

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

WRIT PETITION NO. 9358 OF 2018

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| 1 | Aberdeen Institutional Commingled
Funds LLC
with its registered address at 1735,
Market Street, 32 nd Floor,
Philadelphia, PA19103 USA |]
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] | |
| 2 | Aberdeen Asia Pacific Excluding Japan
Equity Fund, a series of Aberdeen
Institutional Commingled funds LLC |]
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] | |
| 3 | Aberdeen Asia Pacific Including Japan
Equity Fund, a series of Aberdeen
Institutional Commingled Funds LLC |]
]
] | |
| 4 | Aberdeen Emerging Markets Equity Fund
a series of Aberdeen Institutional
Commingled Funds LLC
v/s. |]
]
] .. | Petitioners. |
| 1 | The Authority of Advance Rulings
(Income Tax), Mumbai |]
] | |
| 2 | Director of Income Tax
(International Taxation)-1, Mumbai. |]
].. | Respondents. |

Mr. Porus Kaka, Sr. Advocate with Mr. Manish Kant, Mr. Rajesh Simhan
and Ms. Shipra Padhi i/b. Nishith Desai & Co., for the Petitioners.
Mr. Tejinder Singh with Mr. Sham Walve, for Respondent No.2.

**CORAM: AKIL KURESHI &
M.S.SANKLECHA, JJ.
RESERVED ON : 28th FEBRUARY, 2019.
PRONOUNCED ON : 8th MARCH, 2019.**

JUDGMENT:- (Per M. S. Sanklecha,j.)

This Petition under Article 226 of the Constitution of India, impugns the order dated 21st February, 2018 passed under Section 245R (6) of the Income Tax Act, 1961 (the Act) by the Authority for Advance Ruling (AAR).

2 This Petition arises from an application filed by the Petitioner No.1 before the AAR, seeking an advance ruling on the following question:-

“ Whether on the facts and in the circumstances of the case, Aberdeen Institutional Commingled Funds, LLC (“Applicant”) is entitled to carry forward accumulated capital loses, as disclosed in the application to the present Assessment Year 2011-12 and thereafter, under section 74 of the Income Tax Act, 1961, notwithstanding the reorganization of the Applicant effective from April 19, 2010?”

The impugned order dated 21st February, 2018 answered the above question in the negative Thus, holding that the applicant is not entitled to carry forward accumulated loses to the Assessment Year 2011-12 and, thereafter, under Section 74 of the Act.

3 At the very outset, Mr. Tejinder Singh, learned Counsel for the Respondents raised a preliminary objection with regard to the Petitioner Nos.2,3 and 4 being parties to this Petition. This in view of the

fact that, they were not the applicants before the AAR, leading to the impugned order dated 21st February, 2018. It is pointed out that, AAR was approached only by Petitioner No.1 herein above as applicant therein, raising the above question for Advance Ruling. The Petitioner Nos. 2 to 4 herein, were not parties before the AAR and the impugned order was passed in the context of the question raised by Petitioner No.1 alone. Therefore, Petitioner Nos. 2 to 4 have no locus to challenge the impugned order dated 21st February, 2018. Thus, Petitioner Nos. 2 to 4 be deleted from this Petition.

4 Mr.Kaka, learned Sr. Counsel appearing in support of this Petition, does not dispute the fact that, Petitioner Nos. 2 to 4 were not parties to the application made by Petitioner No.1 to the AAR . However, it is submitted that, Petitioner Nos. 2 to 4 are series of the funds run/ managed by Petitioner No.1. Therefore, its constituents. It is submitted that, Petitioner Nos. 2 to 4 are a part of Petitioner No.1 and, therefore, necessary parties in this Petition. The assessment of these parties i.e. Petitioner Nos. 2 to 4 would be affected as a consequence of the impugned order dated 21st February, 2018 passed by the AAR. Thus, it is submitted that, as Petitioner Nos. 2 to 4 are necessary parties and there is no need to delete them from this Petition.

5 It is an undisputed before us that the AAR was approached by Petitioner No.1 alone, filing an application for an Advance Ruling on the above question to AAR. However, in its application, Petitioner No.1 did describe Petitioner Nos.2 to 4 as investment series (funds) of Petitioner No.1. Thus, claiming it to be a constituents/ part of the Petitioner No.1. Nevertheless, the question as proposed by Petitioner

No.1 to the AAR was only with regard to it (Petitioner No.1) above being entitled to carry forward losses. The basis of the claim by the Petitioner No.1 for the carry forward losses under Section 74 of the Act, was as a consequence of re-organization of Petitioner No.1 w.e.f. 19th April, 2010. In the circumstances, this Petition seeks a judicial review of the order dated 21st February, 2018 passed by the AAR and the same can only by the same parties who had made an application before the AAR and no new parties are entitled to be added in the Petition to challenge the order of the AAR. The question was answered by the AAR in the context of the application filed by Petitioner No.1 alone with regard to its claim. In the above view, the Petitioner Nos. 2 to 4 are deleted. This Petition as filed is restricted only to the grievance of Petitioner No. 1 herein.

6 Brief facts leading to this Petition, are as under:-

- (i) On 9th December, 1996, Petitioner No.1 was formed as a Delaware Statutory Trust under the laws of State of Delaware, USA. This in the name of Aberdeen Delaware Business Trust. Thus, it was an entity incorporated/ set up in USA.
- (ii) On 19th April, 2010, Petitioner No.1 was re-organized / converted itself from a trust into a Limited Liability Company (LLC) in accordance with the Laws of the State of Delaware, USA. This was pursuant to the Trust Act and LLC Act in State of Delaware, USA. This conversion was pursuant to Section 3821 of the Trust Act and Section 214 of the LLC Act from a statutory trust to LLC. The above Sections of the Trust Act and LLC Act in Delaware, USA, *inter alia* provides that, when the statutory trust has been converted into LLC, for the purposes of law of the State of Delaware, USA, the LLC

would be deemed to be the same entity as the trust. Therefore, such conversion will not constitute a creation of a new entity.

- (iii) Consequent to the above conversion, Securities and Exchange Board of India (SEBI) by a communication dated 4th August, 2010 addressed to one M/s. Aberdeen Asset Management Ltd., informed it that the name of the following investment series (fund) has been changed as under:-

Sr. No.	Old Name	New Name	SEBI Reg. No.
1	Aberdeen Delaware Business Trust Asia Pacific (Ex Japan) Fund	Aberdeen Asia Pacific Excluding Japan Equity Fund, a series of the Aberdeen Institutional Commingled Funds, LLC	2005769
2	Aberdeen Delaware Business Trust Emerging Markets Equity Fund	Aberdeen Emerging Markets Equity Fund, a series of the Aberdeen Institutional Commingled Funds, LLC	2005770
3	Aberdeen Delaware Business Trust Asia Pacific Inc Japan Fund	Aberdeen Asia Pacific Including Japan Equity Fund, a series of the Aberdeen Institutional Commingled Funds, LLC	2006214
4	Aberdeen Delaware Business Trust Global Equity Fund	Aberdeen Global Equity Fund, a series of the Aberdeen Institutional Commingled Funds, LLC	20070202

5	Aberdeen Delaware Business Trust Emerging Markets Small Companies Fun	Aberdeen Emerging Markets Smaller Companies Fund, a series of the Aberdeen Institutional Commingled Funds LLC	20070831
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This change in the records of SEBI was in effect a constitution of its earlier Registration. It is pertinent to note that, Petitioner Nos. 2 to 4 are the same noted as Nos. 1 to 3 above in the communication.

- (iv) Thereafter, on 16th April, 2012, Petitioner made an application to the AAR, seeking Advance Ruling on the question referred to herein above. The applicant after setting out change in the status and name from Aberdeen Delaware Business Trust to Aberdeen Commingled Funds LLC, pointed out losses which had been claimed in the return filed by three of its investment series (funds) namely - Aberdeen Asia Pacific Excluding Japan Equity Fund, a series of Aberdeen Institutional Commingled funds LLC, Aberdeen Asia Pacific Including Japan, Equity Fund, a series of Aberdeen, Institutional Commingled Funds LLC Aberdeen Emerging Markets Equity Fund a series of Aberdeen Institutional Commingled Funds LLC. The aforesaid application sought a Ruling from the AAR on the above question. The application of Petitioner No.1 was admitted on 7th January, 2017 under Section 245R(2) of the Act.
- (v) Thereafter, parties were heard by the AAR at the final hearing of the application made by the Petitioner No.1. Consequent to the above, on 21st February, 2018, the impugned order was passed by the AAR, holding that, in the facts and the circumstances of the

case, the Petitioner No.1 i.e. applicant before it would not be entitled to carry forward accumulated losses, as there is no provision in the Act which allows one assessee to carry forward and set off losses incurred by some other assessee. Thus, the above question was answered in the negative i.e. against the Petitioner.

7 Thus, this Petition challenges the impugned order dated 21st February, 2018 of the AAR.

8 Mr. Kaka, learned Sr. Counsel in support of the Petition submits as under:-

- (i) The Petitioner No.1 was earlier constituted as a statutory trust under the laws of State of Delaware, USA. It was on 19th April, 2010 that the Petitioner was converted from a statutory trust into a LLC under the laws of the State of Delaware, USA. However, under the law of Delaware, in particular, in view of Section 3821 of the Trust Act and Section 214 of the LLC Act, the trust when converted into a LLC in accordance with the law of State of Delaware, USA, would be deemed to be the same entity as it was before the conversion. Thus, Petitioner No.1 being the same entity both before and after its conversion, the Petitioner No.1 is entitled to carry forward its losses for the earlier year under Section 74 of the Act;
- (ii) In terms of Private International Law, the status of a company which is incorporated abroad is determined with reference to the foreign laws. In this case, the laws of State of Delaware, USA and not by laws of India. This continued status would continue to hold in respect of the Petitioner No.1 even in India. Moreover, this issue

is no longer open to debate in view of the Supreme Court decision in *Technip S. A. v/s. SMS Holding (P) Ltd., & Others (2005) 5 SCC 465* ;

- (iii) Reliance was also placed upon the communication dated 4th August, 2010 of SEBI, allowing the same registration to the five series (funds) even after change of its name. Thus, the same support the view that the status of the parties even after conversions, continues to be the same;
- (iv) In any case, under Section 2 (17) of the Act, the company has been defined for the purposes of the Act, as a body corporate incorporated by or under the law of the country outside India would also be considered to be a company for the purposes of this Act. Thus, it is entitled to the benefit of the Act; and
- (v) The Ruling sought from the AAR was that the Petitioner be allowed to carry forward losses incurred by the three series (funds) being run by the Petitioners for the Assessment Year 2011-12 and subsequent thereto. As the Petitioner continues to be same person, both in its earlier status as a trust and now as LLC. Benefit of carry forward loss should have been extended to the Petitioner No.1 by the AAR.

9 As against the above, Mr. Tejvindeer Singh, learned Counsel for the Revenue while opposing the Petition, makes submissions as under:-

- (a) The Respondent do not dispute nor does the impugned order of the AAR disputes the position in law that the status of the Petitioner under the conflict of law is to be decided by the Court in which the

entity was incorporated, in this case, State of Delaware, USA;

- (b) The applicant is not assessee under the Act as the return of income have not been filed by the Petitioner No.1. The return of income is filed by its three series (funds) who have been individually assigned Permanent Account Number (PAN). It is thus, the three series (funds), each of whom is recognized as assessee under the Act. It is these series (funds) who would be entitled if otherwise permitted in law to carry forward the losses, declared in the earlier returns of income for the subject Assessment Year 2011-12 and subsequent years in accordance with law;
- (c) The Petitioner No.1 not having filed any return, much less loss return of income, is not entitled to claim benefit of Section 74 of the Act. In support, attention was invited to Section 80 of the Act which permits the carry forward of losses only when return of income is been filed, claiming loss for the purposes of being set off under Section 74 of the Act. In this case, admittedly, Petitioner No.1 has not filed any return of income, claiming such loss; and
- (d) Attention was drawn to the fact that SEBI had allowed the same registration even after change in name of five of its series (funds), however, the application made by the Petitioner was in respect of only three of the series (funds) out of the five series (fund), operating in India. It was submitted, if all of them, as contended by the Petitioner constitutes a part of the Petitioner, then the set off of loss and profit in each of the series should have been worked out, inter se and the return of income ought to have been filed by the Petitioner with the income tax authorities. This has admittedly not

been done.

10 We have considered the rival submissions. At the very outset, it must be pointed out that neither the AAR nor the Respondent dispute the fact that, in accordance with principles of Private International Law, the status of an entity, incorporated abroad, has to be determined even in India, according to the law of the Country, where the entity was incorporated. This, issue is no longer *res integra* as it stands covered in favour of the Petitioner's contention by the Supreme Court in Technip S.A. (supra). Thus, there is no dispute before us that the Petitioner No.1 both as a trust and as LLC in terms of the law of Delaware, USA, continues to be the same person. This position is accepted in India. Therefore, gain and loss earned by it in its earlier avatar would in law, not be denied only because of change in status from Trust to LLC. However, we note that the AAR answered the above question for Advance Ruling in the negative not on the above ground of change of status of Petitioner No.1 but on the ground that Petitioner No.1 was not possessed of any carry forward loss for the earlier Assessment Year to be set off in Assessment Year 2011-12 and subsequent Assessment Years in terms of Section 74 of the Act. It was in the context of question framed viz. Whether Petitioner No.1 (applicant) is entitled to carry forward losses for earlier years under Section 74 of the Act, that the AAR held that the Petitioner was not the assessee who had claimed a loss in the earlier Assessment Year. The Petitioner No.1 had admittedly filed no return of income and is not allotted any PAN. In the above factual position, the impugned order of the AAR placed reliance upon Section 80 of the Act and the decision of the A. P. High Court in *K.V.K. Raju v/s. CIT* reported in **252 ITR 754** – wherein it has been held that, before a carry forward loss can be claimed

by the assessee, it is necessary that, a loss has been determined in pursuance of a return filed for the earlier Assessment Year under Section 139 of the Act.

11 The submission on behalf of the Petitioner in rejoinder that Section 80 of the Act only prescribed the time period within which the return of income should be filed, is not correct. In fact, Section 139(3) of the Act itself provides that any person who has sustained a loss in the previous year, under the head '*profits and gains of business or profession*' or under the head '*capital gain*' and claims that such loss or any part thereof, should be carried forward, inter alia section 74 of the Act, then he must furnish a return of income. The loss return in the prescribed form as to be filed, as if it was a regular return of income under Section 139(1) of the Act. It is not the case of the Petitioner either before the AAR or even before us that, it had filed any return of income even under the Act. Therefore, though in principle, there can be no dispute that the decision of the Supreme Court in *Technip (supra)* would in Private International Law decide that the status of the Petitioner No.1 as LLC would continue in law to be the same as it was in its earlier avatar/ before conversion, as a Trust. However, the same would not by itself meet with the requirements provided under the Act so as to enable the party to carry forward the loss under Section 74 of the Act. In fact, this distinction is brought out by the Supreme Court in *Technip (supra)* in paragraph 18 thereof, which reads as under:-

“ This general rule regarding determination of status by the lex incorporationis will not apply when the issue relates to the discharge of obligations or assertion of rights by a corporation in another country, whether such obligation is

imposed by or right arises under the statute or contract, which is governed by the law of such other country.”

12 The reliance by the Petitioner upon the communication dated 4th August, 2010 by SEBI as the Regulatory Authority, allowing the series (funds) to continue with its earlier Registration, even after the change of its name does not assist the Petitioner. This for the reason that, before the AAR, it is not the series (funds) who are seeking to carry forward the losses but the Petitioner No.1 who has admittedly filed no return of income and is not assessed under the Act. Besides, the requirement of the Act has to be independently satisfied by the Petitioner No.1 before the AAR to carry forward the losses. As pointed out above, this has not been satisfied by the Petitioner No.1 as correctly held by the AAR.

13 One cannot loose sight of the fact that, the ruling of the AAR on the question as proposed would necessarily depend upon context, in which, the question has been raised. In this case, the Petitioner No.1 was seeking to carry forward accumulated loses under Section 74 of the Act when admittedly it had not filed any return of income, claiming loses for the earlier Assessment Year under the Act and it was not an Assessee under the Act. Thus, no fault can be found with the impugned order of the AAR, answering the question as posed for its consideration by the Petitioner No.1 in the negative. However, it is made clear that, this decision will not impact the case of the three series (funds) to claim the benefit of carrying forward losses under Section 74 of the Act, if they are otherwise entitlement to it in law. Neither the AAR nor we had any occasion in the present proceedings to decide whether or not, the three series (funds), for whom the Petitioner is claiming benefit in its hands, are

entitled to the benefit of carry forward losses under Section 74 of the Act or not. Their claim, if any, in their individual capacity is left untouched by this order to be decided in appropriate proceedings, if claimed by them.

14 In the above view, **Petition is dismissed.**

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)