

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"C" BENCH, MUMBAI**

**SHRI AMARJIT SINGH, ACCOUNTANT MEMBER  
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 368/MUM/2024  
(Assessment Year: 2015-16)**

**Assistant Commissioner of Income Tax  
Circle 23(1), Mumbai,  
511, 5<sup>th</sup> Floor, Piramal Chambers,  
Parel, Mumbai - 400012**

..... **Appellant**

**Milestone Real Estate Fund**  
402A, Hallmark Business Plaza,  
Sant Dyaneshwar Marg,  
Opp. Gurunanak Hospital,  
Bandra (East), Mumbai - 400051  
[PAN: AAATI5880L]

Vs

..... **Respondent**

**ITA No. 06/MUM/2024      &      ITA No. 194/MUM/2024  
(Assessment Year: 2017-18)      (Assessment Year: 2018-19)**

**Assistant Commissioner of Income Tax  
Circle 23(1), Mumbai,  
511, 5<sup>th</sup> Floor, Piramal Chambers,  
Lalbaugh, Parel, Mumbai - 400012**

..... **Appellant**

**Milestone Real Estate Fund**  
Cowrks Worli PS56, 3<sup>rd</sup> Floor,  
Birla Centurion, Century Mills Compound,  
Pandurang Budhakar Marg, Worli,  
Mumbai - 400030  
[PAN: AAATI5880L]

Vs

..... **Respondent**

**Appearance**

For the Appellant/Department      :      Smt. Smiti Samant, Shri H.M.  
Bhatt, Ms. Madhu Malati Ghosh,  
Shri Raj Singh Meel

For the Respondent/Assessee      :      Shri Madhur Agarwal,  
Shri Hitesh Trivedi

**Date**

Conclusion of hearing : 29.08.2024  
Pronouncement of order : 10.09.2024

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**ORDER**

**Per Bench:**

1. This is a batch of 3 appeals pertaining to Assessment Years 2015-16, 2017-18 and 2018-19 preferred by the Revenue, which were heard together as the same involved identical issues and are, therefore, being disposed of by way of a common order.

**ITA No. 368/Mum/2024 (Assessment Year 2015-16)**

2. We would first take up appeal for the Assessment Year 2015-16 preferred by the Revenue challenging the order, dated 01/12/2023, passed by the National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as 'the **CIT(A)**'] partly allowing the appeal of the Assessee against the Assessment Order, dated 20/12/2018, passed under Section 143(3) read with Section 147 of the Income Tax Act, 1961 [hereinafter referred to as 'the **Act**'].

- 2.1. The Revenue has raised following grounds of appeal:

- "1 *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 and allowing the exemption of Rs. 1,27,93,22,744/-, u/s 10(23FB) of the I.T. Act ?"*
2. *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(23FB) of the Act, by ignoring the fact that section 10(231B) clearly states that the entire income of a VCF is not exempt, but only income from investments in venture Capital Undertaking (VCU) that are recognized by SEBI should be exempt from tax whereas, in the present case, no separate recognition has been provided for seven contributory schemes, even though all of them*

*are separately auditable and maintain separate books of accounts ?"*

3. *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(23FB) of the Act, by ignoring the fact that the exemption claimed by the assessee under section 10(23FB) of the Act is not allowable as the investments have been made by the assessee in VCU's engaged in real estate activities, which are either a service nor an activity involved in the production and manufacture of articles or things and therefore will not be eligible to be claimed as VCU's as per the VCF regulation?*
4. *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(23FB) of the Act, by ignoring the fact that the explanatory notes for the amendment made to Section 10(23FB) through the Finance Act, 2013, which implies that certain Venture Capital Funds that are availing of pass through status as of April 1,2013 will continuously enjoy that status in subsequent assessment years too, and further amendments are made for the new funds that are registered under the SEBI (Alternative Interment Funds) regulation 2012, w.e.f. May 21 2012, to get pass-through status u/s 115U and exemption u/s 10(23FB). However, the existing Venture Capital Funds that are not enjoying the pass through U/s 115U and exemption u/s 10(23FB), which were registered before May 21, 2012 will continue to be governed under the earlier provisions, which have sectorial restrictions on Venture Capital Undertakings that eligible for exemption u/s 10(23FB) as of A.Y. 2012-13 ?*
5. *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(23FB) of the Act by ignoring the fact that the assessee has made investments in VCUs which are associated concerns in which trustees held share exceeding 15% of the paid-up Equity share capital either individually or collectively and as per sub clause (c) of regulations 12, all investments made or to be made by VCF shall not be in the associated companies ?*
6. *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 amounting to Rs. 8,29,91,434/-/-, earned from distribution from units held in mutual funds?"*

7. *The appellant prays that the order of the Hon'ble CIT(A), on the above grounds be set-aside and that of the Assessing Officer be restored."*

8. *The appellant craves leave to amend or to alter any ground or add a new ground, which may be necessary."*

3. The relevant facts in brief are that the Assessee, a Venture Capital Fund, filed Return of Income for the Assessment Year 2015-16 on 30/11/2015 declaring total income of INR 10,85,28,560/-. The aforesaid return was processed under Section 143(1) of the Act. Subsequently, reassessment proceedings were initiated under Section 147 of the Act by issuance of notice, dated 14/12/2018, under Section 148 of the Act. In response to the aforesaid notices, Assessee filed return of income on 15/03/2018 declaring total income of INR 10,85,28,560/- and revised its claim of exempt income to INR 136,23,14,178/- as against INR 8,29,91,434/- claimed in the original return of income. In addition, the Assessee also claimed exemption in respect of dividend income received from the investment in mutual funds under Section 10(35) of the Act. The Assessee was provided reasons for reopening assessment against which objections were filed by the Assessee. Vide Order, dated 25/09/2018, the Assessing Officer disposed off the aforesaid objections and proceeded with the reassessment proceeding which culminated into the Assessment Order, dated 20/12/2018, passed under Section 143(3) read with 147 of the Act. The Assessing Officer assessed the total income of the Assessee on INR 147,08,42,740/- after making addition of INR 127,93,22,744/- [136,23,14,178 less INR 8,29,19,134] by denying the exemption claimed by the Assessee under Section 10(23FB) of the Act in respect of the income received from investment

made in the Venture Capital Undertaking, and addition of INR 8,29,91,434/- by denying the exemption claimed by the Assessee under Section 10(35) of the Act in respect of the dividend income received from the investment in mutual funds.

4. Being aggrieved, the Assessee preferred Appeal before the CIT(A) challenging validity of the reassessment proceedings as well as additions made by the Assessing officer on merits. Vide Order, dated 01/12/2013, the CIT(A) partly allowed the appeal preferred by the Assessee. The CIT(A) upheld the validity of reassessment proceedings but deleted the additions made by the Assessing Officer by accepting Assessee's claim for exemption under Section 10(23FB) of the Act and Section 10(35) of the Act.
5. Now the Revenue has preferred the present appeal against the relief granted by the CIT(A) on the grounds reproduced in paragraph 2 above.
6. During the appellate proceedings before us, both sides reiterated the stand taken before the authorities below. The Learned Departmental Representative, placed reliance upon the Assessment Order. Per Contra, the Learned Authorised Representative for the Appellant relied upon the following decisions of the Tribunal:
  - (a) Order dated, 10/08/2018, passed by the Mumbai Bench of the Tribunal in the case of the Assessee for the Assessment Year 2013-2014 in ITA No. 2509/MUM/2018
  - (b) Common Order, dated 22/09/2020, passed by the Mumbai Bench of the Tribunal in the case of the Assessee disposing ITA No. 1145/MUM/2018 pertaining to the Assessment Year 2014-2015
  - (c) Order dated, 13/08/2021, passed by the Mumbai Bench of the Tribunal in the case of ACIT - 23(1) Vs.

Aditya Birla Real Estate Fund for the Assessment Year  
2016-2017 in ITA No. 7504/MUM/2019

7. We have heard both sides and perused the material on record.
8. The facts as emanating from the record are that the Assessee was constituted as a trust established under the Indian Trusts Act, 1882, holding registration with the Securities and Exchange Board of India (**SEBI**) as a Venture Capital Fund (**VCF**) under the SEBI (Venture Capital Fund) Regulations, 1996.
9. During the relevant previous year the Assessee had earned two types of income (a) income derived from the investment in companies which were claimed by the Assessee to be Venture Capital Undertakings (**VCU**) and income derived from investment made in mutual fund units. In the return of income, Assessee had claimed that income derived from the investment made in Venture Capital Undertaking was exempted from tax in terms of Section 10(23FB) of the Act. While the income derived from investments made in mutual fund was claimed by the Assessee to be exempted under Section 10(35) of the Act. The aforesaid claims of the Assessee were rejected by the Assessing Officer after giving/making the following findings/observations:
  - (a) The Assessee had made investment in undertakings involvement in Real Estate Sector which fall into Negative List specified in Third Schedule of SEBI (Venture Capital Fund) Regulations, 1996. Therefore, the aforesaid investments do not qualify as investment in Venture Capital Undertaking.
  - (b) The amendments were made in the provisions of Section 10(23FB) of the Act by Finance Act, 2013 with effect from Assessment Year 2013-14, whereby the

sectoral caps were removed. However, the same would not be applicable to the Assessee who would continue to be governed by earlier provisions with sectoral restrictions. The investments was made by the Assessee in undertaking not operating in specified sectors/business or activity at the relevant time. Therefore, the income from the same would not be eligible for exemption under Section 10(23FB) of the Act.

- (c) The Assessee had made investment in the domestic companies wherein the Assessee had holding more than the threshold specified in definition of 'Venture Capital Fund' contained in Explanation (b) to Section 10(23FB) of the Act. The aforesaid investments were made in contravention of the provisions contain in SEBI (Venture Capital Fund) Regulations, 1996 and the provisions contained in Section 10(23FB) of the Act.
- (d) The investments made by the Assessee into the mutual funds were in violation of the objects of the Assessee/Trust. The income arising from the aforesaid investment could not be treated as income arising out of investment in Venture Capital Undertaking and therefore, the Assessee was not entitled to claim benefit of Section 10(23FB) in respect of the same. Further, Assessee could not be permitted to claim dividend income derived from the non-qualifying investment as exempt under Section 10(35) of the Act. As per Section 10(23FB) of the Act only income from investment in Venture Capital Undertaking was exempt under Section 10(23FB) of the Act and, therefore, all

other incomes were to be treated as taxable. Therefore, exemption under section 10(35) of the Act was not available in respect of dividend income from investment in units of mutual fund. Section 10 of the Act provides for exemption in computing the total income of a 'person'. The definition of term 'person' does not specifically include a Venture Capital Fund. A Venture Capital Fund, being a trust, enjoys special status only for the purpose of exemption under Section 10(23FB) of the Act. In Section 10(35) of the Act there is no specific import of Section 10(23FB) of the Act and vice-versa. Thus, there is no enabling provision permitting the Assessee to claim benefit of Section 10(35) of the Act.

10. In the Appeal, the CIT(A) deleted the additions made by the Assessing Officer under Section 10(23FB) of the Act by placing reliance upon the decision of the Tribunal in the case of the Assessee pertaining to the Assessment Year 2013-14 [ITA No. 2509/MUM/2018, dated 10/08/2018].

11. We have given thoughtful consideration to the rival contentions and also the view taken by the Tribunal in the decision cited on behalf of the Assessee.

**Ground No. 1 to 5**

12. We note that Section 10(23FB) was introduced by the Finance Act, 2000 with effect from 01/04/2001. As originally enacted, Section 10(23FB) of the Act provided exemption in respect of 'any income' of Venture Capital Fund set-up to raise funds for investment in 'Venture Capital Undertaking' being a domestic company whose shares are not listed on a recognized stock

exchange and which was engaged in business of service/production/manufacture of article/things [excluding activities/sectors to be specified by the SEBI with the approval of Central Government]. Section 10(23FB) as originally enacted read as under:

"10. *In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included*

*(23FB) any income of a venture capital company or venture capital fund set up to raise funds for investment in a venture capital undertaking.*

*Explanation. For the purposes of this clause,*

*xx xx*

*(c) venture capital undertaking means a domestic company*

*(i) whose shares are not listed in a recognized stock exchange in India;*

*(ii) which is engaged in the business for providing services, production or manufacture of an article or thing but does not include such activities or sectors which are specified, with the approval of the Central Government, by the Securities and Exchange Board of India, by notification in the Official Gazette, in this behalf" (Emphasis Supplied)*

13. By way of Notification, dated 28/09/2004, bearing number S.O. 1060 (E) [No.249 (F.NO.142/27/2004-TPL)], in exercise of the powers conferred by Clause (c) of Explanation to Section 10(23FB) of the Act, the Central Board of Direct Taxes (CBDT) notified a domestic company, being a Venture Capital Undertaking referred to in Clause (n) of Regulation 2 of SEBI (Venture Capital Funds) Regulations, 1996 as Venture Capital

Undertaking for the purpose of Section 10(23FB) of the Act.

14. However, as per the subsequent amendment brought by the Finance Act, 2007 (with effect from 01/04/2008), the definition of Venture Capital Undertaking, as contained in Explanation (c) to Section 10(23FB) of the Act, was substituted and Venture Capital Undertaking was defined to mean a domestic company (*whose shares are not listed on a recognized stock exchange*) engaged in specified business or activity. The new/substituted clause (c) of Explanation to Section 10(23FB) of the Act read as under:

(c) *"venture capital undertaking" means such domestic company whose shares are not listed in a recognised stock exchange in India **and** which is engaged in the:*

(i) *business of:*

(A) *nanotechnology;*

(B) *information technology relating to hardware and software development;*

(C) *seed research and development;*

(D) *bio-technology;*

(E) *research and development of new chemical entities in the pharmaceutical sector;*

(F) *production of bio-fuels;*

(G) *building and operating composite hotel-cum-convention centre with seating capacity of more than three thousand; or*

(H) *developing or operating and maintaining or developing, operating and maintaining any infrastructure facility as defined in the Explanation to clause (i) of sub-section (4) of section 80-IA; or*

(ii) *dairy or poultry industry"*

15. In relation to the above amendment, Circular No. 3 of 2008,

dated 12/03/2008, was issued by the CBDT which provided Explanatory Notes to provisions relating to direct taxes contained in the Finance Act, 2007 wherein it was stated as under:

*"14. Exemption for certain income of a venture capital company or venture capital fund*

*14.1 Clause (23FB) of section 10 provides exemption in respect of any income of a venture capital company or venture capital fund set up to raise funds for investment in a venture capital undertaking. Such "venture capital undertaking" has been defined in clause (c) of Explanation 1 to clause (23FB) to mean a venture capital undertaking referred to in the Securities and Exchange Board of India (Venture Capital Funds) Regulations, 1996 made under the Securities and Exchange Board of India Act, 1992 and notified as such in the Official Gazette by the Board for the purposes of the clause.*

*14.2 With a view to make the tax benefit more focused and to channelise **existing as well as future investments** in key, risk-prone thrust areas, clause (23FB) has been amended whereby such exemption will now be available **only in respect of income** of a venture capital company or venture capital fund **from investment in a venture capital undertaking.** For this purpose, the said clause (c) of Explanation 1 has also been amended to define "venture capital undertaking" as such domestic company whose shares are not listed in a recognised stock exchange in India and **which is engaged in the....."***

16. Thus, as per amendment brought by the Finance Act, 2007 the benefit of exemption under Section 10(23FB) of the Act was restricted to only income from investment in Venture Capital Undertaking which is engaged in the specified business/activities.
17. Thereafter, Section 10(23FB) of the Act was again amended by the Finance Act, 2012, with effect from the assessment year 2013-14, and the definition of Venture Capital Undertaking as

contained in Explanation (c) to Section 10(23FB) of the Act was again substituted. As per the substituted definition, the Venture Capital Undertaking was defined to mean 'Venture Capital Undertaking' as defined under the SEBI (Venture Capital Funds) Regulations, 1996 which reads as under:

*"2. Definition*

*In these regulations unless the context otherwise requires*

*(n) "venture capital undertaking" means a domestic company*

- (i) whose shares are not listed on a recognized stock exchange in India;*
- (ii) which is engaged in the business for providing services, production or manufacture of article or things or does not include such activities or sectors which are specified in the **negative list** by the Board with the approval of the Central Government by notification in the Official Gazette in this behalf.*

18. In this regard, the Memorandum on provisions on Direct Taxes contained in the Finance Bill, 2012 stated as under:

*"PROVISIONS RELATING TO VENTURE CAPITAL FUND (VCF) OR  
VENTURE CAPITAL COMPANY (VCC)*

*Provisions of Section 10(23FB) and Section 115U of the Act were intended to ensure a tax pass through status to Securities and Exchange Board of India (SEBI) registered Venture Capital Fund (VCF) or Venture Capital Company (VCC). Section 10(23FB) granted exemption in respect of income of such VCF/VCC. The benefit was available if investment by such VCC/VCF was in unlisted shares of a domestic company, i.e. a Venture Capital Undertaking (VCU). Section 115U ensures that income, in the hand of the investor through VCF/VCC is taxed in like manner and to the same extent as if the investment was directly made by investor in the VCU. Further, TDS provisions are not applicable to any payment made by the VCF to its investor and payment by VCC to the investor is exempted from Dividend Distribution Tax (DDT).*

*Section 10(23FB) further provides that income of a SEBI regulated VCF or VCC, derived from investment in a domestic*

company i.e. Venture Capital Undertaking (VCU), is exempt from taxation, provided the VCU is engaged in only **nine specified businesses**. The working of VCF, VCC or VCU are regulated by SEBI and RBI. In order to avoid multiplicity of conditions in different regulations for the same entities, **the sectoral restriction on business of VCU is required to be removed from Income Tax Act and such VCU is to be allowed to be governed by conditions imposed by SEBI and RBI.**

The provisions of section 115U currently allow an opportunity of indefinite deferral of taxation in the hands of investor. With a view to rationalize the above position and to align it with the true intent of a pass-through status, it is proposed to amend section 10(23FB) and section 115U to provide that:

- (i) **The venture Capital undertaking shall have same meaning as provided in relevant SEBI regulations and there would be no sectoral restriction.**
- (ii) Income accruing to VCF/VCC shall be taxable in the hands of investor on accrual basis with no deferral.
- (iii) The exemption from applicability of TDS provisions on income credited or paid by VCF/VCC to investors shall be withdrawn.

*These amendments will take effect from 1st April, 2013, and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent years.*

*[Clauses 5, 54]" (Emphasis Supplied)*

19. On perusal of the above, it become clear that as per the definition of Venture Capital Undertaking, as substituted by the Finance Act, 2012, read with the definition of 'Venture Capital Undertaking' contained in Regulation 2(n) of the SEBI (Venture Capital Funds) Regulation, 1996, a domestic company which is engaged in activities or sectors [other than those specified in the 'Negative List' contained in 'Third Schedule' to SEBI (Venture Capital Funds) Regulations, 1996] was to be regarded as Venture Capital Undertaking provided other conditions specified in Regulation 2(n)(i) were fulfilled. We find that the 'Negative List'

contained in Third Schedule to SEBI (Venture Capital Funds) Regulations, 1996 initially included 'Real Estate' Sector at Sl. No. 1. However, the same was deleted from the 'Negative List' with effect from 05/04/2004 by way of SEBI (Venture Capital Fund) (Amendment), Regulation, 2004. Thus, with effect from 05/04/2004, the 'Negative List' contained in 'Third Schedule' to SEBI (Venture Capital Funds) Regulations, 1996 read as under:

*"THIRD SCHEDULE  
Securities and Exchange Board of India  
(Venture Capital Funds) Regulation, 1996*

*NEGATIVE LIST*

*(1)\*\* \*\* \*\**

*(2) Non-banking financial services [excluding those Non-Banking Financial Companies which are registered with Reserve Bank of India and have been categorized as Equipment Leasing or Hire Purchase Companies.].*

*(3) gold financing [excluding those companies which are engaged in gold financing for jewellery.].*

*(4) Activities not permitted under industrial policy of Government of India*

*(5) Any other activity which may be specified by the Board in consultation with Government of India from time to time."*

20. Subsequently, with effect from 21/05/2012, the SEBI (Venture Capital Fund) Regulations, 1996 was replaced by the SEBI (Alternative Investment Funds) Regulations, 2012, and corresponding changes were made in Section 10(23FB) of the Act.

21. Thus, Section 10(23B) of the Act as applicable for the relevant assessment year(s) read as under:

*"10. In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included*

xx xx

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

Following proviso shall be inserted to clause (23FB) of section 10 by the Finance Act, 2015, w.e.f. 1-4-2016:

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.

[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 recognised 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 recognised 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 Regulations4;]

5[\*\*\*]."

(Emphasis Supplied)

22. Keeping in view the above provisions of Section 10(23FB) of the Act as applicable to the relevant assessment year, we hold as under:

- (a) The Assessee qualifies as a 'Venture Capital Fund' in terms of Explanation (b)(A)(I) to Section 10(23FB) of the Act. The Assessee-Trust was created vide registered Trust Deed, dated 18/07/2005, and was granted registration by the SEBI as a Venture Capital Fund on 26/09/2005. The Assessee continues to be regulated under the SEBI (Venture Capital Funds) Regulations, 1996 as it holds a valid registration till date. In our view, the Assessing Officer erred in placing reliance on the provisions contained in Explanation (b)(A)(II)(i)/(ii) to Section 10(23FB) of the Act while concluding that the Assessee does not qualify as a Venture Capital Fund as the same are not applicable to the Assessee since the Assessee is registered as Venture Capital Fund under SEBI (Venture Capital Funds) Regulations, 1996 and not as Venture Capital Fund registered under the sub-category of Alternative Investment Fund under SEBI (Alternative Investment Funds) Regulations, 2012. Further, in any case, the as per Explanation (b)(A)(II)(ii) to Section 10(23FB) of the Act a

Venture Capital Fund registered under the sub-category of Alternative Investment Fund is not permitted to make investment in venture capital undertakings in which its trustee or the settler holds equity shares in excess of fifteen per cent of the paid-up equity share capital of such venture capital undertaking. There is no bar on the Venture Capital Fund from holding more than 15% paid-up equity capital of Venture Capital Undertaking. Thus, the provisions of contained in Explanation (b)(A)(II) to Section 10(23) of the Act are not attracted in the facts of the present case.

- (b) The investments made by the Assessee in domestic companies in real estate sector cannot be regarded as falling outside the ambit of definition of 'Venture Capital Undertaking' as contained in Regulation 2(n) of the SEBI (Venture Capital Fund) Regulation, 1996 since the 'Real Estate' sector stands omitted from the 'Negative List' contained in 'Third Schedule' to SEBI (Venture Capital Fund) Regulation, 1996 with effect from 05/04/2004 by the SEBI (Venture Capital Fund) (Amendment), Regulation, 2004. Thus, to this extent, there is no violation of terms and conditions subject to which the Assessee was registered as Venture Capital Fund by SEBI.
- (c) The contention of the Revenue that an investment made by the Assessee as an investment in Venture Capital Undertaking has to be tested on the basis of the definition of Venture Capital Undertaking as on the date of investment does not have any statutory basis. The sectoral restriction on the business of the domestic companies otherwise falling within the definition of 'Venture Capital

Undertaking' as defined in Regulation 2(n) of the SEBI (Venture Capital Fund) Regulation, 1996 were brought in by Finance Act, 2007 and removed by the Finance Act, 2012. While removing the sectoral restrictions, no provision/clause was incorporated in Section 10(23FB) of the Act to restrict the benefit of Section 10(23FB) to only investments made after 01/04/2013 [i.e., the date on which the amendments made by the Finance Act, 2012 to Section 10(23FB) of the Act came into effect]. To the contrary, we note that even after the SEBI (Venture Capital Fund) Regulation, 1996 was replaced by the SEBI (Alternative Investment Funds) Regulations, 2012, the provisions contained in Section 10(23FB) of the Act continue to provide for exemption in respect of income from investment made by the Venture Capital Fund in a Venture Capital Undertaking.

23. We note that identical views were expressed by the Mumbai Bench of the Tribunal while allowing Assessee's appeal challenging order of revision passed by the Learned Principal Commission of Income Tax under Section 263 of the Act for the Assessment Year 2013-2014. The aforesaid order dated, 10/08/2018, passed by the Mumbai Bench of the Tribunal in ITA No. 2509/Mum/2018 was relied upon by the CIT(A) while granting relief to the Appellant in appeal preferred against the assessment order for the relevant assessment year. During the course of hearing the Learned Authorised Representative for the Appellant had also placed on record the common order, dated 22/09/2020, passed by the Tribunal in the case of the Assessee whereby the Tribunal had decided identical issues raised in appeal preferred by the Assessee in ITA No. 1145/Mum/2018 pertaining to the Assessment Year 2014-15 in favor of the

Assessee by following the aforesaid decision of the Tribunal for the Assessment Year 2013-14. In view of the aforesaid Ground No. 1 to 5 raised by the Revenue are dismissed.

**Ground No. 6**

24. We note that even the contention raised by the Revenue regarding investments made by the Assessee in the units of mutual fund leading to violation of the terms of trust deed and the terms/condition on which registration as Venture Capital Fund was granted to the Assessee by SEBI were considered and rejected by the Mumbai Bench of the Tribunal in the above decision for the Assessment Year 2013-14 [ITA No. 2509/Mum/2018, dated 10/08/2018] holding as under:

*"25. Further, the learned Principal Commissioner has observed that the assessee has violated the conditions imposed under Securities and Exchange Board of India Act and Regulations by investing in mutual fund. However, the learned Principal Commissioner has not specified which provisions of SEBI Act or Regulations have been violated by the assessee by investing in mutual fund. On carefully going through the Securities and Exchange Board of India (Venture Capital Funds) Regulations, 1996, we were unable to locate any restriction/condition imposed therein prohibiting the assessee from investing in mutual fund. On the contrary, the learned Sr. Counsel has brought to our notice a clarification issued by SEBI, wherein, it has been specifically stated that there is no prohibition in investing surplus fund available with Venture Capital Fund in short term liquid mutual fund. In any case of the matter, the allegation of breach/violation of SEBI Regulation has originated from the Principal Commissioner, whereas, there is no such allegation of violation of SEBI Regulations by the competent authority i.e., SEBI. Undisputedly, SEBI has issued registration certificate to the assessee registering it as a Venture Capital Fund in the year 2005. Therefore, the competent authority which can look into any violation is the SEBI. Neither the registration certificate granted has been withdrawn by SEBI nor any action has been taken against the assessee for any violation as alleged by the learned Principal Commissioner. In fact, on going through the Securities and Exchange Board of India (Venture Capital Funds) Regulations,*

1996, we find that as per section 8 of the said Regulations, the grant of registration certificate is subject to the condition that Venture Capital Fund shall abide by the conditions mentioned therein. There is no material on record to indicate that the assessee has violated any of the conditions of section 8 of Securities and Exchange Board of India (Venture Capital Funds) Regulations, 1996. Further, section 22 of the said Regulation empowers SEBI to call upon the Venture Capital Fund to file such report, as the Board may desire with regard to activities carried on by the Venture Capital Fund. Further, section 25 of the said Regulation empowers the Board to inspect or investigate the books of account, records and documents of a Venture Capital Fund through an Inspecting or Investigating Officer and on the basis of such report, the Board can take such measures against the Venture Capital Fund as per section 29 or 30 of the said Regulation. Undisputedly, in case of the present assessee there is no such allegation or action by the SEBI which could demonstrate violation of any conditions imposed by SEBI. At least, no material has been brought before us by the learned Departmental Representative to demonstrate such fact. Thus, in the absence of any allegation or action by the SEBI against the assessee towards violation of SEBI Regulations, the learned Principal Commissioner cannot make such allegation only for the purpose of denying assessee's claim of exemption under section 10(23FB) of the Act. In this context, we may rely upon the following decisions:

- (i) G.V.K. Biosciences (P.) Ltd. (supra);
- (ii) Small Is Beautiful case (supra); and
- (iii) Gujarat Information Technology Fund case supra).

26. In fact, in case of DHFL Venture Capital Fund (supra), the Tribunal, while considering a similar issue of claim of exemption under section 10(23FB) of the Act has held that in the absence of allegation of any violation of its Regulations by SEBI, the income tax authorities cannot disallow assessee's claim of exemption alleging violation of SEBI conditions. Thus, the reasoning of the learned Principal Commissioner that the assessee has violated SEBI Regulations, hence, not eligible to avail exemption under section 10(23FB) of the Act is unsustainable. (Emphasis Supplied)

25. Further, on behalf of the Assessee reliance in this regard was also placed on the decision of the Tribunal in the case of ACIT –

23(1) Vs. M/s Aditya Birla Real Estate Fund [ITA No. 7504/Mum/2019; Assessment Year 2016-2017, dated 13/05/2021] wherein the Tribunal had rejected the contention of the Revenue that exemption under Section 10(35) of the Act would not be available to a Venture Capital Fund eligible to claim exemption under Section 10(23FB) of the Act. The relevant extract of the aforesaid decision of the Tribunal holds as under:

*"11. Furthermore, we note that the ITAT in ITA No. 7472/Mum/2015 in the case of HDFC Property Fund Vs. ITO vide order dated 28.2.2019 has held that venture capital fund (VCF) cannot be denied benefit of section 10(23FB) if the same is operating in terms of trust deed, and its certificate granted by SEBI subsists and there is no adverse action taken or contemplated by SEBI for violation of any VCF Regulation. We may refer to para 14 of the said order as under :*

*"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." 12. In the background of aforesaid discussion and precedent we do not find any infirmity in the order of learned CIT(A). In this view of the matter we uphold the order of learned CIT(A).*

Ground No.2.

13. Brief facts are that the AO stated in his order that the income of VCF shall be exempt only to the extent it is

from the investment in venture capital undertaking. All other incomes would be taxable. On perusal of computation of income filed by 'the assessee, the AO noticed that the assessee has made investments in the units of Mutual Fund 'Birla Sun Life Cash Manager' to the tune of Rs. 74,04,81,089/- on which it has received dividend income of Rs.6,64,92,670/- and claimed exemption u/s. 10(35). The AO has disallowed the said claim of deduction u/s. 10(35) of the Act for the following reasons:

i) the assessee Fund which was created to function as a VCF was eligible for deduction under a specific section 10(23FB) and therefore it cannot claim deduction under another section of 10(35) on a part of its income. After the amendment in the provision of section 10(23FB) w.e.f. 1.04.2008, the exemption was made more restrictive and income' other than the income from investment in VCUs would be taxable.

The A.O relied on the following decisions:

a) Hon'ble ITAT, Mumbai in the case of ITO-19(2)(3) vs. M/s. Khitij Venture Capital Fund.

b) Hon'ble ITAT, Ahmedabad Bench in, the case of ITO, Ward 10(20 Vs. Gujarat Information Technology Fund.

ii) the assessee, which is a VCF, is not covered by the definition of a 'person' as defined under section 2(31) of the Act, since it is a trust which enjoys a special 'status' for the specific purpose of only exemption u/s 10(23FB) of the Act.

14. In view of the above, the AO has denied the assessee's claim of exemption with respect to income from mutual funds amounting to Rs.664,92,670/-

15. Upon assessee's appeal learned CIT(A) deleted the disallowance by holding as under :-

"I have considered the AO's order and submissions and details filed by the appellant. The appellant is

*registered as a VCF under SEBI Regulations and its income from investment in VCUs is exempt u/s 10(23FB) of the Act. Further, it has earned some income which are not from investment in VCUs and the -same has been offered to tax as Non VCU income. The non-VCU income includes, interest income on Fixed deposits, interest income on delayed payment of capital contribution, profit from sale of Units of Mutual Fund and dividend from investment in Mutual Fund.*

*6.3.1 The AO has disallowed the claim of exemption u/s. 10(35), in respect of the dividend income earned on Mutual Funds, on the ground that appellant is a Fund which was created to function as a VCF and was eligible for deduction under a specific section 10(23FB) and therefore it cannot claim deduction under (another section of 10(35) on a part of its income. Further, the AO has taken a view that the appellant being a Venture Capital Fund (VCF), is not covered by the definition of a 'person' as defined under section 2(31) of the Act, since it is a trust which enjoys a special 'status' for the specific purpose of only exemption u/s. 10(23FB) of the Act.*

*6.3.2 I find that the appellant is a Trust Fund and has been registered as a VCF by the SEBI Regulations. Its status is that of an AOP(Trust) and the return of income has been filed by the Trustee, in the status of AOP(Trust). The AO has also accepted the status of appellant as a Trust in the assessment order.*

*The general rule as laid down in section 161(1) is that income received by a trustee on behalf of the beneficiary shall be assessed in the hands of the trustee as representative assessee and such assessment shall be made and the tax thereon shall be levied upon and be recovered from the representative assesses in like manner and to the same extent as it would be leviable upon the recoverable from the person represented by him. So the view taken by the AO that the appellant is not*

covered by the definition of person under section 2(31) is not correct. Ground No. 6 is allowed.

6.3.3 The AO has sought to tax the income from Mutual Funds received as dividend and exempt u/s. 10(35). In this regard, I find that the operation of section 10(23FB) and 10(35) are independent. Since, the appellant Fund has income from investment in VCU the same has been excluded from its total income u/s. 10(23FB), by treating it as a pass through entity for such, which is to be taxed in the hands of the investors/beneficiaries in terms of section 115U of the Act. However, since the non VCU income has not been so excluded, the same has been, offered to tax by the appellant and necessary exemption u/s 10(35) would be available to the appellant on such income, like any other person assessed to tax. The decisions cited by the A.O in the case of M/s, Kshitij Venture Capital Fund and M/s. Gujarat information Technology Fund are in respect of the exemption available to a VCF u/s, 10(23FB) and are not concerned in the issue of allowing exemption to a VCF u/s.10(35) of the Act. Thus, there is no justification for disallowing the claim of exemption in respect of income by way of dividends u/s. 10(35) of the Act. Further, I find that the appellant has not claimed any expenditure while computing its non VCU income and therefore, no disallowance u/s. 14A is required in the present facts of the case. In view of above discussion, the addition of Rs. 664,92,670/- on account of disallowance of exemption claimed u/s. 10(35) of the Act is deleted."

16. Against the above order Revenue is in appeal before us.

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(35) 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)."*

26. Respectfully following the above decisions of the Tribunal, we hold that in the facts and circumstances of the present case the Assessee was entitled to claim exemption under Section 10(35) of the Act in respect of dividend income received from investment in units of mutual fund as the same were neither shown to be in violation of terms of the trust deed or any SEBI regulations. Accordingly, Ground No. 6 raised by the Revenue is dismissed.
27. We do not find any infirmity in the order passed by the CIT(A) as the CIT(A) has granted relief to the Assessee by following the binding decision of the Tribunal.

**ITA No. 06/Mum/2024 (Assessment Year 2017-18)**  
**ITA No.194/Mum/2024 (Assessment Year 2018-19)**

28. During the course of hearing both the sides had agreed that grounds of appeal raised by the Revenue in appeals for the Assessment Years 2017-2018 and 2018-2019 were identical to the grounds raised in appeal for the Assessment Year 20015-2016. Since there was no change in the facts & circumstances,

both the sides had adopted their respective submission made in appeal for the Assessment Year 2015-2016. Therefore, keeping in view findings and adjudication in respect grounds raised by the Revenue in appeal for the Assessment Year 2015-2016, which shall apply mutatis mutandis to the corresponding grounds raised in the appeal for the Assessment Year 2017-2018 and 2018-2019, all the grounds raised by the Revenue in appeal for the Assessment Year 2017-2018 and 2018-2019 are dismissed.

29. In result, all the three appeals preferred by the Revenue are dismissed.

Order pronounced on 10.09.2024

**Sd/-**

**(Amarjit Singh)**  
**Accountant Member**

**Sd/-**

**(Rahul Chaudhary)**  
**Judicial Member**

मुंबई Mumbai; दिनांक Dated : 10.09.2024

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai