

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "F" MUMBAI**

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)  
AND  
SHRI SANDEEP SINGH KARHAIL (JUDICIAL MEMBER)**

**ITA Nos. 1689 & 1691/MUM/2024  
Assessment Years: 2012-13 & 2016-17**

JM Financial Property Fund I,  
141, Maker Chambers III,  
Nariman Point,  
Mumbai-400021.

**Vs.**

Income-tax Officer, Ward-  
25(1)(1),  
Kautilya Bhavan, C-41 to C-43  
G Block, Bandra Kurla  
Complex, Bandra (East),  
Mumbai-400051.

**PAN NO. AABTJ 0513 C**  
**Appellant**

**Respondent**

Assessee by : Mr. Madhur Aggarwal/  
Mr. Pinak Shah  
Revenue by : Mr. Ashish Kumar, Sr. DR

Date of Hearing : 25/06/2024  
Date of pronouncement : 24/07/2024

**ORDER**

**PER OM PRAKASH KANT, AM**

These two appeals by the assessee are directed against separate orders, both dated 15.02.2024, passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short ‘the Ld. CIT(A)’] for assessment year 2012-13 and 2016-17 respectively. Identical issues in dispute have been



raised in both these appeals except quantum of addition, therefore, same were heard together and disposed off by way of this consolidated order for convenience.

2. The grounds raised by the assessee in ITA No. 1089/Mum/2024 for AY 2012-13 are reproduced as under:

**Ground No. 1: General**

*On the facts and in the circumstances of the case and in law, the reassessment order dated 27.12.2019 passed under section 143(3) read with section 147 of the Income-tax Act, 1961 ('the Act') by the Ld. Income Tax Officer - 17(2)(1), Mumbai (Ld. AO) and the order dated 15.02.2024 passed under section 250 of the Act by the Ld. Commissioner of Income-tax (Appeals) - National Faceless Appeal Centre ('Ld. CIT(A) - NFAC\*) are without application of mind, bad in law and liable to be quashed.*

**Ground No. 2: Reassessment order is invalid and non-est in absence of a valid DIN**

*On the facts and in the circumstances of the case and in law, the reassessment order dated 27.12.2019 being passed in absence of a valid Document Identification Number (DIN) is in violation of the Circular No. 19/2019 dated 14 August 2019 issued by the Central Board of Direct Taxes and therefore, is invalid, non-est and is liable to be quashed.*

**Ground No. 3: Reopening of the assessment is bad in law**

*On the facts and in the circumstances of the case and in law, the Ld. CIT(A) - NFAC, has erred in upholding the reopening of the assessment under section 147 of the Act by the Ld. AO, without appreciating that the reopening is without jurisdiction, bad in law and void-ab-initio.*

*The Appellant prays that reassessment proceeding be held as without jurisdiction, bad in law and void-ab-initio.*

**Ground Nos. 4 to 10 are without prejudice to Ground Nos. 1 to 3**

**Ground No. 4: Denying the exemption under section 10(23FB) of the Act**

*On the facts and circumstances of the case, and in law, the Ld. CIT(A) - NFAC erred in upholding the AO's action of denying the exemption under section 10(23FB) of the Act to the Appellant.*



While doing so, the Ld. CIT(A) - NFAC erred in, inter alia, not appreciating that:

a. The Ld. AO grossly erred in usurping the statutory jurisdiction of the Securities and Exchange Board of India (SEBI) in alleging that the Appellant has violated SEBI (VCF) Regulations;

b. The Ld. AO erred in considering the investments made in mutual funds as violation of SEBI (VCF) Regulations;

c. The Ld. AO erred in alleging that the Appellant has invested in associate company;

d. The Ld. AO erred in alleging that the investment made in Maytas Properties Limited is in violation of SEBI (VCF) Regulations;

e. The Ld. AO erred in not considering the interpretive letters dated 10 June 2016 and 28 January 2019 issued by the SEBI.

The Appellant prays that the exemption under section 10(23FB) of the Act may kindly be granted to the Appellant.

**Ground No. 5: Denying the exemption under the provisions of section 10(35) of the Act**

Without prejudice to the above, on the facts and circumstances of the case, and in law, the Ld. CIT(A) - NFAC erred in upholding the AO's contention in denying the exemption under section 10(35) of the Act on income earned from distribution from units held in mutual funds.

The Appellant prays, on a without prejudice basis, that the income from distribution from units held in mutual funds be treated as exempt under section 10(35) of the Act.

**Ground No. 6: Order passed in violation of the Hon'ble Tribunal's order**

On the facts and circumstances of the case, and in law, the Ld. CIT(A) - NFAC has erred in not following the Hon'ble Mumbai Tribunal's order in the case of JM Financial India Fund Scheme B (JMFIIF\*) for the AY 2015-16 (ITA No. 277/Mum/2019).

The Appellant prays that the order passed by the Ld. CIT(A) - NFAC is bad-in-law as it is passed in violation of the binding decision of the Hon'ble Tribunal.

**Ground No. 7: Assessment under the provisions of section 161(1) of the Act**

Without prejudice to the above, on the facts and circumstances of the case, and in law, the Ld. CIT(A) - NFAC erred in not appreciating that the Ld. AO, having denied the exemption under section 10(23FB) and section



*10(35) of the Act, ought to have made the assessment in terms of section 161(1) of the Act.*

*The Appellant prays, on a without prejudice basis, that where exemption is denied under section 10(23FB) and section 10(35) of the Act, the income be assessed as per the provision of section 161(1) of the Act.*

**Ground No. 8: Taxation of income which had already been considered in the returns of income of the beneficiaries**

*On the facts and circumstances of the case, and in law, the Ld. CIT(A) - NFAC erred in upholding the AO's action of taxing in the hands of the Appellant, income which had already been taxed in the hands of the beneficiaries of the trust.*

**Ground No. 9: Levy of interest of Rs. 1,11,96,456 under section 234B of the Act**

*On the facts and circumstances of the case, and in law, the Ld. CIT(A) - NFAC erred in upholding the AO's action of levying the interest of Rs.1,11,96,456 under section 234B of the Act.*

*The Appellant prays that no interest be levied under section 234B of the Act.*

**Ground No. 10: Initiation of penalty proceedings**

*On the facts and circumstances of the case, and in law, the Ld. CIT(A) - NFAC erred in upholding the AO's contention in initiating penalty proceedings under section 271(1)(c) of the Act against the Appellant on account of furnishing inaccurate particulars and concealment of income.*

*The Grounds stated above are independent of, and without prejudice to one another.*

3. Briefly stated, facts of the case are that the assessee is a venture capital fund (VDF) registered with the Security Exchange Board of India (SEBI). In the return of income declaring Nil income, filed on 30/07/2012, the assessee claimed its income from investment in venture capital undertaking (VCU) as exempt u/s 10(23FB) of the Income-tax Act, 1961 (in short 'the Act') and dividend from investment in shares and return from mutual funds was claimed as exempted u/s 10(34)/10(35) of the Act. The return



of income filed by the assessee was processed u/s 143(1) of the Act. Thereafter, the Assessing Officer reopened the assessment u/s 147 of the Act. Consequently, notice u/s 148 of the Act was issued on 31.03.2019. In response, the assessee filed return of income declaring Nil income. Thereafter, assessment u/s 147 r.w.s. 143(3) of the Act was completed wherein, the Assessing Officer withdrawn the exemption u/s 10(23FB) of the Act amounting to Rs.96,97,401/-, holding that the assessee violated provisions of the SEBI (VCF) Regulations and therefore, not eligible for said exemption . The Assessing Officer further denied the exemption u/s 10(35) of the Act amounting to Rs.3,29,90,151/- claimed in respect of dividend/income from sale of the mutual fund. In this manner, total income of the assessee was assessed at Rs.4,26,87,552/-.

4. On further appeal, the Ld. CIT(A) upheld both the disallowance made by the Assessing Officer.

5. Aggrieved, the assessee is in appeal before the Tribunal by way of raising grounds as reproduced above.

6. Before us, the Ld. counsel for the assessee has filed a Paper Book containing pages 1 to 249.

7. The Ld. counsel for the assessee submitted that Ground No. 1 of the appeal is general and therefore, not required to be adjudicated separately. In ground No. 2, the assessee has challenged the reassessment order dated 27.12.2019 as being



passed in absence of invalid documentation identification number and therefore, the said reassessment order being in violation of Circular NO. 19/2019 dated 14.08.2019 issued by the Central Board of Direct Taxes (CBDT), it is invalid, *non-est*, therefore, it was liable to be quashed. In ground No. 3, the Ld. counsel for the assessee has challenged the reassessment proceedings as being without jurisdiction and bad in law. The ground Nos. 4 and 5 of the appeal of the assessee are in relation to merit of the disallowance made by the Assessing Officer.

8. Before us, the Ld. counsel for the assessee submitted that if ground Nos. 4 and 5 of the appeal of the assessee are adjudicated and it get relief, then ground Nos. 2 and 3 and ground Nos. 6 of the appeal will be rendered academic. Regarding ground Nos. 4 and 5 of the appeal of the assessee, the Ld. counsel submitted that same are covered in favour of the assessee by the order of the Tribunal in ITA No. 277/Mum/2019 for assessment year 2015-16.

9. We have heard rival submission of the parties and perused the relevant material on record.

9.1 The brief facts qua the issue in dispute raised in ground No. 4 in relation to denying exemption u/s 10(23FB) of the Act, are that assessee is a venture capital fund and raised funds from the investors and further invested in venture capital undertaking (VCU). The income earned from the VCU has been distributed to the



investors in proportion of their investment. The section 10(23FB) of the Act prescribe exemption of income from the venture capital undertaking in the hands of the VCF. The relevant provision of section 10(23FB) is reproduced as under:

*"(23FB) any income of a venture capital company or venture capital fund from investment in a venture capital undertaking."*

9.2 Further w.e.f. 01.04.2016 i.e. AY 2016-17 proviso has been inserted which exclude certain funds from this exemption. The relevant proviso is reproduced as under:

*"Provided that nothing contained in this clause shall apply in respect of any income of a venture capital company or venture capital fund, being an investment fund specified in clause (a) of the Explanation 1 to section 115UB, of the previous year relevant to the assessment year beginning on or after the 1st day of April, 2016."*

9.3 Further, venture capital fund (VCF) and venture capital undertaking (VCU) has been defined under Explanation below section 10(23FB) of the Act as under:

*"(a) .....*

*(b) "venture capital fund" means a fund—*

*(A) operating under a trust deed registered under the provisions of the Registration Act, 1908 (16 of 1908), which—*

*(I) 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*

*(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 recognised stock exchange; or

(II) has been granted a certificate of registration as Venture Capital Fund as a sub-category of Category I Alternative Investment Fund under the Alternative Investment Funds Regulations and which fulfils the following conditions, namely:—

(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

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

9.5 The assessee company received funds from investors but before investment in the VCU, temporarily parked the funds in portfolio companies or in the mutual funds and income earned there on during was claimed exempted u/s 10(34) and 10(35) of the Act. Thereafter, the funds were ultimately invested into the VCU income earned there from has been distributed among the unit holders and which has been claimed as u/s 10(23FB) of the Act. The income received from VCU was also invested temporarily in mutual fund etc before distribution to unit holders or investors. According to the Ld. Assessing Officer, the assessee was authorized for investment in the VCU only, and not to invest funds temporarily in the mutual funds etc. therefore, the assessee has violated Regulations of the SEBI prescribed for the purpose of the VCF fund. Thus, According to the Assessing Officer, the assessee was not entitled for benefit u/s 10(23FB) of the Act. The ld CIT(A) has upheld the finding of the AO. However, we find that in the case of



the assessee, the Tribunal in ITA No. 277/Mum/2019 for assessment year 2015-16 has discussed the issue in detail and held that SEBI has not given any adverse report in respect of the assessee. The relevant finding of the Tribunal (supra) is reproduced 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 ld. 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 I 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

(iii) it has not invested in any venture capital undertaking in which its director or a substantial shareholder (being a beneficial owner of equity shares exceeding ten per cent of its equity share capital) 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;

(b) "venture capital fund" means a fund--

(A) operating under a trust deed registered under the provisions of the [Registration Act, 1908](#) (16 of 1908), which--

(I) 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 I 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

(ii) 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 nature 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 accrued or arisen to, the venture capital company or the venture 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 is actually 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 Capital Company or a VCF registered with SEBI. Since, the assessee 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(23BF) 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 21st 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 has certificates as mentioned therein. Even if certificates are granted under misrepresentation of facts then it is for the concerned authorities 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 Hon. Supreme Court. It observed as under :-

*"It would be conducive to judicial discipline and the maintaining of certainty and uniformity in administering the law that the taxing authorities should proceed on the basis that the recognition granted and available for any particular assessment year implies that the provident fund satisfies all the conditions under rule 4 of Part A of the 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 sub-clause (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 I.T. 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 fulfillment of condition under sub-clause (iii) 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 AO. 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 conditions laid down under these regulations. The Tribunal further expressed the view that the Assessing Officer may report the matter of violations, 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 Ltd. 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 the appellant that there is an industry and trade practice whereby Venture Capital Funds retain certain amounts with them, pending regular investments in Venture Capital Undertakings for certain purposes, like disbursement of expenses, distribution to unit-holders, etc. Till such time the funds are not utilised for the main purposes, advisably the Venture Capital Fund would make temporary investments to earn monies. The course adopted by the assessee in this 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 by the Assessing Officer. In fact, our attention was drawn to SEBI (Informal Guidance) Scheme, 2003 issued by SEBI with regard to VCF Regulations where the temporary deployment of funds by a Venture Capital Fund in liquid mutual funds or bank deposits or other liquid assets of high quality such as treasury bills, etc. were permissible. Moreover, we cannot lose sight of the fact that the Certificate of Registration as a Venture Capital Fund issued by SEBI continues to subsist during the period under consideration, which clearly belies the assertion of the Assessing Officer that there has been a violation of VCF Regulations of SEBI. Thus, on an overall analysis of the situation, we find that the temporary investment made in the units of mutual funds is within the ambit of appellant's Trust Deed and also within the ambit of VCF Regulations of SEBI.

13. Insofar as the investment made by the assessee in Debenture application monies is concerned, in this context also we find that appellant has a good case. At the time of hearing, our attention was also drawn to the detailed written submissions made before the lower authorities, which bring out that the investment in question were towards Optionally Convertible Debentures. The assessee asserted before the lower authorities that putting application money in Convertible Debentures is also to be understood as investment in equity linked instruments because ultimately the Debenture will be converted into equity shares. In this context, with reference to the VCF Regulations of SEBI, assessee pointed out that Regulation 12(ii) of the VCF Regulations prescribes that not more than 33.33% of investible surplus may be in debt instrument of a VCU in which the VCF has already made investment by way of equity. The learned representative has pointed out that assessee had made investment in one of the VCUs by way of equity and accordingly, even if the instant Debenture application money is considered as a debt instrument, the same is within the permissible limits though, according to him, investment in equity linked Convertible Debentures is to be understood as linked to equity shares only. All these aspects have been 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 VCU 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 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 prescribed under Section 10(23FB) of the Act was not warranted, we hold so.”

9.6 Since, the only basis for the Assessing Officer for rejecting the exemption u/s 10(23FB) of the Act was violation of the SEBI Regulations in respect of VCF but The Ld. Departmental Representative (DR) could not brought on record any documentary evidence in support of contemplation or initiation of any adverse action by the SEBI for violation of VCF Regulations against the assessee. Thus, both the Assessing Officer and the Ld. DR have failed to substantiate any violation of such Regulations . There is no dispute on the other conditions of section 10(23FB) of the Act. Therefore, following the finding of the Tribunal (supra), we set aside the finding of the Ld. CIT(A) and direct the Assessing Officer to allow the exemption u/s 10(23FB) of the Act. The ground No. 4 of the appeal of the assessee is accordingly allowed.



10. The ground No. 5 of the appeal relates to disallowance of dividend income claimed by the assessee u/s 10(35) of the Act. According to the Assessing Officer, the assessee not being any person specified under the Income-tax Act and permitted to claim its income from VCU as exempt u/s 10(23FB) of the Act, it could not allowed to treat the dividend income as exempt u/s 10(35) of the Act. We find that identical issue has been decided in favour of the assessee by the Tribunal (supra), which is reproduced as under:

*“24. We have considered the rival submission about the parties and find that we have already allowed exemption to the assessee under section 10(23FB) of the Act, which was the basis for denying further exemption under section 10(34) and section 10(35). Considering the fact that we have already allowed relief to the assessee on the exemption under section 10(23FB) therefore, the basis on which the assessee was denied exemption under section 10(34) and section 10(35) has already been set aside therefore the discussion on the merit of these grounds of appeal have become academic, resultantly, they assessee is also allowed exemption under section 10(34) and 10(35) of the Act.”*

10.1 Further, the Tribunal in the case of Aditya Birla Real Estate Fund in ITA No. 2684/Mum/2023 for assessment year 2017-18 has relied in the order of the Tribunal in assessment year 2016-17 wherein it is held that provisions of section 10(35) of the Act and section 10(24FB) of the Act operate in different fields and therefore, Assessing Officer cannot exclude either of exemption. The relevant finding of the Tribunal(supra) is reproduced as under:

*“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.”

10.2 In view of the above, the disallowance of dividend income u/s 10(35) of the Act sustained by the Ld. CIT(A) is set-aside. The ground No. 5 of appeal of the assessee is accordingly allowed. Since, we have already allowed the ground Nos. 4 and 5 of the appeal of the assessee, the other grounds are rendered merely academic and therefore, we are not required to adjudicate upon.

11. In ITA No. 1691/Mum/2024, for AY 2016-17, there are no change in facts and circumstances except that proviso has been introduced u/s 10(23FB) of the Act which we have already reproduced above. This proviso is effective from the assessment year 2016-17 i.e. present assessment year. Therefore, we restore the issue in dispute for the assessment year under consideration back to the file of the Assessing Officer for examining the applicability of the proviso and if the same is not applicable then Assessing Officer following our finding in the assessment year 2012-13 allow the exemption u/s 10(23FB) of the Act and u/s 10(34) and section 10(35) of the Act in accordance with law. Since, the grounds on merit have been adjudicated ,therefore, other grounds raised by the assessee are rendered merely academic, hence we are not adjudicating upon.



12. In the result, the appeal of the assessee for assessment year 2012-13 is allowed whereas appeal of assessee for assessment year 2016-17 is allowed for statistical purposes.

**Order pronounced in the open Court on 24/07/2024.**

**Sd/-  
(SANDEEP SINGH KARHAIL)  
JUDICIAL MEMBER**

**Sd/-  
(OM PRAKASH KANT)  
ACCOUNTANT MEMBER**

Mumbai;  
Dated: 24/07/2024  
Rahul Sharma, Sr. P.S.

**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,  
(Assistant Registrar)  
**ITAT, Mumbai**