R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO. 578 OF 2019

Aditya Birla Real Estate Fund .. Petitioner

Versus

Union of India & Ors. .. Respondents

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- Mr. Percy Pardiwalla, Senior Counsel a/w Mr. Farid Karachiwala, Ms. Sneh Parikh and Ms. Aishwaryajeeta Tawde i/by J. Sagar Associates for the Petitioner
- Mr. Sham Walve for the Respondent

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CORAM : AKIL KURESHI &
SARANG V. KOTWAL, JJ.

DATE : MARCH 28, 2019.

P.C.:

1. The petitioner has challenged the orders dated 19.2.2019 and 25.2.2019 as at annexures “L” and “N” to the petition.

2. Brief facts are as under:

3. The petitioner is a trust registered under the Indian Trusts Act, 1882. The petitioner is also registered with the Securities and Exchange Board of India (hereinafter referred to as "SEBI") as a Venture Capital Fund under the SEBI

(Venture Capital Fund) Regulations, 1996 (hereinafter referred to as "SEBI VCF Regulations"). The petitioner receives funds from individuals and institutions which the petitioner invests in various Venture Capital Undertakings. The income arising out of such investment is exempt from tax in terms of Section 10(23FB) of the Income Tax Act, 1961 ("the Act" for short).

4. For the assessment year 2016-17, the petitioner filed return of income declaring total income of Rs. 49.13 Lakhs (rounded off). Such return was taken in scrutiny by the Assessing Officer. He passed order under Section 143(3) of the Act on 31.12.2018. He assessed the petitioner's total income of Rs. 70.57 crores (rounded off) and raised correspondence tax demand. In this order, the Assessing Officer referred to the following heads of additions:-

i. The petitioner's income from investments in three companies namely Amrapali Smart City Developers Pvt Ltd, CSN Estates Pvt Ltd and Starteck Infraprojects Pvt Ltd which the Assessing Officer believed were not venture capital undertakings;

ii. The petitioner's income from short term investments in mutual funds with respect to which, the Assessing Officer was of the opinion that the petitioner was entitled to exemption only in terms of Section 10(23FB) of the Act and the petitioner cannot avail of the exemption under Section 10(35) of the Act, being the venture capital fund.

5. The petitioner has filed appeal against the said order of assessment. Pending such appeal, the petitioner applied to the Assessing Officer for stay of the recovery pending appeal. The Assessing Officer passed order on 16.1.2019 requiring the petitioner to deposit 20% of the disputed tax subject to which rest of the recoveries would be stayed. The petitioner, thereupon, approached the Principal Commissioner who passed an order on 19.2.2019 in which he granted further relief to the petitioner. In relation to the income arising out of the petitioner's short term investments in mutual funds, he granted full stay. He, however directed the petitioner to deposit 20% of the disputed tax in relation to the investments in the said three Venture Capital Undertakings. The Principal Commissioner reiterated this stand in further communication dated 25.2.2019, hence, this petition.

6. Learned counsel for the petitioner submitted that the petitioner had invested the funds in Venture Capital

Undertakings. The petitioner has been filing regular reports before the SEBI. SEBI has not raised any objection with respect to any of these investments. The Assessing Officer cannot examine whether the concerns were Venture Capital Undertakings or not. Learned counsel further submitted that in relation to Amrapalai Smart City Developers Pvt Ltd and CSN Estates Pvt Ltd, the investments were made at the time when the undertakings were admittedly carrying on the activities which would qualify them as Venture Capital Undertakings. If subsequently, as in case of Amrapali Smart City Developers Pvt Ltd, the company discontinued its activities, the petitioner's investments would not be tainted. Learned counsel lastly contended that in any case, the income generated out of such investments is always taxable. Only question is whether the tax should be paid by the petitioner's investors or the petitioner as a trust. In any case, the Department cannot tax the same income twice. In the present case, the petitioner had pointed out to the Principal Commissioner that the recipients of the income have already been subjected to tax. The petitioner, therefore, cannot ask to pay the tax on the same income again.

7. On the other hand, learned counsel for the Department submitted that the issues are at large before the Commissioner. At this stage, it is not necessary to examine the correctness of the petitioner's contention. The Assessing Officer has passed a detailed order. The question today as of the petitioner's claim of exemption under Section 10(23FB) of the Act. Once such exemption is withdrawn, the petitioner's liability to pay the tax on such income would automatically arise.

8. Having heard the learned counsel for the parties and having perused the documents on record, in view of the fact that the appeal is pending before the Appellate Commissioner, we would not like to make any definitive or conclusive observations. All issues, we are sure would would be examined by the Appellate Commissioner in accordance with law. However, it cannot be denied that the petitioner has number of arguable contentions. The question of SEBI's control in relation to the petitioner's activities and the point of time when the activities of the Venture Capital Undertakings can be verified would be relevant question. The question of double taxation in case such exemption is denied would also be a relevant consideration. In view of such facts, we stay the recoveries arising out of the order of assessment pending appeal. The petitioner shall not cause any delay in disposing of the appeal. If the Department is of the opinion that the petitioner is dragging the petitioner is dragging the appeal proceedings, it would be open for the Department to file appropriate proceedings for recall of stay order. With this direction, the petition is disposed of.

[SARANG V. KOTWAL, J.] **[AKIL KURESHI, J]**