IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, JUDICIAL MEMBER
AND SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

ITA No.178/Bang/2012
Assessment year : 2008-09

The Deputy Commissioner of Income Tax, Circle 9(1), Bangalore.	Vs.	M/s. India Advantage Fund-VII, 10th Floor, Prestige Obelisk, No.3, Kasturba Road, Bangalore – 560 001. **PAN : AAATI 5597C**
APPELLANT		RESPONDENT

Appellant by	:	Shri Farahat Hussain Qureshi, CIT-II(DR)
Respondent by	:	S/Shri S.E. Dastur, Sr. Advocate & Kalpesh Maroo, C.A.

Date of hearing	:	27.08.2014
Date of Pronouncement	:	17.10.2014

O R D E R

Per N.V. Vasudevan, Judicial Member

ITA No.178/Bang/2012 is an appeal by the Revenue against the order dated 23.11.2011 of CIT(Appeals)-V, Bengaluru, relating to assessment year 2008-09.

2. The Assessee is a trust constituted under an instrument of trust dated 25/9/2006. M/s. ICICI Venture Funds Management Company Limited (hereinafter referred to as “Settlor” or “Author of Trust”) by an indenture of Trust dated 25.9.2006 transferred a sum of Rs.10,000/- to M/S. The Western India Trustee and Executor Company Limited (hereinafter referred as the “Trustee”) as initial corpus to be applied and governed by the terms and conditions of the indenture dated 25.9.2006. The trustee was empowered to call for contributions from the contributors which will be invested by the Trustee in accordance with the objects of the trust. The objective of creation of the trust was to invest in certain securities called mezzanine instruments and to achieve commensurate returns to the contributors. The fund collected from the contributors together with the initial corpus was to be handed over to the trustees under the provisions of the Indian Trust Act, 1882. The trust was to facilitate investment by the contributors who should be resident in India and achieve returns to such contributors. The trust deed provides that the contributors to the fund will also be its beneficiaries.

3. The trustees had power to appoint investment managers to manage the trust fund. The Settlor was to be appointed as the investment manager. The terms of the appointment of the Settlor as investment manager are set out in an investment management agreement dated 25.9.2006 between the Assessee represented by the Trustee and Settlor.

4. The Settlor as investment manager issued memorandum to prospective investors on a confidential basis for them to consider an investment in mezzanine Fund. An investor who wishes to contribute to the fund enters into a contribution agreement with the trust, the trustees acting on behalf of the trust and the Settlor acting in his capacity as investment manager.

5. The following is the list of beneficiaries who contributed to the fund for investment and the capital value of their investment as on 31.3.2008:

Name of the investor	Capital value as at March 31, 2008
ICICI Venture Funds Management Co. Ltd.	52,825,500
Life Insurance Corporation of India	52,770,900
SIDBI	52,770,900
Oriental Bank of Commerce	52,770,900
Central Bank of India	27,300,000
S. Gopalakrishnan	54,600,000
Hemendra Kothari	13,650,000
Riday Pradeep Nakhate	4,095,000
Debashis Chatterjee	2,730,000
Devashish Chopra	2,730,000
Kapila Malhan	2,730,000
Lalita D Gupte	2,730,000
M M Mohan	2,730,000
Nagaraj Srinivasa	2,730,000
Rahul Kumar N Baldota	2,730,000
Rajagopal Reddy Devi Reddy	2,730,000
Rajiv Kuchhal	2,730,000
R Seshasayee	2,730,000
Shrenik Kumar N Baldota	2,730,000
Visveswaran Gupta	2,730,000
Chanrai Consultants Private Ltd.	5,460,000
Chowdry Associates	2,730,000

Name of the investor	Capital value as at March 31, 2008
Nasa Finlease Private Ltd.	5,460,000
Shaw Wallace Welfare & Benefit Co.	2,730,000
Union Bank of India	52,770,900
The Oriental Insurance Co. Ltd.	27,300,000
B.S. Sons	2,730,000
Kempty Cottages (P) Ltd.	2,730,000
Radha Madhav Investments Ltd.	13,650,000
Stonera Systems (P) Ltd.	2,730,000
Suryaprakash	2,730,000
Anand Vithal Badve & Penelope Badve	2,730,000
C S Vaidyanathan	2,730,000
Ganapathy Nallasivan	2,730,000
Praveen K Ganapathy	2,730,000
ICICI Bank	52,770,900
Total	**528,255,000**

6. For AY 2008-09, the Assessee filed return of income declaring total income of Rs.1,81,68,357/- and claimed refund of Rs.61,03,968 which is nothing but the TDS made by the Assessee on the interest given to the beneficiaries as set out in the last column of the chart given in the earlier paragraph. A revised return of income was filed on 26.6.2009 in which the total income declared was the same but the request for refund of TDS as made in the original return of income was not made in the revised return of income.

7. The reason as to why the revised return of income was filed are set out by the Assessee in a letter dated 23.11.2010 addressed to the AO. The same reads thus:-

"In this regard, we wish to submit that the Fund has declared an income of Rs.1,81,68,357 in its revised return of income for the AY 2008-09. We wish to submit that the aforesaid declaration was made by the Fund out of extreme precaution and in good faith to provide complete information and details about the income earned by the Fund and offered to tax by the beneficiaries. As stated in our earlier submissions, while the Fund has disclosed the total income in its return of income, pursuant to the provisions of section 61 to section 63 of the Act, the same has been included in the return of income of the beneficiaries and offered to tax directly by them.

In order to enable the beneficiaries of the Fund to include their share of income and tax deducted at source in the Fund, in their return of income, the Fund on a period basis, provides them with the allocation of each beneficiary share of taxable income vide an allocation letter. In this regard, we have provided below the table detailing the taxable income allocated to each beneficiary for inclusion in their total income.

Sl No	Name of the investor	STCG – Profit on Sale of Mutual Fund Units	Interest Income	Expenses of the Fund	Total	TDS on Interest Income
1	ICICI Venture Funds Management Co. Ltd.	530,838	3,120,922	(1,816,836)	1,816,836	610,397
2	Life Insurance Corporation of India	530,289	3,117,696	(1,833,028)	1,814,958	609,766
3	SIDBI	530,289	3,117,696	(1,833,028)	1,814,958	609,766
4	Oriental Bank of Commerce	530,289	3,117,696	(1,833,028)	1,814,958	609,766
5	Central Bank of India	274,335	1,612,880	(948,281)	938,933	315,451
6	S. Gopalakrishnan	548,670	3,225,759	(1,896,562)	1,877,866	630,901
7	Hemendra Kothari	137,167	3,225,759	(474,141)	469,467	157,725
8	Riday Pradeep Nakhate	41,150	241,932	(142,242)	140,840	47,318
9	Debashis Chatterjee	27,433	161,288	(94,828)	93,893	31,545
10	Devashish Chopra	27,433	161,288	(94,828)	93,893	31,545
11	Kapila Malhan	27,433	161,288	(94,828)	93,893	31,545
12	Lalita D Gupte	27,433	161,288	(94,828)	93,893	31,545
13	M M Mohan	27,433	161,288	(94,828)	93,893	31,545
14	Nagaraj Srinivasa	27,433	161,288	(94,828)	93,893	31,545

Sl No	Name of the investor	STCG – Profit on Sale of Mutual Fund Units	Interest Income	Expenses of the Fund	Total	TDS on Interest Income
15	Rahul Kumar N Baldota	27,433	161,288	(94,828)	93,893	31,545
16	Rajagopal Reddy Devi Reddy	27,433	161,288	(94,828)	93,893	31,545
17	Rajiv Kuchhal	27,433	161,288	(94,828)	93,893	31,545
18	R Seshasayee	27,433	161,288	(94,828)	93,893	31,545
19	Shrenik Kumar N Baldota	27,433	161,288	(94,828)	93,893	31,545
20	Visveswaran Gupta	27,433	161,288	(94,828)	93,893	31,545
21	Chanrai Consultants Private Ltd.	54,867	322,576	(189,656)	187,787	63,090
22	Chowdry Associates	27,433	161,288	(94,828)	93,893	31,545
23	Nasa Finlease Private Ltd.	54,867	322,576	(189,656)	187,787	63,090
24	Shaw Wallace Welfare & Benefit Co.	27,433	161,288	(94,828)	93,893	31,545
25	Union Bank of India	530,289	3,117,696	(1,833,028)	1,814,958	609,766
26	The Oriental Insurance Co. Ltd.	274,335	1,612,880	(948,281)	938,933	315,451
27	B.S. Sons	27,433	161,288	(94,828)	93,893	31,545
28	Kempty Cottages (P) Ltd.	27,433	161,288	(94,828)	93,893	31,545
29	Radha Madhav Investments Ltd.	137,167	806,440	(474,141)	469,467	157,725
30	Stonera Systems (P) Ltd.	27,433	161,288	(94,828)	93,893	31,545
31	Suryaprakash K	27,433	161,288	(94,828)	93,893	31,545
32	Anand Vithal Badve & Penelope Badve	27,433	161,288	(94,828)	93,893	31,545
33	C S Vaidyanathan	27,433	161,288	(94,828)	93,893	31,545
34	Ganapathy Nallasivan	27,433	161,288	(94,828)	93,893	31,545
35	Praveen K Ganapathy	27,433	161,288	(94,828)	93,893	31,545
36	ICICI Bank	530,289	3,117,696	(1,833,028)	1,814,958	609,766
	Total	**5,308,377**	**31,209,221**	**(18,349,241)**	**18,168,357**	**6,103,968**

Consequently, the effective income taxable in the hands of the Fund is to be considered as NIL. Since, the provisions of the Act mandate that the income arising from revocable transfers are to be taxed in the hands of the transferors (i.e., the contributors) the Fund has not offered the same to tax again in its hands."

8. Before we set out as to how the AO proceeded to frame assessment in the case of the Assessee, the scheme of Assessment of income of private trust as laid down in the various provisions of the Income Tax Act, 1961 ("Act") needs to be set out. In respect of any income which the trustee receives or is entitled to receive on behalf or for the benefit of any person, the trustee would be considered as a representative assessee in terms of the provisions of Sec.160 (1)(iv) of the Act. The income received by the Assessee from the investment manager pursuant to the investment management agreement dated 25.9.2006, would be income falling within the ambit of Sec.160(1)(iv) of the Act. In respect of such income the Assessee would be considered as representative assessee.

9. In terms of Sec.161(1) of the Act, every representative assessee, as regards the income in respect of which he is a representative assessee, shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially, and shall be liable to assessment in his own name in respect of that income; but any such assessment shall be deemed to be made upon him in his representative capacity only, and the **tax shall**, subject to the other provisions contained in this Chapter, **be levied upon and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by**

him. To the above rule laid down in Sec.161(1) of the Act, there are three exceptions. They are:-

(a) Under s. 161(1A), this rule of apportionment and determination of proportionate tax attributable to the beneficiary will not apply to any income earned by the trustee as profits and gains of a business. The whole of such income shall be taxed at the "maximum marginal rate". A similar proviso occurs also in s. 164(1) restricting benefits where business income is involved.

(b) Under s. 164(1), if the individual shares of the persons on whose behalf and for whose benefit the income is receivable are indeterminate or unknown, such income, again, will be taxed at the "maximum marginal rate".

(c) In certain other circumstances, set out in the proviso to s. 164(1), the relevant income will be assessable not at the maximum rate but at the rate applicable to it as if it were the total income of an AOP.

10. Sec.166 of the Act provides that the provisions relating to making assessment in the hands of a representative assessee, income of person on whose behalf or for whose benefit income is received or receivable by the representative assessee, shall not prevent either the direct assessment of the person on whose behalf or for whose benefit income therein referred

to is receivable, or the recovery from such person of the tax payable in respect of such income.

11. Under Section 61 of the Act “All income arising to any person by virtue of a revocable transfer of assets shall be chargeable to income-tax as the income of the transferor and shall be included in his total income”. Sec.62 of the Act provides that if a transfer is irrevocable for a specified period than Sec.61 will not apply. Section 63 defines as to what is “transfer” and “revocable transfer” for the purpose of Sec.61 & 62 of the Act. It provides that:- (a) a transfer shall be deemed to be revocable if – (i) it contains any provision for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor, or (ii) it, in any way, gives the transferor a right to re-assume power directly or indirectly over the whole or any part of the income or assets; (b) "transfer" includes any settlement, trust, covenant, agreement or arrangement. The contention of the Assessee as can be seen from the reasons for filing revised return was that the monies given by the beneficiaries to the Trust was a revocable transfer and therefore any income arising from such revocable transfer will have to be necessarily assessed only in the hands of the transferee i.e., the beneficiaries and not the transferor, i.e., Trustee.

12. We will now revert to the manner in which the AO framed the order of assessment. The AO was of the view that the individual shares of the persons on whose behalf or for whose benefit income is received or

receivable by the Assessee or part thereof are indeterminate or unknown. In this regard the AO referred to the Trust Deed dated 25.9.2006 and observed that the shares of the beneficiaries are not mentioned therein. He was also of the view that the fact that the deed mentions that share of the beneficiaries would be allocated according to their investments in the fund does not make the share determinate or known. The AO was therefore of the view that the provisions of Sec.164(1) of the Act would apply and the Assessee would be liable to be assessed at the maximum marginal rate which was 30% plus surcharge, if any, and education cess, if any. The beneficiaries had however declared interest income at the applicable rates and STCG on sale of mutual fund units at 10% which is the rate as per the provisions of Sec.111A of the Act. There is no dispute with regard to the fact that the beneficiaries have declared income allocated by the Trust to them and have been assessed in respect of the share of their income. The AO also observed that the same income cannot taxed twice once in the hands of the Trust and again in the hands of the beneficiaries in view of the provisions of Sec.86 of the Act which provides that where the assessee is a member of an association of persons income-tax shall not be payable by the assessee in respect of his share in the income of the association, if the association is chargeable to tax on its total income at the maximum marginal rate or any higher rate under any of the provisions of this Act. The AO also held that the Assessee and the beneficiaries joined in a common purpose or common action, the object of which was to produce

income, profits and gains and therefore constituted an AOP. The AO also referred to the fact that the Assessee had obtained PAN in the status of an AOP (Trust) and filed its E-Return of income by quoting the status as AOP/BOI. Consequently the income in question has to be brought to tax in the hands of AOP at the maximum marginal rate. In this regard the AO made reference to the decision of the Hon'ble Supreme Court in the case of *ITO Vs. Ch. Atchaiah 218 ITR 239 (SC)* wherein, in the context of assessment of income of an AOP, it was held by the Hon'ble Supreme Court that income has to be brought to tax in the hands of right person. The Assessee had before the AO relied on the following judicial pronouncements in support of its stand that there was no AOP in existence and therefore the Assessee should not be taxed at the maximum marginal rate.

(1) Gopala Pillai A.K. Vs. ITO 75 ITR 120 (Mad);

(2) CWT Vs. Trustees of HEH Nizam's Family (remainder Wealth) Trust 107 ITR 555 (SC);

(3) CIT Vs. Shamaraju Trustees 56 Taxman 175 (Karn.); (4) Lakshmipat Singhania Vs. CIT 72 ITR 291 (SC).

The AO without discussing the facts of those cases and the ratio laid down in those decisions and as to how the facts of the Assessee's case are different from those cases, held that the cases cited are not applicable to the facts of the Assessee's case.

13. The AO also observed as follows:-

> "It is not denied that the business was carried on by the fund on behalf of the beneficiaries of the Trust (AOP) and that considerable profits were earned from the business. The control and management of the business was in the hands of the Fund. The control and management was a unified one. The beneficiaries had joined in a common purpose and they acted jointly. When they did so, they acted on behalf of the persons who are the owners of the business. The Fund did not and could not have represented the individual interest of the various beneficiaries. If they had done so, there would have been chaos in the business. The profits to which those owners lay claim and which they were not averse to pocked, were earned on behalf of an AOP. Reliance is placed on the decision of the Supreme Court in the case of N.V. Shanmugam & Co. Vs. CIT 81 ITR 310 (SC) and CIT Vs. Managing Trustees Nagore Durgah 57 ITR 321 (SC)."

14. The AO for the above reasons brought to tax the entire income in the hands of the Assessee at the Maximum Marginal Rate.

15. Before CIT(A) the Assessee challenged (i) the conclusion of the AO that the Assessee is an AOP; (ii) Income or any part of in respect of which the Assessee is liable as representative Assessee is specifically receivable on behalf or for the benefit of any one person; or the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is receivable are indeterminate or unknown.

16. **ARGUMENTS ADVANCED BY THE ASSESSEE BEFORE CIT(A) AS TO WHY IT SHOULD NOT BE REGARDED AS AOP:**

16.1 Under Section 161 of the Act the liability of a representative assessee in respect of income for which he is so assessable, the status of the Assessee cannot be different from that of the beneficiaries. For the above proposition reliance was placed on the decision of the Hon'ble Delhi High Court in the case of *CIT Vs. Food Corporation of India Contributory Provident Fund 318 ITR 318 (Del)* wherein the question for consideration was as to whether Assessee which was a trust and whose beneficiaries were individuals is liable to deduct tax at source u/s.194A of the Act, which did not apply to individuals. The Hon'ble Delhi High Court upheld the plea of the trust that its beneficiaries were individuals and therefore it should also be regarded as individual and the provisions of Sec.194A of the Act should be held to be not applicable to the Assessee trust.

16.2 Sec.2(31) of the Act defines the term "Person". The definition includes "Association of Persons"(AOP). There is no definition of the expression AOP occurring in the 1922 Act. By a series of decisions, the meaning of this expression was precisely defined and tests were laid down in order to find out when a conglomerate of persons could be held to be an AOP for the purposes of section 3 of the 1922 Act. While interpreting this expression occurring in section 3 of the Indian IT Act, 1922, the Supreme

Court in *CIT vs. Indira Balkrishna (1960) 39 ITR 546 (SC)* approved the view expressed earlier by Beaumont, C.J., in *CIT vs. Lakshmidas Devidas (1937) 5 ITR 584 (Bom)* and also *Dwarkanath Harishchandra Pitale (1937) 5 ITR 716 (Bom)*, that *"an AOP must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce income, profits or gains"*. So also is the view expressed by *Costello, J., in B.N. Elias (1935) 3 ITR 408 (Cal) : TC10R.155,* in the following words: *''It may well be that the intention of the legislature was to hit combinations of individuals who were engaged together in some joint enterprise but did not in law constitute partnerships. ... We find that .... there is a combination of persons formed for the promotion of a joint enterprise ... then I think no difficulty arises whatever in the way of saying that... these persons did constitute an association."* The Supreme Court, however, administered the following caution : *''There is no formula of universal application as to what facts, how many of them and of what nature, are necessary to come to a conclusion that there is an AOP within the meaning of section 3; it must depend on the particular facts and circumstances of each case as to whether the conclusion can be drawn or not"*. To the above judicial exposition of what constitutes AOP, there has been a statutory rider

added. The Finance Act, 2002 has inserted w.e.f. 1st April, 2003 an Explanation to clarify that object of deriving income is not necessary for AOP, BOI, local authority or an artificial juridical person in order that such entity may come within the definition of "Person" in section 2(31). If income results than they are liable to be taxed as AOP if the other conditions laid down by judicial decisions are satisfied.

16.3 In the light of the above definition of AOP, the Assessee pointed out before CIT(A) that :-

(i) the Assessee is a trust constituted under an instrument of trust dated 25/9/2006. M/S.ICICI Venture Funds Management Company Limited (hereinafter referred to as “Settlor”) by an indenture of Trust dated 25.9.2006 transferred a sum of Rs.10,000/- to M/S. The Western India Trustee and Executor Company Limited (hereinafter referred as the “Trustee”) as initial corpus to be applied and governed by the terms and conditions of the indenture dated 25.9.2006. The trustee was empowered to call for contributions from the contributors which will be invested by the Trustee in accordance with the objects of the trust. The objective of creation of the trust was to invest in certain securities called mezzanine instruments and to achieve commensurate returns to the contributors. The fund collected from the contributors together with the initial corpus was to be handed over to the trustees under the provisions of the Indian Trust Act, 1882. The trust was to facilitate

investment by the contributors who should be resident in India and achieve returns to such contributors. The contributors to the fund are its beneficiaries;

(ii) the trustees had power to appoint investment managers to manage the trust fund. The Settlor was to be appointed as the investment manager. The terms of the appointment of the settlor as investment manager are set out in an investment management agreement dated 25.9.2006 between the Assessee represented by the Trustee and Settlor; &

(iii) the Settlor as investment manager issued memorandum to prospective investors on a confidential basis for them to consider an investment in mezzanine Fund. An investor who wishes to contribute to the fund enters into a contribution agreement with the trust, the trustees acting on behalf of the trust and the Settlor acting in his capacity as investment manager.

The Assessee pleaded that the aforesaid manner in which the Trust was created and contributions obtained would show that the beneficiaries contribute their money to the Assessee and enter into separate arrangements with each beneficiary. There is no inter se arrangement between one contributory/ beneficiary and the other contributory/beneficiary as each of them enter into separate contribution arrangement with the Assessee. Therefore there it cannot be said that two or more beneficiaries

join in a common purpose or common action and therefore the tests for considering the Assessee as AOP is not satisfied. The beneficiaries have not set up the Trust. The Assessee relied on the decision of the Hon'ble Karnataka High Court in the case of *CIT Vs. Shyamaraju (Trustees) 189 ITR 392 (Karn.)* and the decision of the Hon'ble Bombay High Court in the case of *CIT Vs. Marsons Beneficiary Trust 188 ITR 224 (Bom.)*. The principle laid down in the aforesaid two decisions is that for a valid trust to be created the beneficiaries consent is not necessary. The authority to carry on activities of the trust is derived by virtue of the power conferred on the trustees by the trust deed. Therefore it cannot be said that the beneficiaries have come together with the object of carrying on investment in mezzanine funds which is the object of the trust. The beneficiaries are mere recipients of the income earned by the trust. They cannot therefore be regarded as an AOP.

(iv) With regard to the contention of the AO that the Assessee has obtained PAN in the status of an AOP (Trust) and filed its ROI by quoting the status as AOP/BOI, the Assessee pointed out that the PAN application requires that an applicant has to mandatorily state the status. Form No 49A, being the application for obtaining a PAN permits the applicant to tick only any one of tile following options:

i. Individual
ii. HUF
iii. Company

iv. Firm
v. Association of Persons
vi. Association of Persons (Trusts)
vii. Body of individuals
viii. Local authority
ix. Artificial Juridical person

The Assessee pointed out that from the above list, the Assessee is left with no other option but to choose the option of AOP (Trusts) to obtain the PAN.

(v) With regard to the status mentioned in the ROI, the Assessee pointed out that the provisions of Rule 12 of the Income- tax Rules, 1962 provides different forms for filing the ROI based on the status and nature of income of the persons. The CBDT has notified the following forms:

> ITR Form 1 - 4 is applicable to Individuals / HUF's;
> ITR 6 is applicable to Companies;
> ITR 7 is applicable to Persons being a company under section 25 of the Companies Act, 1956, Charitable or Religious trusts, Political parties, etc.;
> ITR 5 is applicable in the case of a person not being an individual or a HUF or a company or a person to whom ITR 7 applies.

The Assessee pointed out that ITR 5 is a residual form and used by any category of persons other than an Individual, HUF, Company etc. Since, there is no specific form prescribed in the case of Trusts / representative assessee, the Assessee had used ITR 5. Further, the Assessee had electronically filed the return for the subject assessment year. In the

section where the status of the person filing the return has to be mentioned, the Form for the subject assessment year contained only the following options:

1 — Firm
2 — Local Authority
3 — Cooperative Bank
4 — Cooperative Society
5 — Any other AOP/BOI

Therefore, the Assessee was left with no choice but to choose the status as "Any other AOP/BOI" in the ROI filed electronically. Considering the above, the mere fact that the status of the trust in the ROI had been mentioned as 'Any other AOP / BOI', the Assessee cannot be held to constitute an AOP. The Assessee also relied on Circular: No. 14(XL-35), dated 11-4-1955 issued by the CBDT wherein it has been clarified that

(a) Any relief which the assessee is entitled to, whether claimed in the ROI or not, has to be granted to the assessee.
(b) Only legitimate tax must be assessed and must be collected. The AO should not take advantage of an assessee's mistake to collect more tax out of the assessee that is legitimately due from him."

17. ARGUMENTS ADVANCED BY THE ASSESSEE BEFORE CIT(A) AS TO WHY PROVISIONS OF SECTION 164(1) OF THE ACT ARE NOT ATTRACTED:

17.1 Sec.164(1) of the Act will not get attracted for the reason that the beneficiaries are not identifiable. So long as the trust deed gives the

details of the beneficiaries and the description of the person who is to be benefited, the beneficiaries cannot be said to be uncertain. If in a trust deed there is a reference to wife or children as beneficiaries but as on the date of creation of the trust the marriage has not taken place, merely because wife/children cannot be known until the marriage and begetting of children by the stated beneficiaries, it cannot be said that the trust deed does not prescribe the beneficiaries and s. 164 is not attracted. Reliance was also placed on the CBDT circular No.281 dated 22.9.1980 wherein the CBDT has explained the scope of Sec.164 with regard to stating the name of the beneficiaries in the trust deed. In the said circular the provisions of Expln.-1 to Sec.164 of the Act regarding identification of beneficiaries has been explained to the effect that for identification of beneficiaries it is not necessary that the beneficiary in the relevant previous year should be actually named in the order of the Court or the instrument of trust or wakf deed, all that is necessary is that the beneficiary should be identifiable with reference to the order of the Court or the instrument of trust or wakf deed on the date of such order, instrument or deed.

17.2 With regard to ascertainment of share of the beneficiaries, it was contended that Article 6.5 of the Trust Deed clearly specifies the manner in which the income of the Assessee is to be distributed. The said clause details formula with respect to the share of each beneficiary. It is not the requirement of law that trust deed should actually prescribe the percentage share of the beneficiary in order for the trust to be determinate. It is

enough if the shares are capable of being determined based on the provisions of the trust deed. In the case of the Assessee the trustee have no discretion to decide the share of each beneficiary and are bound by the provisions of the trust deed and is duty bound to follow the distribution mechanism specified in the trust deed.

17.3 Sec. 161(1) lays down 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 assessee "in like manner and to the same extent as it would be leviable upon the recoverable from the person represented by him". In other words, in a case to which s. 161(1) applies, the trustee cannot be assessed on the aggregate income received by it. The assessment in the name of the trustee in terms of the sub-section can be made in two ways. The AO may make as many assessments, in the name of the trustee, as there are beneficiaries and levy the tax appropriate to such income at the rate of tax applicable to the total income of each beneficiary. Or, he may make a single assessment on the trustee but indicate therein the share income of each beneficiary and the tax attributable to it. To the above rule, however, three exceptions have been incorporated in the Act :

(a) Under s. 161(1A), this rule of apportionment and determination of proportionate tax attributable to the beneficiary will not apply to any income earned by the trustee as profits and gains of a business. The whole of such income shall be taxed at the "maximum marginal rate".

A similar proviso occurs also in s. 164(1) restricting benefits where business income is involved.

(b) Under s. 164(1), if the individual shares of the persons on whose behalf and for whose benefit the income is receivable are indeterminate or unknown, such income, again, will be taxed at the "maximum marginal rate".

(c) In certain other circumstances, set out in the proviso to s. 164(1), the relevant income will be assessable not at the maximum rate but at the rate applicable to it as if it were the total income of an AOP.

On application of clause (b) above, it was submitted that Sec. 164(1) will not come into operation if the trust deed sets out expressly the manner in which the beneficiaries are to be ascertained and also the share to which each of them would be entitled without ambiguity. The persons as well as the shares must be capable of being definitely pin-pointed and ascertained on the date of the trust deed itself without leaving these to be decided upon at a future date by a person other than the author either at his discretion or in a manner not envisaged in the trust deed. The whole object and intent of s. 164, as amended in 1980, is to prevent the shares of beneficiaries being manipulated at the discretion of the trustees. If it is read as requiring the specification of the beneficiaries and their shares in the deed itself, it may lead to absurdities. When the Trust deed authorises addition of further contributors to the trust at different points of time in addition to initial contributors, it is not possible to say that the share income of the beneficiaries cannot be determined or known from the trust deed.

18. **OTHER GENERAL ARGUMENTS:**

18.1 The Assessee contended before CIT(A) that the Assessee was set up as a revocable trust and the scheme of the Act clearly indicates that income of the fund has to be assessed in the hands of the beneficiaries being the contributors/transferors. Reference in this regard was made to Section 61 of the Act which provides that "All income arising to any person by virtue of a revocable transfer of assets shall be chargeable to income-tax as the income of the transferor and shall be included in his total income". Sec.62 of the Act provides that if a transfer is irrevocable for a specified period than Sec.61 will not apply. Section 63 defines as to what is "transfer" and "revocable transfer" for the purpose of Sec.61 & 62 of the Act. It provides that:-(a) a transfer shall be deemed to be revocable if-(i) it contains any provision for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor, or (ii) it, in any way, gives the transferor a right to re-assume power directly or indirectly over the whole or any part of the income or assets; (b) "transfer" includes any settlement, trust, covenant, agreement or arrangement. It was argued that under clause 13.3.1 of the trust deed the trustees may at any time before the expiry of the term terminate the trust subject to satisfying certain procedures/conditions. It was pointed out that the Hon'ble Supreme Court in the case of *CIT Vs. Rahbir Singh AIR (1966) 18 (SC)* has held that a settlement of disposition was deemed to be statutorily revocable if there was a provision therein for the retransfer of the income or assets or

which conferred a right to reassume power over the income or assets. It was contended that it was not the requirement of the Act that the trust deed should state specifically that the Trust is revocable in nature and a clause which provides for re-assumption/retransfer of the assets is sufficient to treat the trust as revocable trust. Consequently, it was argued that the income of the Assessee was chargeable to tax only in the hands of the beneficiaries/contributors in accordance with the provisions of Sec.61 of the Act.

18.2 Income of the Assessee had already been offered to tax by the beneficiaries and consequently, the same income cannot be taxed again in the hands of the appellant.

ARGUMENTS ON BEHALF OF THE ASSESSING OFFICER BEFORE THE CIT(A)

19. The AO in the form of remand report dated 20.10.2011 mainly reiterated the stand of the revenue as contained in the order of assessment as follows:-

1. The AO drew attention to Clause 6 of the trust deed regarding distribution of Trust Fund and Income and pointed out that under Clause 6.6.3 distribution will be at the discretion of the Trustee in consultation with the investment manager. According to the AO the above provision in the trust deed would show that distribution of income is at the discretion of the trustees.

2. The trust deed does not say it is a revocable trust.

3. The beneficiaries of the trust are assessed at various places of India. It is very difficult to monitor all these beneficiaries as to whether they have filed their returns and even if filed, whether correct share of income received/receivable from the assessee are admitted. The AO of the trustee will have no control to scrutinize as to whether any expenditure or set off of loss is claimed by the beneficiaries in their returns against the share income. To avoid all these things, the right and correct person to be taxed is the trustee as representative assessee on the whole of income consisting of profits and gains of business. The AO in this regard placed reliance on the decision of the ITAT Madras Bench in the case of *DCIT Vs. Manilal Bapalal Family Benefit Trust 66 ITD 179 (Mad)* wherein the provisions of Sec.161(1A) of the Act were applied.

DECISION OF THE CIT(A):

20. The CIT(A) in the impugned order has narrated the whole of the written submission of the Assessee, the remand report of the AO and rejoinder of the Assessee to the remand report and finally gave his conclusion as follows:

> "24. In view of the above discussion, after careful consideration of the facts and circumstances of the case, I am convinced that the appellant trust is a revocable trust. It need not be subjected to

tax as the tax obligations have been fully discharged by the beneficiaries of the appellant trust. Therefore the AO is directed to treat the income of the appellant trust as NIL as against Rs.3,54,10,591 determined by the AO. As the income of the appellant trust is determined as NIL the issue of disallowance of expenditure made by the AO is not considered and the appeal is allowed."

21. Aggrieved by the order of the CIT(A), the revenue has preferred the present appeal before the Tribunal. The grounds of appeal raised by the revenue read thus:

"1. The Order of the CIT (A) is opposed to facts of the case.

2. The CIT (A) should have appreciated the fact that the assessee, an Asset Management entity came into existence by virtue of a Trust deed.

3. The CIT(A) has erred in holding that the assessee trust , is a revocable trust and it need not be subjected to tax, as the tax obligation have been fully discharged by the beneficiaries of the assessee trust.

4. The CIT (A) ought to have appreciated the fact, that the names of the Beneficiaries are not identifiable in the original trust deed.

5. The CIT (A) ought to have appreciated the fact, that the beneficiaries and the shares of the beneficiaries are not mentioned in the trust deed.

6. The CIT (A) ought to have appreciated the fact that, the shares of the beneficiaries are not determinate on the basis of the trust deed. Hence, the income of the Trust has to be assessed in the hands of the Trust and not in the hands of the beneficiaries.

7. The CIT (A) ought to have appreciated the fact that the shares of the beneficiaries are not distributed exactly as per the formula determinable from the trust deed rather the shares vary

depending upon the amount contributed by the beneficiaries for asset management.

8. The CIT (A) erred in holding that the assessee, trust cannot be assessed as an "AOP".

9. The CIT (A) ought to have appreciated the fact that Section 2(31) of the I. T. Act gives an inclusive definition for the word "Person". There is no separate status of Trust envisaged in the definition of person. All the trusts are assessed on the status of AOP. This being the case, the assessment of the assessee in the status of AOP is in order. Accordingly, whatever provisions of the Act applies to AOPs will apply to the assessee also. Hence it is not relevant whether the necessary ingredients for formation of an AOP are fulfilled by the assessee or not. The assessee who is a trust is rightly assessed in the status of AOP since there is no specific status of Trust is available in Section 2(31).

10. The CIT (A) ought to have appreciated the fact that Income tax Act envisages that the income of a person has to be assessed in the correct and appropriate status. Merely, because someone else has been assessed and has paid tax, though by mistake on the same income, the entity in whose hands the income is actually assessable cannot be excluded from assessment.

11. The appellant craves for permission to add or delete the grounds of Appeal at the time of hearing the case."

22. The learned DR reiterated the stand of the revenue as contained in the order of assessment and as set out in the remand report of the AO filed before CIT(A). Besides the above, the learned DR brought to our notice CBDT Circular No.13/2014 whereby the CBDT had clarified that Alternative Investment Funds which are subject to The SEBI (Alternative Investment Funds) Regulations, 2012 which are not venture capital funds and which are non-charitable trusts where the investors name and beneficial interest

are not explicitly known on the date of its creation- such information becoming available only when the funds starts accepting contribution from the investors, have to be treated as falling within Sec.164(1) of the act and the fund should be taxed in respect of the income received on behalf of the beneficiaries at the maximum marginal rate. According to him the case of the Assessee would fall within the above directions of the CBDT and therefore the action of the AO was correct and had to be restored. It was also the submission of the learned DR that the order of the CIT(A) is a non-speaking order and does not discuss the basis on which he has come to conclusions for allowing the appeal of the Assessee.

23. The learned counsel for the Assessee submitted that the revenue should not raise disputes of the nature sought to be raised in this appeal, when the tax due on the income which the trustee received on behalf of the beneficiaries have been offered by the beneficiaries to tax and taxed in the hands of the beneficiaries. In this regard he drew our attention to the decision of the Hon'ble Bombay High Court in the case of *CIT Vs. Nagri Mills Co. Ltd. 33 ITR 681 (Bom)* wherein the Hon'ble Bombay High Court, in the context of year of allowing deduction on account of bonus to workmen, observed as follows:-

> "3. We have often wondered why the IT authorities, in a matter such as this where the deduction is obviously a permissible deduction under the IT Act, raise disputes as to the year in which the deduction should be allowed. The question as to the year in which a deduction is allowable may be material

> when the rate of tax chargeable on the assessee in two different years is different; but in the case of income of a company, tax is attracted at a uniform rate, and whether the deduction in respect of bonus was granted in the asst. yr. 1952-53 or in the assessment year corresponding to the accounting year 1952, that is in the asst. yr. 1953-54, should be a matter of no consequence to the Department; and one should have thought that the Department would not fritter away its energies in fighting matters of this kind. But, obviously, judging from the references that come up to us every now and then, the Department appears to delight in raising points of this character which do not affect the taxability of the assessee or the tax that the Department is likely to collect from him whether in one year or the other."

24. With the aforesaid prelude, he made submission on the grounds raised by the Revenue before the Tribunal in the grounds of appeal. On ground No.3 raised by the Revenue in which the revenue has attacked the findings of the CIT(A) that the Assessee trust is a revocable trust and it need not be subjected tax as the tax obligation have been fully discharged by the beneficiaries of the Assessee trust, the learned counsel for the Assessee drew our attention to Sec.61 and 63 of the Act. Section 61 of the Act provides that *"All income arising to any person by virtue of a revocable transfer of assets shall be chargeable to income-tax as the income of the transferor and shall be included in his total income".* Section 63 defines as to what is "transfer" and "revocable transfer" for the purpose of Sec.61 of the Act. It provides that:-

(a) a transfer shall be deemed to be revocable if –

  (i) it contains any provision for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor, or

(ii) it, in any way, gives the transferor a right to re-assume power directly or indirectly over the whole or any part of the income or assets;

(b) "transfer" includes any settlement, trust, covenant, agreement or arrangement.

The first aspect pointed out by him was that the beneficiaries transfer funds to the trust in accordance with the terms of the trust deed and therefore there is a transfer within the meaning of Sec.61 of the Act. It was his contention that the Sec.61 talks of a specific power of revocation conferred under the instrument of transfer and Sec.63 defining “revocable transfer” deals with “deemed revocable transfers”. According to him, if there is a direct power or revocation under the instrument of transfer there is no need to resort to the provisions of Sec.63 of the Act.

25. He next drew our attention to Article-13 of the Trust deed which reads thus:-

> “13 Term and termination of the Trust
>
> 13.1 Term: The term of this Indenture shall 7 (seven) years from the date of the Initial Closing (hereinafter referred to as the “Term”)
>
> 13.2 Extension of term: The Trustee may extend the Term for two additional periods of one year each upon the prior recommendation of the investment Manager and the approval of 75% of the Contributors.

13.3 Premature termination of the Trust and revocation of Contributions:

13.3.1 The Trustee may at anytime before the expiry of the Term, terminate this Indenture with the prior written recommendation of the Investment Manager and upon obtaining the prior written consent of all the Contributors for such termination in writing.

13.3.2 Trustees may refund the Fund Contribution to the Contributor, without interest, within a period of 3 months from the date of receipt of first contribution, in the event the minimum fund commitment is not received.

13.4 Procedure on termination: In the event of the Trust being terminated in the circumstances above mentioned, the Trustee shall as soon as practicable thereafter.

13.4.1 take all practical steps to sell all the non-cash assets of the Trust Fund in the manner the Trustee deems fit or advisable;

l3.4.2 shall commence arrangements to pay all the liabilities of the Trust;

13.4.3 return to the extent of the available cash in the Trust Fund, all outstanding interests in the Trust in proportion to the percentage of the Capital Contribution held by the respective Contributors immediately prior to the date of termination of the Trust; and

13.4.4 distribute initial Settlement, accretions thereto to the Settlor or their respective nominees and assigns.

13.4.5 distribute the residual portfolio in specie."

26. It was submitted by him that the above power of revocation which is a general power of revocation is sufficient for construing the transfer in the present case as a revocable transfer. According to him it is not necessary

that the power of revocation should be at the instance of the contributors/beneficiaries and it can be at the instance of any person either the settlor, trustee or the beneficiaries. According to him the provisions of Sec.61 of the Act does not contemplate a power of revocation only at the instance of the transferor. In support of the above contention the learned counsel for the Assessee placed reliance on the decision of the Hon'ble Supreme Court in the case of *Addl.CIT Vs. Surat Art Silk Cloth Mfrs. Association 121 ITR 1 (SC)* at page-17, wherein the Hon'ble Supreme Court had to examine the question as to whether the expression " advancement of any other object of general public utility not involving the carrying on of any activity for profit" would mean that the charitable organisation cannot carry on any business. The Hon'ble Supreme Court observed as follows:-

> "It is clear on a plain natural construction of the language used by the legislature that the ten crucial words "not involving the carrying on of any activity for profit" go with "object of general public utility" and not with "advancement". It is the object of general public utility which must not involve the carrying on of any activity for profit and not its advancement or attainment. What is inhibited by these last ten words is the linking of activity for profit with the object of general public utility and not its linking with the accomplishment or carrying out of the object. It is not necessary that the accomplishment of the object or the means to carry out the object should not involve an activity for profit. That is not the mandate of the newly added words. What these words require is that the object should not involve the carrying on of any activity for profit. The emphasis is on the object of general public utility and not on its accomplishment or attainment. The decisions of the Kerala and A.P. High Courts in CIT vs. Cochin Chamber of Commerce and Industry (1973) 87

> ITR 83 (Ker) : TC23R.239 and A.P. State Road Transport Corporation vs. CIT 1975 CTR (AP) 43 : (1975) 100 ITR 392 (AP) : TC23R.248, in our opinion, lay down the correct interpretation of the last ten words in s. 2, cl. (15). The true meaning of these last ten words is that when the purpose of a trust or institution is the advancement of an object of general public utility, it is that object of general public utility and not its accomplishment or carrying out which must not involve the carrying on of any activity for profit."

27. It was pointed out by the learned counsel that the ratio laid down in the aforesaid decision if applied to the interpretation of the provisions of Sec.61 can only mean that it is the existence of the power to revoke the transfer that has to be seen and not the person at whose instance such revocation can be done. It was his submission that the reason behind the rule, bringing to tax income in the hands of the transferor, is existence of a power by which the transferor can derive the benefit of income arising by virtue of the transfer. The source of such power need not be only in the hands of the transferor. It was thus submitted by the learned counsel for the Assessee that there was a specific power of revocation conferred under the instrument of transfer and therefore Sec.61 would apply and there is no need to resort to the provisions of Sec.63 of the Act. Consequently the income arising by virtue of the transfer has to be brought to tax only in the hands of the transferor/beneficiary and not in the hands of the trustee/transferee.

28. His next submission was that even if it is assumed for the sake of argument that there is no direct specific power to revoke Transfer, the provisions of Sec.63 defining "revocable transfers" will apply and consequently income has to be brought to tax only in the hands of the beneficiary/transferor. In this regard our attention was drawn to the document in the form of prospectus inviting contribution from contributors wherein the following clauses are found:

> "The Fund is expected to terminate seven years from the date of the Indenture of Trust. The process of redemption/termination shall be completed within a period of twelve months to completely liquidate its assets. However, in the event that the investments in the Portfolio Companies are not realised at the end of seven years from the date of the Indenture of Trust, its term may be extended for two additional periods of one year each, upon the recommendation of the Investment Manager and the approval of 75% of the Contributors.
>
> In addition, 75% of the Contributors, if unsatisfied with the performance of the Fund, by a written notice can revoke their Contribution to the Fund at any point of time and the Trustee shall then terminate the Fund subject to the following:
>
> (i) Capital Commitments will not be terminated to the extent necessary to pay Fund Expenses or honor investment commitments previously made by the Fund;
>
> (ii) The Fund will continue for such period of time as may be necessary to liquidate existing investments in an orderly manner; and
>
> (iii) The Management Fee will continue to be payable until the Fund terminates based upon the total Capital Commitments without regard to any termination thereof."

29. The above power of the transferor/beneficiary to revoke the transfer though not in the instrument of transfer but by virtue of the power conferred in a document by which the investment manager appointed by the trust by virtue of powers conferred under the trust deed, would be sufficient to conclude that the transferor/beneficiary had deemed powers of revocation.

30. Our attention was drawn to the decision of the Hon'ble Supreme Court in the case of *Jyothendrasinhji Vs. S.I.Tripathi & Ors., 201 ITR 611 (SC)*, wherein it was held that Sec. 63(1) of the Act does not say that the deed of transfer must confer or vest an unconditional or an exclusive power of revocation in the transferor. The fact that concurrence of the trustee had to be obtained by the transferor/settler for revocation will not make the trust an irrevocable transfer. In such circumstances it must be held that the deed contains a provision giving the transferor a right to re-assume power directly or indirectly over the whole or any part of income or assets within the meaning of s. 63(1)(ii) of the Act.

31. Our attention was drawn to clause-6 of the trust deed which provides for distribution of the Trust Fund and Income. Clause 6.3 of the trust deed provides as follows:

> "6. Validity of Decisions Made by the Trustee
>
> ……..
>
> 6.3 Frequency of Distribution: Subject to obtaining any regulatory clearance for any distribution and subject to the

> Investment Manager determining in its reasonable opinion that the amounts to be distributed are not deminimis, Income, gains and any other receipts that are realized and received in cash by the Fund and which the Fund does not have a right to retain pursuant to the terms of this Indenture, the Private Placement Memorandum or the Contribution Agreements will be distributed as soon as practicable after such gains are realized. The Trustee may retain Income, gains and/or other receipts of the Fund to satisfy current or anticipated liabilities of the Fund. However there may be times when the Trust may not distribute any income. The Trust may also declare special distributions, if any, on as-needed basis. Further, to the extent of any un-drawn Capital Commitments, the Fund may, at the discretion of the Investment Manager, apply any Distribution Proceeds (as defined below) towards any purpose, which could otherwise have been funded by a Drawdown from Contributors. However the distribution will be at the discretion of the Trustee in consultation with the Investment Manager."

32. Our attention was drawn to the order of the CIT(A) in which the remand report of the AO filed before CIT(A) is extracted in the order of the CIT(A). In para-17.5 of the CIT(A)'s order the remand report of the AO on the aspect of the trust being revocable has been set out. It was pointed out by the learned counsel for the Assessee that the AO has not disputed in his remand report the fact that the Assessee trust is revocable but only says that beneficiaries are assessed at different places in India and it is very difficult to monitor all these beneficiaries as to whether they have filed their returns and even if filed, whether correct share of income received/receivable from the Assessee are admitted. To avoid such eventuality it would be correct to Assessee the trustee/representative Assessee. It was his submission that once the trust is accepted to be

revocable then there is no question of assessing the transferee and it is only the transferor who can be assessed. It was his submission that Sec.61 mandates that income arising to any person by virtue of a revocable transfer of assets shall be chargeable to income tax as income of the transferor and therefore the assessment in the hands of the transferee/representative assessee is not proper.

33. The learned counsel for the Assessee then drew our attention to Gr.Nos. 4 to 7 raised by the Revenue in which the Revenue has contended that :-

(a) the names of the Beneficiaries are not identifiable in the original Trust Deed;

(b) the shares of the beneficiaries are not mentioned in the trust deed;

(c) the shares of the beneficiaries are not determinate on the basis of the trust deed; &

(d) even the distribution of shares of the beneficiaries have not been made by the trust as per the formula laid down in the trust deed.

34. On the above stand of the revenue as reflected in Gr.Nos.4 to 7 the learned counsel for the Assessee drew our attention to Clause 1.1.13 of the Trust deed which reads thus:

> "1.1.13 "Contributors" or "Beneficiaries' means the Persons, each of whom have made or agreed to make Contributions to the Trust in accordance with the Contribution Agreement."

35. According to him the above clause in the Trust deed is enough to identify the beneficiaries. Our attention was also drawn by him to CBDT Circular No.281 dated 22.9.1980 wherein the CBDT has explained the scope of Sec.164 with regard to stating the name of the beneficiaries in the trust deed. In the said circular the provisions of Expln.-1 to Sec.164 of the Act regarding identification of beneficiaries has been explained to the effect that for identification of beneficiaries it is not necessary that the beneficiary in the relevant previous year should be actually named in the order of the Court or the instrument of trust or wakf deed, all that is necessary is that the beneficiary should be identifiable with reference to the order of the Court or the instrument of trust or wakf deed on the date of such order, instrument or deed. He also drew our attention to the following decisions:-

(1) **CIT Vs. P.Sekar Trust 321 ITR 305 (Mad)** wherein the Hon'ble Madras High Court held that so long as the trust deed gives the details of the beneficiaries and the description of the person who is to be benefited, the beneficiaries cannot be said to be uncertain, merely because wife/children cannot be known until the marriage and begetting of children by the stated beneficiaries. The Hon'ble Court noticed in the above case that the Beneficiaries were five in number for the period from 1st April, 1986 to 31st March, 1989 and the respective share of each beneficiary was in different percentage as stated in the deed itself. From 1st April, 1989 onwards the

beneficiaries were seven in number and their shares in the income was equal. As per trust deed, as and when B and P are married, their spouses would automatically become beneficiaries along with the other continuing beneficiaries in the said accounting year and subsequent accounting years and equally divide the beneficial interest in income of the aforesaid beneficiaries. Likewise, as and when any child or children is/are born to the said B and P the child or children so born shall automatically become a beneficiary/beneficiaries along with the other continuing beneficiaries in the said accounting year and subsequent accounting years and equally divide the beneficial interest in income of the aforesaid beneficiaries. Deed also provided that in the event of death of a beneficiary what should be done. The Hon'ble High Court having regard to the terms of the trust deed, held that the deed clearly prescribes the beneficiaries and the shares they are entitled to and other terms relevant to the share of interest in the corpus on determination or termination of the trust and therefore Sec.164 was not attracted.

(2) **CIT Vs. Manilal Bapalal 321 ITR 322(Mad)** wherein the Hon'ble High Court had to deal with a case where the CIT in exercise of powers u/s.263 revised an order of the assessment as erroneous and prejudicial to the interest of the revenue as the trust had not been treated as an AOP and taxed on that basis, as in his view the

trust deed did not identify all the beneficiaries and the shares were also not determinate. That view of the CIT was found to be erroneous by the Tribunal and quashed. On further appeal by the Revenue, the Hon'ble High Court found that the beneficiaries of the trust included the prospective spouses of some of the beneficiaries. The trust deed also provided that in the event of a beneficiary dying before marriage or not marrying before the trust came to an end, that part of the benefit which was to be given to the spouse would be given to the heir of the beneficiary or to the beneficiary himself or herself. The Hon'ble High Court therefore came to the conclusion that the share to be allotted to the beneficiaries was determinate under the trust deed and the beneficiaries also being known, the Tribunal has rightly held that the CIT was in error in revising the order of the AO on the ground that the shares were indeterminate and that the trust deed is void or vagueness.

(3) **XYZ., In Re 224 ITR 473 (AAR)**: The Authority for Advance Ruling (AAR) held that if the trust deed sets out expressly the manner in which the beneficiaries are to be ascertained and also the share to which each of them would be entitled without ambiguity, then it cannot be said that the Trust deed does not name the beneficiaries or that their shares are indeterminate. The persons as well as the shares must be capable of being definitely pin-pointed and ascertained on the date of the trust deed itself without leaving these

to be decided upon at a future date by a person other than the author either at his discretion or in a manner not envisaged in the trust deed. Even if the Trust deed authorises addition of further contributors to the trust at different points of time in addition to initial contributors, than the same would not make the beneficiaries unknown or their share indeterminate. Even if the scheme of computation of income of beneficiaries is complicated, it is not possible to say that the share income of the beneficiaries cannot be determined or known from the trust deed

36. The learned counsel for the Assessee then addressed arguments on grounds 8 & 9 raised by the Revenue in its grounds of appeal in which the revenue has questioned the order of the CIT(A) whereby the CIT(A) held that :-

(a) that the Assessee cannot be assessed as AOP and

(b) there is no separate status of Trust for making assessment envisaged under the Act.

In this regard the definition of person u/s. 2(31) of the Act which does not specifically refer to “Trust” is being highlighted in the grounds raised by the Revenue.

37. On the above grounds of appeal, the learned counsel for the Assessee firstly pointed out that the definition of “Person” in Sec.2(31) of

the Act is an inclusive definition and not an exhaustive definition and therefore absence of “Trust” in the definition of “Person” in Sec.2(31) of the Act is not conclusive in the matter. It was submitted by him that the form of return of income as it existed for the relevant assessment year did not contain a clause for filing return of income by a “Trust” in the status other than AOP. In this regard our attention was drawn by him to CBDT Circular No.6/2012 dated 3.8.2012 wherein the CBDT has realised this difficulty it has 'private discretionary trusts' having total income exceeding ten lakh rupees are facing problems in filing their return of income electronically in cases where they are filing their return in the status of an individual. This was because status of a private discretionary trust has been held in law as that of an 'individual'. The existing e-filing software did not accept the return of a private discretionary trust in the status of an 'individual'. Accordingly the CBDT gave directions that it will not be mandatory for 'private discretionary trusts', if its total income exceeds ten lakh rupees, to electronically furnish the return of income for assessment year 2012-13. It was also highlighted that Form No.49A which was the prescribed form of application for allotment of Permanent Account Number (PAN) also did not contain a separate status “Trust” but contained a column “AOP (Trust)”. The revised Form No.49A later notified contains a column for status as “Trust”. According to him therefore the argument of the revenue that all “Trusts” are AOPs is not correct.

38. Our attention was drawn to the following decisions to highlight the characteristics of an AOP and as to how those characteristics were completely absent in the case of the Assessee:-

(1) **CIT Vs. Marsons Beneficiary Trust 188 ITR 224 (Bom)** wherein it was held that coming together of persons is necessary for coming into existence of AOP.

(2) **State of Madras Vs. Subramania Iyer 61 ITR 613 (Mad)** wherein it was held that to constitute an association of individuals, it is necessary to prove that as between themselves, the individuals had associated together and decided upon the common exploitation of their lands for common benefit and that it was only in pursuance of that agreement a single person was selected to carry out the common purpose of joint cultivation. The mere factum of common cultivation by a single manager of different parcels of land owned by different persons could not by itself be held to be sufficient to constitute the owners as association of individuals.

(3) **CIT Vs. Indira Balakrishnan 39 ITR 546 (SC)**.

39. The learned counsel for the Assessee thereafter took up ground No.10 raised by the Revenue for consideration. The Revenue therein has raised issue that income has to be brought to tax in the hands of the right person in the right status. In this regard our attention was drawn to the following decisions:-

(1) **CIT Vs. David Joseph 214 ITR 658 (Ker)** wherein the Hon'ble Kerala High Court found that the Tribunal in the impugned order before the Hon'ble High Court has referred to three circulars dt. 24th Feb., 1967, 26th Dec., 1974 and 24th Aug., 1966. These circulars are to the effect that once the choice is made by the Department to tax either the trust or the beneficiary, it is no more open to the Department to go behind it and assess the other at the same time. The position that emerges would be a position for the application of the principle of finality. Once a beneficiary is assessed and his assessment is completed prior in point of time, and his assessment is an element of finality, it is a natural consequence flowing therefrom that the Department does not get any permission to go behind it for the purpose of scrutinising the procedure, for finding out faults in regard thereto, the sole object of which is to justify the subsequent action taken by the Department. These are in fact the normal consequences that flow from the principle of finality. This principle especially emerges from three circulars and has established into a settled practice, any time a deviation therefrom cannot be permitted, even on the ground of a mistake with regard to the merits of the situation that received finality. The Tribunal was right in holding that the assessee-trust cannot be taxed in view of the fact that one of the beneficiaries of the trust had earlier been assessed by the completion of the assessment proceedings on 31st Dec., 1980 in his capacity as beneficiary of the trust.

(2) **Rai Sahe Seth Ghisalal Modi Family Trust v. CIT, 149 ITR 724 (MP)** wherein the Hon'ble M.P.High Court held that if ITO making assessment on beneficiaries, knew fully well that s. 164(1) applied, yet exercised his discretion to assess the beneficiaries and not the trust and the mere fact that he stated in the assessment order that the assessments were subject to rectification was of no avail.

(3) **Trustees Of Chaturbhuj Raghavji Trust vs. CIT, 50 ITR 693 (Bom)** wherein the Hon'ble Bombay High Court held that under sub-s. (2) of s. 41, it is permissible for the IT authorities to make direct assessment on the person on whose behalf income, profits and gains from a trust are receivable. Sec. 41 having provided for two alternative methods, namely, either to tax the income in the hands of the trustees or directly in the hands of the person on whose behalf the income was receivable under the trust, and one of them having been availed of by the IT Department in directly assessing beneficiary in respect of the income, the other was no longer available to the Department. It was contended on behalf of the Revenue that the option was of the ITO who was assessing the trust to decide whether he would assess the income in the hands of the trustees or directly in the hands of the beneficiary. This contention was rejected by the Hon'ble High Court which held that Sec. 41 was a special enabling provision which permitted the assessment in the hands of the trustees but did not preclude the direct assessment in the hands of the beneficiaries. There is nothing in s. 41 which would indicate that the choice between the alternative methods

provided therein has to be made only at the time of the assessment of the trustees or that the choice only belongs to the ITO who is assessing the trust.

40. Our attention was also drawn to Circular No.157 dated 26.12.1974 of CBDT wherein the CBDT has clarified on assessment of trust where share of beneficiaries unknown. It has been clarified therein as follows:

> "According to the scheme of the IT Act of 1961, even as it was under the IT Act of 1922, the general principle is to charge all income only once. The Board desire to reiterate the earlier instructions in this regard. In order that there is no loss of revenue, the ITO should keep this point in view at the time of raising the initial assessment either of the trust or the beneficiaries and adopt a course beneficial to the Revenue. Having exercised his option once, will it not be open to the ITO to assess the same income for that assessment year in the hands of the other person (i.e., the beneficiary or the trustee)."

41. The learned counsel submitted that CBDT Circular No.13/2014 dated 28.7.2014 referred to by the learned DR in support of the case of the Revenue is firstly not applicable for the relevant Assessment Year in the present appeal. For the proposition that Circulars not in force in the relevant Assessment year cannot be applied the he relied on the decision of the Hon'ble Bombay High Court in the case of *BASF (India) Ltd. & Anr v.. W. Hasan, CIT & ORS., 280 ITR 136 (Bom)*. He also highlighted the unreasonable stand taken by the AO in assessing income but not giving credit for tax paid. In this regard our attention was drawn to

the following observations of the Hon'ble Supreme Court in *Income Tax Officer v. Bachu Lal Kapoor, 60 ITR 74 (SC)*:-

> "It was then forcibly brought to our notice that the said view would be subversive of the doctrine of "double taxation". It was said that as the orders of assessment on the individual members of the said family had become final, if the ITO was permitted to assess the HUF for the same assessment year, tax would be imposed on the same income twice over. It is true that the Act does not envisage taxation of the same income twice over "on one passage of money in the form of one sort of income". It is equally true that s. 14(1) of the Act expressly debars the imposition of tax on any part of the income of an HUF received by its members. The fact that there is no provision in the Act dealing with a converse position does not affect the question, for the existence of such a converse position is legally impossible under the Act. So long as the HUF exists, the individual thereof cannot separately be assessed in respect of its income. Nonetheless, if, under some mistake, such income was assessed to tax in the hands of the individual members, which should not have been done, when a proper assessment made on the HUF in respect of that income, the Revenue had to make appropriate adjustments; otherwise, the assessment made in respect of that income on the HUF would be contrary to the provisions of the Act, particularly s. 14(1) of the Act. We, therefore, hold that if the assessment proceedings initiated under s. 34 of the Act culminated in the assessment of the HUF, appropriate adjustments have to be made by the ITO in respect of the tax realised by the Revenue in respect of that part of the income of the family assessed on the individuals of the said family. To do so is not to re-open the final orders of assessment, but in reality to arrive at the correct figure of tax payable by the HUF."

42. We have given a very careful consideration to the rival submissions. The Assessee, as we have already seen, is the Assessee is a trust constituted under an instrument of trust dated 25/9/2006. M/S. ICICI

Venture Funds Management Company Limited (hereinafter referred to as "Settlor") by an indenture of Trust dated 25.9.2006 transferred a sum of Rs.10,000/- to M/S. The Western India Trustee and Executor Company Limited (hereinafter referred as the "Trustee") as initial corpus to be applied and governed by the terms and conditions of the indenture dated 25.9.2006. The trustee was empowered to call for contributions from the contributors which will be invested by the Trustee in accordance with the objects of the trust. The objective of creation of the trust was to invest in certain securities called mezzanine instruments and to achieve commensurate returns to the contributors. The fund collected from the contributors together with the initial corpus was to be handed over to the trustees under the provisions of the Indian Trust Act, 1882. The trust was to facilitate investment by the contributors who should be resident in India and achieve returns to such contributors. The contributors to the fund are its beneficiaries. It is a Private Trust to which the provisions of Indian Trust Act, 1882 would apply.

43. Sec.3 of the Indian Trust Act, 1882 defines "Trust" as an obligation annexed to the ownership of property, and arising out a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner; the person who reposes or declares the confidence is called the "author of the trust'; the person who accepts the confidence is called the "trustee"; the person for whose benefit the confidence is accepted is called the "beneficiary"; the

subject-matter of the trust is called “trust property” or “trust-money”; the “beneficial interest” or “interest” of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument, if any, by which the trust is declared is called the “instrument of trust”.

44. We were initially doubtful, whether a person who contributes to the trust in accordance with the terms of a contribution agreement could be said to be “beneficiary” of the trust. It is no doubt true that the beneficiaries are identifiable in terms of the trust deed as persons who contribute under the contribution agreement. But can the beneficiaries be made to contribute to the trust? Beneficiaries are generally recipients of benefits under the deed of trust. Can the trust hold the money so contributed in trust for the contributors and can such contributors be called “beneficiaries”? It appeared to us to be a venture undertaken by the Trust, author of the trust and the identified beneficiary at the time of creation of the trust who happens to be the beneficiary and the Investment Manager to whom without any option the management of the trust fund had to be entrusted. It is like any other form of business organization mobilizing funds for investments and promising returns to the contributors. Can such objective be achieved by forming a trust?

45. Similar questions arose for consideration before the Authority for Advance Ruling in the case of *XYZ, In Re 224 ITR 473 (AAR)*. We need to look at the facts of the said case before we set out the ruling given

by the AAR. An American company in collaboration with an Indian financial services company proposed to set up another fund. For this purpose a trust was created whereby the Indian Financial services company was the author of the trust and another Indian Trust company was appointed as Trustee. The funds of the Trust were to be invested in Indian companies and projects in India. The Indian financial service company was to act as the principal Investment Adviser in India to the trust under an advisory agreement. By an Indenture of trust, the Indian financial service company made an initial settlement of Rs. 1 lakh on the trustees on trust. This along with contributions that may be made to the trust fund by others is referred to as `Contribution Fund'. The Indian financial services company was the only contributor and also the only beneficiary under the trust deed. Clause 7 of the trust deed contains a provision to the following effect :-

> "Power of Addition
>
> 7. (a) The trustee shall have the power at any time or times during the trust period to add as beneficiaries such one or more persons or class of persons as the trustee shall in their absolute discretion determine.
>
> (b) Any such addition shall be made by deed signed by the trustee and :
>
> (i) naming or describing the person or persons or class of persons to be added as beneficiaries;
>
> (ii) specifying the date (not being earlier than the date of the deed but during the trust period) from which such person or persons to be thereby added as beneficiaries; and

(c) It is hereby clarified that such beneficiaries will be entitled to only such share that is in proportion to the contribution made by them and in accordance with the Contribution Agreement."

46. On the above facts, which are on par with the facts of the present case before us, the AAR held as follows:-

"At the time of hearing, a doubt was expressed by the Authority as to how far a provision conferring an absolute discretion on the trustees to add names of beneficiaries to the trust would be justified in law. Though the authorised representative of the applicant (AR) contended that this clause was perfectly in order (citing O.P. Agarwalla on Trust, p. 220-2), he also expressed his willingness to modify cl. 7(a) as follows in order to obviate any kind of objection :-

"7.(a) The trustee shall during the trust period, have the power at their discretion to admit as beneficiary any institutional investor which agrees to enter into a contribution agreement."

and, consequent on the above, to insert a definition of the expression "institutional investor" in cl. 1 to the following effect :

"(1) `Institutional Investor' means any entity other than an individual, being a natural person including but not limited to financial institution, company or corporation, Government, State or Political sub-division or local authority, that trustees may consider a reputable investor."

After a little discussion he was willing also to drop the last seven words which were considered to be somewhat vague.

9. One may pause here to consider whether there could be any valid objections to the constitution of a trust in this manner. The authors of the trust are the IC, the Indian financial service company and others contributing to the trust by the date of the trust deed. Indeed even institutional investors contributing to the trust, in helping the CT achieve its target of 50 million dollars can be considered as supplemental authors of the trust, the CA

constituting r/w the trust deed, the instruments constituting the trust in their cases. **The purposes of the trust are, as stated in the TD, to invest the trust funds and distributing the proceeds to the beneficiaries. This is, in a sense, nothing more than an arrangement by which certain parties agreed to contribute funds for a common purpose and divide the profits amongst themselves. No doubt the same objective could be achieved by the constitution of a firm or a company but, equally, there seems to be no valid objection if the parties wish to do it in the form of a trust which, under the Trust Act, merely represents certain obligations annexed to the ownership of property in the form of the contributed funds. The purposes of the trust cannot be said to be forbidden by law or likely to defeat the provisions of any law or fraudulent or involving injury to any person or property or opposed to public policy : vide s. 4 of the Indian Trusts Act (IV of 1882). It will appear later that, in entering into the present transactions, the parties took into account certain difficulties if the same transactions had been put through the format of a company and also took into account certain financial and tax implications. But these cannot render the purposes of the trust unlawful within the meaning of the Indian statute.** The clause which enabled the trustees to admit any one as a beneficiary, the Authority felt, might introduce a degree of uncertainty regarding the element of beneficiaries under the trust. The parties have agreed to modify the clause as indicated above. The result is that now the trustee's choice of beneficiaries is restricted (a) by the overall limit of the fund; (b) only to institutional investors; and (c) to persons who agree to subscribe to the CA. The criteria for persons to become beneficiaries and the shares of income they are entitled to are clearly defined in the deed. The Authority is of opinion, that with the introduction of the modifications referred to above and in the light of the statement on law contained in the passages from Agarwalla's Trust Act cited by learned counsel, there can be no objection to the validity of the modified trust deed. [Parenthetically, however, it may be observed that, in the definition in cl. (a) proposed to be inserted, the words "being a natural person" appears to be a surplusage and may be omitted without detracting from the meaning of the clause. But this has no impact on the validity of the trust deed."

(emphasis supplied)

47. We agree with the aforesaid observations of the AAR and we proceed further to decide the various issues raised by the Revenue in its appeal.

48. Private Trusts could be Fixed or Discretionary Trusts. A fixed trust is a trust in which the beneficiaries have a current fixed entitlement to such income as remains after proper exercise of the trustee's powers. On the other hand, a discretionary trust is one in which the beneficiaries have no such current fixed entitlement, but only a hope (*spes*) that the trustees in carrying out their duty to consider how much income might be paid to such beneficiaries will in their discretion pay that income to a particular beneficiary or beneficiaries. The beneficiaries have no interest in possession under the trust. There are various reasons why a settlor prefers to establish a discretionary trust rather than a fixed trust. Some of the important one's being – to protect the beneficiary against creditors; to continue to exercise control over young or improvident beneficiaries; to make adjustment according to circumstances. "When a trust is set up, there is no way of knowing how the beneficiaries will fare in the future; which of them will be most in need, which will be deserving, which spendthrift, which inebriate, which will marry millionaires and which missionaries". The trustee can take all these factors into consideration in making their decisions.

49. When it comes to tax on income received by the Trust on behalf of the beneficiaries, there are some implications depending on whether the trust is a discretionary trust or a non-discretionary trust. As we have already seen in terms of Sec.164(1) a trust is assessed as a representative assessee in respect of income which it receives on behalf of its beneficiaries and if the beneficiaries are not certain or shares of beneficiaries are indeterminate, tax shall be charged on the relevant income or part of relevant income at the maximum marginal rate. Explanation 1 to Sec.164 deems that in certain situations beneficiaries shall be deemed to be not identifiable or their shares are unascertained or indeterminate or unknown. These provisions have already been set out in the earlier part of this order and are not being repeated. The legislative history of the above provisions needs to be examined to find out the object of introduction of the Explanation. Sec. 164(1) was in the Act when it was enacted in 1962 but its wording underwent a change, introducing a concept of taxation at marginal rate in 1970 by the Finance Act of 1970 w.e.f. 1st April, 1970. The object and scope of this amendment were elaborated in a circular of the CBDT (Circular No. 45 dt. 2nd Sept., 1970) as under :-

> "Private discretionary trusts. — Under the provisions of s. 164 of the IT Act before the amendment made by the Finance Act, 1970, income of a trust in which the shares of the beneficiaries are indeterminate or unknown, is chargeable to tax as a single unit treating it as the total income of an AOP. This provision affords scope for reduction of tax liability by transferring property to trustees and vesting discretion in them to accumulate the income or apply it for the benefit of any one or more of the beneficiaries,

> at their choice. By creating a multiplicity of such trusts, each one of which derives a comparatively low income, the incidence of tax on the income from property transferred to the several trusts is maintained at a low level. In such arrangements, it is often found that one or more of the beneficiaries of the trust are persons having high personal incomes, but no part of the trust income being specifically allocable to such beneficiaries under the terms of the trust, such income cannot be subject to tax at a high personal rate which would have been applicable if their shares had been determinate.

50. In order to put an effective curb on the proliferation of such trusts, and to reduce the scope of tax avoidance through such means, the Finance Act, 1970, has replaced s. 164 of the IT Act by a new section. Under s. 164 as so replaced, a `representative assessee' who receives income for the benefit of more than one person whose shares in such income are indeterminate or unknown, will be chargeable to income-tax on such income at the flat rate of 65% or the rate which would be applicable if such income were the total income of an AOP, whichever course would be more beneficial to the Revenue.

51. When the Explanation was added in 1980, the CBDT issued the following circular [see (1980) 123 ITR (St) 159] [The quotation has been taken from the Memorandum explaining the provisions of the Finance (No. 2) Bill, 1980 and not from the relevant circular, which is Circular No. 281 dt. 22nd Sept., 1980 reported in (1981) 131 ITR (St) 4, though the Circular uses similar language—Ed.] :

> "49. xxx xxx xxx
>
> (iv) Under the existing provisions, the flat rate of 65% is not applicable where the beneficiaries and their shares are known in the previous year, although such beneficiaries or their shares have not been specified in the relevant instrument of trust, order of the Court or wakf deed. This provision has been misused in some cases by giving discretion to the trustees to decide the allocation of the income every year and in other ways. In such a situation, the trustees and beneficiaries are able to manipulate the arrangements in such a manner that a discretionary trust is converted to a specific trust whenever it suits them tax-wise. In order to prevent such manipulation, it is proposed to provide that unless the beneficiaries and their shares are expressly stated in the order of the Court or the instrument of trust or wakf deed, as the case may be, and are ascertainable as such on the date of such order, instrument or deed, the trust will be regarded as a discretionary trust and assessed accordingly."

52. From the above extracts it can be seen that the object of the amendments to the provision was only that the distribution of the income should not be entirely at the discretion of the trustees and that the trust deed should regulate the shares.

53. Having noticed the tax implications of discretionary trusts, we may now revert to the various issues raised by the Revenue in the grounds of appeal and the facts of the present case. The issue raised in grounds No.1 is general, calling for no specific adjudication. The issue raised by the Revenue in Ground No.2 is with regard to the applicability of the provisions of Sec.60, 61 and 63 of the Act to the facts and circumstances of the present case. In this regard it needs to be clarified that the Assessee in its reply dated 15.12.2010 to the AO in the course of assessment proceedings

pointed out the above provisions and submitted that it is only the beneficiaries who have to be assessed to tax in respect of income arising from a revocable transfer. The AO in the order of assessment did not consider the above argument nor has he given any reasons why the same are rejected. The submission made by the Assessee before CIT(A) on this aspect have been accepted by the CIT(A) but he has not discussed or given any reasons as to how the submissions are being accepted. The basic scheme of section 61 r/w section 62 and section 63 is as follows : where under a settlement any income arises to the settlor, it has to be assessed in the hands of settlor, whether the settlement is revocable or irrevocable. If under a settlement any income arises to any other person apart from the settlor such income can still be assessed in the hands of the settlor provided the settlement is revocable. Even if a settlement on the face of it is stated to be irrevocable, if the same provides for direct or indirect retransfer of income or assets of the settlement to the settlor or gives the settlor a right to resume power directly or indirectly over such income or asset, the settlement should be deemed to be revocable.

54. In Chapter X of the private placement memorandum issued by the investment manager inviting contribution from investors, the tax considerations in making investments as understood by them have been set out. The contents thereof in brief are that the contribution by the contributors are akin to “revocable transfer” u/s.61 of the Act read with Sec.63 of the Act and therefore income arising from the transfer are

assessable in the hands of the contributors. The contributors are therefore informed that in respect of their pro-rata share of income received by the Fund it is the contributors who will be liable to tax and not the Trust/Fund. The nature of income that is likely to arise from the revocable transfer has also been set out therein and the same is referred to as (1) Dividend declared by companies whose shares are held by the Trust, are exempt in the hands of the shareholders and therefore the dividend earned by the Trust from investment would be exempt from tax and therefore there would be no tax implications in the hands of the beneficiary. (2) Interest on loans given by the Trust/Fund to companies would suffer tax deduction at source. Nevertheless the beneficiaries have to declare interest income and pay tax thereon but claim refund of tax paid or credit for taxes already paid. (3) Gain on sale of Portfolio Investments would be subjected to tax either as Long Term Capital Gain or Short Term Capital Gain. There is also a reference to the fact that in case the gain on sale of securities of companies held/invested by the Trust/Fund are held to be in the nature of business income then such business income would be taxable in the hands of the beneficiaries at the relevant applicable rates. (4) Gain on redemption premium of debentures/bonds will also suffer tax either as long term or short term capital gain depending on the period of holding.

55. Under clause-2 of the contribution Agreement, the contributor/beneficiary/investor agrees to contribute a specified sum to the trust/fund. Clause-2.6 of the contribution agreement specifies that the

contributor/investor/beneficiary shall not have any right to demand the return of his/her/its fund contributor, other than upon dissolution of the fund. Clause-2.6.2 provides that the trustee may refund the fund contributor to the contributor, without interest, within a period of 3 months from the date hereof, in the event the minimum fund commitment is not received. Clause2.9 of the contributor agreement also lays down that the redemption of units by the beneficiary shall be at the sole discretion of the Trustees in consultation with the investment manager.

56. In the light of the aforesaid clauses in the contribution agreement, can it be said that transfer of funds by the beneficiary to the trust/fund is a revocable transfer?

57. The answer to the above question cannot be given by merely reading the clauses in the contribution agreement alone. The contention of the learned counsel for the Assessee before us was that the Contribution agreement has to be read along with the Trust Deed as well as the Investment Management agreement and offer document for private placement issued by the Investment Manager. Article-13 of the Trust Deed provides for termination of the Trust. Though such a power is not with the beneficiary/transferor, it is not the requirement of Sec.61 that the power of revocation must be at the instance of the beneficiary/transferor. The power of revocation under Clause13 of the Deed of Trust is a general power of revocation and the same would be sufficient for construing the transfer in

the present case as a revocable transfer. As rightly contended by the learned counsel for the Assessee it is not necessary that the power of revocation should be at the instance of the contributors/beneficiaries/ transferor and it can be at the instance of any person either settlor, trustee, transferee or the beneficiaries. Provisions of Sec.61 of the Act do not contemplate a power of revocation only at the instance of the transferor. In this regard the reliance placed by the learned counsel for the Assessee on the observations of the Hon'ble Supreme Court in the case of *Surat Art Silk Cloth Mfrs. Association (supra)* support the plea taken by him. As rightly contended by him the existence of a power to revoke the transfer that has to be seen and not the manner in which/ or at whose instance such revocation is brought about.

58. The alternative submission of the learned counsel for the Assessee that the provisions of Sec.63(a) of the Act, which deems existence of power of revocation in certain circumstances, are also acceptable. In this regard prospectus inviting contribution from contributors clearly lay down in certain circumstances 75% of the contributors can revoke their contribution to the fund at any point of time and the trustees shall then terminate the fund. Though the above power of the transferor/beneficiary to revoke the transfer is not in the instrument of transfer but by virtue of the power conferred in a document by which the investment manager appointed by the trust by virtue of powers conferred under the trust deed, would be sufficient to

conclude that the transferor/beneficiary had deemed powers of revocation. In this regard the reliance placed by the learned counsel for the Assessee on the ration laid down in the decision of the Hon'ble Supreme Court in the case of *Jyothendrasinhji (supra)* is squarely applicable to the present case. In the aforesaid decision the Hon'ble Supreme Court held that Sec. 63(1) of the Act does not say that the deed of transfer must confer or vest an unconditional or an exclusive power of revocation in the transferor. It was further held that the fact that concurrence of the trustee had to be obtained by the transferor/settler for revocation will not make the trust an irrevocable transfer. In such circumstances it must be held that the deed contains a provision giving the transferor a right to re-assume power directly or indirectly over the whole or any part of income or assets within the meaning of s. 63(a)(ii) of the Act.

59. For the reasons given above we hold that Sec.61 read with Sec.63 of the Act which mandates that income arising to any person by virtue of a revocable transfer of assets shall be chargeable to income tax as income of the transferor will apply to the facts and circumstances of the present case and therefore the assessment in the hands of the transferee/representative assessee was not proper.

60. The issues raised by the Revenue in Grounds 4 to 7 of the grounds of appeal is with regard to applicability of provisions of Sec.164(1) of the Act. In view of the conclusion on Ground No.3 the adjudication of other

grounds may not be necessary. Since the order of the AO is based on the applicability of the provisions of Sec.164(1) of the Act, we deem it appropriate to adjudicate on the issues raised in ground No.4 to 7 as well. The provisions of Sec.164(1) of the Act and Expln.-1 to Sec.164 are relevant in this regard.

> "Sec.164(1) lays down that where any income or any part thereof in respect of which the persons mentioned in cl. (iv) of sub-section (1) of Section 160 is liable as representative assessee or any part thereof
>
> (i) is not specifically receivable on behalf or for the benefit of any one person;
>
> or
>
> (ii) where the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is receivable are indeterminate or unknown (such income, such part of the income and such persons being hereafter in this section referred to as "relevant income", "part of relevant income" and "beneficiaries", respectively),
>
> tax shall be charged on the relevant income or part of relevant income at the maximum marginal rate.
>
> Explanation 1 to Sec.164 lays down that any income or part thereof to which Section 164(1) applies shall be deemed as being not specifically receivable on behalf or for the benefit of any one person unless the person on whose behalf or for whose benefit such income or such part thereof is receivable during the previous year is expressly stated in the order of the Court or the instrument of trust or wakf deed, as the case may be, and is identifiable as such on the date of such order, instrument or deed;(ii) the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is received shall be deemed to be indeterminate or unknown unless the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is receivable, are expressly stated in

the order of the Court or the instrument of trust or wakf deed, as the case may be, and are ascertainable as such on the date of such order, instrument or deed."

61. The general rule as laid down in Sec. 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 assessee "in like manner and to the same extent as it would be leviable upon the recoverable from the person represented by him". To the above rule, however, three exceptions have been incorporated in the Act :-

(a) Under s. 161(1A), this rule of apportionment and determination of proportionate tax attributable to the beneficiary will not apply to any income earned by the trustee as profits and gains of a business. The whole of such income shall be taxed at the "maximum marginal rate". A similar proviso occurs also in s. 164(1) restricting benefits where business income is involved.

(b) Under s. 164(1), if the beneficiaries are not identifiable or the individual shares of the persons on whose behalf and for whose benefit the income is receivable are indeterminate or unknown, such income, again, will be taxed at the "maximum marginal rate".

(c) In certain other circumstances, set out in the proviso to s. 164(1), the relevant income will be assessable not at the maximum rate but at the rate applicable to it as if it were the total income of an AOP.

62. In the present case the AO has not invoked the provisions of Sec.161(1A) of the Act or the proviso to Sec.164(1) of the Act and therefore, we need not examine those provisions. As far as identification of

individual shares of the Sec.164(1) of the Act will not get attracted for the reason that the beneficiaries are not identifiable.

63. The question for our consideration therefore is regarding applicability of Sec.164(1) of the Act. There are two aspects to be noticed in the above provisions. The first aspect is the identification of the beneficiaries. The second aspect is with regard to ascertainment of the share of the beneficiaries.

64. On the aspect of identification of the beneficiaries, it is the plea of the learned counsel for the Assessee that so long as the trust deed gives the details of the beneficiaries and the description of the person who is to be benefited, the beneficiaries cannot be said to be uncertain. CBDT Circular No.281 dated 22.9.1980 wherein the CBDT has explained the scope of Sec.164 with regard to stating the name of the beneficiaries in the trust deed. In the said circular the provisions of Expln.-1 to Sec.164 of the Act regarding identification of beneficiaries has been explained to the effect that for identification of beneficiaries it is not necessary that the beneficiary in the relevant previous year should be actually named in the order of the Court or the instrument of trust or wakf deed, all that is necessary is that the beneficiary should be identifiable with reference to the order of the Court or the instrument of trust or wakf deed on the date of such order, instrument or deed. We find that Clause 1.1.13 of the Trust Deed clearly lays down that beneficiaries means the Persons, each of whom have made

or agreed to make contributions to the Trust in accordance with the Contribution Agreement. We are of the view that the above clause is sufficient to identify the beneficiaries.

65. On the aspect of ascertainment of share of the beneficiaries, we find that Article 6.5 of the Trust Deed clearly specifies the manner in which the income of the Assessee is to be distributed. The said clause details formula with respect to the share of each beneficiary. As rightly contended on behalf of the Assessee it is not the requirement of law that trust deed should actually prescribe the percentage share of the beneficiary in order for the trust to be determinate. It is enough if the shares are capable of being determined based on the provisions of the trust deed. In the case of the Assessee the trustee have no discretion to decide the share of each beneficiary and are bound by the provisions of the trust deed and is duty bound to follow the distribution mechanism specified in the trust deed. The further aspect that may require consideration in the present case is with regard to the clause in the Trust Deed which authorises addition of further contributors to the trust at different points of time in addition to initial contributors. From this clause can it be said that share income of the beneficiaries cannot be determined or known from the trust deed. On the above aspect, we find the AAR in the case of XYZ In re (supra) has considered similar clause in a trust deed with specific reference to the provisions of Sec.164(1) of the Act and has held that if the trust deed sets out expressly the manner in which the beneficiaries are to be ascertained

and also the share to which each of them would be entitled without ambiguity, then it cannot be said that the Trust deed does not name the beneficiaries or that their shares are indeterminate. The persons as well as the shares must be capable of being definitely pin-pointed and ascertained on the date of the trust deed itself without leaving these to be decided upon at a future date by a person other than the author either at his discretion or in a manner not envisaged in the trust deed. Even if the Trust deed authorises addition of further contributors to the trust at different points of time, in addition to initial contributors, than the same would not make the beneficiaries unknown or their share indeterminate. Even if the scheme of computation of income of beneficiaries is complicated, it is not possible to say that the share income of the beneficiaries cannot be determined or known from the trust deed. In view of the aforesaid decision of the AAR, with which we respectfully agree, we hold that the provisions of Sec.164(1) of the Act would not be attracted in the present case. We also find that the Hon'ble Madras High Court in the case of *P.Sekar Trust (supra)* and *Manilal Bapalal (supra)* has taken a view that identity by reference to the terms of the trust deed is sufficient and it is not necessary that the beneficiaries should be specifically named in the deed of trust. Consequently Grounds 4 to 7 raised by the Revenue are held to be without merit.

66. In ground No.8, the Revenue has challenged the order of the CIT(A) whereby the CIT(A) held that the Assessee cannot be assessed as an "AOP". In Ground No.9 the Revenue has contended that there is no separate status of Trust for making assessment envisaged under the Act. In this regard the definition of person u/s. 2(31) of the Act which does not specifically refer to "Trust" is being highlighted in the grounds raised by the Revenue. These grounds can be conveniently dealt with together.

67. Sec.2(31) of the Act defines the term "Person". The definition includes "Association of Persons"(AOP). There is no definition of the expression AOP occurring in the 1922 Act. By a series of decisions, the meaning of this expression was precisely defined and tests were laid down in order to find out when a conglomerate of persons could be held to be an AOP for the purposes of section 3 of the 1922 Act. While interpreting this expression occurring in section 3 of the Indian IT Act, 1922, the Supreme Court in *CIT vs. Indira Balkrishna (supra)* held "an AOP must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce income, profits or gains". The Supreme Court, however, administered the following caution : *''There is no formula of universal application as to what facts, how many of them and of what nature, are necessary to come to a conclusion that there is an AOP within the meaning of section 3; it must depend on the particular*

facts and circumstances of each case as to whether the conclusion can be drawn or not". To the above judicial exposition of what constitutes AOP, there has been a statutory rider added. The Finance Act, 2002 has inserted w.e.f. 1st April, 2003 an Explanation to clarify that object of deriving income is not necessary for AOP, BOI, local authority or an artificial juridical person in order that such entity may come within the definition of "Person" in section 2(31). If income results than they are liable to be taxed as AOP if the other conditions laid down by judicial decisions are satisfied. In the light of the above definition of AOP, let us examine the facts of the present case.

(i) The Assessee is a trust constituted under an instrument of trust dated 25/9/2006. M/S.ICICI Venture Funds Management Company Limited (hereinafter referred to as “Settlor”) by an indenture of Trust dated 25.9.2006 transferred a sum of Rs.10,000/- to M/S. The Western India Trustee and Executor Company Limited (hereinafter referred as the “Trustee”) as initial corpus to be applied and governed by the terms and conditions of the indenture dated 25.9.2006. The trustee was empowered to call for contributions from the contributors which will be invested by the Trustee in accordance with the objects of the trust. The objective of creation of the trust was to invest in certain securities called mezzanine instruments and to achieve commensurate returns to the contributors. The fund collected from the contributors together with

the initial corpus was to be handed over to the trustees under the provisions of the Indian Trust Act, 1882. The trust was to facilitate investment by the contributors who should be resident in India and achieve returns to such contributors. The contributors to the fund are its beneficiaries.

(ii) The trustees had power to appoint investment managers to manage the trust fund. The Settlor was to be appointed as the investment manager. The terms of the appointment of the settlor as investment manager are set out in an investment management agreement dated 25.9.2006 between the Assessee represented by the Trustee and Settlor.

(iii) The Settlor as investment manager issued memorandum to prospective investors on a confidential basis for them to consider an investment in mezzanine Fund. An investor who wishes to contribute to the fund enters into a contribution agreement with the trust, the trustees acting on behalf of the trust and the Settlor acting in his capacity as investment manager.

68. It can thus be seen that the beneficiaries contributed their money to the Assessee and a separate agreement was entered into between the Assessee and each beneficiary. There is no inter se arrangement between one contributory/ beneficiary and the other contributory/beneficiary as each of them enter into separate contribution arrangement with the Assessee.

Therefore it cannot be said that two or more beneficiaries joined in a common purpose or common action and therefore the tests for considering the Assessee as AOP was satisfied. The beneficiaries have not set up the Trust. Therefore it cannot be said that the beneficiaries have come together with the object of carrying on investment in mezzanine funds which is the object of the trust. The beneficiaries are mere recipients of the income earned by the trust. They cannot therefore be regarded as an AOP. Ground No.8 raised by the Revenue is therefore held to be without any merit.

69. Another reason assigned by the AO for treating the status of the Assessee as AOP was that in the return of income filed by the Assessee the status was shown in return of income. In this regard it is not in dispute before us that the form of return of income as it existed for the relevant assessment year did not contain a clause for filing return of income by a "Trust" in the status other than AOP. The CBDT realised this difficulty faced by 'private discretionary trusts' having total income exceeding ten lakh rupees facing problem in filing their return of income electronically in cases where they are filing their return in the status of an individual because status of a private discretionary trust has been held in law as that of an 'individual' gave instructions in Circular No.6/2012 dated 3.8.2012 to the effect that it will not be mandatory for 'private discretionary trusts', if its total income exceeds ten lakh rupees, to electronically furnish the return of income for assessment year 2012-13. Form No.49A which was the

prescribed form of application for allotment of Permanent Account Number (PAN) also did not contain a separate status "Trust" but contained a column "AOP (Trust)". The revised Form No.49A later notified contains a column for status as "Trust". Therefore the argument of the revenue that all "Trusts" are AOPs is not correct. If the contention of the Revenue as raised in Ground No.9 is accepted than the provisions of Sec.161(1) of the Act would become redundant. The charge to tax in the hands of the representative Assessee has to be in accordance with Sec.161(1) of the Act and therefore the status of the Assessee cannot be that of AOP. Ground No.9 raised by the Revenue is therefore held to be without any merit.

70. In ground No.10 the Revenue has raised issue that income has to be brought to tax in the hands of the right person in the right status. In this regard there are circulars dt. 24th Feb., 1967, 26th Dec., 1974 and 24th Aug., 1966 on the issue wherein it has been opined that once the choice is made by the Department to tax either the trust or the beneficiary, it is no more open to the Department to go behind it and assess the other at the same time.

71. In the case of *David Joseph (supra)* the Hon'ble Kerala High Court after making a reference to the above circulars held that once a beneficiary is assessed and his assessment is completed prior in point of time, and his assessment is an element of finality, it is a natural consequence flowing

therefrom that the Department does not get any permission to go behind it for the purpose of scrutinising the procedure, for finding out faults in regard thereto, the sole object of which is to justify the subsequent action taken by the Department. These are in fact the normal consequences that flow from the principle of finality. This principle especially emerges from three circulars and has established into a settled practice, any time a deviation therefrom cannot be permitted, even on the ground of a mistake with regard to the merits of the situation that received finality. Similar view has been taken by the Hon'ble M.P.High Court in the case of *Rai Sahe Seth Ghisalal Modi Family Trust (supra)* and Hon'ble Bombay High Court in the case of *Trustees Of Chaturbhuj Raghavji Trust (supra)*.

72. The Hon'ble Bombay High Court in the case of *Trustees of Chaturbhuj Raghavji Trust (supra)* held that under sub-s. (2) of s. 41, it is permissible for the IT authorities to make direct assessment on the person on whose behalf income, profits and gains from a trust are receivable. Sec. 41 having provided for two alternative methods, namely, either to tax the income in the hands of the trustees or directly in the hands of the person on whose behalf the income was receivable under the trust, and one of them having been availed of by the IT Department in directly assessing beneficiary in respect of the income, the other was no longer available to the Department. It was contended on behalf of the Revenue that the option was of the ITO who was assessing the trust to decide

whether he would assess the income in the hands of the trustees or directly in the hands of the beneficiary. This contention was rejected by the Hon'ble High Court which held that Sec. 41 was a special enabling provision which permitted the assessment in the hands of the trustees but did not preclude the direct assessment in the hands of the beneficiaries. There is nothing in s. 41 which would indicate that the choice between the alternative methods provided therein has to be made only at the time of the assessment of the trustees or that the choice only belongs to the ITO who is assessing the trust. In Circular No.157 dated 26.12.1974 of CBDT the CBDT has clarified on assessment of trust where share of beneficiaries are unknown. It has been clarified therein that the ITO should at the time of raising the initial assessment either of the trust or the beneficiaries adopt a course beneficial to the Revenue. Having exercised his option once, it will not be open to the ITO to assess the same income for that assessment year in the hands of the other person (i.e., the beneficiary or the trustee). In CBDT Circular No.13/2014 dated 28.7.2014 the Board has however given instructions that as per the SEBI (Alternative Investment Funds) Regulations, 2012 funds which are not venture capital funds and which are non-charitable trusts where the investors name and beneficial interest are not explicitly known on the date of its creation- such information becoming available only when the funds starts accepting contribution from the investors, have to be treated as falling within Sec.164(1) of the Act and the fund should be taxed

in respect of the income received on behalf of the beneficiaries at the maximum marginal rate.

73. The reliance placed on the aforesaid circular, in our view, will not be of any use for the reason that the said Circular was not in force at the relevant AY when the assessment was made by the AO on the present Assessee. Circulars not in force in the relevant Assessment year cannot be applied as held by the Hon'ble Bombay High Court in the case of *BASF (India) Ltd. & Anr. vs. W. Hasan, CIT & Ors. 280 ITR 136 (Bom)*. The decision of the Hon'ble Supreme in the case of *Ch. Atchaiah (supra)* on which the AO placed reliance in making assessment on the Assessee in our view is not applicable to the facts of the present case. In the said decision the status of the Assessee as that of an AOP was not disputed but it was argued that the ITO had option to assess either the AOP or the individual member of the AOP. The Hon'ble Supreme Court held that unlike under s. 3 of the 1922 Act, the ITO did not have an option under s. 4 of the IT Act, 1961, to assess either the AOP or the individual members thereof. If the ITO has assessed a wrong person, say individual instead of AOP, he is not precluded, in contradistinction to the 1922 Act, to seek to assess the right person under the 1961 Act. The Hon'ble Court made it clear that wherever such on option is given under the 1961 Act, it has been specifically provided, as in s.183 and that under the 1961 Act, tax has to be levied on the right person, irrespective of benefit to Revenue. In the present case, however, we are concerned with a case of assessment of

representative assessee or the person in respect of whom some other person is considered as representative assessee. Sec.161(1) by implication permits assessment of either the beneficiary or the Trustee. When the Trustee is assessed as representative assessee in respect of income received on behalf of the beneficiary, the section provides that tax shall be levied upon and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him. In our view, therefore, the decision of the Hon'ble Supreme Court in the case of *Ch. Atchaiah (supra)* will not be of any assistance to the plea of the revenue in the present case.

74. For the reasons stated above, we find no grounds to interfere with the order of the CIT(A). Consequently, the appeal by the Revenue is dismissed.

75. In the result, the appeal by the revenue is dismissed.

Pronounced in the open court on this 17th day of October, 2014.

Sd/-	Sd/-
(JASON P. BOAZ)	(N.V. VASUDEVAN)
Accountant Member	Judicial Member

Bangalore,
Dated, the 17th October, 2014.

/D S/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar /
Senior Private Secretary
ITAT, Bangalore.