* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 16.07.2025
Judgment delivered on: 29.07.2025

\+ W.P.(C) 9972/2024 & CM APPL Nos.40840/2025, 69940/2024 & 1448/2025

EQUITY INTELLIGENCE AIF TRUST ...Petitioner

versus

THE CENTRAL BOARD OF DIRECT TAXES & ANR. ...Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. S. Ganesh, Sr. Advocate with Ms. Kavita Jha, Sr. Advocate with Mr. Vaibhav and Mr. Himanshu Aggarwal, Advocates

For the Respondents : Mr. Puneet Rai, Sr. Standing Counsel with Mr. Ashvini Kumar and Mr. Rishabh Nangia, Advocates.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

J U D G M E N T

TUSHAR RAO GEDELA, J.

1. Present petition has been filed under Article 226 of the Constitution of India, 1950 seeking to declare the Circular no.13/2014 dated 28.07.2014 issued by the respondent no.1 as *ultra vires* the provisions of sections 160 and 164 of the Income Tax Act, 1961 and further seeks to quash the order dated 27.06.2024 passed by the respondent no.2/Board for Advance

Rulings-1 under section 245R(4) of the Income Tax Act, 1961 following the impugned Circular No.13/2014 issued by the respondent no.1.

2. It is the case of the petitioner that the petitioner is a company incorporated under the Companies Act, 1956 and engaged in the business of rendering Portfolio Management Services, in accordance with the relevant guidelines/regulations issued by Securities and Exchange Board of India. (hereinafter referred to as *"SEBI"*)

3. The petitioner states that the SEBI issued Alternative Investment Fund (hereinafter referred to as *"AIF"*) Regulations, *vide* notification dated 21.05.2012. The said regulations classified AIF in three categories, i.e., Category I, II, III. It is the case of the petitioner that to float an AIF, Category III fund, Equity Intelligence floated the AIF services for the petitioner and acted as the settlor of the petitioner. The object of the petitioner, as stated in the Trust Deed is to act as an Alternative Investment Fund Category III in terms of Securities Exchange Board of India (Alternative Investment Funds) Regulations, 2012 (hereinafter referred to as *"SEBI Regulations"*).

4. It is stated that the petitioner launched a single open-ended scheme, namely, *EQ India Fund*, registered with SEBI for investment in listed equity shares. Pursuant to its launch, contribution agreements were executed with various investors, and units of ₹1000 each were issued. As a long-term investment, an exit load of 5% of the Net Asset Value is levied for redemptions within two years. The petitioner claims that the identity of investors and their income share is determined in accordance with the contribution agreements executed post the Trust Deed. The petitioner

further states that the fund commenced operations on 27.07.2017 and has been filing separate returns of income since Assessment Year (hereinafter referred to as *"AY"*) 2018-19.

5. It is the case of the petitioner that since the fund is treated as a separate taxable entity, the EQ India Fund filed its separate returns of income since its very inception i.e., AY 2018-19. In order to seek clarity on the taxability, the petitioner filed an application on 10.04.2018 in Form 34DA and section 245Q(1) of the Income Tax Act, 1961 (hereinafter referred to as *"the Act"*) seeking advance ruling on various issues before the Authority for Advance Ruling (hereinafter referred to as *"AAR"*).

6. The petitioner states that in the meantime, during the pendency of the application before AAR, the Assessing Officer (hereinafter referred to as *"AO"*) completed the assessment proceedings under section 143(3) read with section 143(3A) & 143(3B) of the Act in the case of EQ India Fund for AY 2018-19, accepting the returned loss of the Trust. Further, in the Financial Year 2021-22, the Finance Act, 2021 abolished the institution of AAR and replaced the same with the respondent no.2/Board of Advance Rulings-1(hereinafter referred to as *"BAR"*). The petitioner's application was also transferred from AAR to the jurisdiction of respondent no.2/BAR.

7. It is the case of the petitioner that on 27.06.2024, the respondent no.2/BAR *vide* impugned order rejected the application for withdrawal filed by the petitioner by holding that that if the names of the beneficiaries are not set out in the original Trust Deed then such Trust would be treated as indeterminate and resultantly be subject to Maximum Marginal Rate under the provisions of section 164 of the Act. Hence, the present petition.

CONTENTIONS OF THE PETITIONER:

8. Mr. S. Ganesh, learned senior counsel appearing for the petitioner submitted that the petitioner is an investment trust and its beneficiaries are investors, each of whom has purchased a certain number of units in the Trust Fund and each of such units is known as *"Net Asset Value"* (hereinafter referred to as *"NAV"*). He stated that such value is preciously determined daily and intimated to the investors and also to SEBI on a periodic basis. He further submitted that this NAV has never been questioned by SEBI till date. According to him, this crucial factor has been completely disregarded by the respondent no.2/BAR in its impugned order.

9. Briefly referring to sections 161 and 164 of the Act, he submitted that if the shares of the beneficiaries are ascertainable and determinable, their income is taxed at the normal rate, however, if the same shares are neither ascertainable nor determinable then the said income is taxed at the Maximum Marginal Rate. He submitted that in the assessment made by the AO, it was specifically held that the petitioner is a determinate Trust and such orders have become final.

10. Learned senior counsel submits that contrary to the said understanding of the AO and the petitioner, the impugned order passed by the respondent no.2/BAR holds that if the names of the beneficiaries are not set out in the original Trust Deed then such Trust would be treated as *"indeterminate"* and resultantly be subject to Maximum Marginal Rate under the provisions of section 164 of the Act. He contended that this conclusion of the respondent no.2/BAR is not only erroneous but also contrary to the understanding of the tax authorities itself and has incorrectly

based itself on the Central Board of Direct Taxes (hereinafter referred to as *"CBDT"*) Circular No.13/2014 issued on 28.07.2014. It is the order of the respondent no.2/BAR as also the CBDT Circular dated 28.07.2014 which is impugned in the present writ petition.

11. Learned senior counsel at the initial stage alludes to the SEBI Regulations of the year 2012 particularly Regulations 3(1) and 6(3) read with section 12 of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as *"SEBI Act"*) which, according to him, unequivocally prohibit an entity from acting as an AIF or from receiving any investment unless and until it has first obtained the certificate of registration from SEBI. He further submitted that in order to register, the AIF has to submit its Trust Deed to the SEBI consequent upon it being registered under the Registration Act, 1908. According to him, the aforesaid provisions, when read in conjunction makes it crystal clear that the original Trust Deed of the AIF cannot contain the name of the investors and if it did, the same would constitute major violation of the SEBI Regulations disentitling the Trust from seeking registration.

12. Mr. Ganesh, in continuation and in conjunction with the aforesaid argument *qua* the SEBI Regulations also relied upon the CBDT Circular No.281/1980 dated 22.09.1980 expressly clarifying that for construing a Trust as *'determinate'*, it was not necessary that the names of all the beneficiaries should be set out in the original Trust Deed. He forcefully contended that the aforesaid CBDT Circular No.281/1980 has neither been withdrawn nor rescinded or superseded by any other subsequent Circular including the impugned CBDT Circular No.13/2014. By drawing attention

to the Circular No.13/2014, he pointed out that there is no reference to the CBDT Circular No.281/1980 and thus, inferentially, according to him the said Circular No.281/1980 still stands.

13. Mr. Ganesh, learned senior counsel invoked the doctrine of impossibility in order to buttress the aforesaid submission. In that, once the aforesaid regulations of SEBI read with section 12 of the SEBI Act prohibited any entity from acting as AIF or even further from receiving any investment unless and until it has first obtained the certificate of registration from SEBI, there could be no question of any AIF including the petitioner from having or containing the names of investors in the original Trust Deed. Moreover, according to him, the mere mentioning of the name of the investors prior to obtaining the certificate of registration would itself constitute a major violation of SEBI Regulations disentitling the petitioner from seeking registration. In view of the above, he contended that the mandate of Circular no.13/2014 in contradistinction to the prohibition in SEBI Regulations and the SEBI Act would constitute the doctrine of impossibility. He thus contended that an entity cannot be expected to commit an act which was impossible in law. He relied upon the judgment of ***Cochin State Power & Light Corporation vs. State of Kerala: (1965) SCC OnLine SC 29 and Raj Kumar Dey vs. Tarapeda Dey: (1987) 4 SCC 398*** in order to support the aforesaid submission based on doctrine of impossibility.

14. Predicated on the above legal submissions, learned senior counsel stoutly contended that the construction and interpretation of the respondent no.2/BAR to the instructions contained in Circular no.13/2014 are

absolutely erroneous and in fact, bordering perversity warranting interference by this Court.

15. The next argument of learned senior counsel is based on the judgment of the Division Bench of the Karnataka High Court in the case of ***The Commissioner of Income Tax & Anr. vs. M/s India Advantage Fund-VII: 2017 SCC OnLine Kar 6857***. He submitted that relying upon the CBDT Circular No.281/1980 the learned Division Bench had rejected the contention of the Revenue that if the names of the investors were not set out in the original Trust Deed then the Trust would have to be considered indeterminate. Relying further upon the said judgment, learned senior counsel also pointed out that it was also held that there could be subsequent investors from time to time whose names may possibly not appear in the original Trust Deed, yet, this by itself would not render the Trust, *'indeterminate'*. Vitally, he contends that this judgment has not only been accepted by the Revenue as it is, but implemented on all fours subsequently and been allowed to become final. He also referred to the judgment of the Madras High Court in ***Commissioner of Income Tax, Chennai vs. TVS Shriram Growth Fund: 2020 SCC OnLine Mad 28112***; ***Commissioner of Income Tax, Chennai vs. P.Sekar Trust: (2010) 321 ITR 305 (Mad.)*** and ***Commissioner of Income Tax, Chennai vs. Tamilnadu Urban Development Fund: 2019 (104) Taxmann.com 361 (Madras)*** and submitted that the Madras High Court in ***TVS Shriram Growth fund*** *(supra)* also referred and relied upon the judgment rendered by the Karnataka High Court in the case of ***India Advantage Fund*** *(supra)* to come to the same conclusion. He further submitted that a Special Leave

Petition against the judgment of the Madras High Court in ***TVS Shriram Growth fund*** *(supra)* was preferred by the Revenue before the Hon'ble Supreme Court which too was dismissed. He thus submitted that the view taken by both the Karnataka High Court as also the Madras High Court in the aforesaid judgments have become final and binding upon the Revenue, having been tested before the Hon'ble Supreme Court. On that basis, he forcefully contended that the Revenue cannot be permitted to take contrary stands in respect of different AIFs/Trusts performing the same function purely on the basis of such AIFs/Trusts being located in different States of the country.

16. He next contended that the impugned CBDT Circular no.13/2014 is unreasoned and does not give any credible rationale as to why the non-mentioning of the investors in the original Trust Deed would make such AIF, *'indeterminate'*. He stoutly contended that the said Circular of the year 2014 has completely ignored and overlooked the provisions of Regulations 3(1) and 6(3) of the SEBI Regulations read with section 12 of the SEBI Act which was promulgated in the year 2012 and was in force before the impugned Circular No.12/2014 was issued. He vehemently contended while pointing out to para 6 of the impugned Circular that intriguingly the Circular states that it would not apply to the AIF/Trust situated in all those States where the High Court has taken or would take a contrary view. He contended that such a stand is unpalatable in law. According to learned senior counsel, the judgments are binding on the Revenue and it cannot take contradictory stands based on the location of the AIF/Trust inasmuch as it would not only result in anomaly but also

incongruity. He reiterated that the impugned Circular is conspicuous by the absence of any reference at all to the CBDT Circular No.281/1980. In other words, he contended that the provisions of CBDT Circular No.281/1980 are still valid and in force.

CONTENTIONS OF THE RESPONDENTS:

17. *Per Contra*, Mr. Puneet Rai, learned senior standing counsel for the respondents refuted the arguments and submissions made on behalf of the petitioner.

18. At the outset, learned standing counsel has submitted that the present petition is not maintainable in view of the alternate remedy of appeal under section 245W of the Act to assail the impugned order dated 27.06.2024 passed by respondent no.2/BAR. In that context, he relied upon the judgment of the Hon'ble Supreme Court in ***Genpact India Pvt Ltd vs. DCIT and Anr.***; ***2019 SCC OnLine SC 1500*** particularly to paras 20 to 27.

19. While referring to sections 160, 161, 161(1a), 164, 115U, 115UB and 43(5) of the Act, Mr. Rai submitted that it is abundantly clear that taxability of AIF-III funds cannot be equated with AIF-I or AIF-II funds. According to him the provisions of section 115UB of the Act provide a pass through status only for category I and II funds and not for category III funds. Moreover, section 43(5) of the Act stipulates that Derivatives are taxable as Business Income and permitted to be traded only in AIF-III funds. He also relied upon the Private Placement Memorandum issued by the petitioner and furnished to the prospective investors referring to the various relevant Income Tax Provisions at page 255 of the petition. Premised thereon, he agitated that the petitioner was duly aware of the provisions of the Act

before setting up the AIF fund, hence, cannot be permitted to now turn around and feign ignorance of the relevant provisions of the Act.

20. Mr. Rai forcefully contended that the Explanation 1 to section 164 clearly stipulates that in case the names or identity of the investors or their shares are not mentioned in the Trust Deed on the day of its execution, the trust would be considered as *"Indeterminate"* and resultantly the taxability cannot be determined. For this purpose he referred to provisions of section 161 of the Act to submit that the taxability and liability of a *"Representative Assessee"* is to be assessed accordingly. In particular, he invited attention to sub-section 1A, according to which, where any income in respect of which the person mentioned in clause (iv) of sub-section (1) of section 160 is liable as a *"Representative Assessee"* consists of, or includes, profits and gains of business tax, shall be charged on whole of income in respect of which such person is so liable at the Maximum Marginal Rate. He submitted that admittedly, in the present case none of the Investors were named or identifiable having not been mentioned in the original Trust Deed. Having regard thereto, according to him, the Circular No.13/2014 would be squarely applicable and the petitioner would be charged to tax at the Maximum Marginal Rate.

21. Learned senior standing counsel copiously referred to the Private Placement Memorandum particularly to Section X respecting *"Tax Considerations"* in order to support his submission that even the petitioner clearly understood its liability and taxability as a *"Representative Assessee"* under section 161 of the Act and had cautioned the investors to invest in terms thereof.

22. So far as the reliance of the petitioner on the judgment referred to above is concerned, Mr. Rai forcefully submitted that the facts on the basis whereof the ***Tamilnadu Urban Development Fund*** *(supra)* was rendered by the Madras High Court was distinct, inasmuch as the fund in that case was a close-ended fund with the contributors being identifiable whereas in the present case, the fund is open-ended and contributors are not static. Thus, the ratio of the said case, according to him, is not applicable to the facts of the present case. In respect of the case of ***TVS Sriram Growth Fund*** *(supra)* he submitted that a SLP was preferred by the Revenue against the judgment of the learned Division Bench of the Madras High Court which was dismissed, but only on account of Low Tax Effect and not tested on merits. In other words, he contended that the said decision of the learned Division Bench is not binding on this Court. So far as the judgment of Division Bench of Karnataka High Court in ***India Advantage Fund*** *(supra)* is concerned, he submitted that the said case pertained to the AY 2008-09 which is prior not only to the notification of the CBDT Circular No.13/2014 but also to AIF Funds which were introduced in the year 2012 and thus, the *ratio decidendi* laid down, being peculiar to the facts obtaining in that case, would not be applicable to the present case. This is so because the challenge in the present petition is to the CBDT Circular No. 13/2014 which was not even a subject matter of consideration in ***India Advantage Fund*** *(supra)*. Thus, none of the judgments relied upon by the petitioner enure to its benefit.

23. Mr. Rai very stoutly argued that the reliance upon the CBDT Circular No.281/1980 dated 22.09.1980 by the petitioner is completely misplaced

and erroneous. As per the memorandum explaining the provision in the Finance (No.2) Bill, 1980, the Explanation 1 to section 164 was introduced as a measure to plug loopholes for tax avoidance through the medium of *"Private Trust"*. However, the petitioner is a trust created in the year 2017 for floating category-III AIF. According to him, the said Circular relied upon by the petitioner was not issued in the context of a Trust created for the purpose of category-III AIFs and was issued almost three decades prior to the SEBI Regulations which were issued in the year 2012. Thus, according to him, the petitioner cannot take any benefit or advantage out of the provisions of the Circular dated 22.09.1980.

REJOINDER BY THE PETITIONER:

24. Mr. S. Ganesh, learned senior counsel reiterates that the impugned order of respondent no.2/BAR premises its reasoning totally on the provisions of Circular No.13/2014 to conclude that the petitioner is *'indeterminate'* as investors are not named in the original Trust Deed without applying its mind independently to the submissions made by the petitioner before it. According to him, the respondent no.2/BAR completely ignored and overlooked the provisions of Circular dated 22.09.1980 and more importantly did not even consider the fact that the Circular No. 13/2014 does not, even remotely, refer to the Circular of the year 1980.

25. He submitted that the SEBI Regulations, read harmoniously and holistically, would mandate that investments cannot be accepted by a Trust unless it is first registered under the Registration Act, 1908 subsequent to which it was mandatory to get itself registered under the provisions of SEBI Regulations. According to him, unless the above procedure and provisions

are complied with by any Trust, similar to the petitioner, the question of naming or identifying any investor or ascertaining their shares is impermissible.

26. Learned senior counsel stated that, peculiarly the CBDT Circular No. 13/2014 on the one hand contemplates naming or identifying the investors in the original Trust Deed, yet in para 6, also provides that the said Circular would have no effect on the States where the High Court have passed orders similar to the ones referred above. According to him, this would result in an anomalous situation, apart from violating the maxim/doctrine of *"Impossibility"*. In a passing reference he also submitted that intriguingly the said Board Circular of the year 2014 has been made applicable only to the petitioner, whereas there are about 500 other Trusts all over the Country which remain untouched. Thus, the action is clearly discriminatory.

ANALYSIS AND CONCLUSION

27. Before we advert to the facts and the issues of law arising in the present case, we find it apposite to place on record certain provisions of the CBDT Circular No.281/1980 dated 22.09.1980 and the Explanation appended to section 164 of the Act. Mr. S. Ganesh, learned senior counsel while arguing on behalf of the petitioner had placed on record a copy of the Circular no.281/1980 dated 22.09.1980 which provided the Explanation 1 to section 164 sought to be inserted under the Finance Act, 1980 as under:

> *"**Measures to plug loopholes for tax avoidance through the medium of private trusts – Section 164***
> *30.1 xxx*
> *30.2 xxx*
> *30.3 It was felt that the provisions of section 164, even after their amendment in 1970, had not been fully effective in curbing the use o private trusts for avoiding proper tax liability. The Finance Act has,*

therefore , made the following amendments to section 164 with a view to curbing tax avoidance through the medium of such trusts :

1. xxx

2. xxx

3. xxx

4. Under the provisions as they existed prior to the amendments made by the Finance Act, the flat rate of 65 per cent was 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 was misused in some cases by giving discretion to the trustees to decide the allocation of income every year and in several other ways. In such a situation, the trustees and beneficiaries were able to manipulate the arrangements in such a manner that a discretionary trust was converted into a specific trust whenever it suited them tax-wise. In order to prevent such manipulation, the Finance Act has inserted Explanation 1 in section 164 to provide as under :

> *a. any income in respect of which the court of wards, the administrator-general, the official trustee, receiver, manager, trustee or mutawalli appointed under a wakf deed is liable as a representative assessee or any part thereof shall be regarded as not being 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. [**For this purpose, 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** ;]*
>
> *b. the individual shares of the persons on whose behalf or for whose benefit such income or part thereof is receivable will be regarded as indeterminate or unknown unless the individual shares of such persons 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.*

As a result of the insertion of the above Explanation, trust under which a discretion is given to the trustee to decide the allocation of the income every year or a right is given to the beneficiary to exercise the option to receive the income or not each year will all be regarded as discretionary trusts and assessed accordingly.

> ***30.4*** *The aforesaid amendments to section 164 come into force with effect from 1st April, 1980 and will, accordingly, apply in relation to the assessment year 1980-81 and subsequent years. It may be specifically noted that the new provisions will apply in respect of all discretionary trusts whether created before or on or after 1st April, 1980.*
> *[Section 27 of the Finance Act]"*

(emphasis supplied)

28. We have also perused section 27 of the Finance (No.2) Act, 1980 (Amending Act) by way of which amendments to various sections of the Act, including section 164 were inserted and find that no such mention of the aforesaid underlined portion is referred to at all.

29. While attempting to trace the original proceedings under the Finance Act, 1980 this Court had perused the amendments of the Finance Act, 1980 and the Finance (No.2) Act, 1980 and finds that the portion which stands underlined above as placed on record, does not find mention in the enacted section 164 of the Act. In order to appreciate what is contained in the amendments of the Finance Act, it would be apposite to extract the same hereunder:

> *"**Amendments of the Finance Act, 1980 and the Finance (No.2) Act, 1980 at a Glance***
> ***II. Finance (No.2) Act, 1980***
> ***Discretionary trust***
> *- income received by the trustees of a discretionary trust will be chargeable at the rate applicable to the highest slab of income of an AOP as specified in the Finance Act of the relevant assessment year [sub-section (1) of section 164 amended w.e.f. 1-4-1980]*
> *- provisions of section 164(1) will not apply to a discretionary trust in which none of the beneficiaries has any other taxable income and none of them is beneficiary in any other trust [clause (i) of the proviso to sub-section (1) of section 164 substituted w.e.f. 1-4-1980]*
> *- benefit of concessional tax treatment will be withdrawn if the person declaring such trust has declared any other trust by will [clause ii) of the proviso to sub-section (L) of section 164 amended w.e.f. 1-4-1980]*

- where the property is held under trust in part only for charitable or religious purposes and the income which is applicable to other purposes is receivable on behalf of beneficiaries whose shares are indeterminate or unknown, the tax chargeable would be the aggregate of the tax on that part of the income which is applicable to charitable or religious purposes, to the extent it is not exempt under section 11, at the rates applicable to an AOP; and the tax on the income which is applicable to other purposes would be at the rate applicable to the highest slab of income of an AOP as specified in the Finance Act of the relevant assessment year [sub-section (3) of section 164 amended w.e.f. 1-4-1980]

- benefit of the proviso will be available in respect of that part of the income which is not applicable to the charitable or religious purposes if none of the beneficiaries has any other taxable income and none of them is beneficiary in any other trust [clause (i) of the proviso to sub-section (3) of section 164 substituted w.e.f. 1-4-1980]

- benefit of the concessional tax treatment will be withdrawn if the person declaring such trust has declared any other trust by will [clause (ii) of the proviso to sub-section (3) of section 164 amended w.e.f. 1-4-1980]

*- **any income in respect of which the persons mentioned in section 160(1)(ii) and (iv) are liable as representative assessee or any part thereof will be deemed as not being 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 mentioned in the order of the court or instrument of trust or the wakf deed and is identifiable on the date of the order, instrument of trust or the wakf deed; further individual shares of the beneficiaries will be deemed to be indeterminate or unknown unless the individual shares of such beneficiaries are expressly stated in the order of the court or an instrument of trust or the wakf deed and are ascertainable on the date of such order, instrument or deed [new Explanations 1 and 2 inserted to sub-section (3) of section 164 w..f. 1-4-1980]***

(emphasis supplied)

Pertinently, we observe that the underlined portion as mentioned in the Finance (No.2) Act, 1980 above, was inserted as Explanation 1 to section 164 of the Act with effect from 01.04.1980 with certain more additions.

In order to affirm and to ensure that the Court is not committing an

error, the amended section 164 inserted by the Finance (no.2) Act, 1980 with effect from 01.04.1980 is extracted hereunder:

> *164. (1) Subject to the provisions of sub-sections (2) and (3), where any income in respect of which the persons mentioned in clauses (iii) and (iv) of sub-section (1) of section 160 are liable as representative assessees or any part thereof is not specifically receivable on behalf or for the benefit of any one person or 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 :]*
>
> *(2) xxx xxx xxx*
>
> *(3) In a case where the relevant income is derived from property held under trust in part only for charitable or religious purposes [or is of the nature referred to in sub-clause (iia) of clause (24) of section 2] and either the relevant income applicable to purposes other than charitable or religious purposes (or any part thereof) [is not specifically receivable on behalf or for the benefit of any one person or the individual shares of the beneficiaries in the income so applicable are indeterminate or unknown, the tax chargeable on the relevant income shall be the aggregate of—*
>
> *(a) the tax which would be chargeable on that part of the relevant income which is applicable to charitable or religious purposes (as reduced by the income, if any, which is exempt under section 11) as if such part (or such part as so reduced) were the total income of an association of persons ;*
>
> *and*
>
> *(b) the tax on that part of the relevant income which is applicable to purposes other than charitable or religious purposes, and which is either not specifically receivable on behalf or for the benefit of any one person or in respect of which the shares of the beneficiaries are indeterminate or unknown, at the maximum marginal rate :]*
>
> *Provided that in a case where—*
>
> *(i) none of the beneficiaries in respect of the part of the relevant income which is not applicable to charitable or religious purposes has any other income chargeable under this Act exceeding the maximum amount not chargeable to tax in the case of an association of persons or is a beneficiary under any other trust ; or]*

(ii) the relevant income is receivable [under a trust declared by any person by will and such trust is the only trust so declared by him]; or

(iii) the relevant income is receivable under a trust created before the Income-tax Officer 1st day of March, 1970, by a non-testamentary instrument and the is satisfied, having regard to all the circumstances existing at the relevant time, that the trust, to the extent it is not for charitable or religious purposes, was created bona fide exclusively for the benefit of the relatives of the settlor, or where the settlor is a Hindu undivided family, exclusively for the benefit of the members of such family, in circumstances where such relatives or members were mainly dependent on the settlor for their support and maintenance,

tax shall be charged '[on the relevant income as if the relevant income (as reduced by the income, if any, which is exempt under section 11) were the total income of an association of persons.

[Explanation 1: For the purposes of this section,—

(i) any income in respect of which the persons mentioned in clause (iii) and clause (iv) of sub-section (1) of section 160 are liable as representative assessee or any part thereof shall be deemed as being not specifically receivable on behalf or for the benefit of any one person unless he 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 ascertain-able as such on the date of such order, instrument or deed.

Explanation 2 : In this section, "maximum marginal rate" means the rate of income-tax (including surcharge on income-tax, if any) applicable in relation to the highest slab of income in the case of an association of persons as specified in the Finance Act of the relevant year.]

(emphasis supplied)

From a perusal of the aforesaid provisions and explanations as also the amendments noted above, it is clear that the portion underlined of the copy of the Finance Act, 1980 placed on record on behalf of the petitioner

in sub para (a) of para 4 of clause 30.3 of the Circular No.281/1980 regarding insertion of Explanation 1 in Section 164 of the Act, is conspicuous by its absence both in the amending Act as also the section 164 and its Explanation on the statute book of the Income Tax Act, 1961. Thus, it appears that though such a portion may have been a part of the Circular yet was not made a part of the Finance Act, 1980. That apart, Clause 30.4 of the Circular no.281/1980 dated 22.09.1980 categorically specifies that the proposed amendments to section 164 was to come into effect from 01.04.1980 and were to apply in relation to the AY 1980-81 and subsequent years. It was further clarified that the new provisions would apply in respect of all discretionary Trusts whether created before or on or after 01.04.1980. Thus, what is factually available as Explanation 1 to section 164 of the Act is the one which is found in the amended Finance (No.2) Act 1980 and the Income Tax Act, 1961 with effect from 01.04.1980 without the underlined portion contained in the corresponding paragraph of the Circular No.281/1980 dated 22.09.1980. That apart, the portion relied upon by the petitioner is not found in any of the subsequent Finance Acts enacted.

30. In view of the above quandary, we are unable to appreciate the arguments of the petitioner that CBDT Circular No.281/1980 has been ignored or overlooked or that it has neither been rescinded nor superseded or even that it does not find mention in the CBDT Circular No.13/2014.

31. Having said that we would now proceed to determine the *lis*.

32. Broadly, the dispute does not pertain to factual aspects, rather, only to the construction and interpretation of Explanation 1 to section 164 of the Act. The petitioner contended that the provisions of Regulation 3(1) and

Regulation 6(3) of the SEBI Regulations read with provisions of section 12 of the SEBI Act would prohibit the petitioner from accepting any investment or mentioning the name of the beneficiaries in the original Trust Deed unless the said provisions were scrupulously complied with and that too, only after obtaining the certificate of registration from SEBI. The certificate of registration to be obtained from SEBI is contingent upon the Trust Deed being registered under the Registration Act, 1908. In other words, the petitioner contended that on the one hand, the Circular no.13/2014 mandated Trusts akin or similar to the petitioner Trust i.e. Category III AIFs, to necessarily mention the name of the beneficiaries on the original Trust Deed whereas, the SEBI Regulations prohibited any investment to be obtained from the beneficiaries before obtaining certificate of registration from it, under the aforesaid provisions. This procedure was contended to be contrary to the doctrine of impossibility.

33. On the other hand, on behalf of the Revenue, there were really no contrary submissions urged against the aforesaid contentions. We have carefully considered the submissions made on behalf of the petitioner in respect of the aforesaid submissions. In that context, it would be appropriate to extract Regulation 3(1), Regulation 4(c) and Regulation 6 of the SEBI Regulations read with provisions of section 12 of the SEBI Act which read thus-

> ***"SEBI Regulations***
> ***Registration of Alternative Investment Funds.***
> ***3.*** *(1) On and from the commencement of these regulations, no entity or person shall act as an Alternative Investment Fund unless it has obtained a certificate of registration from the Board:*
>
> ***Provided*** *that an existing fund falling within the definition of Alternative Investment Fund which is not registered with the Board may continue to*

operate for a period of six months from commencement of these regulations or if it has made an application for registration under sub-regulation (5) within the said period of six months, till the disposal of such application:

***Provided** further that the Board may, in special cases, extend the said period up to a maximum of twelve months from the date of such commencement:*

***Provided** further that existing schemes will be allowed to complete their agreed tenure, such funds shall not raise any fresh monies other than commitments already made till registration is granted under regulation 6:*

***[Provided** further that such existing funds, which do not propose to accept any fresh commitments after commencement of these regulations shall not be required to obtain registration under these regulations subject to submission of information on their activities to the Board in the manner as may be specified]*

***Provided** further that if such existing funds are not able to comply with conditions specified under these regulations, they may apply for exemption to the Board from strict compliance with these regulations and the Board upon examination may provide such exemptions or issue such instructions as may be deemed appropriate.*

Eligibility Criteria.

***4.** For the purpose of the grant of certificate to an applicant, the Board shall consider the following conditions for eligibility, namely,—*

(a) xxx
(b) xxx
(c) in case the applicant is a Trust, the instrument of trust is in the form of a deed and has been duly registered under the provisions of the Registration Act, 1908;

Procedure for grant of Certificate.

***6.** (1) The Board may grant certificate under any specific category of Alternative Investment Fund, if it is satisfied that the applicant fulfills the requirements as specified in these regulations.*

(2) The Board shall, on receipt of the registration fee as specified in the Second Schedule, grant a certificate of registration in Form B.

(3) The registration may be granted with such conditions as may be deemed appropriate by the Board.

[(4) The Board may, on being satisfied that the applicant complies with the provisions of regulation 4 except those of clause (c) or clause (d)

thereof, as the case may be, grant an in-principle approval to the applicant:

***Provided** that the applicant shall comply with clause (c) or clause (d) of regulation 4, as the case may be, within six months from the date of grant of in-principle approval and upon compliance with the same, the Board may grant a certificate of registration under sub regulation (2).*

*(5) **An Alternative Investment Fund that has been granted in-principle approval may accept commitments from investors but shall not accept any monies till it is granted registration under sub-regulation (2) of this regulation.**]*

SEBI Act

12. Registration of stock-brokers, sub-brokers, share transfer agents, etc.—(I) No stock-broker, sub-broker, share transfer agent, banker to an issue, trustee of trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment adviser and such other intermediary who may be associated with securities market shall buy, sell or deal in securities except under, and in accordance with, the conditions of a certificate of registration obtained from the Board in accordance with the [regulations] made under this Act:

Provided that a person buying or selling securities or otherwise dealing with the securities market as a stock-broker, sub-broker, share transfer agent, banker to an issue, trustee of trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment adviser and such other intermediary Who may be associated with securities market immediately before the establishment of the Board for which no registration certificate was necessary prior to such establishment, may continue to do so for a period of three months from such establishment or, if he has made an application for such registration within the said period of three months, till the disposal of such application:

(1B) xxx

***(1C) No person shall sponsor or cause to be sponsored or carry on or cause to be carried on the activity of an alternative investment fund or a business trust as defined in clause (13A) of section 2 of the Income-tax Act, 1961 (43 of 1961), unless a certificate or registration is granted by the Board in accordance with the regulations made under this Act.**]*

(2) xxx
(3) xxx"

(emphasis supplied)

34. It would also be apposite to peruse Regulation 7 of the SEBI

Regulations which are concerning the conditions of grant of certificate. The same reads thus-

> ***Conditions of certificate.***
> *7. (1) The certificate granted under regulation 6 shall, inter-alia, be subject to the following conditions:-*
>
> *(a) the Alternative Investment Fund shall abide by the provisions of the Act and these regulations;*
>
> *(b) the Alternative Investment Fund shall not carry on any other activity other than permitted activities;*
>
> *(c) the Alternative Investment Fund shall forthwith inform the Board in writing, if any information or particulars previously submitted to the Board are found to be false or misleading in any material particular or if there is any material change in the information already submitted.*
>
> *(2) An Alternative Investment Fund which has been granted registration under a particular category cannot change its category subsequent to registration, except with the approval of the Board.*

35. A holistic, harmonious and conjunctive reading of all the aforesaid provisions of SEBI Regulations as also section 12 of the SEBI Act would bring to fore that Category III AIFs like the petitioner Trust are strictly regulated and controlled in their functioning under those provisions. It is pertinent to observe that Regulation 3(1) of the SEBI Regulations and section 12(1) and 12(1C) of the SEBI Act commence with a negative covenant indicating the strict application of the said provisions. In other words, the said Regulations and the Section restrict the functioning of the petitioner Trust save and except in the manner as provided under the said Section and the Regulations. Thus, unless and until a Trust registers the original Trust Deed, firstly under the provisions of Registration Act, 1908 and secondly, obtains the certificate of registration under the provisions of SEBI Act and Regulations, it cannot accept any funds or investment from a beneficiary. Significantly, sub Regulation (5) of Regulation 6 of the SEBI

Regulations respecting the *"Procedure for grant of Certificate"* clearly specifies that if an AIF has been granted in-principle approval under sub Regulation (4) of Regulation 6, it may accept commitments from investors but shall not accept any money till it is granted registration under sub-Regulation (2) of Regulation 6. This itself would indicate, manifestly, that no AIF can accept any commitment or investment from any investor or beneficiary unless and until it is first registered in terms of Regulation 4(c) of the SEBI Regulations under the provisions of Registration Act, 1908 and thereafter be granted certificate of registration under Regulation 6 of the SEBI Regulations. If this were to be the manner and procedure stipulated under the SEBI Act and the Regulations framed thereunder, we are unable to appreciate as to how and in what manner would a Category III AIF entity like the petitioner specify or mention the names of the investors or beneficiaries in the original Trust Deed at the time of registration. Thus, there is force in the submissions of Mr. Ganesh on this issue.

36. Having analysed as above, we would now consider the contents of CBDT Circular no.13/2014 which has been impugned herein and is the primary bone of contention. In order to appreciate the controversy revolving around the said Circular, it would be appropriate to reproduce the same hereunder:-

"CIRCULAR NO. 13/2014 [F.NO.225/78/2014-ITA.II]

SECTION 164 OF THE INCOME-TAX ACT, 1961 - CHARGE OF TAX WHERE SHARE OF BENEFICIARIES UNKNOWN - CLARIFICATION ON TAXATION OF ALTERNATIVE INVESTMENT FUNDS HAVING STATUS OF NON-CHARITABLE TRUSTS UNDER INCOME-TAX ACT, 1961

CIRCULAR NO. 13/2014 [F.NO.225/78/2014-ITA.II], DATED 28-7-2014

The SEBI (Alternative Investment Funds) Regulations, 2012 ('AIF Regulations') vide Regulation No. 4 issued in May 2012 aims at regulating all forms of private pool of funds in India. The said Regulations divide the Alternative Investment Funds ('AIFs') into three broad categories - Category-I, Category-II and Category-III Alternative Investment Funds, depending upon the operational strategies, objectives and fund structure. A large number of AIFs registered with SEBI have been set up in the form of non-charitable trusts.

2. While the AIFs, being Venture Capital Funds, making investment in the Venture Capital Undertakings have been accorded 'tax pass through' status under section 10(23FB) read with section 115U of the Income-tax Act, 1961 ('Act') (whereby income arising in the hands of such Fund would be treated as tax exempt, while investors of such funds would become liable to tax liability on as if the investors have made the investments directly in the Venture Capital Undertaking), clarification has been sought about tax-treatment in cases of AIFs being noncharitable 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 contributions from the investors.

3. Board has been requested to clarify whether the income of such funds would be taxable in the hands of the Trustees of the AIF in the capacity of a 'Representative Assessee' (as defined u/s 160(i)(iv) of the Act) or in the hands of investors (i.e. contributors of funds).

4. The matter has been examined. In the situation where the trust deed either does not name the investors or does not specify their beneficial interests, provisions of sub-section (1) of section 164 would come into play and the entire income of the Fund shall become liable to be taxed at the Maximum Marginal Rate of income-tax in the hands of the trustees of such AIFs in their capacity as 'Representative Assessee'. It is also clarified that in such cases, provisions of section 166 of the Act need not be invoked in the hands of the investor, as corresponding income has already been taxed in the hands of the 'Representative Assessee' in accordance with sub-section (1) of section 164 of the Act.

5. However, in cases of funds where names of the beneficiaries and their interests in the Fund are determined i.e. stated in the trust deed, the tax on whole of the income of the Fund - consisting of or including profits

and gains of business, would be leviable upon the Trustees of such AIF, being 'Representative Assessee' at the Maximum Marginal Rate in accordance with sub-section (1A) of section 161 of the Act.

6. The clarification given above shall not be operative in the area falling in the jurisdiction of a High Court which has taken or takes a contrary decision on the issue.

7. The contents of this Circular may be brought to the notice of all concerned."

(emphasis supplied)

37. From the above, it appears that the said Circular pertains to clarification issued by the CBDT in respect of section 164 of the Act particularly as to how the charge of tax, where the share of beneficiaries is unknown, is to be ascertained and determined. Apparently, this clarification is in respect of AIF entities having status of non-charitable Trusts. It would be relevant to note that the said notification is in respect of Category I, Category II and Category III AIF entities. According to para 2 of the said Circular, the clarification was sought about tax-treatment in cases of AIFs being non-charitable Trust where the investors' name and beneficial interest are not explicitly known on the date of its creation and such information becoming available only when the fund starts accepting contribution from the investors. The Board was requested to clarify whether the income of such funds would be taxable in the hands of the trustees of the AIF in the capacity of a *"Representative Assessee"* as defined under section 160(i)(iv) of the Act or in the hands of the investors.

38. The Circular clarifies that where the Trust Deed either does not name the investors or does not specify their beneficial interests, provisions of sub-section (1) of section 164 of the Act would be applicable and the entire

income of the fund would be liable to be taxed at the Maximum Marginal Rate of income tax in the hands of the trustees of such AIFs in their capacity as *"Representative Assessee"*. It is intriguing to note that having given the aforesaid clarification, the said Circular in para 6 also noted that the said clarification "*would not be operative in the area falling in the jurisdiction of a High Court which has taken or takes a contrary decision on the issue."* To say the least, para 6 appears to be baffling and contrary to the well settled judicial principles of law. An issue of law, settled by a Constitutional Court, neither challenged nor set aside by a higher Constitutional Court, would be binding upon the Revenue authorities all over the country and cannot be implemented State specific or area specific. Moreover, it appears that the said paragraph has been deliberately inserted keeping in view the judgments in the case of ***India Advantage Fund*** *(supra)* and ***TVS Shriram Growth Fund*** *(supra)* as relied upon by the petitioner.

39. There is no cavil that the judgement of the Division Bench of the Madras High Court in ***TVS Shriram Growth Fund*** *(supra)* was challenged by the Revenue before the Hon'ble Supreme Court by way of an SLP which was dismissed, though on account of low tax effect. It is trite that the *ratio decidendi* of the Division Bench judgment in ***India Advantage Fund*** *(supra)* would hold the field in so far as the interpretation of the controversy involved in the present case is concerned i.e. whether Category III AIF would be taxable at the Maximum Marginal Rate at the hands of the *"Representative Assessee"* under the provisions of Explanation 1 section 164 of the Act on account of the fact that the original Trust Deed did not

mention the name of the investors or the beneficial interest of the investors. This issue was also settled by the Karnataka High Court in ***India Advantage Fund*** *(supra)*. In fact, the judgment rendered by the Division bench of the Karnataka High Court was relied upon by the Madras High Court in ***TVS Shriram Growth Fund*** *(supra)* against which an SLP was filed and was dismissed.

40. If this Court were to uphold the clarification issued under the Circular No.13/2014, particularly having regard to the aforesaid analysis revolving around the Regulation nos.3, 4, 6 and 7 of the SEBI Regulations, the provisions of section 12 of the SEBI Act and the aforesaid trite law, it would lead to an anomalous and incongruous situation. In that, on the one hand, the Explanation 1 to section 164 of the Act and the Circular no.13/2014 would mandate necessary mentioning of the names of the investors or their beneficial interests in the original Trust Deed, and on the other, the SEBI Act and Regulations would prohibit the same. This, in our humble opinion, would be an impossible situation for Category III AIF like the petitioner to comply with. No entity under any enactment can be perceived or compelled to perform the impossible. In the present case, the facts as noted and obtained above seem to be leading to such an impossibility. We are fully convinced that the maxim "*lex non cogit ad impossibilia*" would apply on all fours to the facts of the present case. In this context it would be apposite to extract the relevant paragraphs of ***Cochin State Power & Light Corporation Ltd.,*** *(supra)* & ***Raj Kumar Dey*** *(supra)* hereinbelow:-

Cochin State Power & Light Corporation Ltd., *(supra)*

"7...Sub-section (1) of Section 6 expressly vests in the State Electricity Board the option of purchase on the expiry of the relevant period specified in the license. But the State Government claims that under sub-section (2) of Section 6 it is now vested with the option. Now, under sub-section (2) of Section 6, the State Government would be vested with the option only "where a State Electricity Board has not been constituted, or if constituted, does not elect to purchase the undertaking". It is common case that the State Electricity Board was duly constituted. But the State Government claims that the State Electricity Board did not elect to purchase the undertaking. For this purpose, the State Government relies upon the deeming provisions of sub-section (4) of Section 6, and contends that as the Board did not send to the State Government any intimation in writing of its intention to exercise the option as required by the sub-section, the Board must be deemed to have elected not to purchase the undertaking. Now, the effect of sub-section (4) read with sub-section (2) of Section 6 is that on failure of the Board to give the notice prescribed by sub-section (4), the option vested in the Board under sub-section (1) of Section 6 was liable to be divested. Sub-section (4) of Section 6 imposed upon the Board the duty of giving after the coming into force of Section 6 a notice in writing of its intention to exercise the option at least 18 months before the expiry of the relevant period. ***Section 6 came into force on September 5, 1959, and the relevant period expired on December 3, 1960. In the circumstances, the giving of the requisite notice of 18 months in respect of the option of purchase on the expiry of December 2, 1960, was impossible from the very commencement of Section 6. The performance of this impossible duty must be excused in accordance with the maxim, lex non cogitia ad impossibile (the law does not compel the doing of impossibilities), and sub-section (4) of Section 6 must be construed as not being applicable to a case where compliance with it is impossible.*** *We must therefore, hold that the State Electricity Board was not required to give the notice under sub-section (4) of Section 6 in respect of its option of purchase on the expiry of 25 years."*

(emphasis supplied)

Raj Kumar Dey *(supra)*

"6...The other maxim is lex non cogit ad impossibilia (Broom's Legal Maxims — page 162) — The law does not compel a man to do that which he cannot possibly perform. The law itself and the administration of it, said Sir W. Scott, with reference to an alleged infraction of the revenue laws, must yield to that to which everything must bend, to necessity; the law, in its most positive and peremptory

injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases".

41. Learned counsel for the Revenue had sought to distinguish the judgments in the case of ***India Advantage Fund*** *(supra)* and ***TVS Shriram Growth Fund*** *(supra)* relied upon by the petitioner on the ground that those dealt with the Assessment Years 2008-09; 2009-10 and 2010-11 and thus, being prior in time to the Circular No.13/2014, would be inapplicable to the facts of the present case. In this context, it would be apposite to extract the relevant paragraphs of the aforesaid judgments which are as under:

India Advantage Fund *(supra)*

*"**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 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 the conclusion that the shares are determinable. Once the shares are determinable amongst the beneficiaries, it would meet the requirement of the law, to come out from the applicability of section 164 of the Act."*

TVS Shriram Growth Fund *(supra)*

***18.** The broad issues which would fall for consideration are whether the assessee-trust is a determinative trust or indeterminate trust. The Assessing Officer came to the conclusion that it is an indeterminate trust, as the list of beneficiaries has not been specifically set out in the deed of*

trust. The other issue would be whether if in case, the beneficiaries are assessed for the income arising from the trust and whether it is determinative or indeterminate can the trust be assessed once over again. The third issue would be whether merely because the names of the beneficiaries are not mentioned in the trust deed, but shown as beneficiaries and are identifiable and having been assessed whether the trust can be assessed again. In fact, the Tribunal ought to have followed the decision of the Division Bench of this court in the case of P. Sekhar Trust (supra). However, the same has been distinguished by the Tribunal in the case of TVS Investments I Fund v. ITO (2017) 57 ITR (Trib) 133 (Chennai) by observing that the said judgment is not applicable to the facts of the case because in it, the beneficiaries are incorporated on the day of the institution of the trust deed and moreover, they did not receive any income in that year. Unfortunately, the Tribunal in the case of TVS Investments I Fund, did not fully appreciate the finding rendered by the hon'ble Division Bench of this court and post a wrong question, which led to a wrong answer. For better appreciation, we quote the relevant paragraphs of the judgment in P. Sekhar Trust (supra) hereunder (page 312 of 321 ITR):-

> *"11. Section 5 of the Act deals with the scope of the total income of any previous year of residents and non-residents. Section 4 of the Act deals with the charge of Income-tax in respect of total income of the previous year of every person 'subject to the provisions of this Act'. Chapter XV of the Act deals with the liability in special cases. Representative assessees are dealt with in section 160 of the Act. Section 160(1)(iv) of the Act provides that in respect of income which a trustee appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise (including any wakf deed, which is valid under the Musalman Wakf Validating Act, 1913 (6 of 1913) receives or is entitled to receive on behalf of or for the benefit of any person such trustee or trustees will be representative assessee. Section 161 provides for the extent of the liability of the representative assessee to the effect that 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 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 Chapter XV, 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.. ..*
>
> *12. ……..*

13. …….
14. …….
15. …….

16. Thus, the scheme of the Act, the statutory provisions, as well as the line of judgments referred to above clearly state that though section 5 referred to total income of the person whose income is being assessed and the charge of Income-tax under section 4 of the Act is on the total income, what could be taxed in the hands of the representative assessee is only the income which the beneficiaries could be said to have received or to be deemed to have received in India or in whose favour the income has accrued or arises or is deemed to accrue or arise to him in India ; or accrues or arises to him outside India during the relevant year. Though the trust may receive the income, the extent to which the same can be taxed is to the extent to which tax would be leviable and recoverable from the beneficiaries. Section 161 of the Act specifically provides that the tax to be levied on the representative assessee and to be recovered from him is to be 'in the like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him'. (emphasis supplied)

17. Section 164 of the Act gets attracted only when the shares of the beneficiaries are unknown, which is manifest from the marginal heading of that section itself, viz., 'Charge of tax where the share of the beneficiaries unknown'. That section comes into play only where any income or any part thereof is not specifically receivable on behalf of or for the benefit of any one person or 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, and in such case, the relevant income, or part of the relevant income shall be charged at the maximum marginal rate.

18. From this, it is clear that in order to attract section 164(1) of the Act, the beneficiaries for whose benefit, such income or such part thereof is receivable are indeterminate and unknown."

19. *The legal position qua the applicability of the provisions of section 14(1) of the Act has been thoroughly examined by the Tribunal and by an elaborate order, the Tribunal has held in favour of the assessee. We find that the Tribunal rightly took note of the statutory provisions and the law governing this subject and arrived at a conclusion. The view taken by the Bangalore Bench of the Tribunal was affirmed by the High Court of Karnataka on the following terms (page 216 of 392 ITR):-*

"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. ……

8. ……

9. ……

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 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 the affirmative against the Revenue and in favour of the assessee."

42. From a plain reading of the ratio laid down by the aforesaid

judgments, it is manifest that the interpretation and construction of the requirement of mentioning the names of the investors or their beneficial interests in the original Trust Deed was engaging the attention of the Courts. The said interpretation and construction of such a requirement has no bearing in respect of which of the assessment years were in question. This opinion is further strengthened by the fact that even before Circular no.13/2014 was notified, Explanation 1 to section 164 of the Act was on the statute book with effect from 01.04.1980 having identical restrictions. Moreover, the Karnataka High Court has succinctly tested the proposition and set out its opinion in para 10 of its judgement extracted above. The Court was interpreting the provisions of section 164 of the Act and considering whether *shares are determinable even when even or after the trust is formed or may be in future when the Trust is in existence*; and on the facts of that case had concluded that *once the benefits are to be shared in the proportion to the investments made, any person with reasonable prudence would reach to the conclusion that the shares are determinable.* Consequently, on such reasoning, the Karnataka High Court concluded that once the shares were determinable, it would meet the requirement of law to come out of the applicability of section 164 of the Act. We respectfully concur with such reasoning. Thus, the said submission is unmerited and untenable both on law as well as on facts.

43. Mr. Rai, learned senior standing counsel for the Revenue had referred to other provisions of the Act, however, in view of the above restricted examination of the *lis* in respect of the construction and interpretation of the provisions of section 164 and the extant CBDT

Circulars, it would not be necessary to advert to those provisions.

44. On a scrutiny of the impugned order of the BAR we find that it has not only overlooked the law settled by the Madras and Karnataka High Courts but has also not considered that para 6 of the CBDT Circular no.13/2014 is contrary to the well settled principles of law, which we find abhorrent and baffling. Ergo, in view of the *ratio decidendi* in the judgements of ***India Advantage Fund*** *(supra)* and ***TVS Shriram Growth Fund*** *(supra)* coupled with our own analysis above, we find the impugned order dated 27.06.2024 of the respondent no.2/BAR unsustainable and is accordingly set aside.

45. So far as the CBDT Circular No.13/2014 is concerned we direct that the same be read down in the manner as constructed and interpreted by us hereinabove.

46. So far as the objection regarding non-maintainability of the present writ petition on the premise that a statutory appeal under section 245W of the Act is available to the petitioner, we are not quite convinced with the said submission. This is for the reason that existence of an alternate efficacious remedy though may bar exercise of discretionary jurisdiction under Article 226 of the Constitution of India, 1950, however, is not a complete prohibition to exercise judicial review in such cases where it is deemed appropriate by the High Court. In the present case, though statutory appeal is available, yet, since the impugned order of BAR overlooks and ignores the interpretation and construction of section 164 of the Act by learned Division Bench of Karnataka and Madras High Court, this by itself would propel this Court to interfere with the impugned order.

Apart from the aforesaid, since the issue would have a wide impact on Category III AIFs all over the country, the remedy of an appeal specific to the petitioner may not be in public interest. The public interest as also the interest of the revenue would be sub-served, in our considered opinion, by exercising our jurisdiction under Article 226 of the Constitution of India, 1950. For the same reason, the impugned CBDT Circular No.13/2014 also would be amenable to exercise of jurisdiction under Article 226 of the Constitution of India, 1950 since the recitals of Para 6 are contrary to the well settled principles of law.

47. Resultantly, the writ petition is allowed, the impugned order dated 27.06.2024 of the respondent no.2/Board for Advance Rulings is quashed and set aside and simultaneously, the clarification contained in CBDT Circular No.13/2014 dated 28.07.2014 is directed to be read down to conform to the above analysis and conclusion

48. In view of the aforesaid, the writ petition is disposed of alongwith pending applications.

TUSHAR RAO GEDELA, J

DEVENDER KUMAR UPADHYAY, CJ

JULY 29, 2025/*rl/aj/kct*