

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2796 OF 2019

Aberdeen Asia Pacific Including Japan Equity Fund ... Petitioner  
Vs.  
Deputy Commissioner of Income Tax (International  
Taxation)-1(1)(1), Mumbai and another ... Respondents

WITH  
WRIT PETITION NO.2803 OF 2019

Aberdeen Emerging Markets Equity Fund ... Petitioner  
Vs.  
Deputy Commissioner of Income Tax (International  
Taxation)-1(1)(1), Mumbai and another ... Respondents

WITH  
WRIT PETITION NO.3525 OF 2019

Aberdeen Asia Pacific Excluding Japan Equity Fund ... Petitioner  
Vs.  
Deputy Commissioner of Income Tax (International  
Taxation)-1(1)(1), Mumbai and another ... Respondents

Mr. Porus Kaka, Senior Advocate a/w. Mr. Manish Kanth, Mr. Anandu Unnikrishnan and Ms. Shipra Padhi i/b. Nishith Desai Associates for Petitioner in all the Petitions.

Mr. Charanjit Chanderpal a/w Mr. S. B. Shenoy, Ms. Vaibhavi Gala and Ms. Shaista Hadi for Respondents.

**CORAM : UJJAL BHUYAN &  
MILIND N. JADHAV, JJ.**

**Reserved on : MARCH 06, 2020**

**Pronounced on : JUNE 12, 2020**

**P.C.:**

1. Heard Mr. Porus Kaka, learned senior counsel along with Mr. Manish Kanth, Mr. Anandu Unnikrishnan and Ms. Shipra Padhi instructed by Nishith Desai Associates for the petitioners; and Mr. Charanjit Chanderpal, learned

standing counsel, Revenue along with Mr. S. B. Shenoy, Ms. Vaibhavi Gala and Ms. Shaista Hadi, learned counsel for the respondents.

2. Facts and reliefs sought for in all the three writ petitions being identical, those were heard together and are being disposed of by this common order. In fact, status of the petitioners in all the three writ petitions are identical.

3. Since learned counsel for the petitioners had argued Writ Petition No.2796 of 2019 as the lead case, facts of that case are adverted to hereunder for adjudication of the *lis* covering all the writ petitions.

4. Petitioner is Aberdeen Asia Pacific Including Japan Equity Fund. Petitioner is a sub-fund or series of Aberdeen Institutional Commingled Funds, LLC (AICFL), a Delaware (USA) based Limited Liability Company. AICFL has been organised for the purpose of investing and dealing in all securities and instruments across the world. AICFL has set up various investment schemes in the form of sub-funds or 'series' with different sets of investors for investing in specific strategies.

5. Petitioners in the three writ petitions are the sub-funds or 'series' of AICFL and have obtained necessary sub-account registration of Foreign Institutional Investors with the Securities Exchange Board of India (SEBI).

6. Originally AICFL was set up as a Trust under the laws of the State of Delaware, USA, to be precise on 09.12.1996, known as Aberdeen Delaware Business Trust with three sub-trusts. Petitioner was constituted as one of the sub-trusts under Aberdeen Delaware Business Trust, the other two sub-trusts being the other two writ petitioners.

7. Because of popularity of the LLC regime i.e., Limited Liability Company

across the investment funds industry, AICFL was re-organized / converted from a Trust into a Limited Liability Company (LLC) on 19.04.2010 in accordance with the provisions of the Trust Act and the LLC Act in the State of Delaware, USA. It is stated that Section 3821 of the Trust Act and Section 214 of the LLC Act in Delaware, USA provide that when a statutory trust is converted into LLC, for the purposes of the law in the State of Delaware, USA, the LLC would be deemed to be the same entity as the trust. Therefore, such conversion would not constitute creation of a new entity.

8. As a consequence of such conversion of AICFL from trust to LLC, petitioner was also converted from a sub-trust to a sub-fund or 'series' of AICFL. Petitioner has highlighted the following salient aspects of such re-organization / conversion:-

- (i) AICFL which previously existed as a trust was continued as LLC without dissolution and was deemed by law to be the same entity as the erstwhile trust;
- (ii) Upon such conversion of AICFL, each sub-trust, including the petitioner, continued as a corresponding sub-fund or 'series' of AICFL without dissolution;
- (iii) Each investor's interest in a sub-trust issued and outstanding immediately prior to conversion was automatically converted into LLC interest in the corresponding sub-fund or 'series' of AICFL;
- (iv) All the rights, privileges and powers of each sub-trust including the petitioner and all property and debts due to such sub-trust vested in the corresponding sub-fund of the LLC and became the property of such sub-fund;
- (v) There was no change in the beneficial ownership of the beneficiaries of the sub-trusts including the petitioner upon conversion; and
- (vi) Conversion did not lead to a taxable event for United States income tax purposes or for Delaware State income tax purposes.

9. The conversion was taken note of and accepted by both the US Securities and Exchange Commission and by SEBI as effectively involving nothing more than a change of name of the entity. As a matter of fact SEBI did not consider the petitioner to be a new entity and the petitioner continued to use its existing sub-account registration with SEBI for investing in Indian public markets.

10. Notwithstanding the fact that petitioner is a sub-fund or 'series' of AICFL, it has been treated as an independent entity for tax purposes by the tax authorities in India, both before and after conversion.

11. Prior to conversion, petitioner as a sub-trust had incurred and accumulated losses under the head 'capital gains' to the tune of Rs.5,83,56,060.00 from the assessment year 2009-10 to the assessment year 2010-11. Such losses were fully and properly disclosed by the petitioner in the returns filed for each of the assessment years. After conversion, these losses were carried forward by the petitioner, now organised as a sub-fund or 'series' of the LLC, to assessment year 2011-12 and beyond in accordance with Section 74 of the Income Tax Act, 1961 (briefly 'the Act' hereinafter).

12. On 16.04.2012, AICFL filed an application before the Authority for Advance Rulings (AAR) seeking an advance ruling on the following question:-

Whether on the facts and in the circumstances of the case, Aberdeen Institutional Commingled Funds, LLC i.e., the applicant was entitled to carry forward accumulated capital losses as disclosed in the application to the assessment year 2011-12 and thereafter, under Section 74 of the Act, notwithstanding its reorganisation effective from April 19, 2010?

13. The above application was registered as AAR No.1308 of 2012. By the ruling dated 21.02.2018, the Authority for Advance Rulings (AAR) took the view

that Section 70 of the Act limits the claim of carry forward of loss to the assessee to the exclusion of everyone else. The benefit of setting off of loss is available only to the assessee. While acknowledging that under the provisions of the two statutes of the State of Delaware (USA), the new LLC (Aberdeen Institutional Commingled Funds, LLC) may be deemed to be the same entity as that of the Trust (Aberdeen Delaware Business Trust), AAR however accepted the stand of the Revenue that allowance of carry forward and setting off of accumulated loss has to be examined under the provisions of the Indian income tax law, more particularly under Sections 70 to 79 of the Act, where there are no such deeming provisions. The deeming fiction created by the statutes of Delaware under which the Trust and the LLC are treated to be the same entity cannot be invoked to canvass carry forward and set off of losses in India in the absence of any such specific provisions in the Act. It was held that the LLC was never an assessable entity in India; it had never filed any income tax returns in India. The Trust and LLC are separate assessable entities. The LLC having not filed any return cannot carry forward and cannot claim set off of losses accumulated by the Trust and this cannot effect the tax liability of the LLC. There being no specific provision in the Act allowing one assessee to carry forward and set off losses incurred by some other assessee, the question was answered by the AAR in the negative and against the applicant.

14. Thereafter respondent No.1 issued a notice under Section 148 of the Act dated 23.03.2018 for the assessment year 2011-12 addressed to the petitioner stating that he had reasons to believe that petitioner's income chargeable to tax for the said assessment year had escaped assessment within the meaning of Section 147 of the Act. Respondent No.1 stated that he proposed to re-assess the income of the petitioner for the said assessment year and called upon the petitioner to submit a return in the prescribed form for the said assessment year within the specified period. It was further mentioned that the said notice was issued after obtaining the necessary satisfaction of respondent No.2.

15. In accordance with the law laid down by the Supreme Court in *GKN Driveshafts India Vs. ITO*, **259 ITR 19**, petitioner requested respondent No.1 for a copy of the reasons recorded prior to re-opening of assessment vide letter dated 19.04.2018.

16. In the meanwhile petitioner also informed respondent No.1 on 11.06.2018 that a writ petition was being filed in the High Court to challenge the ruling of AAR. But without prejudice to the above, petitioner stated that it had discharged the tax arising pursuant to the ruling of the AAR and provided the details of the taxes discharged enclosing therewith the challans evidencing discharge of the outstanding tax liability.

17. Respondent No.1 thereafter provided a copy of the reasons recorded prior to issuance of notice under Section 148 of the Act vide letter dated 20.07.2018. It was mentioned in the reasons recorded that the application filed by the AICFL before the AAR was the principal source of tangible information coming to the possession of respondent No.1 from which he had reasons to believe that income chargeable to tax had escaped assessment in the case of the assessee i.e., the petitioner. Relying on the ruling given by the AAR, it was mentioned that petitioner is a person which is separate from the sub-trust. Upon re-organisation the legal status of the Trust was converted into LLC. Presently, only the LLC exist and the Trust has ceased to exist. The loss was incurred by a different entity and it cannot be carried forward and set off by another assessee. Loss claimed as set off under Section 74 of the Act amounting to Rs.3,11,39,585.00 and the claim of carry forward of loss amounting to Rs.2,72,16,475.00 for the assessment year 2011-12 by the assessee, totalling Rs.5,83,56,060.00, are not losses incurred by the assessee; rather those were losses incurred by a different person. This gave reason to believe to the Assessing Officer that income chargeable to tax had escaped assessment within the meaning of Section 147 of the Act. It was further mentioned that the

present case is squarely covered by clause (b) of Explanation-2 below Section 147 of the Act which provides that where a return of income has been furnished by the assessee and no assessment has been made but it is noticed by the Assessing Officer that the assessee has understated the income or claimed excessive loss, deduction, allowance or relief in the return, then such a situation shall also be deemed to be a case where income chargeable to tax has escaped assessment.

18. On 24.09.2018, petitioner submitted letter of objection before respondent No.1 against the reasons recorded for initiation of re-assessment proceedings under Section 147 of the Act, also seeking a copy of the prior sanction of respondent No.2. On 25.10.2018, respondent No.1 informed the petitioner that the objections raised by it were not acceptable. While calling upon the petitioner to join the assessment proceedings, a copy of prior sanction of respondent No.2 was furnished to the petitioner.

19. In the meanwhile, AICFL filed Writ Petition No.9358 of 2018 before this court challenging the ruling of AAR dated 21.02.2018. By order dated 24.11.2018, this Court passed an interim order restraining the Assessing Officer from completing the re-assessment in terms of the ruling of AAR.

20. By the judgment and order dated 08.03.2019, this Court dismissed Writ Petition No.9358 of 2018. It may be mentioned that the present petitioner had also joined AICFL as petitioner No.3 in Writ Petition No.9358 of 2018 in assailing the AAR ruling. In the said judgment this Court deleted the present petitioner and similarly situated the other two sub-funds who are presently petitioners in Writ Petition Nos.2803 and 3525 of 2019 respectively from the list of petitioners in Writ Petition No.9358 of 2018 on the ground that they had not approached AAR; only AICFL had approached AAR.

20.1. On the substantive issue this Court held that in accordance with the

principles of private international law, the status of an entity incorporated abroad has to be determined even in India according to the law of the country where the entity was incorporated. It was held that in terms of the law of Delaware, USA, AICFL both as Trust and as LLC continues to be the same person. This position is accepted in India. Therefore, gain and loss earned by it in its earlier *avatar* would in law not be denied only because of change in status from Trust to LLC. However, this Court noted that AAR had answered the question in the negative not on the above ground of change of status but on the ground that AICFL was not the assessee which had claimed loss in the earlier assessment year. It was not possessed of any carry forward of loss from earlier assessment years to be set off in assessment year 2011-12 and subsequent assessment years in terms of Section 74 of the Act. Rather, AICFL had admittedly filed no return of income and has not been allotted any Permanent Account Number (PAN). However, it was clarified that the ruling of AAR would not impact the case of the three 'series' (funds) i.e., the three writ petitioners in the three present writ petitions to claim the benefit of carry forward of loss under Section 74 of the Act, if they are otherwise entitled to in law.

21. Following the aforesaid judgment, respondent No.1 issued another notice dated 12.03.2019 under Section 142(1) of the Act to the petitioner for the assessment year 2011-12 calling upon the petitioner to comply with the previous notice issued by respondent No.1.

22. Pursuant to the aforesaid judgment, petitioner submitted its final objection to the re-opening of assessment on 19.03.2019 buttressing its claims on the basis of the aforesaid judgment of this Court in the case of AICFL.

23. On 08.04.2019, respondent No.1 issued notice under Section 142(1) of the Act calling upon the petitioner to furnish the accounts and documents specified in the annexure to the notice in justification of its claim of set off of brought forward



loss of Rs.1,03,34,976.00 and carry forward of loss of Rs.1,68,81,499.00 for the assessment year 2012-13. In response thereto, petitioner filed detailed submissions dated 15.04.2019 in the light of the judgment in AICFL and providing the information sought for.

24. Petitioner has stated that to its utter shock and surprise, respondent No.1 as the Assessing Officer passed the draft assessment order dated 06.05.2019 for the assessment year 2011-12 under Section 143(3) read with Sections 147 and 144-C(1) of the Act. By the said order respondent No.1 disallowed the claim of accumulated loss amounting to Rs.5,83,56,060.00 carried forward by the petitioner to assessment year 2011-12 and thereafter pursuant to conversion.

25. This was followed by the draft assessment order dated 07.05.2019 passed by respondent No.1 as the Assessing Officer for the assessment year 2012-13 under Section 143(3) read with Section 144-C(1) of the Act. By the said order, respondent No.1 disallowed the claim of the petitioner for set off of loss amounting to Rs.1,03,34,976.00, further disallowing petitioner's claim of carry forward of loss amounting to Rs.1,68,81,499.00.

26. Aggrieved by the aforesaid, petitioner has preferred the present writ petition under Article 226 of the Constitution of India seeking the following reliefs:-

- (i) to set aside and quash the notice dated 23.03.2018 issued by respondent No.1 under Section 148 of the Act for the assessment year 2011-12;
- (ii) to set aside and quash the draft assessment order dated 06.05.2019 passed by respondent No.1 for the assessment year 2011-12; and,
- (iii) to set aside and quash the draft assessment order dated 07.05.2019 passed by respondent No.1 for the assessment year 2012-13.

27. Writ Petition No.3525 of 2019 was taken up for consideration on

18.12.2019. On that day, this Court while issuing notice returnable on 13.01.2020 granted ad-interim stay to the impugned notice dated 23.03.2018 issued under Section 148 of the Act for the assessment year 2011-12.

27.1. On 13.01.2020 this Court while adjourning the case on the request of learned counsel for the respondents, granted liberty to the petitioner to seek early date for consideration of stay in the event Dispute Resolution Panel sought to proceed post passing of draft assessment orders.

27.2. Thereafter, this Court passed an order on 14.02.2020 directing that the ad-interim stay granted on 18.12.2019 in Writ Petition No.3525 of 2019 should continue. Further, it was directed that the draft assessment orders dated 06.05.2019 and 07.05.2019 as well as proceedings before the Dispute Resolution Panel would remain stayed.

28. Mr. Porus Kaka, learned senior counsel for the petitioner submits that notwithstanding the interim order of this Court, Dispute Resolution Panel issued directions under Section 144-C(5) of the Act on 28.02.2020 in respect of the draft order of assessment dated 06.05.2019 for the assessment year 2011-12. This is unacceptable, he submits. Referring to the ruling of AAR dated 21.02.2018 and judgment of this Court dated 08.03.2019 passed in the writ petition filed by AICFL, he submits that Supreme Court in the case of *Technip SA Vs. SMS Holding (P) Ltd.*, (2005) 5 SCC 465 has settled the position that ordinarily question of status of an entity would have to be decided according to the laws of domicile or place of incorporation. Following this position, this Court held that AICFL both as a Trust and as LLC in terms of the law of Delaware, USA, continues to be the same person which position is accepted in India. However, on the ground that AICFL had not filed any return in the earlier assessment years and therefore it did not possess any loss of earlier assessment years to be carried forward and set off in the assessment year 2011-12 and subsequent assessment

years, both AAR and this Court held that since AICFL was not the assessee possessing accumulated loss, it could not claim the benefit of carry forward and setting off of loss. However, this Court had clarified that the above decision would not impact the case of the three 'series' or funds i.e., the present writ petitioners to claim the benefit of carry forward and set off of loss under Section 74 of the Act. In the reasons recorded for re-opening of assessment, it is specifically stated that the application of AICFL before the AAR was the principal source of tangible information on the basis of which respondent No.1 had formed the belief that income of the petitioner chargeable to tax had escaped assessment. Reverting back to the judgment of this Court, Mr. Kaka submits that this Court had clarified that while the benefit of carry forward and set off of loss was not available to the AICFL since it had never filed any return, it would be open to the three writ petitioners. Even the Revenue had admitted before this Court that it is the three 'series' or funds i.e., the three writ petitioners which had filed returns of income being individually recognised as assesseees under the Act entitled to carry forward the loss and claim set off. He submits that having taken such a stand by the Revenue in the case of AICFL, it is not open to the Revenue to take a contrary stand in the case of the present three petitioners. He therefore, submits that the formation of belief by respondent No.1 being contrary to the law laid down by the Supreme Court in **Technip SA** (*supra*) and of this Court in the case of **AICFL** (*supra*), the same is wholly untenable in law and on that basis no notice of re-opening of assessment under Section 148 of the Act could have been issued or can be sustained.

28.1. Referring to the draft assessment order dated 06.05.2019 for the assessment year 2011-12, he submits that the sole ground on which re-assessment was made was that the petitioner as sub-trust of the Trust and as 'series' or fund of LLC are two different entities. Therefore, the 'series' or fund cannot claim the benefit of carry forward of loss of the other entity. This is completely contrary to the law laid down by the Supreme Court in **Technip SA** (*supra*) and the judgment of this Court

in **AICFL** (*supra*). Besides, being consequential to the impugned notice, the draft assessment order cannot survive independently in the event the impugned notice is interdicted despite directions issued by the Dispute Resolution Panel which are again in violation of the interim order of this Court.

28.2. In so far the draft assessment order dated 07.05.2019 for the assessment year 2012-13 is concerned, Mr. Kaka submits that since it is structured on the same erroneous principle, it also cannot be sustained.

28.3. He, therefore, submits that the impugned notice as well as the two draft assessment orders are liable to be set aside and quashed.

29. On the other hand, Mr. Chandernal, learned standing counsel, Revenue submits that the writ petition may not be entertained by this Court as following the notice under Section 148 of the Act, respondent No.1 had passed draft assessment order. In fact, for assessment year 2012-13 it is not a case of re-assessment but regular assessment. Petitioner has got adequate and efficacious alternative remedy provided under the statute by way of several layers of appeal. Therefore, petitioner should avail the alternative remedy. All the writ petitions should be dismissed, he submits.

30. In response, learned counsel for the petitioner submits that the fact that draft assessment order has been passed would not denude the right of the petitioner to challenge the notice of re-assessment if it is without jurisdiction. If the assumption of jurisdiction is wrong, the re-assessment order passed subsequently would have no legs to stand. If the notice goes, so does the order of re-assessment. In support of his submission learned counsel for the petitioner has placed reliance on the decision of the Supreme Court in *Calcutta Discount Company Ltd. Vs. ITO*, **41 ITR 191**, which has been subsequently explained and reiterated by the Gujarat High Court in *Garden Finance Ltd. Vs. ACIT*, **268 ITR 48** and by the Delhi High

Court in *Techspan India (P) Ltd. Vs. ITO*, **283 ITR 212**.

31. Submissions made by learned counsel for the parties have been considered. Also perused and considered the materials on record and the cases cited at the Bar.

32. In **Technip SA** (*supra*), Supreme Court held that questions as to the status of a corporation are to be decided according to the laws of its domicile or incorporation subject to certain exceptions including the exception of domestic public policy. This is because a corporation is a purely artificial body created by law. It can act only in accordance with the law of its creation. Therefore, if it is a corporation, it can be so only by virtue of the law by which it was incorporated and it is to this law alone that all questions concerning the creation and dissolution of the corporate status are referred unless it is contrary to public policy. However, Supreme Court carved out a distinction to the above principle by holding that the above general rule regarding determination of status will not apply when the issue relates to discharge of obligations or assertion of rights by a corporation in another country whether such obligation is imposed by or right arises under the statute or contract which is governed by the law of such other country.

33. Having noticed the above, we may revert back to the facts of the present case. Prior to conversion, AICFL was a trust by the name of Aberdeen Delaware Business Trust which was set up as a trust under the Trust Act of Delaware State. It had three sub-trusts briefly known as Ex Japan Sub-Trust, Inc Japan Sub-Trust and Emerging Markets Sub-Trust i.e., the earlier *avatars* of the present three writ petitioners. After conversion from statutory trust to LLC, Aberdeen Delaware Business Trust came to be known as Aberdeen Institutional Commingled Funds, LLC (already referred to as AICFL). The three sub-trusts as above were accordingly converted to sub-fund or 'series' of AICFL and in short came to be known as Ex Japan Series, Inc Japan Series and Emerging Markets Series i.e., the present three writ petitioners.

34. AICFL sought an advance ruling from AAR on the question as to whether it was entitled to carry forward accumulated capital loss as disclosed in the application filed before it to the assessment year 2011-12 and thereafter under Section 74 of the Act notwithstanding its reorganization from a statutory trust to a limited liability company (LLC). Revenue's stand in the proceedings before AAR was that the loss was not incurred either by the AICFL or by its earlier *avatar* Aberdeen Delaware Business Trust. The loss stood in the name of the three trust funds which was claimed to be carried forward by the three new LLC funds (i.e., the present three writ petitioners), which have separate legal existence from AICFL. AAR noted that under Sections 70 to 79 of the Act it is only the assessee who is entitled to claim carry forward and setting off of loss. While acknowledging that under the provisions of the Trust Act and the LLC Act of the State of Delaware, USA, the LLC may be deemed to be the same entity as that of the Trust upon re-organization / conversion but the claim of carry forward and setting off of loss of the applicant i.e., AICFL would have to be examined under the Indian income tax law, more particularly under Sections 70 to 79 of the Act. AAR found as a fact that AICFL was never an assessee in India and that it had never filed any income tax returns in India. The Trust and LLC are separate assessable entities. Assertion of rights by AICFL of carry forward and set off of accumulated loss in India can only be governed by the provisions of the Act. Taking the view that there was no specific provision in the Act allowing one assessee to carry forward and set off loss incurred by some other assessee, AAR answered the question posed before it in the negative and against AICFL.

35. When the above ruling of AAR was challenged by AICFL before this Court, the stand taken by the Revenue while opposing the writ petition was that it did not dispute the position in law that the status of AICFL under the conflict of law has to be decided by the law of the country in which the entity was incorporated, in this case the State of Delaware, USA. However, it was contended that AICFL was not

an assessee under the Act and consequently it did not file any return of income. Therefore, it was not entitled to claim benefit of Section 74 of the Act. On the other hand, returns of income were filed by its three 'series' (funds) i.e., the present three writ petitioners, which have been individually assigned separate Permanent Account Numbers (PANs). It was therefore, submitted that it was the three 'series' (funds) each of which is recognized as an assessee under the Act which would be entitled to carry forward the accumulated loss of earlier years to the assessment year 2011-12 and subsequent years, if otherwise permitted in law.

35.1. This Court held that there could be no dispute to the proposition that AICFL both as a Trust and as LLC in terms of the laws of Delaware, USA continues to be the same person. Noting that this position is accepted in India, this Court held that gain and loss earned by AICFL in its earlier *avatar* would in law not be denied only because of change in status from Trust to LLC. However this Court noted that AAR had answered the question posed before it in the negative not because of change of status of AICFL but on the ground that AICFL was not an assessee in India and had not filed any return of income. Therefore, question of any claim as to loss or carry forward of loss or setting off of loss by AICFL did not arise. This Court further noted that SEBI as the regulatory authority has allowed the 'series' (funds) i.e., the present three writ petitioners to continue with their earlier registration even after change of name. But this Court took the view that this would not assist AICFL because before the AAR it was not the 'series' (funds) which were seeking to carry forward the loss but by AICFL which had admittedly filed no return of income and was not assessed under the Act being not an assessee. It was in that context this Court made it clear that the ruling of AAR would not impact the case of the three 'series' (funds) i.e., the present three writ petitioners to claim the benefit of carry forward of loss under Section 74 of the Act, if they are otherwise entitled under the law.

36. Having deliberated upon the above, let us now examine the reasons

recorded by respondent No.1 for re-assessment because it is the reasons alone which are to be examined while adjudicating as to whether the Assessing Officer had reason to believe that any income of the assessee chargeable to tax had escaped assessment within the meaning of Section 147 of the Act.

37. In the reasons recorded, respondent No.1 acknowledged that the application filed by AICFL before the AAR was the principal source of tangible information coming to his possession on the basis of which he had formed the belief that income chargeable to tax had escaped assessment in the case of the petitioner. Upon analysis of the information collected / received, respondent No.1 as the Assessing Officer came to the finding that the assessee i.e., Aberdeen Asia Pacific Including Japan Equity Fund, a 'series' (fund) of AICFL, is a person which is separate from Aberdeen Delaware Business Trust Asia Pacific Inc Japan Fund. The latter existed as a trust fund and upon re-organization its legal status was converted into a 'series' (fund) of the LLC. At present only the LLC exist as the Trust has ceased to exist. Consequently, the sub-trusts do not exist. Therefore, for the purpose of the Act each of them is a separate assessee. From the AAR application it came to the knowledge of the Assessing Officer that the loss claimed as set off under Section 74 of the Act amounting to Rs.3,11,39,585.00 and the claim of carry forward of loss amounting to Rs.2,72,16,475.00 by the assessee for the assessment year 2011-12, totalling Rs.5,83,56,060.00, are not losses incurred by the assessee; rather those are losses incurred by Aberdeen Delaware Business Trust Asia Pacific Inc Japan Fund which is a different person being a trust fund or sub-trust.

37.1. In that context respondent No.1 observed that carry forward and set off of loss is a privilege given by the Act to an assessee who has suffered the loss. Therefore, loss incurred by one assessee cannot be claimed to be carried forward or allowed to be set off by another assessee. It was on that basis that respondent No.1 issued the impugned notice under Section 148 of the Act re-opening the



assessment for the assessment year 2011-12.

38. It is quite apparent that the view taken by respondent No.1 which led to the formation of belief that income of the petitioner chargeable to tax has escaped assessment is totally erroneous being contrary to the ruling of AAR. Further, it stood totally contradicted by the judgment of this Court in AICFL. Moreover, it is also contrary to the stand taken by the Revenue itself in the said writ proceeding. It was the stand of the Revenue that AICFL was not the assessee under the Act and it did not file return of income. Therefore, claiming of any carry forward of loss or set off of loss by AIFCL did not arise. On the other hand, it was the specific case of the Revenue that returns of income were filed by the three 'series' (funds) i.e., the present three writ petitioners each of which are recognised as assessees under the Act. It was admitted by the Revenue that it is the 'series' (funds) which would be entitled to carry forward the loss declared in the earlier returns of income to the assessment year 2011-12 and subsequent years, if otherwise eligible.

38.1. This Court accepted the position that in terms of the laws of Delaware, AICFL earlier as the Trust and presently as LLC continues to be the same person which position is accepted in India. Thereafter, this Court categorically held that gain and loss earned by AICFL in its earlier *avatar* would in law not be denied only because of change in status from Trust to LLC. If this be so, then by extension, gain and loss earned by the present petitioner in its earlier *avatar* would not be denied only because of change in status from sub-trust of the Trust to 'series' (funds) of LLC. This Court had negated the claim of AICFL not on the ground of change of status from Trust to LLC but on the ground that AICFL was not possessed of any carry forward of loss of earlier assessment years to be set off in assessment year 2011-12 and subsequent assessment years because AICFL was not an assessee under the Act and had filed no return of income previously. While upholding the ruling of AAR this Court however clarified that the said decision would not impact the case of the three 'series' (funds) i.e., the present three writ

petitioners to claim the benefit of carry forward and set off of loss under Section 74 of the Act if otherwise entitled under the law.

39. However, in the reasons recorded by respondent No.1 it was precisely on the ground of change of status that the claim of the assessee i.e., the petitioner was found to be not acceptable which led to formation of the belief that income of the petitioner chargeable to tax had escaped assessment for the assessment year 2011-12. Therefore, the very foundation for formation of such belief is erroneous, which has been contradicted by this Court. In other words, after the judgment of this Court in AICFL, the very basis for re-opening the assessment no longer survived. This position is buttressed in the draft assessment order dated 06.05.2019 passed by respondent No.1 for the assessment year 2011-12 under Section 143(3) read with Sections 147 and 144-C(1) of the Act. In the said order passed on re-assessment it was clearly held that the old trust fund and the new LLC fund are separate legal entities for the purpose of the Act. Therefore, loss of the old trust fund could not be carried forward by the new LLC fund. As indicated above, this is a complete misreading of the judgment of this Court which has vitiated the re-assessment proceeding for the assessment year 2011-12 as well as the assessment proceeding for the subsequent assessment year 2012-13.

40. Coming to the objection raised by learned standing counsel for the Revenue that in view of the fact that re-assessment order has been passed for the assessment year 2011-12 and assessment order for the assessment year 2012-13 petitioner should be relegated to the alternative remedy of appellate forum as provided under the statute, it is trite that if the Assessing Officer had no jurisdiction to initiate re-assessment proceeding, the mere fact that subsequent orders have been passed would not render the challenge to jurisdiction infructuous. If the very basis for re-opening assessment does not survive, orders on such re-opening would not survive too.

41. That being the position and considering the matter in its entirety we are of the view that the impugned notice dated 23.03.2018 under Section 148 of the Act issued by respondent No.1 for the assessment year 2011-12 cannot be sustained. Consequential draft assessment order dated 06.05.2019 for the said assessment year and all orders passed thereafter would thus also be rendered unsustainable. That apart, the draft assessment order dated 07.05.2019 for the assessment year 2012-13 in so far it followed the principle applied in the order dated 06.05.2019 while disallowing the claim of the petitioner to carry forward and set-off of loss would also be unsustainable to that extent.

42. Accordingly, impugned notice dated 23.03.2018 and all consequential orders pursuant thereto for the assessment year 2011-12 are hereby set aside and quashed. Likewise, the assessment order dated 07.05.2019 for the assessment year 2012-13 would accordingly stand interfered with to the above extent.

43. Petitioners in the other two writ petitions i.e. Writ Petition Nos.2803 and 3525 of 2019 are similarly placed like the petitioner in Writ Petition No.2796 of 2019 seeking identical reliefs, being 'series' (funds) of AICFL. In view of the decision in Writ Petition No.2796 of 2019, petitioners in these two writ petitions are also granted similar relief as granted to the petitioner in Writ Petition No.2796 of 2019.

44. Consequently, all the three writ petitions are hereby allowed. However, there shall be no order as to costs.

**(MILIND N. JADHAV, J.)**

**(UJJAL BHUYAN, J.)**

*Minal Parab*