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[2021] 132 taxmann.com 18 (Bombay)/[2021] 439 ITR 437 (Bombay)[28-10-2021]

INTERNATIONAL TAXATION : Income earned by assessee a UAE based settlor/sole beneficiary through Jersey-based trust by virtue of investment in Indian Portfolio companies will be governed by beneficial provisions of India-UAE DTAA and would not be chargeable to tax in India either by virtue of application of section 61 read with section 63 or on an application of section 161 conjointly with provisions of article 24 of India-UAE DTAA

[2021] 132 taxmann.com 18 (Bombay)

HIGH COURT OF BOMBAY

Abu Dhabi Investment Authority

v.

Authority for Advance Ruling, (Income Tax)*

K.R. SHRIRAM AND ABHAY AHUJA, JJ.
WRIT PETITION NOS. 709 AND 770 OF 2021†
OCTOBER 28, 2021

Section 9, read with sections 61, 63 and 161, of the Income-tax Act, 1961 and article 24 of India-UAE DTAA - Income - Deemed to accrue or arise in India (Income of Government and Institutions - Scope of provision) - Assessee was a public institution owned by and subject to the supervision of the Emirate of Abu Dhabi, expressly mentioned under article 4(2)(d) of the India-UAE DTAA as a resident of UAE - It filed Nil return in India and did not have any PE/business connection - Assessee as settlor/sole beneficiary proposed to make a trust with ETL (trustee) in Jersey - Said trust was a revocable and determinable trust which was registered with SEBI as FII and later as FPI - Assessee in its capacity as settlor and as per deed of settlement, made a capital commitment of USD 200 million in said trust as revocable transfer - Assessee filed an application before AAR to determine taxability of income accruing on investments made or proposed to be made in Indian portfolio companies by Trust - AAR held that assessee would not be eligible for exemption under article 24 of India-UAE DTAA since income was not earned directly but through a device - However, it was noted that even if trust was based out of Jersey and was settled in Jersey, assessee, being settlor and sole beneficiary of trust and a resident of UAE as per India-UAE DTAA, income which arises to assessee by virtue of its investment in Indian Portfolio companies, will be governed by beneficial provisions of India-UAE DTAA - Whether therefore, income that accrued to trust would not be chargeable to tax in India either by virtue of application of section 61 read with section 63 or on an application of section 161 conjointly with provisions of article 24 of India-UAE DTAA - Held, yes [Paras 32, 33 and 34] [In favour of assessee]

FACTS

- The assessee was a public institution owned by and subject to the supervision of the Emirate of Abu Dhabi. It was a resident of UAE for the purposes of article 4(2)(*d*) of the India-UAE DTAA and, accordingly, entitled to invoke the beneficial provisions of the India-UAE DTAA

for the purpose of determining its tax liability in India.

- The assessee filed its return of income in India, disclosing therein income that falls within the scope of section 5(2) but in view of the exemption available in terms of the India-UAE DTAA, reported NIL taxable income. Further, assessee did not have any permanent establishment/fixed place of business or any other form of presence in India and did not have any business connection/operations in India.

- Green Maiden A 2013 Trust was established by assessee and ETL as settlor and trustee, respectively. The trust was settled by assessee in Jersey. Under the Deed of Settlement dated 22-7-2013 the trust was set up by and for the benefit of assessee who was, apart from being the settlor, also the sole beneficiary of the trust. This trust was a revocable and determinable trust. The assessee set up the trust to make investments in India and claimed the benefit of the India-UAE DTAA.

- The Trust was registered with SEBI as Foreign Institutional Investor (FII) under the SEBI (Foreign Institutional Investors) Regulations, 1995 and later on as Foreign Portfolio Investor under the SEBI (Foreign Portfolio Investors) Regulations, 2014. ETL as trustee had entered into an Investment Management Agreement with KMIL. One of the obligations cast on KMIL in terms of the agreement was that a KMIL group subsidiary would invest in each and every portfolio company alongside the Trust.

- The Deed of Settlement provided that the capital contributions made or proposed to be made by ADIA to the Trust would be a revocable transfer. Pursuant to the Deed of Settlement, assessee made a capital commitment of USD 200 million in the trust in its capacity as settlor. According to assessee, the income derived from making investment and debt securities in India was not assessable to tax in India having regard to the provisions article 24 of the India-UAE DTAA read with sections 61 and 161.

- In view to have clarity on the position and avoid needless litigation if the revenue adopted a stand contrary to what assessee was advancing, the assessee filed an application before AAR

to determine taxability of the income accruing on the investments made or proposed to be made in the Indian portfolio companies by the Trust.

- AAR denied assessee the benefit of India-UAE DTAA read with relevant provisions of the Act in respect of the income accruing on the investments made or proposed to be made by Green Maiden A 2013 Trust.

- On Writ Petition:

HELD

- Section 61 provides that any income arising to any person by virtue of revocable transfer shall be chargeable to tax as the income of the transferor. The Deed of Settlement shows that there is a revocable transfer by settlor, *i.e.,* assessee to trustee ETL and as such any income arising to the trustee should be chargeable in the hands of assessee. Nothing in section 61 requires involvement of a trust in revocable transfer. Section 61 is plain and simple inasmuch as, it provides for income arising to any person by virtue of a revocable transfer of assets shall be chargeable to income tax as the income of the transferor and shall be included in his total income. Further section 61 is not dependent on section 63. A transfer can be revocable transfer on its own merits without reference to section 63. Clause (*a*) of section 63 merely extends the provisions of section 61 to cases which might not otherwise be covered by section 61 by extending the meaning of word revocable. Clause (*b*) in section 63 extends the meaning of the word transfer in section 61 to cases which might not otherwise amount to transfer. [Para 24]

- A settlement or a trust are merely instances of what could amount to transfer for the purposes of section 61. Section 63 (*b*) includes in the definition of transfer any settlement or trust or covenant or agreement or arrangement. Moreover, section 63 is not restricted only to trust. It is an inclusive definition. So long as the conditions provided in section 63(*a*) are fulfilled, any transfer whether connected with the trust or not will be a revocable transfer.

The case of AAR that if the transaction does not qualify as a trust, the provisions of section 63 and/or section 61 are not applicable, is erroneous. In any event, under section 63 there is no requirement that a trust covered by it must necessarily be an Indian trust falling under the Indian Trust Act. Such restriction which is not there in the Act cannot be imported into sections 61 and 63. As noted earlier, where such restriction is provided for the Act says so as noted in section 10(23FB) where it specifically provides that venture capital fund means a fund operating under the trust deed registered under the provisions of Registration Act, 1908. [Para 25]

- As regards the stand that India has not ratified the Hague Convention on the Law Applicable to Trust and on their recognition (Hague Trust Convention, Convention of 1-7-1985), trust laws of a foreign jurisdiction are not applicable in India, the word 'trust' first of all is not defined under the Act or General Clauses Act, 1897. The word trust has to be interpreted as per its general meaning. The trust is defined under section 3 of the Indian Trust Act to be an obligation annexed to the ownership of the property, and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another, or of another and the owner. A trust can be an Indian Trust or a Foreign Trust. There is nothing in sections 61 and 63 to restrict its applicability only to trust settled in India and, therefore, one cannot rule out their applicability to a Foreign Trust. Even if the definition of the trust under the Indian Trust Act can be held to say that it does not cover 'The Trust', *i.e.,* Green Maiden A 2013 Trust, still the word trust in section 63 covers all trust within its ambit. Hague Trust Convention referred to by AAR does not decide the issue one way or the other. There is nothing to even suggest in the ruling of AAR as to how the ratification of Hague Trust Convention would affect the status of Foreign Trust in India. If what AAR has opined is accepted that Foreign Trust can be recognised in India only if and after India ratified the Hague Trust Convention that would imply that no Foreign Trust can be treated as trust for the purpose of the Act. If one has to accept AAR's contention that the word trust can only be an Indian Trust for the purposes of the Act it has to be based on some statutory provisions which is not the case. The Trust created in terms of the deed of settlement is consistent with

the requirements of both, the Indian Trusts Act as well as Trust (Jersey) Law, 1984 as to what constitutes a trust. [Para 26]

- As to the ground that the settlor cannot be a sole beneficiary, as assessee was settlor as well as sole beneficiary, first of all the Act does not make any such provision. Secondly, there is no provision under the Indian Trust Act also which debars the settlor from being beneficiary. Thus, it follows that the settlor cannot be the trustee and sole beneficiary. In the present instance, the settlor is not the trustee but is the sole beneficiary which is clearly permissible. [Para 27]

- As regards AAR's view that sections 60 to 64 are designed to overtake and circumvent the counter design by a taxpayer to reduce its tax liability by parting its property in such a way that the income should no longer be received by him but at the same time he retains certain powers over property/income, that is not the case as regards assessee. In the case at hand, if assessee had invested the amount directly, the income derived from such investment would stand exempted under article 24 of India-UAE DTAA. The assessee has not created the trust to avoid tax and that is not AAR's case either. AAR says if assessee had directly invested they would not have been liable to pay tax. AAR failed to understand why would someone not invest directly if the returns on such investment would be exempt from tax. AAR fails to appreciate that assessee routed its investment on certain instruments through the trust only for commercial expediency. According to AAR the assessee's representative could not satisfactorily answer the query as to why assessee routed its investments in non-convertible debenture funds through Jersey route for investment in Indian market and ADIA itself being an FII registered with SEBI could have directly invested in Indian Portfolios and taken advantage of article 24 of India-UAE treaty. But the fact is assessee has explained in detail in its letter dated 13-11-2018 and letter dated 25-9-2019 to AAR, why it routed its investment in non-convertible debentures through Jersey route for Indian market. [Para 28]

- As regards the ground that section 160(1)(*i*) or 160(1)(*iv*), provides that trustee can be representative assessee but in this case trustee being a resident of Jersey cannot be an

agent of assessee, it is viewed that is not sustainable as the Act does not provide anywhere that only trustee who is resident of India can be an agent under section 160. [Para 29]

- As regards the ground of proposed amendment in the Finance Bill, 2020 (Exemption from certain income of wholly owned subsidiaries of assessee), it was improper for AAR to have relied upon the proposed amendment as same was introduced in the Act post the hearing of the application and was never put to assessee for them to make any submissions thereon. If, AAR wanted to, it could have given notice to assessee to make their submissions thereon. Therefore, the contents of the proposed amendment could not have been relied upon by AAR. [Para 30]

- It is viewed, therefore, the Deed of Settlement dated 22-7-2013,whereby the trust was set up, contained specific clauses which established the revocable nature of the trust. As the assessee has settled the trust on the terms mentioned in the Deed of Settlement, the contribution made by it to the trust would be a transfer as defined in section 63. As section 63 does not anywhere specify that a trust covered by it must necessarily be a trust falling under the Indian Trust Act, 1882 and as per section 63(*b*), any settlement or trust is included within the meaning of 'transfer' and section 63(*b*) does not provide that the trust described therein needs to bean Indian Trust, the provisions of sections 61 to 63 of the Act are applicable to the case at hand. As the term 'trust' is not defined either in section 63 or section 2, 'trust' would clearly be a trust as one understands the term in its common parlance. Even if one has to have recourse to the definition of the term 'trust' in section 3 of the Indian Trust Act, 1882, *i.e.,* an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owners, or declared and accepted by him, for the benefit of another, or of another and the owner, there is nothing in the language of section 61 or 63 that restricts its applicability only to trusts settled in India and accordingly, AAR was not justified in concluding that a Foreign Trust will not be covered under the said provisions. AAR while expressing its view that India has not ratified Hague Convention on the law applicable to trust has overlooked the fact that assessee is not

seeking to apply Foreign Law to India but is merely seeking an application of section 61 which in no manner excludes, from it applicability, a trust settled outside India. A Foreign Trust can be treated as a trust under the Act also appears from the income tax return forms prescribed under the Act wherein Schedule FA, Para F, in form ITR-5, require the disclosure of 'details of trusts' created under the laws of a country outside India, in which one is trustee, beneficiary or settlor. There are similar requirements in Forms ITR-2, ITR-6 and ITR-7. Therefore, the Act presupposes that a Foreign Trust is a trust for the purposes of the Act. [Para 31]

- Even if, the trust is based out of Jersey and the trust is settled in Jersey, ADIA being the settlor and sole beneficiary of the trust and resident of UAE as per article 24 of the India-UAE DTAA, the income which arises to it by virtue of investment in Indian Portfolio companies will be governed by the beneficial provisions of the India-UAE DTAA. To take it further, even if the trust structure were to be discarded, then it must necessarily follow that the investment must be regarded as having been made by assessee and hence the income would arise in the hands of assessee which income would not be taxable in India by virtue of provisions of India-UAE DTAA. It is to be noted that there was no attempt whatsoever to reduce the tax liability by using the trust structure. When the provisions of the Trust Deed provided that assessee has right to reassume power over the entire income arising on the investments made by the trust in the portfolio companies, the entire income arising there from has to be in terms of section 61 to be assessed in the hands of assessee. This would mean the exemption under article 24 of India-UAE DTAA would be attracted. Even if for a moment it is said that for any reason the provisions of section 61 are not applicable, then also the trustee can only be assessed in a representative capacity and, accordingly the provisions of section 160(*i*)(*iv*) will be applicable. Therefore, even if the income is taxed in the hands of the trustee in terms of section 161(1), it will be taxed in the 'like manner and to the same extent' as the beneficiary. Once again, assessee is the sole beneficiary of the trust, the income assessed in the hands of the trustee will take colour of that of assessee's income and thereby, the benefit of India-UAE DTAA must be granted. [Para 32]

- As there is no bar to the settlor and beneficiary being the same person and in view of the judgment in *Bhavna Nalinkant Nanavati* v. *CGT* [2002] 255 ITR 529 (Guj.) where the court has interpreted section 3 of the Indian Trust Act, 1882 as creating a fiduciary relationship between the trustee and the beneficiary, where the ownership of the trust property has to be for the benefit of another person which can include the settlor himself, if one reads sections 61 and 63, it is quite clear that section 61 is independent of section 63 and a transfer can be a revocable transfer on its own merits and is not restricted only to trusts. A 'settlement' or a 'trust' are instances of what amount to transfer. So long as the settlor has a right to reassume power over the assets settled, the same would amount to revocable transfer. In the facts of the case at hand, assessee could reassume the power and hence the contribution to the trust was a revocable transfer thereby making the income arising to the trust taxable in the hands of assessee which was exempt under article 24 of India-UAE DTAA. The tax liability of a trust has to be determined by applying the provisions of the Act alongwith the provisions of India-UAE DTAA and not apply the law as applicable in Jersey. [Para 33]

- In the circumstances, the ruling dated 18-3-2020 has to be quashed. The income that accrues to the trust would not be chargeable to tax in India either by virtue of application of section 61 read with section 63 or on an application of section 161 conjointly with the provisions of article 24 of the India-UAE DTAA. Since the Ruling dated 18-3-2020 of the AAR, has been quashed, steps taken in furtherance of the Ruling order passed therein are also quashed and set aside. [Para 34]

CASE REVIEW

Bhavna Nalinkant Nanavati v. *CGT* [2002] 255 ITR 529 (Guj.) (para 33) *followed*.

CASES REFERRED TO

Columbia Sportswear Company v. *DIT* [2012] 25 taxmann.com 470/210 Taxman 42/346 ITR 161 (SC) (para 18), *Union of India* v. *Azadi Bachao Andolan* [2003] 132 Taxman 373 (SC) (para 18),

Bhavna Nalinkant Nanavati v. *CGT* [2002] 255 ITR 529 (Guj.) (para 18), *CWT* v. *Estate of Hmm Vikramsinhji of Gondal* [2014] 45 taxmann.com 552/225 Taxman 166 (SC) (para 18) and *CWT* v. *Trustees of H.E.N. Nizam's Family* [1977] 3 SCC 362 (para 18).

Percy Pardiwalla, Sr. Adv. **Ms. Aarti Sahte** and **Ms. Aasavari Kadam** *for the Petitioner.* **Ashok Kotangle** and **P. A. Narayana** *for the Respondent.*

JUDGMENT

K.R. Shriram, J. - Rule. Rule made returnable forthwith and heard and disposed at the admission stage itself with the consent of the counsel.

2. In both the petitions, a common ruling dated 18th March 2020 passed by the Authority for Advance Ruling (Income Tax) (hereinafter referred to as AAR) is impugned. Hence both the petitions are taken up together. Shri Kotangle did not wish to file any reply since according to him only questions of law were involved. We shall take Writ Petition No.770 of 2021 filed by Abu Dhabi Investment Authority (hereinafter referred to as ADIA) as lead petition.

3. ADIA is a public institution owned by and subject to the supervision of the Emirate of Abu Dhabi. Article 4(2)(*d*) of the India-United Arab Emirates ("UAE") Double Taxation Avoidance Agreement (hereinafter referred to as the "India-UAE DTAA") expressly provides that ADIA is a resident of UAE for the purposes of Article 4 thereof and, accordingly, ADIA is entitled to invoke the beneficial provisions of the India-UAE DTAA for the purpose of determining its tax liability in India. ADIA files its return of income (hereinafter referred to as "ROI") in India, disclosing therein income that falls within the scope of section 5(2) of the Income Tax Act, 1961 (hereinafter referred to as the "Act") but in view of the exemption available in terms of the India-UAE DTAA, reports NIL taxable income in the ROI. ADIA does not have any permanent establishment/fixed place of business or any other form of presence in India and does not have any business connection/operations in India. AAR is a statutory authority constituted under section 245-O of the Act to give a ruling on any question raised in respect of any transaction which has been undertaken or is proposed to be undertaken by a non-resident applicant or the

tax liability of a non-resident arising out of a transaction which has been undertaken or is proposed to be undertaken by a resident applicant with such non-resident or whether an arrangement, which is proposed to be undertaken by any person, being a resident or a non-resident, is an impermissible avoidance agreement as referred to in Chapter X-A. The ruling/order on the questions raised before AAR is binding only upon applicant who sought the answer and the revenue authority assessing such applicant but the same has a persuasive value insofar as other assessees are concerned.

4. ADIA is challenging the order/ruling dated 18th March 2020 passed by AAR in case of ADIA as well as Equity Trust (Jersey) Ltd. (hereinafter referred to as ETL) as the trustee, which is petitioner in Writ Petition No.709 of 2021, denying ADIA the benefit of India-UAE DTAA read with relevant provisions of the Act in respect of the income accruing on the investments made or proposed to be made by Green Maiden A 2013 Trust (hereinafter referred to as the Trust), which was established by ADIA and ETL as settlor and trustee, respectively. The trust is settled by ADIA in Jersey. Under the Deed of Settlement dated 22nd July 2013 (the Deed of Settlement), the trust is being set up by and for the benefit of ADIA who is, apart from being the settlor, also the sole beneficiary of the trust. This trust is a revocable and determinable trust.

5. The following provisions of the Deed of Settlement are relevant:

(*aaa*) "Settlor" or "Sole Beneficiary" shall mean ADIA;

(*ccc*) "Term" shall mean the term of the Trust, which shall continue until the later of :

(*i*) 8 (eight) years from the date of Closing. By the end of the 7th (seventh) year, the Trustee may (on the request of the Investment Manager) seek a 1 (one) year extension for liquidation of the Trust and such extension shall be subject to the consent of the Sole Beneficiary; and

(*ii*) the date on which the remaining Receipts in the Trust Fund are distributed to

the Sole Beneficiary after payment and discharge of all accrued expenses (including Operating Expenses), fees and liabilities of the Trust.

(*eee*) "Trust" shall have the meaning provided in the Recitals above;

(*ggg*) "Trust Fund" shall mean the Initial Settlement Sum, the Capital Contributions, Receipts, any accretions, all other cash and property held by the Trustee pursuant to the terms of this Deed in trust for the Sole Beneficiary together with all of the Trustee's interest in Portfolio Investments.

3.1 The Settlor has on or before the execution of this instrument transferred to the Trustee, by way of wire transfer or a cheque or such other instrument, the Initial Settlement Sum and the Trustee hereby admits, acknowledges and declares that the Trust Fund shall be held by it in trust for the Sole Beneficiary and shall be applied and governed by the terms and conditions of this Deed.

9.2 Receipts may, subject to the terms of this Deed, be distributed by the Trustee to the Sole Beneficiary as and when deemed appropriate by the Trustee but subject to payment of all accrued Operating Expenses and accrued fees then payable under the Investment Management Agreement which are not subject to a bona fide dispute. In the event that any fees payable under the Investment Management Agreement are the subject of a bona fide dispute, the Trustee may distribute Receipts subject to withholding a sum from the Receipts which the Trustee deems to be reasonable to discharge the anticipated liability.

9.3 The Trustee shall make distributions to the Sole Beneficiary, at such intervals as it deems fit.

12. TERMINATION OF THE TRUST

12.1 The Trustee shall, if directed by the Sole Beneficiary, at any time before the expiry of the Term and following confirmation from the Investment Manager that the Trust has exited from all its Portfolio Investments, terminate the Trust.

12.2 At the expiry of the Term, the Trustee will take steps to realize or distribute any remaining Portfolio Investments together with any, all and other remaining parts of the Trust Fund.

12.3 Upon termination, the proceeds from the dissolution of the Trust will be distributed to the Sole Beneficiary after payment of all accrued fees, expenses, applicable taxes and the Trustee withholding a reasonable sum to discharge, future obligations, liabilities, fees, cost, expenses and taxes which are likely to accrue.

6. By virtue of the provisions of the Deed of Settlement, it is ADIA's case that the trust is a revocable trust. Pursuant to the Deed of Settlement, ADIA made a capital commitment of USD 200,000,000 (USD Two Hundred Million only) in the trust in its capacity as settlor. The reason for ADIA settling the trust and making investment in India using the Trust are as follows: —

(*i*) At the time when ADIA was making a decision to invest in India, there was no legal framework in the UAE under which a trust could be formed and also ADIA could not establish a sole shareholder subsidiary company in the UAE.

(*ii*) ADIA for commercial and administrative reasons has made all its illiquid investments through separate legal entities (including this one) in order to ensure it does not have to directly deal with various portfolio companies. ADIA also invests through separate legal entities for limitation of liability purpose.

(*iii*) ADIA has been using Jersey as a jurisdiction for establishing companies and trusts and for making a number of investments around the world. Jersey's regulatory regime is complaint with international standards and Jersey has also entered into information exchange agreements with a number of countries and is generally not considered an obstructive or opaque jurisdiction.

In view of the aforesaid reasons ADIA set up the trust to make investments in India and claimed the benefit of the India-UAE DTAA.

7. The Trust was registered with the Securities and Exchange Board of India (SEBI) as Foreign Institutional Investor (FII) under the SEBI (Foreign Institutional Investors) Regulations, 1995 and later on as Foreign Portfolio Investor under the SEBI (Foreign Portfolio Investors) Regulations 2014. ETL as trustee has entered into an Investment Management Agreement dated 24th July 2013 with Kotak Mahindra (International) Ltd. (hereinafter referred to as KMIL). One of the obligations cast on KMIL in terms of the agreement is that a KMIL group Subsidiary will invest in each and every portfolio company alongside the Trust. The Deed of Settlement provides that the capital contributions made or proposed to be made by ADIA to the Trust would be a revocable transfer. According to ADIA, the income derived from making investment and debt securities in India was not assessable to tax in India having regard to the provisions Article 24 of the India-UAE DTAA read with sections 61 and 161 of the Act.

8. In view to have clarity on the position and avoid needless litigation if the revenue adopted a stand contrary to what ADIA was advancing, ADIA filed an application before AAR to determine taxability of the income accruing on the investments made or proposed to be made in the Indian portfolio companies by the Trust. ADIA raised the following questions for determination by AAR:—

(*i*) On the stated facts and in law, whether the capital contribution made / proposed to be made / transferred by ADIA to Green Maiden A 2013 Trust be treated as a revocable transfer for the purpose of section 63 of the Act ?

(*ii*) If the answer to the above question is in the affirmative then, whether on the stated facts and in law, the entire income which may arise from the investments made by the Trust in Indian Companies (Portfolio companies) be chargeable to income-tax in the hands of ADIA as per section 61 of the Act or be chargeable to income-tax in the hands of any other person as defined under the Act ?

(*iii*) If the answer to the first and second question is in the affirmative then, whether on the states facts and law, the entire income in the hands of ADIA which may accrue or arise

from the investments made by the Trust in the Portfolio Companies be exempted from tax in India based on the provisions of Article 24 of the India-UAE DTAA ?

(*iv*) If the answer to the third question is in the affirmative then, whether the Portfolio Companies or any other person responsible for paying any sum, to the Trust, are required to deduct tax at source under the provisions of the Act, on any sum payable by them to the Trust, the income / assets of the Trust being subject to the provisions of section 61 and section 63 of the Act ?

9. The office of CIT (IT)-1 Mumbai, filed a report under section 245R (2) of the Act opposing admission of the application filed by ADIA. According to CIT(IT), ADIA had furnished incomplete/incorrect information to AAR and sought additional clarifications and also sought rejection of the application.

10. By order dated 11th April 2016, AAR admitted the application filed by ADIA. The CIT(IT) filed a rectification application dated 9th June 2016 before AAR, seeking a review of the order of admission apparently due to an error that had crept into the order. The said application was rejected by AAR on 15th November 2018. ADIA also had filed a rectification application dated 21st June 2016 since in the order of admission the words used are "irrevocable trust" whereas it should be "revocable trust". ADIA made further submissions and addressed various communications to AAR. The CIT(IT) gave its final report dated 1st November 2019 under section 245R(4) of the Act reiterating the submissions/contentions raised by them in their earlier report dated 6th August 2019. AAR also held hearing on couple of days where ADIA reiterated its submissions made in their earlier letters and written submissions. Certain case laws were also relied upon by ADIA.

11. AAR did not accept any of the contentions raised by ADIA regarding the income accrued on the investments made or proposed to be made by the Trust in Indian portfolio companies and passed a common order/ruling dated 18th March 2020, which is impugned in both these petitions, denying ADIA and ETL the benefit of the India-UAE DTAA. AAR, inter alia, concluded: —

(*i*) The income from investment in debt portfolios in India is received and accrues to the Trust in India and is taxable under section 5 read with section 9 (1) (*i*) of the Act.

(*ii*) Since there is no treaty between India and Jersey, income received or accrued or arising in India to the Trust registered in Jersey is taxable in India.

(*iii*) India-UAE Treaty does not apply to the Trust or the Trustee.

(*iv*) Since India has not ratified the Hague Convention on the Law Applicable to Trust and on their recognition ("Hague Trust Convention", Convention of 1st July 1985), trust laws of a foreign jurisdiction are not applicable in India.

(*v*) In case of a trust, the settlor cannot be the sole beneficiary. Otherwise the trust would serve no purpose as the trustee is the legal owner of the property in trust, as fiduciary for the beneficiary or beneficiaries who are the equitable owner(*s*) of the trust property. In the present case, since ADIA is the settlor and the sole beneficiary, it does not satisfy the essential ingredients of a trust.

(*vi*) ADIA's arguments on application of section 61 of the Act was rejected by holding that "if Ld AR insists in enforcing sec 61 to present case, it may amount to case of prima facie tax avoidance by ADIA and application may be hit by threshold bar under clause (*iii*) to proviso to sec 245R(2) of the Act. Hence, the references to these sections are not pertinent."

(*vii*) Bifurcate the accrual and receipt of income by the trust and the beneficiary in three stages – Stage 1 is the accrual/receipt of mainly interest income to the trust as sub-account of FII. Stage 2 is transfer of income to the trustee of the trust and Stage 3 is receipt of income by ADIA as and when transferred by trustee by virtue of deed of settlement between ADIA and the Trustee.

In stage 1, the income is taxable in India as there is no treaty between India and Jersey.

Even if it is presumed that the income accrues or arises to the trustee, it is still taxable in India as the income has arisen in India and the trustee being a private limited company is registered in Jersey with whom there is no treaty.

(*viii*) The Trust is not a trust under the Indian Trust Act, 1882 and, therefore, does not fall under section 160(1)(*iv*). The income has accrued to the sub-account, i.e., the Trust. No income has accrued directly to the trustee and, hence, it cannot be taxed in the like manner and to the same extent as ADIA would have been taxable.

(*ix*) Rejected the argument of ADIA that even if the trust is to be ignored, the income would still accrue to ADIA and would be exempt under the India-UAE DTAA. Piercing the veil or lifting of veil of an arrangement is for the benefit of the Revenue to check if conception is used for tax evasion or not. In the present scenario, piercing the veil is not warranted.

(*x*) Accrual of income to trust is not income derived by ADIA. Hence, the said income does not fall under article 24 of India-UAE Treaty.

(*xi*) Had ADIA routed the funds through an entity or structure based in UAE and ADIA being the beneficial owner, then interest income would have been exempt under article 11(3) of India-UAE Treaty. The said view is fortified by the amendment proposed in the Finance Bill, 2020 (exemption for certain income of wholly owned subsidiaries of ADIA). [AAR relied on this amendment in spite of the fact that the same was introduced in the Act post the hearing of the application and was never put to ADIA, for them to make any submissions thereon].

(*xii*) Section 115AD of the Act, applicable to FIIs, is a code in itself. Hence the income earned by the Trust is taxable in India as per section 115AD of the Act.

12. Shri Pardiwalla submitted that the term transfer and revocable transfer have been defined under section 63 of the Act, which reads as under:

"63. "Transfer" and" revocable transfer" defined

For the purposes of sections 60, 61 and 62 and of this section,-

(*a*) a transfer shall be deemed to be revocable if-

(*i*) it contains any provision for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor, or

(*ii*) it, in any way, gives the transferor a right to re-assume power directly or indirectly over the whole or any part of the income or assets;

(*b*) " transfer" includes any settlement, trust, covenant, agreement or arrangement."

Shri Pardiwalla submitted:

(*a*) That section 63 clearly provides that the capital contribution made and/or proposed to be made by ADIA as Settlor in the trust are transfers for the purpose of section 63(*b*) of the Act since it defines transfers to include any settlement or trust;

(*b*) In view of the provisions of the Deed of Settlement, the capital contribution made and/or proposed to be made by ADIA for the Trust will be in the nature of revocable transfer;

(*c*) The trust fund will be held by trustee, i.e., ETL in trust for the sole beneficiary, which expressly mean that the funds held by the trust are held on behalf of ADIA as settlor for the benefit of ADIA as beneficiary;

(*d*) The Deed of Settlement also provides for re-transfer of the entire income arising on the investments made by the Trust in the portfolio companies and the principal amount invested in the portfolio companies and the trustee is obliged to distribute receipts from portfolio investments only to the sole beneficiary, i.e., ADIA;

(*e*) The Deed of Settlement also provides ADIA as settlor with the right to terminate the Trust at any time before the expiry of the term and will be entitled to proceeds of dissolution of the Trust. This means that ADIA as settlor has a right to re-assume power over the entire income arising on the investments made by the Trust in the portfolio companies and the principal amount invested in the portfolio companies. Upon such revocation as per the right, ADIA as settlor having revoked the trust, all the remaining principal amount would revert absolutely to ADIA as settlor;

(*f*) Therefore, since the Deed of Settlement expressly provides for re-transfer of right to re-assume power over the entire income arising on the investments made by the Trust in the portfolio companies as well as the principal amount invested in the portfolio companies, the transfer of the contribution that have been made and/or will be made by ADIA to the Trust are/will each be a revocable transfer under the provisions of section 63 of the Act.

13. Shri Pardiwalla also relied upon section 61 of the Act which contains provisions relating to taxability of income arising by virtue of revocable transfer of assets and the same reads as under:

" Revocable Transfer of Assets

61. All income arising to any person by virtue of a revocable transfer of assets shall be chargeable to income-tax as the income of the transferor and shall be included in his total income."

Shri Pardiwalla submitted as the capital contribution made and/or to be made by ADIA in the trust will be a revocable transfer under section 63 of the Act, any income on the investment that is proposed to be made by the trust in the portfolio companies, in view of the provisions of section 61 of the Act, shall be chargeable to income-tax as the income of ADIA (settlor) and shall be included in the total income of ADIA as settlor only.

14. Shri Pardiwalla also submitted, in the alternative and in addition, that by the Deed of Settlement between ADIA and ETL as settlor and trustee, respectively, the trust has been set up for the benefit of ADIA, the sole beneficiary of the trust. Therefore, it is a determinating trust and even if one says provisions of section 61 are not applicable, then also the Trustees can only be assessed in a representative capacity. Accordingly, the provisions of section 160(1)(*iv*) of the act, will be applicable. Since the trustee is entitled to receive income on behalf of the sole beneficiary, it should be considered as representative assessee of the sole beneficiary.

> "Section 160 - Representative assessee
>
> (1) For the purposes of this Act, "representative assessee" means:—
>
> ** ** **
>
> (*iv*) 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 Mussalman Wakf Validating Act, 1913 (6 of 1913), receives or is entitled to receive on behalf or for the benefit of any person, such trustee or trustees;"
>
> ** ** **

Shri Pardiwalla further submitted that the provisions with respect to the liability of representative assessee are covered under section 161 of the Act, which reads as under:

> Section 161- "Liability of representative assessee
>
> (1) 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 were 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 this Chapter, 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.

(1A) Notwithstanding anything contained in sub-section (1), where any income in respect of which the person mentioned in clause (*iv*) of sub-section (1) of section 160 is liable as representative assessee consists of, or includes, profits and gains of business, tax shall be charged on the whole of the income in respect of which such person is so liable at the maximum marginal rate :

Provided that the provisions of this sub-section shall not apply where such profits and gains are receivable under a trust declared by any person by will exclusively for the benefit of any relative dependent on him for support and maintenance, and such trust is the only trust so declared by him.

(2) Where any person is, in respect of any income, assessable under this Chapter in the capacity of a representative assessee, he shall not, in respect of that income, be assessed under any other provision of this Act."

In view thereof, even if the income is taxed in the hands of the Trustee, in terms of section 161(1) of the Act, it will be taxed in the "like manner and to the same extent" as the beneficiary. As the tax on income received by or accruing to the Trust from the investments made or proposed to be made in portfolio companies is to be levied in the hands of the trustee and recovered from the trustee in the like manner and to the same extent as it would be leviable upon and recoverable from the sole beneficiary and as petitioner is the sole beneficiary of the Trust, the income assessed in the hands of the Trustee will take colour of that of petitioner's income and thereby, the benefit of the India-UAE DTAA must be granted.

15. Shri Pardiwalla relied upon Article 24 of Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with UAE entered into between Government of India and Government of UAE which reads as under:—

"Article 24: Income of Government & Institutions:—

1. Notwithstanding the provisions of Article 13, the Government of one contracting State shall be exempt from tax, including capital gains tax, in the other contracting State in respect of any income derived by such Government from that other contracting State.

2. For the purposes of paragraph (1) of this Article, the term "Government"-

(*a*) in the case of India means the Government of India, and shall include:

(*i*) the political sub-divisions, the local authorities, the local adminstrations, and the local Governments;

(*ii*) the Reserve Bank of India;

(*iii*) any such institution or body as may be agreed from time to time between the two contracting States;

(*b*) in the case of UAE means the Government of the United Arab Emirates and shall include:

(*i*) the political sub-divisions, the local authorities, the local administrations, and the local Governments;

(*ii*) The Central Bank of the United Arab Emirates, Abu Dhabi Investment Authority and Abu Dhabi Fund for Economic Development;

(*iii*) any such institution or body as may be agreed from time to time between the two contracting States."

Shri Pardiwalla submitted that as per Article 24 of the India-UAE DTAA, ADIA is covered under the meaning of the term 'Government' of the United Arab Emirates and any income derived by ADIA from India will be exempt from tax in India in the hands of ADIA.

Shri Pardiwalla also submitted that under section 90(2) of the Act the provisions that are more

beneficial to the assessee should apply. Section 90(2) of the Act reads as under:

> Section 90 - Double Taxation Relief:
>
> ** ** **
>
> (2) Where the Central Government has entered into an agreement with the Government of any country outside India under sub- section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.
>
> ** ** **

Therefore, the provisions of Article 24 of India-UAE DTAA should apply as it is more beneficial than the provisions of the Act. Thus, ADIA should not be liable to pay tax on any income which may arise from investments made by the Trust in portfolio companies.

16. Shri Pardiwalla thereafter relied upon section 166 of the Act. Section 166 of the Act reads as under:

> Section 166- "Direct assessment or recovery not barred.
>
> Nothing in the forgoing sections in this Chapter shall prevent either the direct assessment of the person on whose behalf or for whose benefit income therein referred to is receivable, or the recovery from such person of the tax payable in respect of such income."

Shri Pardiwalla submitted:—

(*a*) Under section 166 of the Act, in the case of representative assessee, the revenue has an option embodied in section 166 to assess the beneficiaries instead of the trustees or

having assessed the trustees it may proceed to recover the tax from the beneficiaries.

(*b*) The basic idea underlying section 166 is that the liability of the trustee should be co-extensive with that of the beneficiaries and in no sense wider or a larger liability and when the question of payment of tax arise, the section mandates to the taxation department that when they are dealing with the income of trustee, they must levy the tax and recover it in the manner laid down in section 161(1) of the Act;

(*c*) The trustees would be assessed in the representative capacity as representing the beneficiary. This, of course, does not mean that the revenue cannot proceed to make direct assessment on the beneficiary in respect of the interest in the trust properties which belongs to him. The beneficiary would always be assessable in respect of his interest in the trust properties, since such interest belongs to him and the right of the Revenue to make direct assessment on him in respect of such interest stands unimpaired by the provision enabling assessment to be made on the trustee in a representative capacity. The Revenue, therefore, may either assess such income in the hands of the trustee in a representative capacity under sub-section (1) of section 161 or assess it directly in the hands of the beneficiary by including it in the net wealth of the beneficiary. What is important to note is that in either case what is taxed is the interest of the beneficiary in the trust properties and not the corpus of the trust properties. So also where beneficiaries are more than one, and their shares are indeterminate or unknown, the trustees would be assessable in respect of their total beneficial interest in the trust properties. It is provided that the assessment may be made on the trustee as if the beneficiaries for whose benefit the trust properties are held were an individual;

(*d*) The beneficial interest is treated as if it belonged to one individual beneficiary and assessment is made on the trustees in the same manner and to the same extent as it would be on such fictional beneficiary;

(*e*) Wherever there is a trust, it is obvious there must be beneficiaries under the trust, because the very concept of a trust connotes that though the legal title vests in the trustee, he does not own or hold the trust properties for his personal benefit but he holds the same for the benefit of others, whether individuals or otherwise;

(*f*) It must follow inevitably from this premise that since it is the beneficial interests which are taxable in the hands of the trustee in a representative capacity, the liability of the trustee cannot be greater than the aggregate liability of the beneficiaries and no part of the corpus of the trust properties can be assessed in the hands of the trustee.

17. Shri Pardiwalla also submitted that if the act was to extend to only Indian Trust, it would have expressly provided like it is provided in section 10(23FB) of the Act, which provides for venture capital fund means a fund operating under a trust deed registered under the provisions of the Registration Act, 1908. Shri Pardiwalla submitted that section s 60 to 63 or section 160 or 161 of the Act does not provide for any such qualification. Therefore, sections 60 to 63 and 160, 161 and 166 are applicable to a foreign trust.

18. Shri Pardiwalla relied upon the following judgments:

(*a*) *Columbia Sportswear Company* v. *DIT* [2012] 25 taxmann.com 470/210 Taxman 42/346 ITR 161 (SC) to submit that there is no alternate remedy against advance ruling by AAR and the proper forum to challenge will be the Division Bench of High Court under Articles 226 and 227 of the Constitution of India.

(*b*) *Union of India* v. *Azadi Bachao Andolan* [2003] 132 Taxman 373 (SC) to submit that the terms of the agreement for avoidance of double taxation would automatically override the provisions of Income Tax Act in the matter of ascertainment or chargeability to income tax and ascertainment of total income to the extent of inconsistency with the terms of double taxation agreement. In other words, in case of inconsistency between the terms of the agreement and the taxation statute, the agreement alone would

prevail.

(*c*) *Bhavna Nalinkant Nanavati* v. *CGT* [2002] 255 ITR 529 (Guj.), to submit that there is no bar in the settlor being the sole beneficiary. Relying on this judgment Shri Pardiwalla submitted that the ownership of a trust is a matter of form rather than of substance. The property may belong to the beneficiary but for obligation and use of it, the property vests in the trust. The trustee is under an obligation to use the ownership rights for the benefit of those to whom the ownership rights really belong, i.e., beneficiary. Shri Pardiwalla states that though trustee comes in possession of the property, the possession is for the benefit of another, i.e., beneficiary. Thus, the trustee is merely a conduit or a vehicle by means of which the donor passes on the interest which donor had in the trust property in favour of the beneficiary, and there is no bar in the settlor and the sole beneficiary being one and the same.

(*d*) *CWT* v. *Estate of Hmm Vikramsinhji of Gondal* [2014] 45 taxmann.com 552/225 Taxman 166 (SC) to submit that even Foreign Trusts are recongnised in Indian Tax Laws.

(*e*) The *CWT* v. *Trustees of H. E. H. Nizam's Family* [1977] 3 SCC 362 to submit that when an assessment is contemplated to be made on the trustee, it is really the beneficiaries who are sought to be assessed in respect of their interest in the trust properties through the trustee.

19. Shri Kotangle made very brief submissions. Shri Kotangle submitted:—

(*a*) There was no treaty between India and Jersey and, therefore, the trust was taxable as a non resident under section 5(2) of the Act, which deals with the scope of total income of a person, who is a non resident. Therefore, if any income is received by or accrues or arise in India to a trust, it will be income due to having accrued or arisen in India and hence taxable;

(*b*) As there is no treaty between India and Jersey where the trust is settled, the India-UAE

DTAA will not be applicable;

(*c*) Under section 1 of the Indian Trust Act 1882, it only extends to the whole of India and hence will not be applicable to the Foreign Trust and for the trust, the liability for trust prevalent will be applicable and as there is no treaty between India and Jersey, sections 63 or 161 to 164 does not apply. Shri Kotangle, however, did not elaborate;

(*d*) Shri Kotangle, however, fairly conceded that India-UAE DTAA overrides the provisions of the Act as held by the Apex Court in *Azadibachao Andolan's* case (*Supra*).

To a specific query raised by the court, Shri Kotangle in fairness, also agreed that there are no provisions in the Act which says that the provisions of sections 61 to 63 or 161 to 166 are not applicable to Foreign Trust.

20. Shri Kotangle also submitted that ADIA received income through a device and not from direct or immediate receipt or transfer of income by trust and, therefore, income received from Indian debt investment is not derived by ADIA and as Article 24 of the Indian-UAE DTAA only exempt from tax the income derived by one government from other confirming State, the treaty is not applicable. Shri Kotangle submitted that ADIA could have directly invested in the instruments or investments in which the trust had invested but chose not to invest directly. When the court asked as to whether there is any bar for any entity to make investments through any special purpose vehicle, Shri Kotangle agreed that there was no bar. When the court mentioned to Shri Kotangle when the purposes of chapter V, as contained in Act, is to tax the amount in the hands of the transferor who made the transfer, amounts / income in the name of a third party or a beneficiary so that the tax on the income derived from the transferred amount is not avoided, and in this case since ADIA itself is not liable to pay any tax as it is directly mentioned in Article 24 of the India-UAE DTAA, there was no benefit for ADIA to adopt this method to invest which they have done, Shri Kotangle did not disagree.

21. The following facts are not disputed:—

(*a*) income earned through ADIA's investment in the Indian debt portfolios directly would have been exempted under Article 24 of India UAE treaty;

(*b*) ADIA was registered as FII and later FPI with SEBI;

(*c*) The Deed of Settlement with ETL regarding the trust;

(*d*) ADIA has made a capital commitment of USD 200 million in the Trust in the capacity of the settlor of the Trust, ETL is the trustee of the trust and ADIA is also the sole beneficiary of the trust;

(*e*) The Trust is registered as FPI with SEBI;

22. According to the impugned order dated 18th March 2020 the income from investment in debt portfolio in India received and/or accrued to the trust in India is taxable under section 5, read with section 9(1)(*i*) of the Act. This is because:—

(*a*) the trust is registered in Jersey and there is no treaty between India and Jersey.

(*b*) Sections 61 and 63 of the act would apply only to those trust which fall under the Indian Trust Act 1882 and as the trust does not meet the definition, characteristics and features of trust as per Indian Law.

(*c*) India has not ratified the Hague Trust Convention of 1st July 1985 and hence trust laws of foreign jurisdiction are not applicable in India.

(*d*) The settlor cannot be the sole beneficiary.

(*e*) Sections 60 to 64 are designed to over take and circumvent the counter design by a taxpayer to reduce its tax liability by parting its property in such a way that the income should no longer be received by him but at the same time he retains certain powers over property/income.

(*f*) Though section 160(1)(*i*) or 160(1)(*iv*) provides that trustee can be representative assessee, in this case trustee being a resident of Jersey cannot be an agent of ADIA.

(*g*) No authority or material has been placed before AAR to suggest that the provisions of section 161 would be applicable to Foreign trust/trustee.

(*h*) The assessee's representative could not satisfactorily answer the query as to why ADIA would like to route its investment in non-convertible debenture funds through Jersey route for investment in Indian market and ADIA itself being an FII registered with SEBI could have directly invested in Indian Portfolios and taken advantage of Article 24 of India-UAE DTAA.

(*i*) As ADIA is receiving income through a device and not from direct or immediate receipt and, therefore, income received from Indian debt investment is not derived by ADIA and does not fall under Article 24 of the India-UAE DTAA.

(*j*) There was a proposed amendment (it has come into effect only from 1st April 2021) which supports the view that if an entity is resident of UAE and through this entity ADIA is in receipt of some income then the income would be exempted from tax under section 10 of the Act and the proposed amendment suggest that indirect accrual of income is not eligible for treaty benefit.

We do not agree with the conclusions arrived at by AAR.

23-24. As regards to the reasoning given by AAR that the trust is registered in jersey, there is no treaty between India and Jersey and section 61 and 63 of the Act would apply only to those trust which fall under the Indian Trust Act 1882, it has to be noted that Shri Kotangale himself agreed that there is no provision in the Act which provides that these provisions shall apply only to Indian Trust. Section 61 of the Act provides that any income arising to any person by virtue of revocable transfer shall be chargeable to tax as the income of the transferor. The Deed of Settlement and particularly clauses from the Deed of Settlement quoted earlier, show that

there is a revocable transfer by settlor, i.e., ADIA to trustee ETL and as such any income arising to the trustee should be chargeable in the hands of ADIA. Nothing in section 61 requires involvement of a trust in revocable transfer. Section 61 is plain and simple in as much as, it provides for income arising to any person by virtue of a revocable transfer of assets shall be chargeable to income tax as the income of the transferor and shall be included in his total income. Further section 61 is not dependent on section 63 of the Act. A transfer can be revocable transfer on its own merits without reference to section 63 of the Act. Clause (*a*) of section 63 of the Act merely extends the provisions of section 61 of the Act to cases which might not otherwise be covered by section 61 by extending the meaning of word revocable. Clause (*b*) in section 63 extends the meaning of the word transfer in section 61 to cases which might not otherwise amount to transfer.

25. A settlement or a trust are merely instances of what could amount to transfer for the purposes of section 61. Section 63 (*b*) includes in the definition of transfer any settlement or trust or covenant or agreement or arrangement. Moreover, section 63 is not restricted only to trust. It is an inclusive definition. So long as the conditions provided in section 63(*a*) are fulfilled, any transfer whether connected with the trust or not will be a revocable transfer. The case of AAR that if the transaction does not qualify as a trust, the provisions of section 63 and/or section 61 are not applicable, is erroneous. In any event, under section 63 there is no requirement that a trust covered by it must necessarily be an Indian trust falling under the Indian Trust Act. Such restriction which is not there in the Act cannot be imported into sections 61 and 63 of the Act. As noted earlier, where such restriction is provided for the Act says so as noted in section 10(23FB) of the Act where it specifically provides that venture capital fund means a fund operating under the trust deed registered under the provisions of Registration Act, 1908.

26. As regards the stand that India has not ratified the Hague Convention on the Law Applicable to Trust and on their recognition ("Hague Trust Convention", Convention of 1 July 1985), trust laws of a foreign jurisdiction are not applicable in India, the word 'trust' first of all is not defined under the Act or General Clauses Act, 1897. The word trust has to be interpreted

as per its general meaning. The trust is defined under section 3 of the Indian Trust Act to be an obligation annexed to the ownership of the property, and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another, or of another and the owner. A trust can be an Indian Trust or a Foreign Trust. There is nothing in sections 61 and 63 of the Act to restrict its applicability only to trust settled in India and, therefore, one cannot rule out their applicability to a Foreign Trust. Even if the definition of the trust under the Indian Trust Act can be held to say that it does not cover 'The Trust', i.e., Green Maiden A 2013 Trust, still the word trust in section 63 covers all trust within its ambit. Hague Trust Convention referred to by AAR does not decide the issue one way or the other. There is nothing to even suggest in the ruling of AAR as to how the ratification of Hague Trust Convention would affect the status of Foreign Trust in India. If we accept what AAR has opined that Foreign Trust can be recognised in India only if and after India ratified the Hague Trust Convention that would imply that no Foreign Trust can be treated as trust for the purpose of the Act. In the case of *Estate of H.M.M. Vikramsinhjit of Gondal* (*supra*) shows that even Foreign Trusts are recognised in Indian Tax Laws. The Apex Court held that certain trust set up outside India are discretionary trust within the meaning of section 164 of the Act. Therefore, even a Foreign Trust is a trust under the Act, which shows AAR's preposition that a Foreign Trust cannot be treated as a trust for the purposes of the Act unless the Hague Trust Convention is ratified by India, is incorrect. Shri Pardiwalla submitted that even Income Tax Return form prescribed under the Act requires the details of trust created under the laws of a country outside India. It was not denied by Shri Kotangle. This presupposes that a Foreign Trust is a trust for the purposes of the Act. If one has to accept AAR's contention that the word trust can only be an Indian Trust for the purposes of the Act it has to be based on some statutory provisions which is not the case.

Shri Pardiwalla showed a comparison between India and Jersey laws on the subject. As per section 3 of Indian Trust Act the trust is an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner.

Article 2 of the Trusts (Jersey) Laws 1984 reads as under:

> "A trust exists where a person (known as a trustee) holds or has vested in the person or is deemed to hold or have vested in the person property (of which the person is not the owner in the person's own right)-
>
> (*a*) for the benefit of any person (known as a beneficiary) whether or not yet ascertained or in existence;
>
> (*b*) for any purpose which is nor for the benefit only of the trustee; or
>
> (*c*) for such benefit as is mentioned in sub-paragraph (*a*) and also for any such purpose as is mentioned in sub-paragraph (*b*)."

Therefore, as can be seen from the definitions, the Trust created in terms of the deed of settlement is consistent with the requirements of both, the Indian Trusts Act as well as Trust (Jersey) Law, 1984 as to what constitutes a trust.

27. As to the ground that the settlor cannot be a sole beneficiary, as ADIA was settlor as well as sole beneficiary, first of all the Act does not make any such provision. Secondly, there is no provision under the Indian Trust Act also which debars the settlor from being beneficiary. In the case of *Bhavna Nalinkant Nanavati* (*supra*), the settlor of the trust was also the sole beneficiary in the Deed of Settlement. The Gujarat High Court, while interpreting section 3 of the Indian Trust Act observed as under:

> ** ** **
>
> "The ownership of trust property has to be for the benefit of a person or more than one person of whom the settlor may himself be one but never for the benefit of an owner alone, viz the trustee. There cannot be a case where the creator of the trust would also be the trustee and also the sole beneficiary, because in such cases a man cannot enforce a trust

against himself."

Thus, it follows that the settlor cannot be the trustee and sole beneficiary. In the present instance, the settlor is not the trustee but is the sole beneficiary which is clearly permissible.

28. As regards AAR's view that sections 60 to 64 are designed to overtake and circumvent the counter design by a taxpayer to reduce its tax liability by parting its property in such a way that the income should no longer be received by him but at the same time he retains certain powers over property/income, that is not the case as regards petitioner. In the case at hand, if ADIA had invested the amount directly, the income derived from such investment would exempted under Article 24 of India-UAE DTAA. ADIA has not created the trust to avoid tax and that is not AAR's case either. AAR says if ADIA had directly invested they would not have been liable to pay tax. AAR failed to understand why would someone not invest directly if the returns on such investment would be exempt from tax. AAR fails to appreciate that ADIA routed its investment on certain instruments through the trust only for commercial expediency. According to AAR the assessee's representative could not satisfactorily answer the query as to why ADIA routed its investments in non-convertible debenture funds through Jersey route for investment in Indian market and ADIA itself being an FII registered with SEBI could have directly invested in Indian Portfolios and taken advantage of Article 24 of India-UAE treaty. But the fact is ADIA has explained in detail in its letter dated 13th November 2018 and letter dated 25th September 2019 to AAR, why it routed its investment in non convertible debentures through Jersey route for Indian market.

29. As regards the ground that section 160(1)(*i*) or 160(1)(*iv*) of the Act, provides that trustee can be representative assessee but in this case trustee being a resident of Jersey cannot be an agent of ADIA, in our view that is not sustainable as the Act does not provide anywhere that only trustee who is resident of India can be an agent under section 160 of the Act.

30. As regards the ground of proposed amendment in the Finance Bill 2020 (Exemption from certain income of wholly owned subsidiaries of ADIA), Shri Pardiwalla submitted that AAR relied on the amendment despite the fact that the same was introduced in the Act post the

hearing of the application and was never put to ADIA for them to make any submissions thereon. We would agree with Shri Pardiwalla. It was improper for AAR to have relied upon the proposed amendment. If, AAR wanted to, it could have given notice to ADIA to make their submissions thereon. Therefore, the contents of the proposed amendment could not have been relied upon by AAR.

31. In our view, therefore, the Deed of Settlement dated 22nd July 2013, whereby the trust was set up, contained specific clauses which established the revocable nature of the trust. As the ADIA has settled the trust on the terms mentioned in the Deed of Settlement, the contribution made by it to the trust would be a transfer as defined in section 63 of the Act. As Section 63 does not anywhere specify that a trust covered by it must necessarily be a trust falling under the Indian Trust Act 1882 and as per section 63(*b*) of the Act, any settlement or trust is included within the meaning of 'transfer' and section 63(*b*) does not provide that the trust described therein needs to be an Indian Trust, the provisions of sections 61 to 63 of the Act are applicable to the case at hand. As the term 'trust' is not defined either in section 63 or section 2 of the Act 'trust' would clearly be a trust as one understands the term in its common parlance. Even if one has to have recourse to the definition of the term "trust" in section 3 of the Indian Trust Act 1882, i.e., an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owners, or declared and accepted by him, for the benefit of another, or of another and the owner, there is nothing in the language of section 61 or 63 that restricts its applicability only to trusts settled in India and accordingly, AAR was not justified in concluding that a Foreign Trust will not be covered under the said provisions. AAR while expressing its view that India has not ratified Hague Convention on the law applicable to trust has overlooked the fact that ADIA is not seeking to apply Foreign Law to India but is merely seeking an application of section 61 which in no manner excludes, from it applicability, a trust settled outside India. A Foreign Trust can be treated as a trust under the Act also appears from the income tax return forms prescribed under the Act wherein Schedule FA, Para F, in form ITR-5, require the disclosure of "details of trusts" created under the laws of a country outside India, in which one is trustee, beneficiary or settlor. There are similar requirements in Form ITR-2, ITR-6 and ITR-7. Therefore, the Act presupposes that a Foreign Trust is a trust for

the purposes of the Act. In *Estate of Vikramsinhjit of Gondal's* case (*Supra*), the Apex Court has applied the provisions of section 164 and 166 of the Act to tax the beneficiary of a trust settled in U.K.

32. Even if, the trust is based out of Jersey and the trust is settled in Jersey, ADIA being the settlor and sole beneficiary of the trust and resident of UAE as per Article 24 of the India-UAE DTAA, the income which arises to it by virtue of investment in Indian Portfolio companies will be governed by the beneficial provisions of the India-UAE DTAA. To take it further, even if the trust structure were to be discarded, then it must necessarily follow that the investment must be regarded as having been made by ADIA and hence the income would arise in the hands of ADIA which income would not be taxable in India by virtue of provisions of India-UAE DTAA. We have to note that there was no attempt whatsoever to reduce the tax liability by using the trust structure. When the provisions of the Trust Deed provided that ADIA has right to re-assume power over the entire income arising on the investments made by the trust in the portfolio companies, the entire income arising therefrom has to be in terms of section 61 of the Act to be assessed in the hands of ADIA. This would mean the exemption under Article 24 of India-UAE DTAA would be attracted. Even if for a moment we say that for any reason the provisions of section 61 are not applicable, then also the trustee can only be assessed in a representative capacity and, accordingly the provisions of section 160(*i*)(*iv*) will be applicable. Therefore, even if the income is taxed in the hands of the trustee in terms of section 161(1), it will be taxed in the "like manner and to the same extent" as the beneficiary. Once again, ADIA is the sole beneficiary of the trust, the income assessed in the hands of the trustee will take colour of that of ADIA's income and thereby, the benefit of India-UAE DTAA must be granted.

33. As there is no bar to the settlor and beneficiary being the same person and in view of the judgment in *Bhavna Nalinkant Nanavati's* case (*supra*) where the court has interpreted section 3 of the Indian Trust Act, 1882 as creating a fiduciary relationship between the trustee and the beneficiary, where the ownership of the trust property has to be for the benefit of another person which can include the settlor himself, if one reads sections 61 and 63 of the Act, it is quite clear that section 61 is independent of section 63 of the Act and a transfer can be a

revocable transfer on its own merits and is not restricted only to trusts. A "settlement" or a "trust" are instances of what amount to transfer. So long as the settlor has a right to reassume power over the assets settled, the same would amount to revocable transfer. In the facts of the case at hand, ADIA could reassume the power and hence the contribution to the trust was a revocable transfer thereby making the income arising to the trust taxable in the hands of ADIA which was exempt under Article 24 of India-UAE DTAA. The tax liability of a trust has to be determined by applying the provisions of the Act alongwith the provisions of India-UAE DTAA and not apply the law as applicable in Jersey.

34. In the circumstances, the ruling dated 18th March 2020 has to be quashed. The income that accrues to the trust would not be chargeable to tax in India either by virtue of application of section 61 read with section 63 or on an application of section 161 of the Act conjointly with the provisions of Article 24 of the India-UAE DTAA. Since we have quashed the Ruling dated 18th March 2020 of the AAR, the steps taken in furtherance of the Ruling order passed therein are also quashed and set aside. Ordered accordingly.

35. Petitions disposed with no order as to costs.

Jyoti

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*In favour of assessee.
†Arising out of order of AAR, dated 18-3-2020.