

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 1ST DAY OF FEBRUARY 2017

PRESENT

THE HON'BLE MR.JUSTICE JAYANT PATEL

AND

THE HON'BLE MR.JUSTICE A N VENUGOPALA GOWDA

ITA NO.191/2015

C/W

ITA NOS.446/2015, 447/2015, 448/2015, 449/2015

& 450/2015

IN ITA NO.191/2015:

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
C.R BUILDING, QUEENS ROAD,
BENGALURU
2. THE DEPUTY COMMISSIONER OF INCOME-TAX
CIRCLE-9(1)
JEEVAN SAMPIGE, 3RD FLOOR,
1/1, SAMPIGE ROAD,
MALLESWARAM,
BENGALURU - 560003. ... APPELLANTS

(BY SRI. K V ARAVIND, ADVOCATE)

AND:

M/S. INDIA ADVANTAGE FUND-VII
 10TH FLOOR, PRESTIGE OBELISK
 NO.3, KASTURBA ROAD,
 BENGALURU - 560001.
 PAN: AAATI5597C

...RESPONDENT

(BY SRI.JEHANGIR MISTRI, SR. COUNSEL FOR
 SMT.VANI H, ADVOCATE)

THIS ITA IS FILED UNDER SECTION 260-A OF
 THE INCOME TAX ACT, 1961, ARISING OUT OF ORDER
 DATED:17/10/2014 PASSED IN ITA
 NO.178/BANG/2012, FOR THE ASSESSMENT YEAR
 2008-2009 AND ETC.,

IN ITA NO.446/2015:**BETWEEN:**

1. THE COMMISSIONER OF INCOME-TAX
 C.R. BUILDING,
 QUEENS ROAD,
 BENGALURU
2. THE DEPUTY COMMISSIONER OF INCOME-TAX
 CIRCLE -9 (1),
 JEEVAN SAMPIGE,
 3RD FLOOR, 1/1, SAMPIGE ROAD,
 MALLESWARAM,
 BENGALURU-560 003

...APPELLANTS

(BY SRI.K V ARAVIND, ADVOCATE)

AND:

M/S ICICI EMERGING SECTORS FUND
 10TH FLOOR, PRESTIGE OBELISK,
 NO.3, KASTURBA ROAD,
 BENGALURU - 560 001,
 PAN:AAATI 3458A

...RESPONDENT

(BY SRI.JEHANGIR MISTRI, SR. COUNSEL FOR
 SMT.VANI H, ADVOCATE)

THIS ITA IS FILED UNDER SECTION 260-A OF
 THE INCOME TAX ACT, 1961, ARISING OUT OF ORDER
 DATED:13/02/2015 PASSED IN ITA
 NO.177/BANG/2012, FOR THE ASSESSMENT YEAR
 2008-2009 AND ETC.,

IN ITA NO.447/2015:**BETWEEN:**

1. THE COMMISSIONER OF INCOME-TAX
 C.R. BUILDING,
 QUEENS ROAD,
 BENGALURU
2. THE DEPUTY COMMISSIONER OF INCOME-TAX
 CIRCLE -9 (1),
 JEEVAN SAMPIGE,
 3RD FLOOR, 1/1, SAMPIGE ROAD,
 MALLESWARAM,
 BENGALURU-560 003

... APPELLANTS

(BY SRI.K V ARAVIND, ADVOCATE)

AND:

M/S ICICI EMERGING SECTORS FUND
 10TH FLOOR, PRESTIGE OBELISK,
 NO.3, KASTURBA ROAD,
 BENGALURU - 560 001,
 PAN:AAATI 3458A

...RESPONDENT

(BY SRI.JEHANGIR MISTRI, SR. COUNSEL FOR
 SMT.VANI H, ADVOCATE)

THIS ITA IS FILED UNDER SECTION 260-A OF
 THE INCOME TAX ACT, 1961, ARISING OUT OF ORDER
 DATED:13/02/2015 PASSED IN ITA
 NO.348/BANG/2011, FOR THE ASSESSMENT YEAR
 2008-2009 AND ETC.,

IN ITA NO.448/2015:**BETWEEN:**

1. THE COMMISSIONER OF INCOME-TAX
 C.R. BUILDING,
 QUEENS ROAD,
 BENGALURU
2. THE DEPUTY COMMISSIONER OF INCOME-TAX
 CIRCLE -9 (1),
 JEEVAN SAMPIGE,
 3RD FLOOR, 1/1, SAMPIGE ROAD,
 MALLESWARAM,
 BENGALURU-560 003

...APPELLANTS

(BY SRI.K V ARAVIND, ADVOCATE)

AND:

M/S ICICI EMERGING SECTORS FUND
 10TH FLOOR, PRESTIGE OBELISK,
 NO.3, KASTURBA ROAD,
 BENGALURU - 560 001,
 PAN:AAATI 3458A

...RESPONDENT

(BY SRI.JEHANGIR MISTRI, SR. COUNSEL FOR
 SMT.VANI H, ADVOCATE)

THIS ITA IS FILED UNDER SECTION 260-A OF
 THE INCOME TAX ACT, 1961, ARISING OUT OF ORDER
 DATED:13/02/2015 PASSED IN ITA
 NO.475/BANG/2013, FOR THE ASSESSMENT YEAR
 2009-2010 AND ETC.,

IN ITA NO.449/2015**BETWEEN:**

1. THE COMMISSIONER OF INCOME-TAX
 C.R. BUILDING,
 QUEENS ROAD,
 BENGALURU
2. THE DEPUTY COMMISSIONER OF INCOME-TAX
 CIRCLE -9 (1),
 JEEVAN SAMPIGE,
 3RD FLOOR, 1/1, SAMPIGE ROAD,
 MALLESWARAM,
 BENGALURU-560 003

...APPELLANTS

(BY SRI.K V ARAVIND, ADVOCATE)

AND:

M/S ICICI ECONET INTERNET
& TECHNOLOGY FUND
10TH FLOOR, PRESTIGE OBELISK,
NO.3, KASTURBA ROAD,
BENGALURU - 560 001,
PAN:AAATI 2889M

...RESPONDENT

(BY SRI.JEHANGIR MISTRI, SR. COUNSEL FOR
SMT.VANI H, ADVOCATE)

THIS ITA IS FILED UNDER SECTION 260-A OF
THE INCOME TAX ACT, 1961, ARISING OUT OF ORDER
DATED:13/02/2015 PASSED IN ITA
NO.347/BANG/2011, FOR THE ASSESSMENT YEAR
2008-2009 AND ETC.,

IN ITA NO.450/2015**BETWEEN:**

1. THE COMMISSIONER OF INCOME-TAX
C.R. BUILDING,
QUEENS ROAD,
BENGALURU
2. THE INCOME-TAX OFFICER
CIRCLE -9 (1),
JEEVAN SAMPIGE,
3RD FLOOR, 1/1, SAMPIGE ROAD,

MALLESWARAM,
BENGALURU-560 003

...APPELLANTS

(BY SRI. K V ARAVIND, ADVOCATE)

AND:

M/S INDIA ADVANTAGE FUND-1,
10TH FLOOR, PRESTIGE OBELISK,
NO.3, KASTURBA ROAD,
BENGALURU-560 001
PAN:AAATI 3344R.

...RESPONDENT

(BY SRI.JEHANGIR MISTRI, SR. COUNSEL FOR
SMT.VANI H, ADVOCATE)

THIS ITA IS FILED UNDER SECTION 260-A OF
THE INCOME TAX ACT 1961, ARISING OUT OF ORDER
DATED:13/02/2015 PASSED IN ITA
NO.179/BANG/2012, FOR THE ASSESSMENT YEAR
2008-2009 AND ETC.,

THESE APPEALS COMING ON FOR ADMISSION
THIS DAY, **JAYANT PATEL J.**, DELIVERED THE
FOLLOWING:

ORDER

All the appeals are preferred by the Revenue raising various questions, but in our view the only one common question which may arise for consideration can be question No.2, which reads as under:

“Whether, the Tribunal, on the facts and in the circumstances of the case was right in holding that the assessee trust cannot be assessed as on AOP even though the requirements of section 164(1) were not met, inasmuch as the shares of the beneficiaries were indeterminate/unknown and hence the assessing officer was justified in invoking the provisions of section 164(1) of the Act and make the assessee liable to be assessed at the maximum marginal rate in the status of AOP. Hence it is not relevant whether the necessary ingredients for formation of an AOP are fulfilled by the assessee or not?”

2. We may also record that the other questions are mainly dependent upon the answer to the above referred question and if the answer is in negative, then only the other questions may arise. Hence, we may refer to the said aspects at the later stage.

3. We have heard Mr.K.V.Aravind, learned Counsel appearing for the appellant-Revenue in all the appeals and Mr.Jehangir Mistri, learned Senior Counsel appearing with Ms.Vani H., learned Counsel appearing for the respondents-assessee.

4. In our considered view, all the detailed facts are not required to be narrated save and except that the Trusts were created on having the different name and style who are assesses in the respective appeals. As per the Trust Deeds, the benefits were shared amongst the beneficiaries and they were also separately assessed to tax under the Income Tax Act, (hereinafter

referred to as 'the Act' for the sake of brevity). However, when the questions arose for assessment of the respective Trust, the Assessing Officer found that, as the shares of the beneficiaries are non-determinable, income needs to be taxed in the hands of the Trustees at the maximum marginal rate and accordingly the assessment orders were issued.

5. The matters were carried in appeal before the CIT (Appeals) and the CIT (Appeals) found that the shares were determinable and ultimately allowed the appeals of the assesseees. When the matters were further carried before the Tribunal by the Revenue, the Tribunal by the impugned order in ITA No.191/2015 at paragraphs-60 to 65 observed thus:

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, that 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."

and ultimately the Tribunal found that the grounds raised by the Revenue on the non-ascertainability of the shares of the beneficiaries and consequently the chargeability of the income in the hands of the Trustees at the maximum marginal rate was without merit. Under the circumstances, the present appeals before

this Court. It is not in dispute that similar view is taken by the Tribunal which are subject matter of other appeals.

6. As such, in our view the matter should rest as the finding of fact for the simple reason that whether the Trust Deed provides for shares of the beneficiaries which are determinable or non-determinable would vary from facts to facts of each Trust including that of the deed of trust etc. Such finding of fact can be arrived at after interpretation of the terms and conditions of the Trust Deed as well as the other facts and circumstances which may be germane to reach the conclusion on the finding of fact. If the matter is to rest on the question of finding of fact, in our view, such question of finding of fact would be outside the scope of judicial review in the present appeals which would be limited to substantial questions of law.

7. However, the learned Counsel appearing for the Revenue attempted to contend that such finding of fact so recorded by the Tribunal is perverse and therefore, it may fall under the judicial scrutiny in the present appeals. In his submission, what was required to be considered by the Tribunal was the exact amount of share by the beneficiaries and the quantification thereof and both should have been on the date when Trust Deed is executed or the Trust is formed. In his submission, if such conditions are not satisfied the shares of the beneficiaries would result into non-determinable shares. He submitted that the Tribunal has not properly examined the matter and such finding of fact by the Tribunal could be said as perverse.

8. In our view, it is by now well settled that the perversity can be tested in two ways. One, if any finding of fact is not supported by record and is on

some hypothesis or surmises. The second test is, that the finding arrived at which any person with reasonable prudence may not record. Then it can be said that such finding is perverse.

9. Examining the matter in the present case it appears that it is not the case of the Revenue that the findings so recorded is such, which no man with reasonable prudence would arrive at such finding. But the contention sought to be canvassed is that on the date of execution of the Trust Deed, the shares should specifically come in existence with the quantification and it need not depend upon the future share of the benefits or upon any future contingency.

10. In our view, the contention is wholly misconceived for three reasons. One is that by no interpretative process the explanation to Section 164 of the Act, which is pressed in service can be read for

determinability of the shares of the beneficiary with the quantum on the date when the Trust deed is executed and the second reason is that the real test is the determinability of the shares of the beneficiary and is not dependent upon the date on which the trust deed was executed if one is to connect the same with the quantum. The real test is whether shares are determinable even when even or after the Trust is formed or may be in future when the Trust is in existence. In the facts of the present case, even the assessing authority found that the beneficiaries are to share the benefit as per their investment made or to say in other words, in proportion to the investment made. Once the benefits are to be shared by the beneficiaries in proportion to the investment made, any person with reasonable prudence would reach to the conclusion that the shares are determinable. Once the

shares are determinable amongst the beneficiaries, it would meet with the requirement of the law, to come out from the applicability of Section 164 of the Act.

11. Under the circumstances, we cannot accept the contention of the Revenue that the shares were non-determinable or the view taken by the Tribunal is perverse. On the contrary, we do find that the view taken by the Tribunal is correct and would not call for interference so far as determinability of the shares of the beneficiaries are concerned.

12. Once the shares of the beneficiaries are found to be determinable, the income is to be taxed of that respective sharer or the beneficiaries in the hands of the beneficiary and not in the hands of the Trustees which has already been shown in the present case.

13. Under the circumstances, in any case, it cannot be said that the Tribunal has committed error. Accordingly, the question is answered in affirmative against the Revenue and in favour of the assessee.

14. If the assessment under Section 164(1) of the Act is not maintained in the hands of the Trustees, the other question raised by the Revenue, in our view, would not arise. The examination of such questions inspite of our answer to the above referred question would only be a mere academic exercise which Court would not undertake and Court would rather decide the questions which are really required to be decided. Hence, we find that the other questions which are raised in the appeals, as such, would not arise nor would be required to be considered.

15. In view of the above, all appeals are dismissed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

JT/-