IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1209 OF 2022

The Pr. Commissioner of Income Tax – 17, Mumbai	..	**Appellant**
V/s.		
Mile Stone Real Estate Fund	..	**Respondent**

Mr. Ravi Rattesar for Appellant.
Mr. J. D. Mistri, Senior Advocate a/w Mr. Madhur Agrawal i/b Mr. Atul K. Jasani for Respondent.

CORAM : B. P. COLABAWALLA AND FARHAN P. DUBASH, JJ.

DATE : 9th SEPTEMBER 2026

P.C.:

1. This Appeal has been filed by the Revenue challenging the order dated 22nd September 2020 passed by the Income-tax Appellate Tribunal, Mumbai – 'D' Bench **("ITAT")**. By the impugned order, the ITAT has dismissed the appeal filed by the Revenue and has confirmed the order of the Commissioner of Income-tax (Appeals) holding that the Assessee is eligible for claim for exemption under Section 10(23FB) of the Income-tax Act, 1961 **("the Act")**.

2. In the Appeal before us, the Revenue has proposed the following questions as substantial questions of law:-

I. Whether, on the facts and in the circumstances of the case and in law, *the ITAT has erred in ignoring the fact that Section 10(23FB) clearly states that the entire income of VCF is not exempt but only income from investments in Venture Capital Undertakings which are recognized by SEBI should be exempt from tax. In the Assessee's case no separate recognition has been provided to even contributory schemes even though all of them are separately auditable and maintain separate books of accounts.*

II. Whether, on the facts and in the circumstances of the case and in law, the ITAT has erred in ignoring the fact that Assessee has made investments in VCUs which are associated concerns in which trustees held shares exceeding 15% of the paid-up equity share capital either individually or collectively and as per sub-clause (c) of Regulation 12, all investments made or to be made by VCF shall not be in associated companies.

3. As the above questions proposed by the Assessing Officer do not clearly bring out the controversy in the matter, we propose to reframe the questions of law as under:

a. Whether, on the facts and in the circumstances of the case and in law, *the ITAT has erred in holding that the Assessee is eligible for exemption under Section 10(23FB) of the Act even though no separate recognition / registration has been obtained from SEBI for every contributory scheme each of which is separately auditable and separate books of accounts are maintained for each scheme?*

b. Whether, on the facts and in the circumstances of the case and in law, the ITAT has erred in ignoring the fact that Assessee has made investments in VCUs which are associated concerns in which trustees held shares (by virtue of being trustees of the Fund) exceeding 15% of the paid-up equity share capital either individually or collectively and as per sub-clause (c) of Regulation 12 are therefore, not eligible for exemption under section 10(23FB) of the Act?

4. The brief facts relevant to consider the aforesaid reframed questions are that the Milestone Real Estate Fund ("**Assessee**" / "**Fund**") is a Trust created under the Indian Trust Act, 1882 and is a Venture Capital Fund ("**VCF**") which is registered with the Securities Exchange Board of India ("**SEBI**") under the *SEBI (Venture Capital Funds) Regulations, 1996* ("**VCF Regulations**"). The primary activity of the Assessee is to float various schemes with a focus to invest primarily in entities engaged in the real estate

sector dealing with immovable property of any kind and any rights and interests therein. The Fund's duration is of 20 years or until the expiry of the last scheme of the Fund, whichever is later.

5. For the Assessment Year under consideration (i.e. AY 2014-15), the Assessee had filed its Return of Income on 29th November 2014, declaring a total income of Rs. 12,84,49,120. The Assessee had claimed exemption of Rs. 161,69,79,775/- under Section 10(23FB) of the Act being the income earned by the Assessee from investment in Venture Capital Undertakings. The Fund had floated seven separate schemes as under –

a. IL & FS Milestone Fund-I
b. IL & FS Milestone Fund-II
c. IL & FS Milestone Fund-IIA
d. IL & FS Milestone Fund-IIB
e. Milestone Domestic Scheme I
f. Milestone Domestic Scheme II
g. Milestone Domestic Scheme III

6. Under each scheme, separate units are issued to unit holders of each scheme and the unit holders in each scheme have rights to the profits earned from the investments made in their scheme. The Assessee maintains separate accounts for each scheme and investments from the funds contributed to each scheme

are also separately recorded. Income from each scheme is also separately determined. The details of the claim for exemption under Section 10(23FB) of the Act is also determined scheme-wise. As all seven separate schemes are floated by the Fund, the Return of Income is filed by the Fund in a consolidated manner, considering all the seven schemes which comprise the Fund.

7. The Assessing Officer in the Assessment Order dated 30^{th} December 2016 for the Assessment Year 2014-15 disallowed the claim of exemption of Rs. 161,69,79,775/- made under Section 10(23FB) of the Act. The Assessing Officer *inter alia* held as under:

a. The Assessee's claim that SEBI has inspected and has not found fault with the operation of the Assessee cannot be a ground for allowing exemption under Section 10(23FB) of the Act. Both the SEBI and Income-tax Department have an equal right to examine and interpret the provisions laid down in the statute for general public interest. If one department reads the provision in a particular manner, it does not mean that the other should also follow the same with blinkers. The Income-tax Department is independently entitled to look at the relevant provisions to see whether the conditions for claiming exemption under Section 10(23FB) of the Act are fulfilled or not.

b. Every scheme floated by the Fund has a separate identity. The contributors of the respective schemes are different and do not have any claim on the result of the other scheme. Separate books of accounts are maintained for each of the seven schemes. Investments made by each scheme are different and do not have any relationship with one another. Therefore, it is as if, there are seven separate funds being operated by the Assessee. There is nothing to show that SEBI has accepted or granted recognition / registration to each of the seven funds floated by the Assessee. Each such fund is required to be separately registered with SEBI for claiming exemption under Section 10(23FB) of the Act.

c. The Fund is not entitled to invest in Venture Capital Undertakings in which the trustee or the settlor holds, either individually or collectively, equity shares in excess of 15% of the paid-up equity share capital of such Venture Capital Undertakings. In the present case, the trustees hold shares in excess of 15% of the equity share capital of various Venture Capital Undertakings, and therefore, such investments are in contravention of the Act and the scheme. In considering the holding of 15%, the Assessing Officer also considered the shares held by the trustee for and on behalf of the Fund. The Assessing Officer rejected the argument of the Assessee that only the shareholding of the trustees in their individual capacity is required to be considered and not the shares held by the trustee on behalf of the Fund for the purpose of considering the shareholding in excess of 15% of the share of the Venture Capital Undertaking. Therefore, as per the Assessing Officer, the Assessee has invested in an associated company as defined in the VCF Regulations and hence, is not eligible for exemption under Section 10(23FB) of the Act.

d. The investments made by the Fund in Venture Capital Undertakings engaged in real estate activities is not eligible for exemption under Section 10(23FB) as it is neither a service nor an activity which is involved in production and manufacture of articles or things.

8. The Assessee challenged the Assessment Order before the Commissioner of Income-tax (Appeals). The Assessee succeeded in the appeal and the Commissioner of Income-tax (Appeals) *vide* order dated 26th December 2017, allowed the claim for exemption under Section 10(23FB) of the Act. The Commissioner of Income-tax (Appeals) *inter alia* held as under:

a. The Commissioner of Income-tax (Appeals) referred to the definition of the term "unit" in Regulation 2(l) of the VCF Regulations, which defines "unit" to mean beneficial interests of the investors in the scheme or fund floated by a trust or shares issued by a company, including a body corporate. It further referred to Regulation 11.3 of the VCF Regulations, which provide that each scheme launched or fund set up by a Venture Capital Fund shall have firm commitment from the investors for contribution of an amount of at least Rs. 5 crores before the start of operation of the Venture Capital Fund. It further noted that SEBI permits the launch of a new scheme by filing a private placement memorandum of such scheme with SEBI. Regulation 23 of the VCF Regulations provides the mechanism for winding up of any scheme of the VCF. Further, the Assessee is required to file a quarterly report to SEBI, and therefore, each scheme is monitored and regulated by SEBI on an ongoing basis.

b. The Commissioner of Income-tax (Appeals) concluded that the VCF has been set up as a trust, which has been registered by SEBI as a Venture Capital Fund. Such trust can launch various schemes, and though each scheme is regulated by SEBI, they are not treated as a separate entity. The schemes launched by a VCF are not separate and distinct from the Fund itself. VCF Regulations permits a VCF to launch various schemes so that each such scheme may have a distinct objective, a separate bank account, separate set of investors and underlying investment of each such scheme. Each such scheme does not require separate registration. Once the trust is registered with SEBI as a VCF, such registration is valid for all schemes launched by the said VCF.

c. The Commissioner of Income-tax (Appeals) further held that as per sub-clause (c) of Regulation 12 of the VCF Regulations, all investments made or to be made by a Fund shall not be in an “associated company”. It was further noted that the term "associated company" is defined under the VCF Regulations to mean a company in which a director or trustee or sponsor or settlor of the Venture Capital Fund or the Asset Management Company holds, either individually or collectively, equity shares in excess of 15% of the paid-up equity share capital of a Venture Capital Undertaking. The reason for providing this restriction is that by virtue of such company being associate companies, the trustees are deemed to have a vested interest in them, and hence, its decision to invest in associate companies can give rise to a conflict of interest. Therefore, to determine whether a Venture Capital Undertaking is an associated company or not, one has to see the share-holding of the trustees in their personal capacity in such undertaking and not the shareholding which the trustees are holding for and on behalf of the Fund. There is no restriction on the percentage of holding by the VCF in the Venture Capital Undertaking and a VCF can hold up to 100% shares of a Venture Capital Undertaking. Therefore, the finding of the Assessing Officer that to see as to whether the Venture Capital Undertaking is an associated company, the shares held by the trustee for and on behalf of the Fund is also required to be considered, is clearly unsustainable and bad in law.

d. The Commissioner of Income-tax (Appeals) further held that to consider the issue of claim for exemption under Section 10(23FB) of the Act, the Assessing Officer only needs to enquire whether the Assessee holds a valid certificate of registration. If the Assessee trust is registered with SEBI as per the Certificate granted under Regulation 7(3) of the VCF Regulations, then it should be accepted that such Certificate is granted after ensuring that the conditions laid down before granting such Certificate are fulfilled. In other words, conditions laid down in the Explanation-1(b) to Section 10(23FB) of the Act are deemed to be fulfilled, the moment relevant Certificates are produced before the Assessing Officer. Therefore, he is not required to go into alleged violation of any conditions, pertaining to the matter of grant of such Certificate.

e. The Commissioner of Income-tax (Appeals) further held that the Venture Capital Undertaking is defined in Rule 2(3) read with Schedule III of the VCF Regulations. Schedule III provides a Negative List and prior to its amendment w.e.f. 5th April 2004, "real estate" was included in the Negative List. However, the same is excluded from Negative List post amendment w.e.f. 5th April 2004. The Fund has been granted recognition *vide* Registration Certificate dated 26th September 2005 that is post amendment of the Negative List. As the Negative List does not include real estate within its ambit, the Assessee is eligible for exemption under Section 10(23FB) of the Act.

9. Being aggrieved by the order of the Commissioner of Income-tax (Appeals), the Revenue filed an appeal before ITAT. The ITAT dismissed the appeal filed by the Revenue and confirmed the order passed by the Commissioner of

Income-tax (Appeals). The ITAT held that the issue of the eligibility of the Assessee for the claim for exemption under Section 10(23FB) of the Act was decided in favor of the Assessee in the Assessee's own case for the Assessment Year 2013-14 at the assessment stage itself. Under Section 263 of the Act, the Commissioner revised the order passed by the Assessing Officer. The Assessee therefore challenged the order passed by the Commissioner under Section 263 of the Act before the ITAT. The ITAT, for Assessment Year 2013-14, reversed the order of the Commissioner under Section 263 and restored the order passed by the Assessing Officer. In the present Assessment Year, the ITAT, relying on the findings of the Coordinate Bench of the Tribunal for the Assessment Year 2013-14, held that the appeal filed by the Revenue is to be dismissed as deduction under Section 10(23FB) of the Act was allowed to the Assessee in the earlier Assessment Year on identical facts and circumstances.

10. We have heard Mr. Ravi Rattesar, the learned Advocate appearing on behalf of the Appellant, as well as Mr. J. D. Mistri, learned Senior Advocate appearing on behalf of the Respondent.

11. The issue which has been raised for our consideration is with respect to the eligibility of the Assessee for exemption under Section 10(23FB) of the Act.

Section 10(23FB) of the Act provides that any income of a Venture Capital Company or a Venture Capital Fund from investment in a Venture Capital Undertaking shall not be included in computing the total income of the Assessee for the previous year. Explanation (b) of the said Section defines "Venture Capital Fund" to mean a fund operating under a trust deed registered under the provisions of the Registration Act, 1908, which has been granted a Certificate of Registration before 21st May 2012, as a Venture Capital Fund and is regulated under the Venture Capital Funds Regulations.

12. With respect to the first question as reframed in the present appeal, we uphold with the finding of the Commissioner of Income-tax (Appeals) that as per the VCF Regulations, only the trust is required to be registered as a Venture Capital Fund and separate registration is not required for each scheme operated by the Fund. With reference to each Scheme, the only requirement is that the Trust or the Fund must submit a copy of the private placement memorandum for each scheme before SEBI. Regulation 3(1) of the VCF Regulations *inter alia* provides that a Trust proposing to carry on any activity as a Venture Capital Fund shall make an application to the Board for grant of a Certificate. Regulation 7 of the VCF Regulations provides for grant of registration. From these Regulations, it is clear that registration is granted to the trust and not for an individual scheme operated by the trust.

We, therefore, uphold the findings of the Commissioner of Income-tax (Appeals) that what is contemplated under the VCF Regulations is the registration of the trust, which is then entitled to operate separate schemes. The said finding has been confirmed by ITAT by dismissing the Revenue's appeal. In this view of the matter and considering the concurrent findings being recorded by the Appellate Authorities, the first question as reframed does not give rise to any substantial question of law, and hence, the same is not entertained.

13. With respect to the second reframed question, we concur with the finding given by the Commissioner of Income-tax (Appeals) that for a Venture Capital Undertaking to be considered as an associated company, the trustees or the settlor should hold more than 15% of the shares of the Venture Capital Undertaking, individually or collectively, in their personal capacity and not with respect to the shares held by the Trustee on behalf of the Fund. Regulation 12 of the VCF Regulations prohibits investments in an 'associate company' by a Venture Capital Fund. Associate companies is defined in Section 2(aa) of the VCF Regulations *inter alia*, to mean a company in which the trustee holds, either individually or collectively, equity shares in excess of 15% of the paid-up equity share capital of a Venture Capital Undertaking. Therefore, in our view, it is clear that the holding of the trustees is to be seen

in their individual capacity and not by virtue of the Fund making an investment in the Venture Capital Undertaking which investment (shares) must be held by the Trustee in that capacity. The Commissioner of Income-tax (Appeals) has rightly held that the holding of the shares by the trustee in its fiduciary capacity, on behalf of the Fund, cannot be considered for determining whether the Venture Capital Undertaking is an associated company or not. In this view of the matter and considering the concurrent findings being recorded by the Appellate Authorities, the second question as reframed, also does not give rise to any substantial question of law, and hence, the same is not entertained.

14. Even otherwise we note that a VCF has been defined in Explanation (b) below Section 10(23FB) to mean *inter alia* a Fund operating under a trust deed registered under the provisions of the Registration Act, 1908, which has been granted a Certificate of Registration before 21st May 2012 as a Venture Capital Fund and is regulated under the Venture Capital Fund Regulations. Therefore, once the Assessee operates under a trust deed registered under the provisions of the Registration Act, 1908 and has a registration from SEBI as a VCF [granted before 21st May 2012], which has not been cancelled or withdrawn, the conditions in the definition are satisfied. Nothing has been brought on record by the Revenue that SEBI, which is the appropriate

regulatory authority, has alleged or taken any action against the Assessee for any violation of the Venture Capital Regulations even though quarterly reports are filed by the Assessee before SEBI. In the absence of such allegation or violation, it is not open to the Income-tax Department to make such an allegation and deny exemption under the provisions of section 10(23FB) of the Act. A similar view has been taken by this Court in the Assessee's own case for the assessment year 2013-14 in Income-tax Appeal No. 3056 of 2019 in its order dated 19th January 2026. For this reason as well, the reframed questions of law do not give rise to any substantial question of law requiring an answer by this Court.

15. In view of the foregoing discussion, the above Appeal is dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

16. This order will be digitally signed by the Private Secretary / Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(FARHAN P. DUBASH, J.) **(B. P. COLABAWALLA, J.)**

Shubham Gadhavepatil

SHUBHAM SHESHRAO GADHAVEPATIL

Digitally signed by SHUBHAM SHESHRAO GADHAVEPATIL Date: 2026.09.17 11:36:29 +0530