

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'A' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**ITA No.2680/Mum/2023
(Assessment Year :2018-19)**

DCIT 23(1) Piramal Chambers Room No.513, Parel Mumbai – 400 012	Vs.	Aditya Birla Real Estate Fund Plot C-22, G Block The II and FS Financial Centre, BKC Bandra (E) Mumbai – 400 051
PAN/GIR No.AACTA6619B		
(Appellant)	..	(Respondent)

Assessee by	Shri Madhur Agarwal Shri Hardik Nirmal & Shri Amol Mahajan
Revenue by	Shri Manoj Kumar Sinha
Date of Hearing	19/03/2024
Date of Pronouncement	27/03/2024

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The appeal filed by the Deputy Commissioner of Income-tax, Circle 23(1), Mumbai (for short, "AO") emanates from the order dated 31/05/2023 passed under section 250 of Income-tax Act [for short, "the Act"] by the learned Commissioner of Income-tax (Appeals), National Faceless Appeal Centre [for short, "the CIT(A)"] for the assessment year (AY) 2018-19. The Ld. CIT(A) has reversed the denial of exemption of

Rs.6,13,68,680/- and Rs.76,18,730/- u/s 10(23FB) and u/s. 10(35) of the Act respectively by the Assessing Officer (AO), National e-assessment Centre, Delhi vide assessment order dated 07.04.2021 u/s 143(3) r.w.s. 143(3A) & 143(38) of the Act.

2 The grounds of appeal of the revenue are reproduced hereunder

"1. Whether on the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in deleting the addition made by the AO and allowing the exemption of Rs. 6,13,38,080/- u/s 10(23FB) of the Act.

2 Whether on the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in not upholding the status of three investee companies of the assessee as NON VCU for the reasons discussed in detail in the assessment order

3 Whether on the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in deleting the addition made by the Assessing Officer and allowing the exemption of Rs. 6,13,38,680 u/s 10(23FB) of the Act in spite of fact that the said M/s Startech Infra-projects Pvt Ltd. and M/s Ozone Projects Private Limited, both companies VCU has not carried any business and derived any income during the year under consideration, where the chapter -III specially mentioned that income of any clause u/s 10 shall not be included total income of a previous year

4 Whether in the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in deleting the addition when CSN Estate Pvt Ltd in which the Assessee has invested which return has lent the money to third party, which shows that it is engaged in finance activity and such act of lending money to third party is clear violation of SEBI (Venture capital Funds) Regulation Act, 1996.

5 Whether on the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in deleting the addition made by the Assessing officer since SEBI has not take any adverse view where as per the provision of Act income derived by the assessee from such investment is not eligible for exemption u/s 10(23FB) of the Act

6. Whether on the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in deleting the addition made by the Assessing Officer, whereas the section 10(23FB), has been amended from 01.04.2008 restricting the scope of Investment to only Venture Capital undertakings.

7. Whether on the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in allowing the exemption u/s 10(35) of the Act, of Rs.76,18,730/- earned from distribution from units held in mutual funds.

8. The appellant prays that the order of the Hon'ble CIT(A), on the above grounds be set aside and that of the assessee officer be restored.

9. The appellant craves to amend or after any grounds or add a new ground which may be necessary"

3 The facts of the case, in brief, are that the assessee was incorporated as a Trust and was registered with SEBI as a Venture of Capital Fund (VCF) under SEBI [Venture Capital Fund) Regulations, 1996 [VCF Regulations). The assessee derived its income from investments in Optionally Convertible Debenture (OCD) of various Venture Capital Undertakings (VCU) and claimed the same as exempt u/s 10(23FB) of the Act. The assessee also received dividend from investment in Mutual Funds and claimed it as exempt income u/s 10(35) of the Act. The assessee filed its return of income for the A.Y. 2018-19 on 14.08.2018 declaring total income of Nil after claiming exemption of Rs.6,13,38,680/- u/s 10(23FB) and

Rs.76,18,730/- u/s 10(35) of the Act. The case was selected for "complete scrutiny" under the e-Assessment Scheme, 2019 on the issue of "Claim of Exemption u/s 23(FB)". Statutory notices u/s 143(2) and 142(1) of the Act along with questionnaire were issued and served upon the assessee, however, AO has stated in the assessment order that the assessee did not respond to the show-cause notice issued to it on 26/03/2021, which was accompanied with the draft assessment order. However, at the same time he has stated that the assessee has made submissions in response to the notices issued u/s 142(1) in the e filling portal from time to time. After incorporating the provisions of section 10(23FB) of the Act and definition of Venture Capital Undertakings as per the Securities and Exchange Board of India (Venture Capital Fund) Regulations, 1996 and after examining the facts of the case in the light of the aforesaid provisions, AO observed that in order to avail exemptions u/s 10(23FB), the VCF has to cumulatively fulfill all the conditions laid down in clause (b)(A) & (B) of Explanation to section 10(23FB) of the Act.

4. During the course of assessment proceedings, the AO had asked the assessee to submit the financials of VCUs in which it has made portfolio investments and has received income during the year. From the details submitted by the assessee, the AO found that 4 out of 11 VCUs failed to fulfill the necessary criteria to qualify as VCUs. The list of the ineligible VCUs and their incomes are as under:

Sl.No.	Venture Capital Undertakings	VCU Income (In Rs.)
1.	CSN Estates Pvt. Ltd.	-
2.	Starteck Infraprojects Pvt. Ltd.	5,03,27,600/-
3.	Amrapali Smart City Development Pvt. Ltd.	-
4.	Ozone Projects Pvt. Ltd.	1,10,11,080/-
	Total VCU Income (FY 2017-18)	6,13,38,680/-

5. Before deciding as to whether incomes from the above VCUs qualify for deduction, the AO has considered the definition of VCU as per section 2(n) of the VCF Regulation, 1996. As per the said definition, VCU means a domestic company (i) whose shares are not listed on a recognized stock exchange in India and (ii) it is engaged in the business for providing services, production or manufacture of article or things but it does not include such activities or sectors which are specified in the "negative list" by the SEBI with the approval of the Central Government by notification in the Official Gazette. The AO held that Amrapali Smart City Developer Pvt. Ltd. (Amrapali) has not carried out any business activity and hence does not satisfy the aforesaid criteria. Therefore, income derived by the assessee from investment in Amrapali is not eligible for exemption u/s 10(23FB) of the Act. Regarding the CSN Estates Pvt. Ltd., he held that it is acting as a pass-through entity as it borrows money from assessee and lends the same to third party. He also found that the assessee has not received any income

from both Amrapali and CSN Estates Pvt. Ltd. Regarding Starteck Infraprojects Pvt. Ltd. and Ozane Projects Pvt. Ltd, the AO stated that there is no proof of any business conducted by them during the subject FY 2017-18 and hence they cannot be treated as VCU under the definition of VCU as per section 2(n) VCF Regulations, 1996. In view of the above reasons, he denied exemption u/s 10(23FB) of the Act.

6. Second issue dealt with by the AO is denial of exemption u/s 10(35) of the Act. The AO found that the assessee invested in the units of Mutual Funds, namely, "Aditya Birla Sun Life Cash Plus" and "Aditya Birla Sun Life Cash Manager" to the extent of Rs.15,22,44,486/-. It received dividend of Rs.76,18,730/- from the above investments and claimed it as exempt u/s 10(35) of the Act. The AO held that after A.Y. 2008-09, income of VCF shall be exempt only if it is from the investment in Venture Capital Undertakings and all other income would be taxable. Since assessee did not receive dividend from VCUs but from Mutual Funds, such dividend is not entitled for exemption u/s 10(35) of the Act. He also held that the assessee is not a person defined u/s 2[31] of the Act. The benefit of section 10(35) of the Act is not available to VCF and therefore, the AO withdrew exemption of Rs.76,18,730/- claimed u/s.10(35) of the Act. In the result, he treated the above ineligible exempt incomes claimed u/s 10(23FB) of Rs. 6,13,38,680/- and u/s.10(35) of Rs.76,18,730/- as income from other sources and determined the total income at Rs.6,89,57,410/ as against Rs.Nil declared by the assessee in the return of income. He also initiated the penalty

proceedings u/s 270A of the Act separately for inaccurate particulars of Income.

7. In the first appeal, the Id. CIT(A) after discussing the facts and observations made by the AO and the submissions by the assessee, held that similar issue was involved in the immediately preceding A.Y.2016-17 wherein, the Id. CIT(A) has decided this identical issue in favour of the assessee. He further observed that identical disallowance was made in respect of income from VCUs in the A.Y. 2016-17 which was the disallowance pertained to Amrapali Smart City Developers Pvt. Ltd., CSN Estates Pvt. Ltd. and Startek Infraprojects Pvt. Ltd, aggregating to Rs. 63,43,60,000/-. His predecessor, CIT(A) had allowed the appeal of the assessee on the impugned issue and the disallowance was deleted.

8. It is an undisputed fact that similar issue has been decided by the Tribunal in favour of the assessee vide its order in ITA No. 7504/Mum/2019 dated 13.08.2021. The relevant observations of the ITAT order has been reproduced at page Nos. 16 to 19 of the appellate order by the Ld. CIT(A). Thereafter, he deleted the disallowance of exemption claimed u/s 10(23FB) and allowed the grounds of the assessee, which is at page Nos. 19 and 20 of the appellate order. The same is reproduced hereunder for ready reference:

"As can be seen from the above, the issue of disallowance of exemption is. 10(23FB) of the Act in respect of the aforesaid 3 companies namely Amrapali Smart City Developers Pvt. Ltd., CSN Estates Pvt. Ltd., Starteck Infraprojects Pvt. Ltd. was in

dispute for A.Y. 2016-17 and the said issue has been decided in favour of the appellant by the Hon'ble Tribunal in the above mentioned case.

I also find that the investment in the company Ozone Projects Pvt. Ltd, is also made in the identical manner and the objections of the Assessing Officer is also identical to the objections raised in respect of the above 3 companies. The financial statements which are filed by the appellant clearly shows that the said company was having business activities and was engaged into real estate activities with own and leased properties. These financial statements are admittedly available on the public domain. In light of the same, the objections of the Assessing Officer are devoid of merits. I do not find merit in the holding the said investment in the company as not eligible for exemption u/s. 10(23FB) of the Act and that the said investment is eligible in lines with the findings of the Hon'ble Tribunal in case of the appellant for A. Y. 2016.

Since the issue is decided by the Hon ble Tribunal in case of the appellant for the immediate preceding year, A.Y. 2016-17, respectfully following the findings of the Hon'ble Tribunal, I decide the said issue in favour of the appellant and delete the disallowance of Rs. 6,13,38,680/- made by the Assessing Officer and direct the Assessing Officer to allow exemption u/s, 10(2378) of the Act. In result, these grounds are treated as allowed."

9. Before us the ld. CIT DR referred to various observations of the Assessing Officer and strongly relied upon his findings.

10. On the other hand, ld. AR first of all referred to the earlier order of the CIT(A) and the Tribunal and also drew our attention to financials of four VCU's and pointed out that in so far as CSN Estates Pvt. Ltd. and Amrapali Smart City Development Pvt. Ltd., since there is no income shown, therefore, the issue of Section 10(23FB) becomes purely academic in this case. In so far as other VCU's are concerned

i.e. M/s Startech Infra-projects Pvt Ltd. and M/s Ozone Projects Private Limited he pointed out from the financials that the observation and finding of the AO is incorrect and had not carried out any business operations or away from their activities appearing in the negative list.

11. After considering relevant finding given in the impugned orders as well as material referred to by the ld. AR in the paper book, first of all we find that similar issue had come up before the Tribunal in A.Y.2016-17 and 2017-18 supra wherein the appeal of the Revenue was dismissed. In the latest order passed by it on 01.03.2023 for A.Y. 2017-18, the ITAT dismissed the grounds of the subject issue by holding as under:

"4.3 We find that the Ld. CIT(A) has followed the binding precedent of the Tribunal in the case of the assessee for immediately preceding assessment year ie, assessment year 2016-17. The order of the Tribunal is still in operation and has not been reversed by any higher appellate forum, therefore, we do not find any infirmity in the order of the Ld. CIT(A) on the issue in dispute. Accordingly, the ground Nos. 1 to 7 of the appeal of the Revenue are dismissed"

12. Now coming to the investment made by the assessee in M/s Startech Infra-projects Pvt Ltd one of the VCU, the shares of which are not listed on recognized stock exchange and carries on business activity in India i.e. real estate business and these activities are not covered in the negative list under Schedule III of the SEBI (VCU) Regulations. Before the authorities below assessee had also filed financial statements of M/s Startech Infra-projects Pvt Ltd for year

ending 31/03/2020. From the perusal of the financials we find M/s Startech Infra-projects Pvt Ltd qualifies as a VCU under the SEBI Regulations and therefore, it qualifies as VCU for the purpose of Section 10(23FB). Similarly, in so far as investment made in M/s Ozone Projects Private Limited again the shares of which are not listed on a recognised stock exchange which also carries on business activity in India and nowhere it has been pointed out that these activities are covered in the negative list under Schedule III to the SEBI Regulations. Further, financial statement of M/s Ozone Projects Private Limited for the year ending 31/03/2018 was also enclosed. Thus, investment in this company also qualifies as a VCU under the SEBI regulations. Accordingly, we do not find any infirmity in the order of the ld. CIT(A) in following the earlier Tribunal order. In view of the above and following reasons given by the Ld. CIT(A) and the ITAT in assessee's own case for AYs 2016-17 and 2017-18, ground Nos. 1 to 6 of the revenue are dismissed.

13. The next ground of the Revenue pertains to deletion of disallowance of Rs.76,18,730/- claimed u/s 10(35) of the Act by the Ld. CIT(A). The assessee had received dividend of Rs. 76,18,730/- from its investment in units of Mutual Funds. Its claim for exemption u/s 10(35) was not allowed by AO because, according to the AO, the assessee is not a person within the meaning of section 2(31) of the Act and Income of VCF is exempt only if it is from investment in VCUs and all other incomes are liable for taxation. We find that similar issue was also before the ld. CIT(A) for AYs 2016-17 and

2017-18. After considering the arguments of both sides on the issue in dispute and the relevant materials, this ground of revenue was dismissed by the Id. CIT(A), The order of the Ld. CIT(A) was upheld by the ITAT. It would be relevant to reproduce the findings of the ITAT for A.Y. 2017-18 in its order dated 01.03.2024(supra) for ready reference:

"5.1 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that the Ld. CIT(A) has followed the finding of the Tribunal in assessment year 2016-17 on the issue in dispute. The relevant finding of the Ld. CIT(A) is reproduced as under:

"1. As can be seen from the submissions made and the assessment order for A.Y. 2016-17 placed on record, the exemption in respect of dividend income from the mutual funds of Rs. 6,64,92,670/- was denied by the Assessing Officer on the identical ground that the appellant being VCF was only eligible for exemption u/s 10(23FB) of the Act if the conditions therein were complied. As such, the appellant cannot be granted exemption u/s 10(35) of the Act if they are entitled to exemption u/s 10(23FB) of the Act. Against the said disallowance, my predecessor had decided the issue in favour of the appellant vides his order dated 18-09-2019. In an appeal filed by the Assessing Officer before the Hon'ble Tribunal in ITA No. 7504/Mum/2019, the Hon'ble Tribunal, vide its order dated 13.08 2021, held as under

17. We have heard both the parties and perused the records. Learned Departmental Representative relied upon the order of the Assessing Officer. However, he could not point out as to why assessee shall not be allowed exemption under section 10(35) of the Act with respect to dividend income.

18. Upon careful consideration we note that the Assessing Officer's view that VCF was eligible for deduction under a specific section 10(23FB) and therefore it cannot claim deduction under another section 10(35) of the Act is

totally inapplicable in the facts and circumstances of the case. Exemption under section 10(23FB) and exemption under section 10(25) of the Act operates in different fields. Learned CIT(A) is correct in holding that operations of these sections are independent. Assessee's income in VCU is exempt under section 10(23FB) of the Act and the dividend income is exempt under section 10(35) of the Act. Hence, there is no infirmity in the assessee's claim of exemption on dividend Income under section 10(35) of the Act. Learned CIT(A)'s order in this regard is cogent. Decisions referred by the Assessing Officer has been duly distinguished by learned CIT(A). We do not find any infirmity in the same. Accordingly, we uphold the order of learned CIT(A)"

1. Since the aforesaid issue is decided by the Hon'ble Tribunal in case of the appellant for A.Y. 2016-17, respectfully following the findings of the Hon'ble Tribunal, the appellant is held eligible for exemption u/s. 10(35) of the Act on the income of Rs. 2,24,18,067/-. As a result the said grounds of appeal are held allowed.

5.2 Since, the Ld. CIT(A) has followed a binding precedent on the issue in dispute, we do not find any infirmity in the order of the Ld. CIT(A) and accordingly, the finding of the Ld. CIT(A) on the issue in dispute is upheld, the ground No. 8 of appeal of the revenue is accordingly dismissed."

14. We find that the facts of the instant appeal are similar to the facts cited supra. As the facts are similar, we do not find any infirmity in the order of the Ld. CIT(A). Accordingly, his findings are upheld and ground No. 7 of revenue is dismissed.

15. Ground Nos. 8 and 9 are general in nature. No specific submission has been filed by the assessee on these grounds. Accordingly, both these grounds are dismissed.

16. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced on 27th March, 2024.

Sd/-
(S RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Mumbai; Dated 27/03/2024
KARUNA, *sr.ps*

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

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, Mumbai