IN THE INCOME TAX APPELLATE TRIBUNAL

"A" BENCH, MUMBAI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.256/Mum./2024
(Assessment Year : 2016-17)

ARCIL Retail Loan Portfolio
004 B Trust
The Ruby, 10th Floor, 29, Senapati
Bapat Marg, Dadar, Mumbai-400028. ..... Appellant

v/s

The Income Tax Officer,
Circle-21(1)(2)
Piramal Chambers, Lalbaug,
Parel, Mumbai-400012 ..... Respondent

Assessee by : Shri Jeet Kamdar
Shri Radhakant Saraf

Revenue by : Shri Ajay Chandra

Date of Hearing – 22/05/2024	Date of Order – 28/05/2024

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 26/12/2023, passed u/s 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*"learned CIT(A)"*], for the assessment year 2016–17.

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

> *"1. The Assessing Officer erred in assessing the Total Income in the hands of the Appellant Trust, It is the contention of the Appellant Trust that the income is not chargeable in the hands of the Appellant Trust but in the hands of the beneficiaries of the Appellant Trust:*

2. The learned Commissioner of Income-tax (Appeals) erred in upholding the action of the Assessing Officer, taxing the income in the hands of the Appellant Trust at the maximum, marginal rate instead of taxing the same in hands of the Security Receipt holders by Completely ignoring the revocable nature of the determinate trust and ignoring the provisions of Section 61 to 63 of the Income Tax Act, 1961.

3. Without prejudice to the foregoing, the learned Commissioner of Income-tax (Appeals) erred in:

i) holding the Appellant Trust as an indeterminate trust ignoring the submissions made by the Appellant in this regard, and,

ii) considering the Appellant Trust as an 'AOP' engaged in the business of securitization of debts.

4. Without prejudice to the foregoing contention, even assuming though not conceding that the income was taxable in the hands of the Appellant Trust, the learned Commissioner of Income-tax (Appeals) erred in confirming the disallowance of protection, preservation, and insurance expenses of Rs. 26,41,715/by ignoring the submissions made by the Appellant.

5. Without prejudice to the foregoing contention, even assuming though not conceding that the income was taxable in the hands of the Appellant Trust, the learned Commissioner of Income-tax (Appeals) erred in confirming the disallowance of management expenses of Rs. 76,907/- by ignoring the submissions made by the Appellant.

6. Without prejudice to the foregoing contention, even assuming though not conceding that the income was taxable in the hands of the Appellant Trust, the learned Commissioner of Income-tax (Appeals) erred in holding that Interest Income and Other income were taxable as Income from Other Sources instead of Business Income of the Appellant Trust.

7. The learned Commissioner of Income-tax (Appeals) erred in confirming the consequential levy of interest u/s 234B of the Act."

3. We have considered the submissions of both sides and perused the material available on record. The brief facts of the case are that the assessee is in the business of Asset Reconstruction – securitization of debts and processing of such debts of banks and institutional lenders. The assessee is created by Assets Reconstruction Company India Limited ("*ARCIL*") for the purpose of liquidating/recovering/realizing the Non-Performing Assets ("*NPAs*"), taken over by the assessee. ARCIL is a registered with Reserve Bank of India u/s 3 of the Securitization and Reconstruction of Financial Assets and

Enforcement of Security Interest Act, 2002 ("SARFAESI Act") as a Securitization Company and Reconstruction Company ("*ARCs*"). ARCs are regulated by the Reserve bank of India. Pursuant to SARFAESI Act and RBI Guidelines, ARCIL acquires financial assets that are classified as NPAs from the banks, financial institutions and housing finance companies operating in India. The concerned bank/financial institutions, which intend to transfer the financial assets to ARCs, must ensure that the same are classified as NPA in accordance with the guidelines of RBI in this regard. Accordingly, ARCIL acquires financial assets that are classified as NPAs from the banks/financial institutions. The stressed assets are acquired by ARCIL by setting up trusts and formulating schemes there under pursuant to section 7 of the SARFAESI Act and RBI guidelines. As per the assessee, the trusts are set up for the acquisition of the financial assets as per the RBI guidelines and are governed by the Indian Trust Act, 1882. Such trust accepts contributions from Security Receipts holders ("*SR holders*") for acquisition of financial assets. The contributions are raised from Qualified Institutional Buyers ("*QIBs*") as defined under SARFAESI Act, for which trusts issued Security Receipts to QIBs. These QIBs include Banks, Financial Institutions, Insurance Companies, ARCS, Mutual Funds, Eligible Non-Banking Finance Companies and Foreign Institutional Investors. The assessee derives income from assets reconstruction activity and handling of NPA of banks/financial institutions.

4. During the year under consideration, the assessee filed its return of income on 29/09/2016 declaring a total income at Rs. Nil. The return filed by the assessee was selected for scrutiny and statutory notices u/s 143(2) as well

as section 142(1) of the Act were issued and served upon the assessee. During the assessment proceedings, the assessee was asked to explain as to why the income/loss derived by assessee should not be taxed in its hand as Association of Person ("*AOP*"). The assessee was also asked to establish that it is a proper trust. In response thereto, the assessee submitted that it has been duly formed as a trust by ARCIL on 22/12/2010 in accordance with the provisions of the Indian Trust Act, 1882. The assessee further submitted that for an entity to be treated as an AOP, a common purpose or common action is a basic requirement, which the assessee trust cannot qualify and therefore it is not an AOP. It was further submitted that in case of the assessee trust, the QIB namely ARCIL and Indian Bank have not joined in common action and have applied for and subscribed to the Security Receipts separately to the trustee. The contributors wishing to subscribe to the Security Receipts have made an application with the trust and the trust has allotted such Security Receipt upon its discretion. The assessee further submitted that the trustee does not work together with the beneficiaries, but works independent and according to its own discretion in accordance with the objects of the trust specified by the trust deed. Therefore, it was further submitted that trustee and beneficiaries do not work together for a common purpose. The assessee submitted that it is a revocable trust and the share of the beneficiaries is known. Therefore, as per the provisions of section 61 read with section 63 of the Act, income earned by a revocable trust is only taxable in the hands of the beneficiaries and not in the hands of the trust. In this regard, the assessee placed reliance upon, inter-alia, the following clause of the trust deed: -

"2. Revocation of Contributions
1. The Security Receipt Holders shall be entitled to revoke the Contributions made by them, at, any time during the term of this Deed, in accordance with the terms arid. Conditions contained therein for any reason, including but not limited to circumstances resulting from any adverse tax consequences: (for either the Trust or the Security Receipts Holders) or any direction of any Statutory Authority., provided that no such revocation shall take effect unless the consent of the Security Holders holding Security Receipts representing not less than 75% of the total face value of the then outstanding' Security receipts, issued pursuant to this deed has been obtained, in this behalf provided that a notice of not less than 60 days of the intention to revoke the contribution is given to the Trustee."

5. The Assessing Officer ("*AO*") vide order dated 26/12/2018 passed u/s 143(3) of the Act did not agree with the submissions of the assessee and held that in the present case, the beneficiaries in the assessee trust are the various QIBs who contributed funds in the trust and are also the beneficiaries. Thus, in the instant case, the settlor and beneficiaries are the same and identical. The AO further held that the trust has three constituents, i.e. settlor, contributor and beneficiary and all the three constituents are independent and distinct whereas in the present case, contributors are also the beneficiaries. Thus, so called trust has been created for the sole motive to the benefit of the settlor/contributor. Therefore, the AO held that the plea of the assessee that it is a trust is completely erroneous, and in fact, the assessee is only an AOP having the QIBs as members in the form of QIB/financial institutions. Accordingly, the AO rejected the submissions of the assessee that it is a trust falling within the meaning of section 61-63 of the Act. The AO held that after the creation of the assessee trust, it has entered into contribution agreement through offer documents with QIBs for the sole purpose of acquisition of NPAs, transferring those at a profit and earning profit/income out of the same. Thus, it was held that coming together of the two or more persons by way of contribution of sufficient fund into an entity in order to invest in the specific

entities with a sole intention to earn profits can only be termed as in AOP. The AO also held that the revocable clause relied upon by the assessee makes it clear that the independent contributors cannot revoke their contributions and only if the contributors holding 90% of the units consent together, then only can the contributions be revoked. Therefore, it was held that in strict terms, the provisions of sections 61 and 63 of the Act are not applicable in the case of the assessee. The AO summarised its finding in para no. 19 of the assessment order as under: -

> *"1. Whereas in the case o the trust, settlor, contributor and beneficiaries, all have to be independent and distinct. In the case of the assessee, the contributors are the beneficiaries themselves, therefore, the assessee cannot be treated as a trust, but as an AOP having several members in the form of QIBs and financial institution.*
>
> *2) After its creation, the so-called trust entered into contribution assignment through offer document for the sole purpose of taking NPAs for sale at a profit. Such an entity can be at best be classified as an AOP created jointly by several persons for earning profits.*
>
> *3) Capital contribution is a revocable transfer by the transferors, but the income arising out of the activities of the fund is an ascertained income and the contributors have no control over it, and in the strict sense of the term is the provisions of Sections 61 & 63 of the 'Act are not applicable to the assessee's case.*
>
> *4) The Clause relied upon by the assessee make it clear that individual contributors cannot revoke their contribution on their own land revocation can occur only if the contributors holding 90% of the units consent together, then only can the contributions be revoked. Such restrictions point out to the fact that the entity is not a revocable trust. The members lack any direct power or revocation under the instrument of transfer*
>
> *5) Any claim of assessee to the effect that the income has been taxed in the hand of the beneficiaries would not help. Income has to be taxed in the right hands, at the right rates of taxation. The sums earned by the assessee on account of various investment/activities has been shown as its income, therefore, it is rightly and appropriately taxable in its own hands and the trust is legally bound to include in the same in the computation of its income."*

6. Accordingly, in view of the aforesaid findings, the AO computed the total income of the assessee at Rs.1,64,98,960/-.

7. In its appeal before the learned CIT(A), the assessee placed reliance upon various decisions of the Tribunal, wherein in the case of similar trust created by ARCIL, this issue has been decided in favour of the assessee by treating the trust as a valid trust as under the Indian Trust Act, 1882 and rejecting the submission of the Revenue to tax the same as an AOP.

8. The learned CIT(A), vide impugned order, dismissed the appeal filed by the assessee and held that since it is a legal issue, which has not attained finality, therefore, the decisions of the Tribunal are not binding at this stage. Accordingly, the learned CIT(A) concluded that the AO has taken correct legal view under the circumstances and the income can only be assessed in the hands of the assessee in the status of AOP. Being aggrieved, the assessee is in appeal before us.

9. We find that the Co-ordinate Bench of Tribunal in ITO Vs. M/s. Scheme A1 of ARCIL CPS 002 XI Trust, in ITA. No. 2293/Mum./2018, for the assessment year 2013-14, vide order dated 10/09/2020, while deciding the similar issue as arising in the case of trust set up by the ARCIL pursuant to the provisions of SARFAESI Act and the guidelines of RBI to acquire financial assets of the borrowers classified as NPAs held that there is no prohibition on the settler in becoming a beneficiary of the trust and as per the provisions of section 9 of the Indian Trust Act, 1882, every person capable of holding property may be a beneficiary of the trust, while as per the section 7 of the Indian Trust Act, 1882 any person competent to contract can become a settlor of the trust. Accordingly, the Co-ordinate Bench held that the observation of

the AO that the assessee trust was not a valid trust, for the reason that its contributors and beneficiaries were the same, clearly militates against the express provisions of the Indian Trust Act, 1882. The relevant findings of the Co-ordinate Bench are as under: -

> *"We have given a thoughtful consideration to the aforesaid observations of the CIT(A), and find ourselves to be in agreement with the view therein taken by him. As observed by the CIT(A), as per Sec. 9 of the Indian Trust Act, 1882, there is no prohibition on the settlor in becoming a beneficiary of the trust. In fact, as provided in Sec. 9 of the Indian Trust Act, 1882, every person capable of holding property may be a beneficiary of the trust. Further, as per Sec. 7 of the Indian Trust Act, 1882, any person competent to contract can become a settlor of the trust. In the backdrop of our aforesaid observations we concur with the CIT(A) that the observations of the A.O that the assessee trust was not a valid trust, for the reason, that its contributors and beneficiaries were the same, clearly militates against the express provisions of the Indian Trust Act, 1882, and thus, cannot be accepted. As a matter of fact, we find that as observed by the CIT(A), all the necessary ingredients for the formation and existence of the trust had been fulfilled, and the RBI guidelines had duly been followed by the assessee trust. Interestingly, we find that in case the claim of the A.O that the assessee is not a valid trust and its creation was only a façade for evasion of taxes was to be accepted, then it would be imply that the trust does not exist at all. If that be so, then we concur with the CIT(A) that there would be no legal sanction to treat the trust as an AOP, as had been advocated by the A.O. Under such a situation, the only transaction that would subsist will be the direct investment by the beneficiaries in the financial assets, and therefore, the question of assessing the assessee trust as an AOP or under any other head of income would be totally out of question. Accordingly, in the backdrop of our aforesaid observations, we are of the considered view that the CIT(A) had rightly dislodged the aforesaid view of the A.O, and in the totality of the facts had correctly observed that the assessee is a valid trust."*

10. Further, the Co-ordinate Bench after considering the relevant clauses of the trust deed, which are similar to the present case, concurred with the view taken by the learned CIT(A) and held that the assessee trust is revocable trust, and therefore, the provisions of section 61 to 63 of the Act would be applicable to it. The relevant findings of the clauses are as under: -

> *"We have given a thoughtful consideration to the observations of the lower authorities, and concur with the view taken by the CIT(A) that the assessee trust is a revocable trust, and thus, the provisions of Sec. 61 to 63 of the Act would be applicable to it. On a perusal of Sec. 61 of the Act, we find that the*

same therein provides that an income arising to a 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. However, if the transfer is irrevocable for a specified period, then as per Sec. 62 of the Act, the provisions of Sec. 61 would be rendered unworkable. As for the definition of the terms "transfer" and "revocable transfer", the same is provided in Sec. 63 of the Act. Sec. 63 provides, that (a) a transfer shall be deemed to be revocable if, viz. (i) it contains any provisions 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 reassume 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. On a literal interpretation of the aforesaid statutory provision, we find that it is nowhere stated that if the transfer is explicitly revocable, the provisions of Sec. 61 and 63 would not apply. As observed by the CIT(A), we find that Clause 5 of the trust deed makes it clear beyond any scope of doubt that the contribution made by the SR holders is „revocable". Accordingly, we have no hesitation in observing that the income therein arising has to be brought to tax in the hands of the SR holders, i.e as per the provision of Sec. 61 to 63 of the Act. Insofar, the view taken by the A.O, that as the revocation of the contributions is conditional upon the consent of the contributors holding 75% of the units, we are afraid that the same would not render the contributions as irrevocable. Our aforesaid view is fortified by the judgment of the Hon'ble High Court of Bombay in the case of Behramji Sorabji Lalkaka Vs. CIT (1948) (16 ITR 301) (Bom). In the aforesaid case, it was observed by the Hon"ble High Court that the words "revocable transfer" are well understood in law and a transfer does not cease to be revocable because the power of revocation cannot be exercised by the settlor without the consent of the named individuals or any of them. As observed by the Hon"ble High Court, a transfer is nonetheless revocable even if it can be revoked only with the consent of any named person or persons. As such, on the basis of our aforesaid observations we are persuaded to subscribe to the view taken by the CIT(A), who had rightly concluded that the assessee trust is a revocable trust, and thus, the provisions of Sec. 61 to 63 of the Act would be applicable to it."

11. Insofar as the findings of the Revenue that the status of the assessee is an AOP on the basis that the beneficiaries had associated and joined hands for a common purpose or action with QIBs for the sole purpose of the acquisition of NPAs, and transferring those at a profit with motive of earning income/profit, the Co-ordinate Bench held that there is nothing on record which would suggest that the beneficiary had agreed to associate for any common objective and the beneficiaries who do not have any control over the activities carried on by the trustee in managing the trust, had made their

respective investments based on the offer documents, and on the basis of their investments made in the trust were allotment the Security Receipt which represented their undivided and proportionate interest in the corpus of the trust. Accordingly, the Co-ordinate came to the conclusion that the AO had failed to place on record any material which would even remotely suggest that there was a concerted effort by the beneficiaries to earn income jointly, and therefore, the assessee cannot be treated as an AOP. The relevant findings of the Co-ordinate Bench are reproduced as under: -

> *"We have given a thoughtful consideration to the observations of the lower authorities in context of the aforesaid issue under consideration before us. Admittedly, the meaning of an "Association of Persons" (for short "AOP") had witnessed a change, vide the Finance Act, 2002 w.e.f. 01.04.2002. As per the amended definition of the term AOP as contemplated in Sec. 2(31)(v) of the Act, the requirement as was earlier laid down by the Hon"ble Supreme Court in its various judgments that the various person as per their volition should have associated with the object of deriving income, profits or gains, had been dispensed with by the legislature, vide the "Explanation" to Sec. 2(31) of the Act, as had been made available on the statute vide the Finance Act, 2002, w.e.f 01.04.2002. As per the "Explanation" to Sec. 2(31) of the Act, an AOP shall be deemed to be in existence, whether or not it was formed or established with the object of deriving income, profits or gains. However, in the case before us, we find, that the CIT(A) had rightly observed that there is nothing on record which would suggest that the beneficiary had agreed to associate for any common objective. In fact, the beneficiaries who do not have any control over the activities carried on by the trustee in managing the trust, had made their respective investments based on the offer documents, and on the basis of their investments made in the trust were allotted the SRs which represented their undivided and proportionate interest in the corpus of the trust. We are unable to comprehend as to on what basis the A.O had concluded that the motive behind creation of the trust was the income earning asset reconstruction activity and handling of NPAs. On a perusal of the records, we find that the two beneficiaries viz. (i) ARCIL; and (ii) ICICI Bank Ltd., had made investments based on the offer document separately, and not jointly, on the basis of which they had been allotted the security receipts (SRs) representing their undivided and proportionate interest in the corpus of the trust. In our considered view, as the A.O had failed to place on record any material which would even remotely suggest that there was a concerted effort by the beneficiaries to earn income jointly, therefore his unsubstantiated view that the assessee was to be treated as an AOP cannot be sustained and has rightly been vacated by the CIT(A)."*

12. The Co-ordinate Bench, further, rejected the findings of the AO that the income has to be taxed in the hands of the assessee and payment of taxes by the contributors would have no bearing, on the basis that the money always intended to be passed on to and only to the beneficiaries, i.e. the SR holders in proportion to their interest in the corpus of the assessee trust as per the trust deed and offer documents. The Co-ordinate Bench also held that the assessee trust is a determinate trust and neither any discretion has been given to the trustee to decide the allocation of the income every year, nor any right is given to the beneficiary to exercise an option to receive the income or not each year.

13. Therefore, from the careful perusal of the aforesaid decision of the Tribunal, it is evident that the Co-ordinate Bench dealt with each and every finding, as raised by the AO in para no. 19 of the assessment order in the present case, as noted in forgoing paragraph, and decided the issue of non-taxability in the hands of the assessee in favour of the assessee. We find that the similar findings have been rendered by the Co-ordinate Bench in following cases of similar trusts set up by ARCIL: -

(i) ITA. No.434/Mum./2017, Arcil CPS 002 XIII Trust Vs. ITO, vide order dated 07/06/2021

(ii) ITA. No. 7353/Mum./2019, ITO Vs. ARCIL AARF-I – 1 Trust, vide order dated 15/09/2021

(III) ITAs. No. 2701/Mum./2017 and Ors, M/s. ISARC 14/2010-11 Trust Vs. ITO, vide order dated 04/09/2019

14. The learned Departmental Representative ("*learned DR*") apart from vehemently relying upon the order of the lower authorities did not point out any reason to deviate from the conclusion so reached by the Co-ordinate

Bench in the aforesaid cases rendered in similar factual matrix. We find that even the learned CIT(A) though agreed that the in similar circumstances same findings of the AO were set aside by the Tribunal, however, refused to follow the decisions of the Tribunal on the basis that the decisions have not attained finality. Accordingly, respectfully following the decisions of the Co-ordinate Bench as noted above, we are of the considered view that the assessee trust is a revocable trust and is not an AOP. Further, the income is liable to be assessed in the hands of the beneficiaries as per the provisions of section 61 to 63 of the Act. Further, since the respective shares were known since inception, therefore, the assessee could not be considered as an indeterminate trust. As a result, the grounds no. 1 - 3 raised in assessee's appeal are allowed.

15. In view of the aforesaid findings, without prejudice grounds raised by the assessee, i.e. grounds no. 4 – 6, are rendered academic in nature and therefore, are left open.

16. Ground no. 7 pertaining to levy of interest u/s 234B of the Act, which is consequential in nature, is allowed.

17. In the result, the appeal by the assessee is allowed.

Order pronounced in the open Court on 28/05/2024

Sd/-	**Sd/-**
NARENDRA KUMAR BILLAIYA **ACCOUNTANT MEMBER**	**SANDEEP SINGH KARHAIL** **JUDICIAL MEMBER**

MUMBAI, DATED: 28/05/2024
Vijay Pal Singh, (Sr. PS)

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The PCIT / CIT (Judicial);

(4) The DR, ITAT, Mumbai; and

(5) Guard file.

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By Order

Assistant Registrar
ITAT, Mumbai