed under Section 10(23FB) of the Act was not warranted, we hold so.

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

18. Thus, on overall consideration of facts and material on record and keeping in view the relevant statutory provisions as well as cited case laws, we are of the view that the assessee is entitled to claim exemption under section 10(23FB) of the Act. We order accordingly. The ground raised by the assessee is allowed.

19. In ground no (v), the assessee has challenged the disallowance of exemption claimed under section 10(34) and 10(35) of the Act in respect of dividend earned amounting to 95,20,928 from mutual funds. The Assessing Officer disallowed assessee's claim of exemption holding that all other income of VCFs, except, the income covered under section 10(23FB) of the Act is taxable. According to the Assessing Officer, the expression 'person' as defined under section 2(31) of the Act does not include VCF. He observed, VCF being a trust enjoying special status for specific purpose is provided exemption specifically under section 10(23FB)

of the Act. The Assessing Officer held that since the assessee being a VCF is qualified to avail exemption under section 10(23FB) of the Act, it cannot claim exemption under section 10(34) and 10(35) of the Act in respect of dividend earned on a funds. Accordingly, he disallowed assessee's claim.

20. Learned Commissioner (Appeals) also sustained the disallowance accepting the reasoning of the Assessing Officer.

21. The learned Sr. Counsel for the assessee submitted, there cannot be any doubt that the assessee is a person as defined under section 2(31) of the Act. He submitted, exemption under section 10(34) and 10(35) of the Act are in respect of specific Income, hence, are not covered under any other provisions. He submitted, when section 10(23FB) of the Act does not specifically prohibits grant of exemption under any other provision in respect of any other income earned by VCF, the claim of the assessee cannot be rejected. Drawing our attention to sections 10(34) and 10(35) of the Act, he submitted, section 10 provides for exemption in respect of certain categories of income earned by any person. Therefore, he submitted, the assessee being a person is eligible for exemption under section 10(35) of the Act. Drawing our attention to a decision of the Hon'ble Jurisdictional High Court in CIT(E) v/s Jassubhai Foundation, 374 ITR 315 (Bom.), the learned Sr. Counsel submitted, in the facts of the said case the High Court allowed claim of exemption under section 10(33) and 10(38) of the Act in respect of a trust availing exemption under section 11 of the Act. He submitted, the Court held that since there is no bar imposed under section 11 of the Act towards availing of exemption under section 10(33) and 10(38) of the Act, claim of E exemption under those provisions have to be allowed. The learned Sr. Counsel submitted, an amendment has been made sub-section (7) of section 11 of the Act imposing restriction for availing exemption under section 10 of the Act. He submitted, no such restriction like section 11(7) of the Act has been imposed in section 10(23FB) of the Act. The learned Sr. Counsel further submitted, dividend income, in any case, is not taxable under sections 10(34) and (35) of the Act at the hands of recipients. He submitted, the assessee being a pass-through entity distributes the dividend income to the contributors/investors. Therefore, when the dividend income is not taxable at the hands of ultimate beneficiary, it cannot be taxed at the hands of the assessee.

22. The learned Departmental Representative relied upon the observations of the Assessing Officer and learned Commissioner (Appeals).

23. We have carefully considered the rival submissions in the light of the decision relied upon and perused the material on record. As could be seen from the assessment order, the assessee being a trust has been assessed in the status of AOP. The basic reason why the Assessing Officer as well as learned Commissioner (Appeals) have reject assessee's claim of exemption under section 10(34) and 10135 of the Act is, the assessee being a VCF has a special status under section 10(23FB) hence, does not come within the definition of person as per section 2(31) of the Act. Therefore, it cannot avail exemption under section 10(34) and 10(35) of the Act. The other reasoning of the Departmental Authorities is, since assessee is specifically provided exemption under section 10(23FB) of the Act, it cannot avail exemption under any other provision.

24. As could be seen from the language of section 10 of the Act, certain categories of income earned by any person are exempt under different clauses of the said section. While dividend income is exempt under section 10(34) of the Act income earned from units of mutual fund is exempt under section 10(35) of the Act. Undisputedly, though, the assessee is a VCF, however, the status of the assessee comes within the definition of 'person' as defined under section 2(31) of the Act. Therefore, it cannot be said that the assessee is having a special status other than any of those as per section 2(31) of the Act. Further, on a careful reading of section 10(23FB) of the Act, we find that it only exempts income earned by a VCF or VCC from investments made in a VCU. Thus, the exemption provided under section 10(23FB) of the Act is in respect of a special category of income. Further, on a careful reading of section 10(23FB) of the Act we do not find any restriction therein insofar as availing of exemption under section 10(34) (35) of the Act. Therefore, when section 10(23FB) of the Act and does not debar the assessee from claiming exemption in respect of any other stream of income, such restriction cannot be imported into the provision. In this context, we may refer to the decision of the Hon'ble Jurisdictional High Court in case of CIT(E) v/s Jassubhal Foundation (supra), wherein, the Hon'ble High Court while examining the issue of claim of exemption under section 10(33) and 10(38) of the Act by a charitable and religious trust which is otherwise eligible for exemption under section 11 of the Act, held that when there is nothing in the language of section 10 or 11 of the Act which says that what is provided by section 10 or dealt with is not to be taken into consideration or omitted from the purview of section 11 of the Act, the assessee's claim of exemption under section 10 of the Act cannot be disallowed. Identical is the situation in the present appeal. When there is no restriction imposed under section 10(23FB) of the Act with regard to availing of exemption under section 10(34) and 10(35) of the Act, the assessee's claim cannot be denied.

25. One more aspect which needs to be considered is, dividend income is otherwise exempt under section 10(34) and 10(35) of the Act at the hands of the recipient of such income. In the facts of the present case, though, the assessee had earned the dividend income from mutual funds, however, such income ultimately has to be to the contributors/investors, who have invested with the assessee. Therefore, the ultimate beneficiary of the dividend income is assessee. Therefore, when the dividend income is not taxable hands of the ultimate beneficiary, it cannot be taxed at the hands of the assessee. Accordingly, we allow assessee's claim of exemption under sections 10(34) and (35) of the Act. The ground raised by the assessee is allowed.

26. In view of our decision in grounds no.(iii) and (v), grounds no.(iv), (vi), (vii), (viii) and (ix) have become academic, hence do not require adjudication.

27. In ground no.(x), the assessee has challenged levy of interest under section 234B and 234C of the Act.

28. These grounds being consequential, no separate adjudication is required.

29. In the result, appeal is partly allowed.

ITA no.1636/Mum./2020

30. The facts and issues involved in this appeal are identical to the

facts and issues involved in ITA no. 1635/Mum./2020, decided by us in the earlier part of the order. Even, the grounds raised in the present identical and corresponding to the grounds raised in ITA no. 1935/Mum/2020. Therefore, our decision in ITA no. 1635/Mum./2020 Will apply mutatis mutandis to this appeal as well. Following the same,

grounds no.(i), (ii) are dismissed as not pressed; grounds no.(iii) and (iv) are allowed and grounds no.(iv), (vi), (vii), (viii) and (ix) being of academic nature, do not require adjudication. Ground no. (x) being consequential is dismissed.

31. In the result, both the appeals are partly allowed."

13. Respectfully following the above decision, the facts in this appeal also exactly as similar in the earlier years and also it is brought to our notice that SEBI has issued separate communication to the Assessing

Officer informing that there is no violation in the investment process of the assessee and it was informed that the assessee is allowed to make short term investments which is not in violation of object of the trust, therefore, we are inclined to allow the grounds 1, 3, 4, 5 and 6 raised by the assessee.

14. With regard to Ground No. 2, which is the ground raised by the assessee on jurisdictional issue, at the time of hearing Ld.AR of the assessee submitted as under: -

> *"B. As regards Ground No. 2 (ie. Reopening proceedings):*
>
> *2.6 Insofar as validity and jurisdiction of reopening proceedings is concerned, the Appellant Assessee submits as under:*
>
> > *2.6.1. Proposition 1: In absence of new tangible material, reopening u/s 147 is bad in law:*
> >
> > *The Appellant Assessee submits that the Ld. AO has not pointed out any new material based on which he has reopened the Appellant Assessee's case. Therefore, reopening in the absence of new tangible material is bad in law.*
> >
> > *In support of the same, the Appellant Assessee places reliance on the decisions cited in the legal chart and legal compilation submitted at bar during the course of the hearing.*
> >
> > *2.6.2. Proposition 2: Re-examining the issue which was duly examined during the original Scrutiny assessment proceedings amounts to change of opinion and the same cannot be the basis for reopening the concluded assessment:*

The Appellant Assessee submits that Para 3 of the order u/s. 143(3) dated December 30, 2018, placed at page no. 19 of the FPB, has categorically captured all the details examined by the Ld. AO basis which he had allowed the exemption claimed by the Appellant. It is also worthwhile to note that SEBI's Interpretative letter was issued to the Ld. AO four days before the order u/s. 143(3) was passed by him, which makes it abundantly clear that the Ld. AO had allowed the exemption claimed by the Appellant Assessee u's. 10 afler due application of mind and complete enquiry. In view of the above, the Appellant Assessee submits that since complete enquiry of the issues under consideration was already made by the Ld. AO at the time of passing the order u/s. 143(3), the reopening has been made only because of change of opinion on the Ld. AO's part and thus, the reopening is bad in law.

In support of the same, the Appellant Assessee places reliance on the decisions cited in the legal chart and legal compilation submitted at bar during the course of the hearing.

2.6.3. Proposition 3: Where reasons recorded for reopening were not provided, reopening is to be quashed:

The Appellant Assessee submits that the reopening is bad in law even on the ground that no reasons for reopening were provided even after multiple requests made in this regard (Please see the reply dated May 31, 2021 on FPB page no. 40, reply dated March 16, 2022 on FPB page no. 58-60 and reply dated March 26, 2022 on FPB page no. 92-94).

In support of the same, the Appellant Assessee places reliance on the decisions cited in

the legal chart and legal compilation submitted at bar during the course of the hearing.

2.7 The arguments preferred by the Ld. DR during the course of hearing have been summarized as under:

2.7.1. Since the return of income pursuant to notice u/s. 148 was not filed within time, the same is non-est.

2.7.2. "Any income" of a VCF was included within the ambit of section 10(23FB) as it stood prior to April 1, 2008. However, pursuant to the amendment brought about by Finance Act, 2007, the scope of the said section was restricted to "income of a VCF from investment in a venture capital undertaking". Therefore, income earned from mutual funds cannot be exempted in the hands of the Appellant Assessee.

2.7.3, Investment made in mutual funds is in breach of the objects of the trust deed and this in turn is a clear violation of Regulation 8(b) of SEBI VCF Regulations.

2.7.4. Since the Appellant Assessee is a VCF, provisions of section 10(34) and 10(35) cannot apply.

2.7.5. Violation of Regulation 12(c) of SEBI VCF Regulations was not considered by the Hon'ble Tribunal in the order passed for AY 2017-18.

2.8. The point-by-point reply to the aforesaid arguments of the Ld. DR are as under:

2.8.1. In response dated May 31, 2021 (at page no. 39 of FPB), it was pointed out by the Appellant Assessee to the Ld. AO that the reason for delay in filing the return of income is the communication of the notice to a wrong email id and not the registered email id of the Appellant Assessee. Indeed, the Ld. AO has not denied this fact in his order.

In any case, as per Para 8 of the order of the Hon'ble Supreme Court against the Miscellaneous Application No. 665 of 2021 in SMW(C) No. 3 of 2020 dated September 23, 2021 the time limits to, inter alia, file the return of income pursuant to notice u/s. 148 also stood extended. This was also submitted to the Ld. AO by the Appellant Assessee in its reply dated March 26, 2022 given at page no. 92 of the FPB.

2.8.2. As regards the amendment in provisions of section 10(23FB) so as to exclude all other streams of income earned by a VCF, the Hon'ble Tribunal in its order for AY 2017-18 has duly considered the same at Paras 12 to 14 and has categorically held that the Appellant Assessee is a VCF qualified for exemption u/s. 10(23FB)

and there is no violation whatsoever by investing in mutual funds and earning income therefrom.

2.8.3. It was the case of both, the ld. AO as well as ld. DR that "as per the object of trust deed, on the basis of which registration has been granted to it as VCF by SEBI, it could only invest in "equity, quasi-equity and equity-related investments, and would include other instruments such as preference shares, warrants for equity conversion, debt instruments and any other instrument of a like nature used to supplement the equity type instruments, issued by portfolio companies". In other words, both the Ld. AO and the Ld. DR have alleged that the Appellant Assessee has breached the objects of its trust deed since the said deed does not mention for investing in mutual funds.

In this regard, the Appellant Assessee draws attention to Clause 2.1 of the Trust deed at page no. 135 of FPB which reads as under:

> *"The primary objective of the Trust will be to carry on, through its various Schemes, the activity of a venture capital fund as permissible under the Regulations and for the purpose of raising resources to make available venture capital assistance to Portfolio Companies, so as to achieve long-term capital appreciation for its Contributors." (Emphasis supplied by Appellant Assessee)*

Further, clause 2.3 of the Trust deed at FPB page no. 135 reads as under:

> *"The Trust and each of its Schemes shall invest in accordance with the provisions of this Indenture and its respective Memorandum and shall not engage in any business or trade."*
>
> *(Emphasis supplied by Appellant Assessee)*

Furthermore, Clause 6.1 of the Trust deed at page no. 145 of FPB which reads as under:

> *"The Schemes may receive proceeds by way of interest, dividends, and income from the Fund Investments, returns/ yield on short term investments and proceeds realised from the disposition of Fund Investments ("Investment Proceeds"). Amounts held by the respective Schemes*

> *pending Investment or distribution or as a reserve for the Schemes anticipated obligations will be invested in short-term securities as stated in the respective Memorandum (Emphasis supplied by Appellant Assessee)*

As per Clause 1.1.23 of the Trust Deed at page no. 133 of FPB defines the term 'Memorandum' to mean the 'Private Placement Memorandum.

The Private Placement Memorandum ("PPM") is placed at page no. 155 of the FPB. The term "Investment Policy' as referred to in Section VI: Summary of Principal Terms of the PPM (refer FPB page no. 206-207) reads as under:

> *"Amounts held by Fund I or Fund Il pending investment or as a reserve for Fund I or Fund II's anticipated obligations will be invested in money market instruments, bank deposits, government securities, treasury bills, corporate bonds and deposits, short-term securities and units of mutual funds." (Emphasis supplied by Appellant Assessee)*

On a conjoint reading of the Trust deed with the PPM, it is clear that the funds may be temporarily invested by the Appellant Assessee in "mutual funds" so as to achieve the long-term capital appreciation for the investors/contributors of the scheme. Therefore, there is no violation or breach of the objects of the Trust deed by the Appellant Assessee.

2.8.4. With respect to simultaneous exemptions being claimed u/s. 10(23FB) and 10(34) and 10(35), the Appellant Assessee submits that the same has been duly adjudicated by the Hon'ble Tribunal in its order for AY 2017-18 at paras 24 and 25, wherein drawing parallel from the wordings of section 11 and relying on the decision of Hon'ble Bombay High Court in the case of CIT(E) v. Jassubhai Foundation (374 ITR 315), it has been held by the Tribunal that section 10(23FB) does not debar an assessee to claim exemption in respect of any other stream of income.

2.8.5. Insofar as the alleged violation of Regulation 12(c) is concerned, the Appellant Assessee submits that the same was alleged by the Ld. AO even in the order passed u/s. 143(3) for AY 2017-18 (attached as Annexure I herewith), relevant extracts of which are as under:

"14.4.2 The sub clause (c) of clause 12 of the VCF Regulations, 1996 puts a restriction on a VCF to invest in associated companies. The definition of the associated company as per SEBI (VCF) Regulations 1996, is reproduced as hereunder 1[aa) "associate company", means a company in which a director or trustee or sponsor or settlor of the venture capital fund or asset management company holds either individually or collectively, equity shares in excess of 15 per cent of the paid-up equity share capital of venture capital undertaking]

14.4.3 In the instant case, the assessee has invested in the units of the mutual funds created by the Aditya Birla group of companies. In this case, the sponsor of this fund is 'Aditya Birla Financial Services Pvt. Ltd.', the settlor is 'Aditya Birla Nuvo Limited', the trustees are "Aditya Birla Trustee Company Private Limited' and the manager is 'Aditya Birla Capital Advisors Private Limited'. Therefore, on this relationship, there is an investment made by the assessee in associated company, which is in violation of SEBI (VCF) Regulations, 1996." (Emphasis supplied by Appellant Assessee)

Indeed, this order was before the Hon'ble Tribunal when the appeal for AY 2017-18 was decided by the Hon'ble Tribunal. Besides, the Appellant Assessee further submits that "associate company" as envisaged in Regulation 12(c) of SEBI VCF Regulations refers to a "Company" whereas the un-investible funds of the Appellant Assessee have been temporarily parked in "Mutual Funds" which is not a company but a trust. Further, the definition of "associate company" refers to "equity shares" whereas mutual fund issues "units" to its investors. Therefore, by no stretch of imagination it can be said that "mutual fund" is "associate company". Further, SEBI itself in its interpretative letter has stated that the un-invested portion of the investible funds can be deployed in liquid mutual funds (see page no. 273 of FPB).

During the course of hearing, a question fell from the Hon'ble Bench as to whether the mutual fund in which investments have been made by the Appellant Assessee can be considered as "associated enterprise" used in the Act. In this regard, the Appellant Assessee humbly submits that it is the term "associate

company" as defined under the SEBI VCF Regulations that is being referred to by both the ld. AO and the Ld. DR and not "associate enterprise" as contained in Chapter X of the Act. In any view of the matter, "associated enterprise" relates to 'international transactions' and 'specified domestic transactions, both of which terms have been given to mean specific transactions as provided for in the relevant sections. The Appellant Assessee most humbly submits that the transactions in question are not subject matter of Chapter X of the Act and hence, the question of examining whether the entities are "Associated Enterprise" or not is academic for the purpose of the current appeal.

The Appellant Assessee also invites attention to Para 15 of the Tribunal order wherein it has been held by the Hon. Tribunal that when the competent authority i.e. SEBI has not found any violation of either VCF Regulations or the conditions of registration granted, the Departmental Authorities cannot presume or allege such violation."

15. On the other hand, Ld. DR objected to the submissions of the assessee and relied on the order of the lower authorities.

16. Considered the rival submissions and material placed on record, we observe that the original assessment was completed u/s 143(3) of the Act and the assessment was selected for scrutiny only on the basis of verification of exemption claimed by the assessee under section 10 of the Act. After due verification only, the assessment was completed. From the present reassessment proceedings, we observe that the reason for reopening of the assessment was to verify the same issues and it was brought to the notice of Assessing Officer that the issue under

consideration is already settled from the order of the coordinate bench decision. However, it was reassessed only for the purpose to keep the issue under consideration alive. It clearly shows that the Assessing Officer wanted to keep the issue alive. It clearly demonstrates the change of opinion. Once the issue is thoroughly verified by the Assessing Officer and on same issue Assessing Officer wanted to verify only to keep the issue alive. This is absolutely abuse of power and also not ready to accept the decision of higher body. Therefore, we do not hesitate to quash the reassessment proceedings as bad in law ab initio. Accordingly, the ground raised by the assessee is allowed.

17. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 29th February, 2024.

Sd/-	**Sd/-**
(NARENDRA KUMAR CHOUDHRY)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated .02.2024
Giridhar, Sr.PS

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum