आयकर अपीलीय अधिकरण "एच" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL
"H" BENCH, MUMBAI

श्री महावीर सिंह,न्यायिक सदस्य **एवं**
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष ।

BEFORE SHRI MAHAVIR SINGH, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./I.T.A. Nos. 5669 & 5670/Mum/2015
(**निर्धारण वर्ष** / Assessment Years: 2010-11 & 2011-12)

Income-Tax Officer **Ward 1(1)(4)** R.No.531-A,Aaykar Bhavan M.K.Road, Mumbai – 400 020	**बनाम**/ Vs.	**HDFC Trustee Company Ltd** 2nd Floor, H.T.Parekh Marg 165-166, Backbay Reclamation Churchgate, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. **AAACH-7615-M**		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

&

आयकर अपील सं./I.T.A. No. 5444/Mum/2015
(**निर्धारण वर्ष** / Assessment Year: 2011-12)

HDFC Trustee Company Ltd 2nd Floor, H.T.Parekh Marg 165-166, Backbay Reclamation Churchgate, Mumbai-400 020	**बनाम**/ Vs.	**Income-Tax Officer** **Ward 1(1)(4)** R.No.531-A,Aaykar Bhavan M.K.Road, Mumbai – 400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. **AAACH-7615-M**		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Assessee by	:	Nitesh Joshi & Milin Thakare, Ld. AR's
Revenue by	:	M.C.Omi Ningshen, Ld. DR

सुनवाई की तारीख / **Date of Hearing**	:	14/02/2018
घोषणा की तारीख / **Date of Pronouncement**	:	21 /02/2018

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)

1. The captioned appeals by assessee as well as revenue for Assessment Years [AY] 2010-11 & 2011-12 contest the order of Ld. first appellate authority on different grounds of appeal. Since common issues are involved, we dispose-off the same by way of this common order for the sake of convenience & brevity. First we take up revenue's appeal ITA No.5669/Mum/2015 for AY 2010-11 which contest the order of Ld. Commissioner of Income-Tax (Appeals)-22 [CIT(A)], Mumbai, *Appeal No.CIT(A)22/IT/156/2014-15* dated 03/03/2016 by raising following sole ground of appeal:-

> 1. Whether on facts and in the circumstances of the case and in law, the CIT(A) was correct in law in deleting the disallowance on marketing and distribution expenses, made by the Assessing Officer, since CIT(A) has not justifiably countered the argument of the Assessing Officer that there was no rational basis of apportionment of expenses between the assessee and HDFC Asset Management Company?"

The assessment for impugned AY was framed by *Ld. Deputy Commissioner of Income Tax-10(1), Mumbai [AO] u/s 143(3) of the Income Tax Act, 1961* on 31/03/2014 wherein the income of the assessee was determined at Rs. 54.95 Lacs as against returned loss of Rs.4.63 Lacs *e-filed* by the assessee on 27/09/2010.

2.1 Brief background is that the assessee was a *Trustee Company* for *HDFC Mutual Fund* and set up by a *Deed of Trust* dated 08/06/2000 between *HDFC Limited* and the assessee. Pursuant to the deed, the assessee had appointed *HDFC Asset Management Company Ltd.*

[HDFC AMC] to act as an *Asset Management Company* with prior approval of the *Securities & Exchange Board of India [SEBI]* for the purpose of managing the affairs of the mutual fund and managing the trust funds mobilized under various schemes as approved by the Trustee Assessee and *SEBI* in accordance with Trust Deed and *SEBI* regulation. The Assessee was entitled to receive Trusteeship Fees from HDFC Mutual Fund as per rate prescribed in Article-12 of the Trust Deed. The assessee also entered into an agreement dated 08/06/2000 with *HDFC AMC* for investment and management of mutual funds and deployment of funds raised by the mutual fund. The assessee during the impugned AY received Trusteeship Fees from *HDFC MF* amounting to Rs.11.99 Crores.

2.2 During assessment proceedings, it was noted that the assessee booked major expenses of Rs.11.90 crores under the head *Marketing & Distribution Expenses* which has been paid to *HDFC AMC*. The assessee contended that said sum was in accordance with SEBI (Mutual Fund] Regulation, 1996 according to which the expenses in excess of respective schemes limits of the Mutual Funds were to be borne by the AMC / Trustee Co. etc. and therefore, the said sum represented share of Trustee Assessee towards expenses incurred by *HDFC AMC* which could not be absorbed by respective schemes. The attention was also drawn to *internal memo* of the assessee dated 31/03/2010 which contained Board Resolution dated 26/10/2005 permitting such apportionment. It was further noted that the total of such expenses incurred by *HDFC AMC* were Rs. 134.49 crores which were borne in the following manner:-

Head	***Amt. (Rs. in crores)***
Absorbed by the MF Schemes	*92.17*
Borne by HDFC AMC	*30.42*
Borne by the Assessee	*11.90*
Total	***134.49***

However, not convinced, Ld. AO disallowed the same to the extent of 5% on the premise that the allocation was designed in such a manner that there was always a loss to the assessee and further, the provisions of Section 40A(2) were applicable to the fact of the case and moreover the assessee could not demonstrate the basis of apportionment of such expenses.

3. Aggrieved, the assessee contested the same with success before Ld. CIT(A) vide impugned order dated 04/09/2015 where Ld. CIT(A), *inter-alia,* placing reliance on the ratio of judgment rendered by Hon'ble Supreme Court in the case of *CIT Vs. Glaxo Smithkline Asia (P.) Ltd. [SLP (civil) No(s). 18121/2007 dated 26/10/2010]* deleted the impugned estimated addition by making following observations:-

> *Considering the above facts on record and the expenditure incurred by the appellant company as per the guidelines of SEBI towards the Mutual fund regulation and also relied on the Hon'ble Supreme Court decision in the case of CIT Vs. Glaxo Smithkline Asia Pvt.Ltd. petition to Special Leave to Appeal (Civil) No(s). 18121/2007 dated 26.10.2010, I am of the considered opinion that the disallowance of the above expenditure made by the AO is not justifiable. Therefore, I direct the AO to delete the addition of Rs.59,52,500/-*

Aggrieved, the revenue is in further appeal before us.

4. The Ld. Departmental Representative [DR] pointed out that the assessee could not demonstrate the basis of apportionment of said expenditure and therefore, the stand of Ld. CIT(A) was not justified. Per *Contra,* Ld. Authorised Representative for Assessee [AR] pleaded that

the revenue had not doubted the genuineness of the expenses but disallowed the same on the premise that the apportionment was not fair, which was none of revenue's business since manner of apportionment of expenditure was a business decision for the assessee and the same was within the framework of *SEBI Regulation* and duly approved by respective Board of Directors. The Ld. AR further drew our attention to the fact that whole exercise was tax neutral since if the expenditure was not allowed to the assessee, the same was certainly allowable to the *HDFC AMC* and both entities fell in the same tax bracket. Our attention is also drawn to statutory provision of Section 40A(2) to contend that the said transaction, at the relevant point of time, was not covered by those provisions since both the assessee and *HDFC AMC* were 100% of subsidiary of a third entity namely *HDFC Ltd.* and had no *inter-se* shareholding between them. Reliance was been placed on several judicial pronouncement as placed in the *paper-book* for various contentions.

5. We have carefully heard the rival contentions and perused relevant material on record including cited judicial pronouncements and duly appreciated the applicable legal provisions. So far as the applicability of the provisions of Section 40A(2) is concerned, we concur with the submissions of Ld. AR that the same could not be applied to issue under appeal for more than one reason. Firstly, both the assessee and the payee, being corporate assessee, fell in the same tax bracket and there was no attempt to evade the taxes and the ratio of cited judgment of Hon'ble Apex Court squarely applied to the facts of the case. It is evident from quantum assessment order that Ld. AO has not doubted the

genuineness or *bona fides* of the expenses but made *adhoc* disallowance of 5% only on the premise that the assessee failed to justify the apportionment of the expenses, which was nothing but a business decision for the assessee. No material has been brought on record by Ld. AO to support the contention that the impugned expenses were excessive or unreasonable in any manner. Secondly, we find that the assessee and payee are subsidiary of a third entity namely *HDFC Ltd.* and during impugned AY, the transactions between two such subsidiary entities were not covered by clause 40A(2)(b)(iv). The said relation has subsequently been covered by Finance Act, 2012 w.e.f. 01/04/2013. Therefore on the totality of facts, we find no reason to interfere with the stand of Ld. First Appellate Authority. Resultantly, the revenue's appeal stands dismissed.

Revenue's Appeal ITA No. 5670/Mum/2015 AY 2011-12

6. The assessee, in similar manner, has suffered estimated addition of 5% amounting to Rs.49.75 Lacs which has been deleted by Ld. CIT(A) by placing reliance on the cited decision of Hon'ble Apex Court. Since the broad facts are similar, our observation, decision and conclusion as above *mutatis mutandis* apply to the same which results into dismissal of revenue's appeal for AY 2011-12.

Assessee's Appeal ITA No. 5444/Mum/2015 AY 2011-12

7. The sole ground raised in assessee's appeal pertains to disallowance of certain *legal & professional fees* amounting to

Rs.63,21,606/-, being reimbursed by the Assessee to *HDFC AMC* to carry out investigations pursuant to certain *SEBI* directions.

8.1 The brief facts *qua* the issue are that one employee of *HDFC AMC* namely *Mr. Nilesh Kapadia-Asst. Vice President* entrusted with executing orders on behalf of mutual fund, was found to be involved in certain *front running activities* in connivance with few outsiders. It was alleged that *Mr. Nilesh Kapadia* provided tips to few outsiders for purchases / sale of certain scrips based on which these outsiders placed their orders in respect of such scrips ahead of the orders of *HDFC mutual fund* schemes. The said activity would increase the price payable by *HDFC mutual fund* schemes for purchases of scrips and alternatively, would reduce the net realization of scrips sold by *HDFC mutual fund*. In other words, the outsiders, acting on tips given by the said employee, gained at the cost of Mutual Fund Schemes by carrying out *intra-day* transactions. Upon receipt of information from *BSE / NSE, SEBI vide* its letter dated 17/06/2010 directed, *inter-alia,* certain investigation into the matter in terms of *SEBI Act, 1992*. Pursuant to those directions, the assessee constituted an investigation committee and appointed *M/s KPMG* at the behest of the audit committee to conduct the investigation in a scientific manner. The expenses so incurred to carry out the said investigation amounted to Rs.1,26,43,213/- which were claimed by the assessee by way of debit to Profit & Loss Account during impugned AY. The Ld. AO denied the same on the premise that it was for *HDFC AMC* to institute the internal inquiry pursuant to the said directions and therefore, the payment thereof was the responsibility of HDFC AMC and not that of assessee and therefore, the same could not be allowed to the assessee.

8.2 Aggrieved, the assessee contested the same with partial success before Ld. CIT(A) vide impugned order dated 04/09/2015 where Ld. CIT(A), after considering the factual matrix concluded that the whole expenditure was to be shared equally by *HDFC AMC* and the assessee and therefore, he restricted the disallowance to 50%. Aggrieved, the assessee is in further appeal before us.

9. The Ld. AR reiterated the stand as taken before first appellate authority and by drawing attention to *Deed of Trust* and *SEBI order* contended that overall responsibility of supervision & control of mutual fund rested with Trustee Assessee and therefore, the expenditure has rightly been claimed by the assessee particularly when the genuineness of the expenditure was not in dispute. Our attention is further drawn to the fact that the revenue is not appeal against the order of the first appellate authority. Per *Contra,* Ld. DR contended that the said employee in question was employed with *HDFC AMC* and therefore, the expenses were to be shared equally between the assessee and the *HDFC AMC* and therefore, the stand of Ld. CIT(A) was quite logical and justified.

10. We have carefully heard the rival contentions and pursued the documents referred to by the respective representatives and appreciated the applicable legal position. At the outset, we find that admittedly, the genuineness of the expenditure is not in dispute and the dispute relates only with the apportionment of expenditure. A perusal of various clauses of *Article-7 & Article-8* of *Deed of Trust* dated 08/06/2000 entered into

between *HDFC Ltd.* and the assessee and as extracted by Ld. CIT(A) on Page Numbers 16 & 17 of the appellate order and as kept in the *paper-book*, reveals that Trustee had overall responsibility of managing the affairs of the mutual fund and were required to ensure that overall activities of the mutual fund were carried in accordance with applicable law, SEBI regulations and in the best interest of the unit holders. The Trustees were also required to ensure compliance of overall statutory formalities and put in place adequate system and manpower and strong internal control system to act in the best interest of the unit holders and ensure that *AMC* did not take up any activity in contravention of SEBI Regulation. The directors, vide clause 7.6, were required to undertake remedial steps, if the conduct of business of mutual fund was not in accordance with SEBI regulation. Lastly, the Trustees were accountable for and be the custodian of the funds and property of the Scheme and hold the same in Trust for the benefits of unit holders in accordance with the SEBI regulations. In nutshell, we find that vide said Deed of Trust, the Trustee assessee was entrusted with overall conduct of the mutual fund schemes and to act as custodian / trustee in the best possible interest of the unit holders and was to ensure compliance of overall statutory formalities / regulations.

11. Upon perusal of SEBI order / directions under Sections 11(1), 11(4) and 11B of SEBI Act, 1992 dated 17/06/2010 as placed on Page Nos. 20-29 of the *paper book* we find that the said order, *inter-alia,* contains following directions:-

(i) HDFC Asset Management Company Limited shall not utilize the services of Mr. Nilesh Kapadia for the trading activities done on behalf of HDFC Asset

Management Company Limited and shall institute an internal inquiry to be conducted by the trustees of HDFC Mutual Fund in the matter.

(ii) Mr. Nilesh Kapadia and HDFC Asset Management Company Limited shall jointly deposit the estimated losses identified so far as per Annexure-A of this order, to the Trustees of HDFC Mutual Fund. This amount shall be held by the Trustees in an account segregated for this purpose, till further orders by Securities and Exchange Board of India in this matter.

(iii) The Trustees of HDFC Mutual Fund shall also set up an investigation committee to examine all transactions/dealings by Mr. Nilesh Kapadia, in his position as the dealer of HDFC Asset Management Company Limited to identify whether he had indulged in similar front running activities on other occasions. The committee shall submit the final report to the Securities and Exchange Board of India within six months of this order explaining any such instances.

(iv) The Trustees of HDFC Mutual Fund shall, within a period of one month from the date of this order, submit a plan to overhaul the internal control systems and the internal preventive measures of HDFC Asset Management Company Limited, to avoid such instance in future

A perusal of the above give strength to our findings that complete responsibility to conduct the affairs of the mutual fund rested with the Trustee Assessee. As per the terms of the directions, the Trustees of the mutual fund were required to set up an investigation committee to examine all the transactions / dealings by *Mr. Nilesh Kapadia.* Further, the Trustees were required to submit a plan to overhaul the internal control systems and the internal preventive measures of *HDFC AMC* to avoid recurrence of such instances in future.

12. Hence, upon conjoint reading of Trust Deed and SEBI directions as above, we conclude that the said expenditure was incurred by the assessee to safeguard / protect its business interest and therefore, allowable to the assessee in terms of Section 37. The Ld.CIT(A) clinched the issue in the right perspective but had no justification to restrict the impugned expenditure to 50%.

13. Viewing the matter from another angle, we find that genuineness of the expenditure was not in dispute. If the expenditure was restricted to 50% then as a logical consequence, the remaining expenditure was to be allowed to *HDFC AMC* since as per the logic of Ld. first appellate authority, the said expenditure was to be shared equally between the two entities. Even in that eventuality, the whole exercise would remain revenue neutral as both entities fall in the same tax bracket and we see no fruitful reason to disturb the already concluded assessments.

14. Therefore, on the facts and circumstances, we uphold that the impugned disallowance of Rs.63.21 Lacs was not justified and therefore, by deleting the same, we allow assessee's appeal. Resultantly, the assessee's appeal stands allowed.

15. Finally, revenue's appeal ITA Nos.5669 & 5670/Mum/2015 stands dismissed whereas assessee's appeal ITA No. 5444/Mum/2015 stands allowed.

Order pronounced in the open court on 21st February, 2018

Sd/-	Sd/-
(Mahavir Singh)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य / **Judicial Member**	लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 21. 02.2018
Sr.PS:- Thirumalesh

<u>आदेश की प्रतिलिपि ग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**