

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

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SMT RENU JAUHRI, ACCOUNTANT MEMBER**

**ITA No.890/Mum/2024
(Assessment Year :2018-19)**

Aditya Birla Private Equity Trust A1, Aditya Birla Centre S.K. Ahire Marg Worli, Mumbai Maharashtra-400030	Vs.	National Faceless Assessment Centre, Delhi (Income Tax Officer-20(1)(1), Mumbai
PAN/GIR No.AACTA4226E		
(Appellant)	..	(Respondent)

Assessee by	Shri Yogesh Thar
Revenue by	Shri P.D.Chougule
Date of Hearing	23/08/2024
Date of Pronouncement	20/11/2024

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeal has been filed by the assessee against order dated 16/01/2024 passed by NFAC, Delhi for the quantum of assessment passed u/s.143(3) for A.Y.2018-19.

2. In the grounds of appeal the assessee has raised following grounds:-

1. *Ground no. I: Not following the order of Hon'ble Tribunal in appellant's own case on an identical issue is bad in law.*

2. Ground no. II: Denial of exemption u/s. 10(23FB) of the act.
3. Ground no. III: Same income cannot be subject to tax twice.
4. Ground no. IV: Denial of exemption u/s. 10(34) and 10(35) of the act.
5. Ground no. V: Denial of exemption u/s. 10(38) of the act.
6. Ground no. VII: Income computed in a commercial manner.
7. Ground no. VIII: Levy of interest u/s.234B & 234C of the Act amounting to Rs. 59,41,19,825.

3. The brief facts are that assessee is a trust established under the Indian Trust Act, 1882 on December 03, 2008. Further, the assessee is also registered as a Venture Capital Fund with Securities and Exchange Board of India ("SEBI") under the SEBI (Venture Capital Fund) Regulation, 1996 ("SEBI VCF Regulations"). The assessee had filed its return of income u/s. 139(1) of the Income Tax Act, 1961 ("the Act") for the captioned assessment year declaring total income of Rs. NIL after claiming exemption of Rs. 4,07,58,22,095/-. The breakup of exempt income is as under:

Sr. No.	Nature of Income	Amount	Exempt u/s.
1.	Dividend from investments in Mutual Fund Units	1,66,65,945	10(35)
2.	Dividend from Investment in Venture Capital Undertaking ("VCU")	7,07,51,739	10(23FB)

3.	Long Term Capital Gain from VCU being gain on sale of unlisted shares	1,50,06,84,003	10(23FB)
4.	Long Term Capital Gain from VCU being gain on sale of listed shares	2,48,77,20,408	10(23FB)
	Total	4,07,58,22,095	

4. Ld. AO had denied the exemption claimed u/s.10 (23FB) and held that assessee has to fulfill the conditions laid down in Clause (b)(A) of the Explanation. He further observed that –

(i) The first condition prescribed by the above section as per clause (b)(A) is that for any entity to be a VCF for claiming exemption under this section, it must be registered and operating as a trust under the provisions of Registration Act 1908. Vide its letter dated 08.02 2021, the assessee had stated that "Aditya Birla Private Equity Trust (the Trust) is a trust established under the Indian Trust Act, 1882 on 03/12/2008 and registered with Securities and Exchange Board of India (SEBI) as a Venture Capital Fund (VCF) vide registration number IN/VCF/08-09/138 dated 24/12/2008. The Trust has formulated a scheme called Aditya Birla Private Equity-Sunrise Fund under the SEBI-VCF Regulations. The objectives of the trust is to raise funds for the purpose of making investment in Indian unlisted companies via equity or equity related instruments or other instruments permitted under SEBI VCF

Regulations. The primary Objective of the Trust will be to carry on, through its various Schemes, the activity of a venture capital fund as permissible under the Regulations and for the purpose of raising resources to make available venture capital assistance to Portfolio Companies so as to achieve long-term capital appreciation for its Contributors. The trust is not in any business activity and the main object of the trust is make investment. During the tenure of trust has raised money by issuing its units to the contributors and had made investment in various VCU.

ii. In this case, the assessee had not only invested in the portfolio investments, but also in mutual funds which is a clear violation of the objectives of the trust. The assessee has made investments in the mutual fund units of ABSL Savings Fund- DDR Direct, ABSL Saving Fund- DDR, Birla Sunlife cash plus scheme, ABSL FRF-STP-Direct Growth Scheme etc. As mentioned above investments in mutual funds was Rs. 13:56.65,588/- as on 31/03/2018. The assessee had invested the above amount in violation and breach of the objectives of the trust.

(iii) Another condition to be fulfilled by the VCF is to have a certificate of registration as a VCF under SEBI (Venture Capital Fund) Regulations, 1996 In this regard the assessee has submitted a certificate of registration as a VCF dated 24th December, 2008. The SEBI grants this certificate on account of certain conditions to be fulfilled by a trust which are mentioned in the SEBI (VCF) Regulations, 1996.

5. Thereafter, he has reproduced Clause 7 & 8 of SEBI (VCF Regulation 1996) and the conditions of granting of certificate under Regulation 7, and held that the assessee had invested in mutual Fund units also, whereas in the capacity of VCF as per the objective of the trust deed it can invest only in "Equity, quasi-equity and equity-related investments, and would include other instruments such as preference shares, warrants for equity conversion, debt instruments and any other instrument of a like nature used to supplement the equity type instruments, issued by portfolio companies" Such investment in mutual fund in breach of the objective of the trust deed is in clear violation of Regulation 8(b) of SEBI (VCF) regulations, 1996 mentioned above. A VCF has certain restrictions in relation to the investments made as per Regulation 12 of SEBI (VCF) regulations, 1996. He further held that Regulation 12 has also been violated by the assessee trust as investment has been made in mutual funds of the Aditya Birla group.

6. Thereafter, AO has denied the claim of deduction of dividend income of Section 10(35) amounting to Rs.1,66,65,945/- holding that income of the assessee cannot be split taking income partly for computation u/s.10(23FB) and partly for computation of exemption u/s.10(35) of the Act.

7. Before the ld. AO assessee has also furnished copy of the Tribunal order for A.Y.2017-18 which was decided on the same issue, **however, he held that decision of filing further appeal**

against Tribunal order by the department is still pending therefore, he is not accepting the ITAT order.

8, Finally, AO has made the addition after observing and holding as under:-

15. The assessee's reply is not acceptable for the following reasons:

15.1 Income claimed exempt by the assessee in section 10(23FB) is exempt only in case where it is derived from investments in Venture capital undertakings, as is clear from the relevant portion of section 10(23FB), as follows:-

10(23FB) any income of a venture capital company or venture capital fund from investment in a venture capital undertaking:

In the instant case, assessee has derived two types of income- Income derived from investment in companies which are claimed to be VCU's by the assessee and

B) Income derived from investment in Mutual Fund units

In view of the claim of exemption of its income from taxation and submissions made by the assessee, it is pertinent to examine its claim of exemption u/s Section 10(23FB) on the test of its identity as Venture Capital Fund (VCF) and its income earned from investments in Venture Capital Undertaking (VCU) and whether simultaneous qualification under both is achieved by assessee or not, so as to determine and decide its claim of exemption under the said section. Section 10(23FB) of IT Act is a special instrument which has been inserted to give benefit of exemption to venture capital fund/companies for certain specialized investments subject to fulfillment of certain conditions. A plain reading of the section as reproduced in the previous paras reveals that to avail exemptions under this section, a VCF has to fulfill 26 conditions as laid out in clause (b)(A)(I).(b)(A)(II)(i),(i) & (i) of Explanation [1] of section 10(23FB), necessarily and simultaneously as the said provisions are cumulative in nature.

15.2 The first condition prescribed by the above section is that for any entity to be a VCF for claiming exemption under this section, it must be registered as a trust under the provisions of Registration Act, 1908. Assessee has filed submissions on record alongwith copy of trust deed. In view of this, the assessee is creature of trust, has acquired the status of a trust and has to maintain this status by abiding to the objectives enunciated in the trust deed. The objective of the trust is reproduced as under

2.1 The primary objective of the Trust will be to carry on, through its various Schemes, the activity of a venture capital fund as permissible under the Regulations and for the purpose of raising resources to make available venture capital assistance to Portfolio Companies, so as to achieve long-term capital appreciation for its Contributors.

2.2 The Trust and its Schemes will invest in equity, quasi-equity and equity related investments, and would include other instruments such as preference shares, warrants for equity conversion, debt instruments and any other instrument of a like nature may be used to supplement the equity type instruments, issued by portfolio companies operating within the particular investment objective of each Scheme. The combination of instruments will be so chosen to attain the objective of maximizing the return on the Fund Investments and in accordance with the provisions of the Regulations.

15.3 In the instant case, the assessee has not only invested in the companies, which the assessee has claimed to be venture capital undertakings for section 10(23FB), but also mutual funds which is a clear violation of the objects of the trust. As far as the claim of the assessee goes that investment in mutual fund was allowed by the PPM, it is undisputable that the provisions of the Act and the objectives as per the trust deed cannot be over-ridden by any clause of the PPM. The assessee has stated that it makes temporary investments from time to time to make use of idle funds. Such investment in breach of the objects of the trust deed is in clear violation of Regulation 8(b) of SEBI (VCF) Regulations, 1996.

15.4.1. In view of the claim of exemption of its income from taxation and submissions made by the assessee, it is pertinent to

examine its claim of exemption u/s Section 10(23FB) on the test of its identity as Venture Capital Fund (VCF) and its income earned from investments in Venture Capital Undertaking (VCU) and whether simultaneous qualification under both is achieved by assessee or not, so as to determine and decide its claim of exemption under the said section. Section 10(23FB) of IT Act is a special instrument which has been inserted to give benefit of exemption to venture capital fund/companies for certain specialized investments subject to fulfillment of certain conditions. A plain reading of the section as reproduced in the previous paras reveals that to avail exemptions under this section, a VCF has to fulfill 26 conditions as laid out in clause (b)(A)(1), (b)(A)(II)(i), (ii) & (ii) of Explanation [1] of section 10(23FB), necessarily and simultaneously as the said provisions are cumulative in nature.

15.4.2 The sub clause (c) of clause 12 of the VCF Regulations, 1996 puts a restriction on a VCF to invest in associated companies. The definition of the associated company as per SEBI (VCF) Regulations 1996, is reproduced as hereunder-

1[aa) "associate company", means a company in which a director or trustee or sponsor or settlor of the venture capital fund or asset management company holds either individually or collectively equity shares in excess of 15 per cent of the paid-up equity share capital of venture capital undertaking.]

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

15.5 From the above discussion, it is clear that the relevant regulations have been violated by the assessee and since the investment and resultant income are in violation of the 'Regulations which are embedded terms and conditions to the Registration' under SEBI Regulations, the Registration becomes

nonexistent in terms of Regulation 8 read with Regulation 7 In view of many violation of various regulations under SEBI (VCF) Regulations 1996, the Registration becomes non-existent and in the effect of nullity of registration, the assessee becomes debarred and failing in fulfillment of conditions during the year (each year being a separate unit) in the context of continuous fulfillment of regulations as envisaged in Regulation 8 read with Regulation 7.

15.6 The distinction between a mandatory provision of law and that which is merely directory is that in a mandatory provision there is an implied prohibition to do the act in any manner while in a directory provision, substantial compliance is considered sufficient. In cases where mandatory compliance is indicated to be condition precedent to the validity of the act itself, the neglect to perform it is fatal. These provisions have been given greater elaboration in State of Punjab vs Satpal Dang, AIR 1969 SC 903 The assessee has given a stretched interpretation of VCF regulations and has tried to water down the provisions of section 10(23FB). Here it is to be noted that the supposed intention of the legislature cannot be appealed to whittle down the statutory language which is otherwise unambiguous.

15.7 Therefore, in view of above facts and findings and legal position, it is clear that there is a clear violation of section 10(23FB)(b)(A) of the Income Tax Act, 1961, by making investment of the fund in violation and breach of the objectives of the Trust mentioned in trust deed and by violating the regulations 7 and 8 of SEBI (VCF) Regulations, 1996. The assessee loses its status/character of VCF for the said purpose and its claim of exemption under the section 10(23FB) of the Income Act is hereby rejected and its income is to be computed in a "commercial manner In view of the same the exemption amounting to Rs.405,91,56,150/- claimed u/s 10(23FB) of the IT Act as a VCF is not correct and hence withdrawn and added to the taxable income accordingly I am satisfied that it is fit case for initiating penalty proceedings u/s 270A for under reporting of income in consequence of misreporting of income in the return of income. Accordingly, penalty proceedings are initiated u/s 270A of the Act separately for mis-reporting of income

11. Before us ld. Counsel for the assessee submitted that, this issue is now squarely covered by the decision of the Tribunal in assessee's own case for A.Y.2017-18 in ITA No.1635/Mum/2020 and for the A.Y.2016-17 in ITA No.91/Mum/2024. On the other hand, Ld. DR referred and relied upon various observations of the AO as incorporated above.

12. We find that this issue stands covered by the decision of the Tribunal and the finding of the Tribunal in both the years, i.e., A.Y.2017-18 and for the A.Y.2016-17, and the finding of the Tribunal can be summarized in the following manner:-

(i) Short term investment in mutual funds is authorized by the Private Placement Memorandum ("PPM") which in turn is in accordance with the trust deed of the assessee.

(ii) The allegation that the assessee has violated the SEBI VCF Regulations is only contended by the departmental authorities, whereas there is absolutely not even a whisper of any such allegation by SEBI regarding any violation committed by the assessee of the Regulations. Thus, when the competent authority i.e. SEBI, has not found any violation of either VCF regulations or the conditions of registration granted as on date, the departmental authorities cannot presume or allege such violation.

(iii) The clarification issued by SEBI in the case Tata Capital Ltd. states that VCFs registered with SEBI can make investment of the un-invested portion of their investible funds in liquid mutual funds or bank deposits or other equity assets of higher quality,

such as treasury bills, CBLOs, commercial papers, certificate of deposits, etc. till deployment of funds as per investment objective. In the said clarification, SEBI has referred to all SEBI registered VCFs and permits short term investment of idle funds in mutual funds and other short term investments.

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

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

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

Thus, the issue involved is covered by the judgment of the Tribunal in assessee's own case for the earlier years.

13. At the time of hearing our attention was invited to the "Interpretative letter under the SEBI (Informal Guidance) Scheme, 2003 in connection with SEBI (Venture Capital Funds) Regulations, 1996" dated December 26, 2018 issued by SEBI to the Ld. AO on a query made by him, wherein SEBI has inter alia stated that registered Venture Capital Funds may deploy the un-

invested portion of the investible funds in liquid mutual funds or bank deposits or other liquid assets of higher quality till investment of funds as per the investment objective. It has been pointed out by the ld. DR that this letter of SEBI was not considered by the Tribunal nor it was pointed out before the Tribunal. However, ld. Counsel clarified that this Interpretative letter issued by SEBI was filed before the Tribunal while the matter came up for hearing. The Tribunal in its order for A.Y. 2016-17 held that since as per SEBI's communication, short term investment has made by the assessee is not in violation of the object of the Trust and on that basis, appeal of the assessee was decided in favour of the assessee in the said year. Before us it has been pointed out that in specific reply to the notice issued by the ld. AO, this fact was also informed to the ld. AO wherein, it was categorically pointed out vide letter dated 10/06/2021 that the assessee had invested in mutual funds for temporary purposes and it is duly permitted to do such investments and has not violated any conditions of its Trust deed by making such investments in mutual funds.

14. Our attention was also drawn to Clause 6.1 of the Trust deed placed in the paper book which reads as under:-

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

Amounts held by the respective Schemes pending Investment or distribution or as a reserve for the Schemes anticipated obligations will be invested in short-term securities as stated in the respective Memorandum.”

Further, the term 'Investment Policy' as referred to in Section VI Summary of Principal Terms of the Private Placement Memorandum ("PPM") reads as under:-

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

15. Thus, it was pointed out that on conjoint reading of the Trust deed with the PPM, it is clear that the funds may be temporarily invested by the assessee in mutual funds and therefore, there is no violation or breach of the objects of the Trust deed by the assessee. On perusal of the same, we agree with Ld. Counsel of the assessee that there is no breach of the object of the Trust.

16. Another point which has been raised is that, in any case the income from long term gain from VCU being gain on sale of unlisted shares which has been claimed exempt u/s. 10(23FB) has already been subject to tax in the hands of the investors, which can be seen from Form 64. Therefore, taxing the same income in the hands of the assessee would amount to taxing the same income twice. Further, the exemption claimed u/s. 10(23FB) also includes an amount of long-term capital gain from VCU being gain on sale of listed shares amounting to Rs.2,48,77,20,408/- which in any case is also exempt u/s 10(38) of the Act. Therefore, to that extent no addition can be made in the hands of the assessee. Thus, it was submitted that the issue

involved is squarely covered by the decision of the Tribunal for A.Y.2016-17 and as well as A.Y. 2017-18.

17. On the other hand, ld. DR had submitted that assessee has invested in mutual funds of group companies, therefore, there is a violation of Regulation 12(c) of SEBI VCF Regulations. It states that VSF shall not invest in an associated company.

18. However, from the plain reading of the said Regulation, we find that "associate company" as envisaged in Regulation 12(c) of SEBI VCF Regulations refers to "Company" whereas the un-investible funds of the assessee have been temporarily parked in "Mutual Funds" which is not a company but a trust. Further, the definition of "associate company" refers to "equity shares" whereas mutual fund issues "units" to its investors. Therefore, by no stretch of imagination it can be said that "mutual fund" is "associate company". Further, SEBI itself in its interpretative letter has stated that the un-invested portion of the investible funds can be deployed in liquid mutual funds.

19. Apart from that if the competent authorities SEBI has not found any violation either VCF Regulation or the conditions of registration granted, the Departmental authorities cannot be presume any violation. Thus, when SEBI itself in the Interpretative letter (supra) has clarified that registered VCF may deploy un-invested portion of the investible funds in other liquid assets of higher quality till investment of funds as per the investment objective, then there cannot be any violation of any SEBI Regulation and neither it can be violation of the objects of

the Trust as held by the ld. AO. Accordingly, we hold that the order of the Tribunal for A.Y.2016-17 and 2017-18 is clearly applicable on the facts of the present case and therefore, respectfully following the earlier year precedence, this issue is decided in favour of the assessee and even the ld. CIT (A) has merely relied upon the finding of the ld. CIT (A) in A.Y.2016-17 which has been reversed by the Tribunal.

20. In the result, appeal of the assessee is allowed.

Order pronounced on 20th November, 2024.

Sd/-
(RENU JAUHRI)
ACCOUNTANT MEMBER

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai; Dated 20/11/2024
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai