BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

APPEAL NO.25/2000

In the matter of:

Kwality Ice Creams (India) Ltd. **Appellant**

Vs.
Securities & Exchange Board of India **Respondent No.1**
Templeton Asset Management (India) Pvt.Ltd **Respondent No.2**
Alliance Capital asset Management (India) Pvt.Ltd **Respondent No.3**
Prudential ICICI Asset Management Ltd **Respondent No.4**

APPEARANCE:

Mr. Saurabh Kirpal
Advocate **for Appellant**

Mr. S.V. Krishnamohan
Division Chief, SEBI

Ms Anita Anoop
Legal officer, SEBI **for Respondent 1**

Mr. J.D.Dwarkadas
Sr.Counsel
I/b Little & Co.,

Ms Madhavi Divan
Advocate
Little & Co., **for Respondent 2**

Ms Zia Mody
Advocate
I/b Prakash & Co.,

Ms Darshika Kothari
Advocate
I/b Prakash & Co., **for Respondent 3**

Mr. J.D.Dwarkadas
Sr.Counsel
I/b A.Y.Chitale & Associates

Mr. Atul Chitale
Advocate
A.Y Chitale & Associates **for Respondent 4**

[Appeal arising from the order dated 4.9.2000 made by Chairman, Securities and Exchange Board of India]

ORDER

The Appellant, a public limited company, had invested Rs.2 crores in three open ended mutual fund schemes providing tax benefits on capital gains. Out of the said investment, one crore rupees was invested in Templeton India Growth Fund of Templeton Mutual Funds and fifty lakhs rupees each in Alliance Fund Growth of Alliance Capital Mutual Fund and Prudential ICICI Growth Plan of Prudential ICICI Mutual Funds. These investments were made during June-July, 1998 Investments in all the three mutual fund schemes provided exemption from capital gains tax, in terms of section 54EB of the Income Tax Act, 1961. Exemption was available subject to the condition that the units in which investment has been made will be repurchasable after a period of 7 years from the date of issue. The Appellant, after about 2 years of the date of purchase of the units decided to forego the benefits of exemption provided under section 54EB and approached Respondents 2 to 4 (Respondent mutual funds) seeking redemption of the units purchased by it. Formal request for this purpose was made on 7.3.2000. But Respondent mutual funds declined to redeem the units on the ground that the units were not repurchasable during the stipulated lock in period of 7 years as agreed to by the Appellant at the time of purchasing the same. Aggrieved by the said decision, the Appellant filed a Civil Writ Petition (W.P.No.1794/2000) in the Delhi High Court. On 3.8.2000 the Delhi High Court made the following order:

> "During the course of hearing of the petition learned Counsel for the petitioners stated that a formal application shall be made before the SEBI – respondent No.2 in view of objection raised in paragraph 15 of the affidavit filed by respondent No.2 stating that the petitioners have not approached the said respondent with any grievance at any time before the filing of the present writ petition. In case such a writ petition is filed by the petitioners before respondent No.2, the same shall be disposed of within three weeks of its filing with reasons. This course shall be adopted by the parties without prejudice to the averments involved in the writ petition. Matter shall be listed on 5th September, 2000 for further hearing as part heard."

In terms of the Delhi High Court's order cited above, the Appellant filed a representation on 4.8.2000 before Respondent 1 herein. After hearing the Appellant and three Respondent mutual funds the said Respondent made an order on 4.9.2000 rejecting the said representation holding that there was no merit in it. Aggrieved by the said order the Appellant approached the Delhi High Court praying for setting aside the same. Subsequently, the Appellant withdrew the application from the High Court with liberty to pursue the alternative remedy of appeal before the Tribunal. The present appeal is the result. The Appellant has prayed therein for a direction to Respondent mutual funds to release the money due upon redemption of the units, calculated as per the Net Asset Value (NAV) prevailing on the date on which the redemption was sought, i.e. 7.3.2000, and interest thereon calculated at 15%, till the date of actual payment.

Shri Saurabh Kirpal, learned Counsel, appearing for the Appellant submitted that all the three mutual funds are open ended mutual funds providing easy entry and exit to the investors, by the very statutory nature of the open ended schemes. He submitted that all the three schemes provided tax exemption on capital gains in terms of section 54EB of the Income Tax Act, 1961. Attention of the Tribunal was drawn to the provisions of section 54EB and the Government notification dated 19.12.1996 issued thereunder identifying long term-specified assets for the purpose of the section. He submitted that the units with 7 years lock in period issued by Respondent mutual funds were long term specified assets for the purpose of availing exemption from capital gains tax as provided under section 54EB. Referring to sub section (2) of the said section 54EB, learned Counsel submitted that the sub section provided an exit route to those who did not want to avail of the tax exemption benefit under sub section (1). If the intention of the legislature was to freeze the specified assets for 7 years as such, sub section (2) would not have been incorporated in the section. Sub section (2) knocks of the eligibility for exemption provided in the section in case the long term specified asset is transferred or converted into money at any time within a period of seven years from the date of its acquisition. Shri Kirpal submitted that sub section (2) suggest that the assessees are at liberty to forgo the benefits at any time and suffer the consequences. Since the Appellant had for sufficient reasons, decided to give up the benefit provided by the section, and that the Appellant was ready to face the consequences provided under sub section (2), it was entitled to get the units redeemed as if there was no lock in bar and Respondent mutual funds had no right to deny redemption. The liability to pay tax is, if at all, a matter between the Income Tax Department and the assessee. The mutual funds should not be concerned with the same. In this connection he stated that any circular or clarification issued by the tax authorities contrary to the legal position flowing from the statute is of no force as stated by the Bombay High Court in Air India Vs. V.K.Srivastava, CIT & Others, (1995-(213)-ITR 0739 – Bom).

Shri Kirpal submitted that while other mutual funds, most particularly, the Unit Trust of India, have been

redeeming units on demand regardless of the fact that the unit holders had originally sought to avail of the benefit under section 54EB agreeing to lock in the units for a period of seven years, Respondent mutual funds, in total disregard to the provisions of sub section (2) declined to redeem the units. Learned Counsel submitted that the requirement of a lock in period has no independent or meaningful existence or relevance except qua the provisions of section 54EB of the Income Tax Act, whereby an investor had sought the tax benefit. If one had waived the said benefit, there can be no compulsion to hold on the specified assets.

Learned Counsel submitted that all the three schemes being open ended schemes provided liquidity by agreeing to repurchase the units at a price linked to the NAV prevailing on the relevant date. He submitted that since the governing law itself provides for encashment without any restriction, Respondent mutual funds cannot impose restriction on redemption of their own. Shri Kirpal further submitted that the restrictive provision in the scheme that the unit will be locked in for 7 years is contrary to the provisions of section 23 of the Indian Contract Act. The offer document cannot be contrary to the Regulation. The rights given to the investor under section 54EB (2) of the Income tax Act cannot be taken away by the Respondents, by imposing contrary conditions. He submitted that permitting a mutual fund to claim to be an open ended scheme and at the same time allowing it to put restrictions which are not compatible with the basic characteristics of an open ended scheme would be contrary to the letter and spirit of the Regulation. The right conferred on the Appellant to redeem the units flowed from the Regulation and that right cannot be denied by Respondents.

Learned Counsel drew the Tribunal's attention to the affidavit dated 19.7.2000 filed by Respondent 1 in the Delhi High Court in CWP 1794/2000 and also to the impugned order to demonstrate that the Respondent had taken inconsistent stand on the issue of easy redemption of units. According to the learned Counsel before the Delhi High Court the Respondent had stated that having regard to the open ended nature of the schemes as defined under the Regulation permitting easy entry and exit route to the unit holders on daily repurchase on continuous basis, the investors are entitled to encash the units prematurely. But in the impugned order an entirely different view was taken ignoring the said correct legal position and the Appellant's request for redemption was rejected. Shri Kirpal submitted that the Respondent's reading of clauses in the offer document in the scheme of Respondent mutual funds 3 and 4 as clauses prohibiting premature redemption of units is not correct. He further submitted that in the scheme of Respondent 2, having said there was no restrictive clauses preventing redemption of units in the offer document in the impugned order, the Respondent declined permission for redemption. The Respondent failed to appreciate that the clauses in the schemes were vague and inconclusive and did not apply the settled rule of interpretation of contracts, contra proferentem. The Respondent failed to appreciate that the offer documents are contracts of adhesion, which the Appellant was obliged to sign without any chance of negotiation or bargaining. Learned Counsel submitted that unreasonable, unjust or inequitable terms in such contracts are liable to be read down.

Shri Kirpal further submitted that the redemption value payable by a mutual fund is the NAV prevailing on the date on which redemption is sought. Even though the Regulation is clear on this point, Respondent 1 for no rhyme or reason viewed that the Appellant cannot be paid so, as the NAV at the time of seeking redemption was higher than the present one and if at all the units are to be redeemed, the redemption value will be based on the current NAV. Learned Counsel submitted that decision of Respondent 1 on the Appellant's representation was more on emotive grounds than on any legal basis and the Respondent was swayed by the notion of public interest, little realising that public interest would not have in any way adversely effected by upholding the Appellant's genuine representation.

Shri Krishna Mohan, learned Representative of Respondent 1, referred to the definition of the term 'open ended scheme' in regulation 2(s) and submitted that all the three schemes in which the Appellant had invested funds are open ended schemes. He submitted that the requirement of 7 years lock in period was an option made available to benefit those investors who wanted exemption under section 54EB. He submitted that if the schemes as a whole are taken into consideration, it could be seen that they retained the open-ended nature. An open-ended scheme providing an option to investor will not change the basic characteristic of the scheme. He further pointed out that the three schemes are not the only open ended schemes in the mutual fund industry providing benefits to the investors, linked to fulfillment of certain conditions, that there are several schemes in operation providing benefit under section 54EB with lock in restriction on redemption. As an example he cited the Equity Linked Saving Schemes in vogue, which though open ended as such, put restrictions on redemption by prescribing lock in period. These schemes are legally recognised and also patronised by large number of investors without any demur.

Countering the Appellant's version that an open ended scheme cannot have any restrictive provisions on redemption, Shri Krishnamohan further submitted that such a proposition is not sustainable as there is no prohibition under the Regulation on mutual funds, providing reasonable optional conditions for the benefit of the investors. Shri Krishna Mohan submitted that the Respondent lacked authority to issue any direction to Respondent mutual funds against the government policy as reflected in CBDT's clarification dated 28.6.2000 received by it on premature redemption of units carrying 7 years lock in period. He produced a copy of CBDT's letter and said that contents of the same were made known to the Appellant and Respondent mutual funds at the time of hearing granted to them, while deciding the representation. He referred to the said letter, in particular paras 4 and 5 which clarified CBDT's stand that the 7 years lock in stipulation was made in view of the underlying policy decision that exemption from capital gains provided for in sections 54EA and 54EB is aimed at giving an impetus to investment in the priority sectors of the economy and consequently premature redemption or transfers within the lock in periods, which could disturb the developmental activities should not be allowed. The letter further stated that the provisions of sub section (2) in 54EA and 54EB cannot be interpreted as allowing any redemption or repurchase of the specified securities. The intention is clearly to ensure that a person who had availed of the benefit of exemption from capital gains tax by investing in specified securities should not, under any circumstances get the added benefit of utilisation of the same funds in more gainful avenues before the expiry of the specified periods. The provisions of sub section (2) cannot be stretched so far as to take the view that the legislative intent was to allow the premature investment. In this context the learned Representative cited the observation of the Supreme Court in K.P.Verghese Vs. I.T.O Ernakulam [(1981) 131 ITR 597 (SC)] in support that the clarification given by the concerned administrative authority should be given due weight. The learned Representative drew the Tribunal's attention to the Court's observation (at page 612 of the ITR cited) relating to two circulars of CBDT, which the Court viewed that quite apart from the binding character they are clearly in the nature of contemporanea exposition furnishing legitimate aid in construction of the section. The rule of construction by reference to contemporanea exposition is a well established rule for interpreting a statute by reference to the exposition it has received from contemporary authority, though it must give way where the language of the statute is plain and unambiguous. He further submitted that as the Calcutta High Court held in Baleshwar Bagarti Dass [(1980) ILR-35 Cal) it is well settled principle of interpretation that Court's in construing a statute will give much weight to the interpretation put up on it, at the time of its enactment and since by those whose duty it has been to construe, execute and apply it. Shri Krishna Mohan submitted that thus, the views of CBDT, which is the administrative authority entrusted with the execution of the provisions of the Income Tax Act, need be given due weightage. Learned Representative further submitted that Respondent mutual funds are bound to go by the views of CBDT, failing which they will have to suffer the consequences. He also cited Supreme Court's observation in Ellerman Lines Ltd Vs. CIT Sest Bengal [(1971) 82 ITR 9B(SC)] wherein the Court had held that even if CBDT directions given in a circular clearly deviated from the provisions of Income Tax Act, yet that circular was binding on the Income Tax Officer. Shri Krishna Mohan stated that the import of the words "all units re-purchasable after a period of seven years" in the notification dated 19.12.1996 is that there is an embargo on Respondent mutual funds prematurely redeeming the units issued with lock in period of 7 years.

Shri Krishna Mohan submitted that if the Appellant is permitted to prematurely encash the units without waiting for the 7 years lock in period to expire, it would be detrimental to the interests of the remaining members of the scheme, since the investment strategy of Respondent mutual funds is based on the indication of fund availability reflected in the notification dated 19.12.1996 of CBDT that the funds mobilised under the schemes are refundable only after 7 years. Such premature redemption which was not envisaged at the time of the launch of the schemes would affect the long term investment strategy of the funds, bringing down the NAV of the schemes endangering the interests of other investors. It was also submitted that for any reason if it is held that premature redemption is permissible, the redemption price should be based on the prevailing NAV and not the one prevailed on 7.3.2000 i.e. the date on which the Appellant sought redemption.

Shri J.D.Dwarkadas, learned Counsel, appearing for Respondents 2 and 4 submitted that the Appellant's right to exit from the schemes at its will is not without any caveat. In an open ended scheme there is no fixed corpus or fixed number of units, that it is open ended in the generic sense because duration of the scheme is not specified and sale or purchase of units can take place on a continuous basis. An open ended scheme operates on the basis of the terms and conditions governing the scheme mutually agreed upon by the parties, under the regulatory frame work prescribed by SEBI. The concept of lock in period is in no way repugnant to the concept of an open-ended scheme. When an investor chooses to subject his investments to a specified lock in period to derive certain benefits, the scheme does not in any way cease to be an open ended one since the investor had only elected to defer his right to redeem the units. He submitted that it was not compulsory for every investor to agree to the lock in requirement. The

scheme provided entry and exit at will as well. However, if any body opted to keep the units locked in, by agreeing to defer redemption by 7 years, it is incumbent on him to honour the said contractual commitment. Learned Counsel submitted that the Appellant is not an ordinary investor, but a corporate entity with requisite expertise at its command to understand the terms and conditions governing investment in the units of the Respondents. Knowing well the requirement that the units are to be locked in for 7 years, as stated in the offer document etc., the Appellant opted for such units as found beneficial to it from the tax angle and decided to invest and agreed to abide by the explicit condition that redemption will be sought after 7 years. Change of mind after two years, for whatever reasons, does not absolve the Appellant from its contractual obligation and commitment to park the funds with the Respondents for a period of not less than 7 years.

According to the learned Counsel the Appellant's version that the offer documents of Respondent 2 did not contain any lock in requirement is contrary to factual position. He read out the relevant portion from the document relating to the requirement of section 54EB (2), in particular about the requirement of 7 years lock in period of units to avail the benefits under the said section. He also referred to the Account statement dated 10.3.2000 issued by Respondent 2 setting out therein clearly that the units have been issued to avail of benefit under section 54EB of the Income tax Act and are not re-purchasable/transferable till the expiry of 7 years from the date of allotment of the same. Further, he referred to item 6 of the application form, whereby the investors were to indicate as to whether they choose to avail of the benefits under sections 54EA or 54EB and the Appellant's affirmative answer thereto. It was made clear therein that by selecting the tax benefit option, the investor had to agree to abide by the lock in requirement and other conditions stipulated. Learned Counsel, further submitted that in the application form, the Appellant of its own free volition marked the choice expressing its willingness to avail of the exemption under section 54EB and abide by the conditions attached to the units issued for the purpose. He explained the sequence of steps leading to execution of the contract between the Appellant and the Respondents resulting in issuance of the units. The Respondents invited offers against the units available for sale, explaining the terms and conditions as provided in the offer of invitation. The Appellant offered to purchase the units by agreeing to the terms and conditions applicable as putforth by the Respondents in the document inviting offers for subscription and as reiterated in the application form etc. Having signed and delivered the application form together with the purchase consideration, the Appellant had unequivocally agreed to abide by the terms and conditions attendant to the transaction, including the requirement of seven years lock in stipulation. By accepting the Appellant's application containing its willingness to abide by the conditions, rules, etc. and issuing units in lieu of the funds received, Respondents accepted the Appellant's offer as expressed in the signed application form. According to the learned Counsel, as a result, a concluded and binding contract between the parties came into existence, where under the Appellant was, inter-alia, expressly bound itself to a lock in period of 7 years. The transaction thus having culminated into a binding contract, it was no longer open to the Appellant to resile from or revoke its offer as contained in the application form. He reiterated that the relationship between the Appellant and the Respondents is purely contractual and governed by the terms and conditions agreed to by the said parties. The purchase and redemption of units are as determined by the terms of the contract concluded between the parties. Shri Dwarkadas submitted that the Appellant is seeking to unilaterally vary the terms of a concluded contract, which is not permissible under section 62 of the Contract Act. In support of this, he cited Privy Council's decision in Y.A.J. Noorbhai Vs. S.P.L.K.R.Karuppan Chetty (AIR 1925 PC 232) and a Division Bench decision of Bombay High Court in Narayan Mahadeo Durve Vs. Moti Pannaji (AIR 1935 Bom 225)

Learned Counsel countering the Appellant's contention that the offer document is a contract of adhesion, which the Appellant was obliged to sign without any chance of negotiation or bargaining, submitted that as could be seen there was no compulsion from the Respondents on the Appellant to put its money in the schemes and that in view of its express election to avail of the tax benefit under section 54EB there can be no question of there being a contract of adhesion.

Yet another submission put forth by the learned Counsel was that the Appellant was estopped from raising the contention now that the units are prematurely redeemable. The Respondents had acted on the Appellant's representation that the fund was locked in for a period of 7 years and based on such an express understanding, they arranged their investment portfolio. In support, the learned Counsel relied on the Supreme Court decision in Delhi Cloth and General Mills Vs.Union of India (AIR 1987 SC 2414). Shri Dwarkadas further submitted that premature redemption of units would also result in grave consequences affecting the schemes, as the Respondents' entire investment strategy would be thrown into disarray affecting NAV of the fund to the detriment of other investors. Countering the Appellant's view, the learned Counsel submitted that since the object of providing tax benefit on investment in the units under section 54EB was part of a Government policy to encourage the public to invest in mutual

funds on a long term basis, permission for premature redemption of the units would in fact be contrary to public policy.

Shri Dwarkadas also referred to exhibit 4 of the reply filed by Respondent 3, which is a copy of the letter dated 19.7.2000 from CBDT to Meril Lynch Mutual Fund and submitted that in view of the clarification given therein that the units issued under section 54 EB of Income Tax Act are subject to lock in period of 7 years and cannot be redeemed prior to the said period, irrespective of whether the investor chooses to avail tax benefits under the section or not, the Appellant is not entitled to redeem the units. The Respondents 2 and 4 have also filed written submissions.

Ms Zia Mody, learned Counsel appearing for Respondent 3, submitted that she adopted the submissions made on behalf of Respondents 2 and 4,and supplemented the same as follows. She cited extensively from the offer document/ application form to show that the requirement of lock in of units to enjoy tax benefit was known to the Appellant, before investing in the scheme. She submitted that the scheme provided investment opportunity for the benefit of those who desired to enjoy tax exemption, within the open-ended scheme as based on mutual agreement. Ms Mody cited the example of Public Provident Fund Scheme in this context. Referring to the guidelines for companies and mutual funds in respect of approved investments issued by CBDT annexed at p.26 of the Respondent's reply, she submitted that while public companies and financial institutions were required to obtain CBDT's specific approval for notifying investment instruments for the purpose of section 54EA/EB, mutual funds referred to in section 10 (23D) of the Income Tax Act were not required to make such application and obtain any specific approval. Mutual Funds were thus left to make their own terms and conditions. The Respondent had accordingly put the clause relating to lock in period as one of the terms of the scheme, so as to enable the investors to avail of the scheme to enjoy tax benefit under section 54EB. Referring to CBDT's notification dated 19.12.1996 she submitted that in the case of mutual funds, the mandate is absolute in nature and do not permit repurchase or redemption within the specified lock in period of 7 years. There is an absolute bar on the units being redeemed or repurchased by mutual funds before the expiry of the stipulated lock in period.

Referring to various CBDT notifications available at Annexure I to the Respondent's reply Ms Mody submitted that certain specified securities were clearly made non transferable/non-redeemable and in certain other cases there was no such stringent requirement. This distinction that the parties are free to take out the securities from the lock in status which are not specifically prohibited from being converted, and forego the benefits of exemption. 54EB (2) explains the relevance of sub section (2) to the section. Units of the Respondent's scheme have been put under the mandatory requirement of keeping under lock in stipulation for 7 years, as is evident from the description that 'units re-purchasable after a period of seven years' in the notification dated 19.12.1996. The Respondent is therefore under a legal disability from repurchasing or redeeming units, which are locked in and cannot accede to the Appellant's request for premature redemption. Further, referring to CBDT's letter dated 14.3.2000 available in the paper book, Ms Mody submitted that the Appellant had also accepted that ultimately CBDT's views alone will prevail in deciding the matter and that is why it approached CBDT for clarification. Even if the Appellant had not received any reply thereto till now as claimed, non receipt of clarification on the subject directly by it should not be a problem, as CBDT vide its letter dated 19.7.2000 addressed to Meril Lynch, in exactly identical set of circumstances, had viewed that it will not be in order to allow the investors to redeem their investments before the lock in period as provided under sections 54EA and 54EB of the Income Tax Act. She referred to Merril Lynch's letter dated 21.2.2000 to CBDT and the reply thereto available at Exhibits 3 and 4 of its reply. Ms Mody further submitted that it is not for the Tribunal to examine and decide the validity of the circular issued by CBDT, that the Tribunal is precluded from interpreting such a circular in any manner.

The dispute relates to denial of premature redemption of units issued by Respondent mutual funds, with the stipulation that the units will not be repurchasable within a period of 7 years from the date of the allotment. The Appellant had purchased units carrying such restriction on redemption, to avail of tax benefit on capital gains provided under section 54EB of the Income Tax Act, 1961, as units repurchasable after a period of seven years issued or to be issued by any mutual fund covered under sub section 23D of section 10 of the Income Tax Act were recognised as long term specified assets for the purpose of the said section. Before we proceed further in the matter, it is felt necessary to have a brief idea of the nature of mutual funds and their operation.

Mutual funds are regulated by Respondent 1 in exercise of the powers conferred on it by section 11 (2)

(c) of the Securities and Exchange Board of India Act, 1992 (SEBI Act). Section 11B of the said Act empowers the Securities and Exchange Board of India (SEBI) to issue appropriate directions to mutual fund(s) in the interest of investors. To regulate the working of mutual funds, Securities and Exchange Board of India (Mutual Fund) Regulations has been notified by the Respondent. The Regulation which originally notified in 1993 was repealed and a new set of Regulation viz. Securities & Exchange Board of India (Mutual Fund) Regulations, 1996 (the Regulations) was brought in its place with effect from 1.10.1996. The Regulation has been amended on a couple of occasions According to section 12 of the Act, mutual funds are required to be registered with the Respondent, to be eligible to carry on the activities of a mutual fund. A mutual fund, according to the Regulation, "means a fund established in the form of a trust to raise monies through the sale of units to the public or a section of the public under one or more schemes for investing in securities, including money market instruments". To put it in a simplistic way, mutual fund is an investment outfit of the investors, for the investors. Investment operations of mutual funds are managed by Asset Management Companies. There is an element of commonality in the objective of all the mutual funds by their very nature i.e., provide maximum benefit to the investors with minimum risk. One cardinal principle governing the scheme is that no one should be permitted to have undue gain or unfair advantage over other fellow investors similarly placed. In a sense the ground rules are provided in the Regulation with umpiring role in SEBI.

The Regulation recognizes two types of mutual funds viz., ‘close ended’ mutual funds and ‘open-ended’ mutual funds. A close ended scheme means "any scheme of a mutual fund in which the period of maturity of the scheme is specified" "An open ended scheme" is one "which offers units for sale without specifying any duration for redemption". Unlike open-ended mutual funds, close-ended schemes generally do not issue new units to investors nor do they redeem units from the sellers periodically. Rather, the units can be traded on stock exchanges like any other stock. Open-ended schemes are patronised more at present. According to the information published by Association of Mutual Fund in India as on 31.3.2000, net assets of open-ended schemes was to the tune of Rs.68, 833 crores accounting for about 61% of the total net assets of all the mutual funds.

A mutual fund entity is at liberty to start more than one scheme. Prior approval of the scheme by the Trustees of the mutual fund and filing a copy of the offer document with SEBI are preconditions to be fulfilled before launching any scheme by a mutual fund. Though the statutory definition of an ‘offer document’ simply describes it as "any document by which a mutual fund invites public for subscription of units of a scheme", it is a very important document, not only from the disclosure angle, but from the legal point of view also. Offer document amongst other matters contains the terms and conditions subject to which units are offered for sale. An offer document in several aspects is akin to ‘prospectus’ provided under the Companies Act, used for inviting offers from the public for subscription of shares. Regulation 29 (1) stipulates that offer document should contain disclosures which are adequate in order to enable the investors to make informed investment decision. SEBI is empowered in terms of sub regulation (2) of regulation 29, in the interest of investors, to require the asset management company of the mutual fund to carry out such modifications in the offer document as it deems fit. However, in case no such modifications are suggested within 21 working days from the date of filing the offer document with SEBI, the same can be issued without waiting any more for the Board’s response. Sub regulation (4) of regulation 29 mandates that every application form should without fail accompany a memorandum containing such information as may be specified by SEBI. SEBI has already specified an exhaustive standard offer document and an abridged memorandum containing key information. This abridged information capsule is meant to serve as an instant referencer to benefit those who are desirous of investing in the units offered by mutual funds.

There are certain specific disclosures, having a bearing on the contention of the parties in the appeal. In para X of the standard offer document under ‘units and offer’, restrictions, if any, on the right to freely retain or dispose of such units are required to be stated (item ix). In terms of para XVIII under ‘information required to be furnished on redemption or repurchase’ following details are required to be briefly stated:

(a) the basis and the manner of determination of redemption and repurchase price of the units in terms of the Regulation

(b) all procedures for determining the redemption and or repurchase price of the units, any restrictions thereon and any changes that may be attendant upon redemption and for terminal redemption

(c) all statutory restrictions governing the redemption and repurchase of units

(d) the names of the centres where redemption can be effected.

Vide regulation 18 (15A) Trustees of mutual funds are required to ensure that no change in the 'fundamental attributes' of the scheme affecting the interests of the unit holders is effected without notifying the proposed change to each unit holder and giving him an option to exit from the scheme at the prevailing NAV. SEBI has clarified the terms of issue of units like liquidity provisions such as listing, repurchase, redemption etc as fundamental attributes.

Having seen the regulatory regime under which mutual funds operate, now let us see the specific terms and conditions governing the schemes of Respondent mutual funds, having a bearing on the issues raised in the appeal. It is an admitted fact that all the three schemes of Respondent mutual funds are open-ended schemes and the Appellant had invested therein as stated earlier. All the three schemes provided 'long term specified assets' in the form of 'units re-purchasable after a period of seven years', designed for the benefit of those seeking exemption from capital gains tax as provided in section 54EA and section 54EB of the Income tax Act. Extracts from the offer documents/ application forms of the schemes floated by Respondent mutual funds, considered relevant for the purpose are furnished below:

Respondent 2

In the 'Account Application' it has been stated under the "investment objectives" that Templeton India Growth fund is a "perpetual open ended scheme seeking to provide long term capital growth to its unit holders". Under the heading "Redemption" it has been stated that "the units of the scheme can be sold back to the fund on any business day at the applicable NAV……". Under the heading 'Taxation' it has been stated that "under section 54EB of the Act, where a long term capital asset is transferred by the unit holder and whole or any part of the net consideration is invested in units of the scheme, or bonds and debentures specified by CBDT, the unit holder can claim exemption from capital gains tax. The tax benefit is subject to the lock in period of 7 years and other terms and conditions specified therein"

Under step No. 6 of the instructions appearing on the application form under the head "tax considerations, (section 54EA/EB)" it has been stated that investors planning to avail tax benefits under section 54EA/EB should indicate their choice by ticking in the "appropriate box". In the application form under step 6 on tax considerations "appropriate box" has been given and after providing the "appropriate boxes" it has been stated that "by selecting such an option the party agrees to abide by the lock in and other conditions stipulated under section 54EA/EB of the Income Tax Act, 1961. Step No. 7 requires the applicant subscriber to state that "having read and understood the contents of the offer documents of the scheme the application is made for the units". It is also required to state that the applicant agrees to abide by the terms, conditions, rules and regulations of the respective schemes.

Respondent 3

In para 5.3.2 of the offer document it has been stated that investors who would prefer capital appreciation can opt for the Growth Plan. The Scheme will not declare dividends under the Growth Plan. Unit holders who opt for this plan will not receive any income from the Scheme. Instead the income earned on their units will remain invested within the scheme and will be reflected in the Net Asset Value.

The Dividend Plan and the Growth Plan are also available for investors who wish to take advantage of the exemption on capital gains tax afforded through Section 54EA and section 54EB of the Income Tax Act, 1961. An investor may opt for the Dividend Plan and/or the Growth Plan while indicating that the investment is being made under section54EA or section 54EB of the Income Tax Act, 1961. Please see section 9, Taxation for a further explanation of Section 54EA and 54EB".

Under para 5.3.4 captioned "Important information for investors who wish to make a section 54 EB investment", it has been stated that unit holders who chose to invest the whole or part of the capital gains from the transfer of a long term capital asset in units that are required to be held under the Income Tax Act, 1961 for a period of seven years can avail of this benefit. The scheme will declare dividends for Unit holders as per the dividend policy in section 8, Dividends. After the seven-year period has elapsed

Unit holders may redeem their Units at the then prevailing NAV consistent with the redemption procedure stated in section 6, Redemption (i.e. Liquidity Provisions) of this offer Document. On redemption after seven years, the original capital gains amount invested will be exempted of any capital gains tax. The difference between the amount received on redemption and the original capital gains invested will be subject to capital gains tax as per section 112 of the Income Tax Act, 1961.

In para 6 under "Redemption" (i.e. liquidity provisions) it has been stated that "on any business day investors may redeem their units and the scheme will buy back the units at the applicable Net Asset Value per unit…….".

The offer document further states under the heading "Automatic Withdrawal Plan" in para 6 that "the scheme offers an Automatic Withdrawal Plan (AWP). Investors who have made investments in the scheme under section 54EA or 54EB of the Income Tax Act, 1961, should note that the AWP will not be available to them during the stipulated lock-in period".

Under para 6.9.1 "Switching Option – Inter scheme" it has been stated that unit holders who have made investments under section 54EA and EB will be permitted to switch only after the completion of their respective lock in periods.

As regards taxation, in the offer document in para 9 (2b) it has been stated that "under section 54EB of the Act, capital gains arising from the transfer of long-term capital asset (on or after October 1, 1996) shall be exempt from tax if the assessee invests within a period of six months after the date of transfer the whole of capital gain in any of the specified assets as specified by the Central Board of Direct Taxes (CBDT) in this behalf by notification in the Official Gazettee (hereinafter referred to as the long term specified assets). Where only a part of the capital gain is so invested, then capital gain proportionate to the amount invested will be exempt. Where the long term specified assets are also eligible for rebate of income tax under section 88 of the Act, the said rebate will not be allowed, if the exemption is available under section 54EB of the Act. If the long term specified assets so purchased are transferred or any loan or advance is taken on the security of such long term specified assets within a period of three years from the date of their acquisition, capital gain originally exempted shall be taxable as long term capital gain of the previous year in which the long term specified assets are transferred or any loan or advance is taken on the security of such long term specified assets.

Under section 54EB, by notification No.10247 dated 19.12.1996 CBDT has specified that all units, re-purchasable after a period of seven years, issued or to be issued by any Mutual Funds referred to in clause (23D) of section 10 of the Income Tax Act, 1961 are long term specified assets for purposes of section 54EB of the Act.

An investor is required to give an undertaking to the effect that he having read and understood the contents of the offer document application is made for the units and that he agrees to abide by the terms, rules and regulations of the scheme.

Respondent 4

It has been stated in the offer document under the heading "Terms of the scheme" on ‘liquidity’ that the scheme will offer for sale and redeem units on every business day not later than 30 days after the close of initial offer period, that the units can be redeemed (i.e. sold back to the fund) on every business day at the redemption price, that the redemption request can be made for any amount from Rs. 500 or more and that the redemption price will be at NAV based prices.

Under heading ‘54EB investment plan’ it has been stated that unit holders who chose the plan may invest the whole or part of the capital gains arising from the transfer of a long term capital asset in the units of the scheme. However, investor should note that the amount so invested would have to be locked in for a period of 7 years and the units so allotted can not be redeemed or switched to another scheme, during the lock in period of 7 years. This is subject to any change that may be affected in the Income tax Act, 1961.

After the prescribed lock in period has elapsed unit holders may redeem their units at the applicable NAV based prices consistent with the redemption procedure stated in redemption of units. The difference between the amount received on redemption and the original amount invested will be subject to the capital gains tax as per section 112 of Income tax act, 1961.

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The stipulated lock in period would be subject to any changes that may be affected in Income tax Act, 1961 including section 54EA and EB.

Under the heading ‘redemption of units’ it has been stated that investors should note that the amount invested u/s. 54EA and EB will have to locked in for a period of 3 years and 7 years respectively and the units so allotted cannot be redeemed during the specified lock in period".

It is seen that as in the case of the other two mutual funds, in he Respondent’s scheme also investor was required to state that having read and understood the contents offer document he applied for the units and that he agreed to abide by the terms, rules and regulations of the scheme.

Since the bone of contention is the scope and effect of section 54EB of the Income Tax Act, 1961, extract from the said section, considered relevant in the context is furnished below:

> " 54EB (1) Where the capital gain arises from the transfer of a long-term capital asset (the capital asset so transferred being hereafter in this section referred to as the original asset), and the assessee has, at any time, within a period of six months after the date of such transfer invested the whole or any part of capital gains, in any of the assets specified by the Board in this behalf by notification in the official Gazette (such assets hereafter in this section referred to as the long-term specified asset), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say,-
>
> > (a) if the cost of the long-term specified asset is not less than the capital gain arising from the transfer of the original asset, the whole of such capital gain shall not be charged under section 45;
> >
> > (b) if the cost of the long-term specified asset is less than the capital gain arising from the transfer of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of acquisition of the long-term specified asset bears to the whole of the capital gain , shall not be charged under section 45.
> >
> > Explanation- "Cost", in relation to any long-term specified asset, means the amount invested in such specified asset out of capital gains received or accruing as a result of the transfer of the original asset.
>
> (2) Where the long-term specified asset is transferred or converted (otherwise than by transfer) into money at any time within a period of seven years from the date of its acquisition, the amount of capital gains arising from the transfer of the original asset not charged under section 45 on the basis of the cost of such long-term, specified asset as provided in clause (a) or, as the case may be. Clause (b) of sub-section (1), shall be deemed to be the income chargeable under the head "Capital gains" relating to long-term capital assets of the previous year in which the long-term specified asset is transferred or converted (otherwise than by transfer) into money.
>
> > Explanation: - In a case where the original asset is transferred and the assessee invests the whole or any part of the capital gain received or accrued as a result of transfer of the original asset in any long-term specified asset and such assessee takes any loan or advance on the security of such specified asset, he shall be deemed to have converted (otherwise than by transfer) such specified asset into money on the date on which such loan or advance is taken."

Government Notification dated 19.12.1996 specifying the assets for the purpose of investment under section 54EB also being relevant, text of the same is extracted below:

> "In exercise of the powers conferred by sub-section (1) of section 54EB of the Income Tax Act, 1961 (43 of 1961) the Central Board of Direct Taxes hereby specifies the following assets, referred to as the long term specified assets, for the purposes of the said section, namely;
>
> > (a) deposits for a period of not less than seven years with the State Bank of India established under the State Bank of India act, 1955 (23 of 1955) or any subsidiary bank as defined in the State Bank of India (Subsidiary Banks) act, 1959 (38 of 1959), or any nationalised bank, that is to say, any corresponding new bank, constituted under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970) or any co-operative society engaged in carrying on the business of banking (including a co-operative land mortgage bank or co-operative land development bank);
> >
> > (b) all bonds, redeemable after a period of seven years, issued or to be issued by the Housing and Urban Development Corporation Limited, New Delhi;
> >
> > (c) all units re-purchasable after a period of seven years, issued or to be issued by any mutual fund (including the Unit Trust of India) referred to in clause (23D) of section 10 of the Income tax Act." (emphasis supplied)

As already stated above there is no dispute as to whether the schemes of mutual funds in which the Appellant had invested, are open-ended or not. Apart from admission, it has been clearly stated in the offer documents that these schemes are open ended. It is also an admitted fact that investment was made in the units re-purchasable after a period of 7 years of the allotment. It has also been admitted that the investment in the said long term specified assets enabled the Appellant to enjoy the benefit of exemption from capital gains tax in terms of section 54EB of the Income Tax Act. Though the Appellant had not disputed the existence of the lock in provision attached to the units issued by Respondents 3 and 4, it was contended in the case of units issued by Respondent 2 that there was no such restriction. This contention is contrary to facts. It has to be remembered that in the Appellant's own version, investments were made in all the three schemes as a tax saving measure. That tax saving was available only to the units which were not re-purchasable before seven years. Further, on a perusal of the abridged offer document and the application form and account statement of the said Respondent, it is clear that the scheme had attached restrictive provision of lock in for 7 years on the units in which investment was to be made for the benefit of tax exemption. It is to be noted that the Regulation providing for open-ended schemes was already in operation on 1.10.1996 i.e. the date from which the Regulation was made effective. Government notification dated 19.12.1996 does not distinguish the units of open ended and close ended mutual funds. All that is required, to be considered as a long term specified asset for investment is that the units should be issued by a mutual fund recognised under section 10 (23D) of the Income Tax Act and those units are re-purchasable only after 7 years from the date of allotment. Restriction on repurchase within 7 years is a condition attached to the unit at the time of issue to qualify it to be a long term specified asset and it will continue to be so, irrespective of the fact that the investor purchased the same for tax benefit or for some other purpose.

In fact the Appellant itself in its petition before the Delhi High Court, had admitted that the liability to pay tax is, if at all, a matter between the Income Tax Authorities and the Appellant and Respondent mutual funds are not to be concerned with the same. Precisely that is the contention of the Respondents also. They had stated that they are not concerned about the Appellant availing or not availing the benefit of tax exemption on capital gains. They are concerned about the need for adherence of the condition attached to the units issued to the Appellant. In fact on a perusal of sub section (2) of section 54EB, extracted above it is seen that the said sub section only talks about the consequences that would visit the assessee in case the long term specified asset is prematurely converted into money. It does not attach any obligation on the mutual funds to repurchase the units contrary to the terms of issue of the units to facilitate the assessees to redeem the units, in case the assessees want to forgo the benefit of capital gain tax exemption.

The basic character of the unit carrying lock in restriction cannot be altered after allotment just to meet the individual requirement of the purchaser of the unit. It is to be remembered that it is not due to the Appellant opting for section 54EB, the units became specified assets. It is the other way round. As the units fitted into the qualification prescribed for the long term specified assets vide government notification dated 19.12.1996, the Appellant opted to purchase the same so as to avail of the benefit under section 54EB. It cannot be said that the moment the Appellant decided voluntarily to forgo the benefits provided

under section 54EB, automatically the character of the long term specified assets also changed. The Appellant had enough choice – a variety of long term specified assets – before it as could be seen from the notification, but it preferred the units carrying restriction on redemption, in its own wisdom. Before purchasing the units, Appellant knew very well the conditions attached to it. It may not be forgotten that the purchase of the units was based on a firm contract entered into between the Appellant and each of the Respondent mutual funds. In this context it is pertinent to mention the well-settled principle that a contract to purchase shares in a company is concluded by allotment of shares issued under the prospectus. This view has the support of the Supreme Court decision in N. Parthasarathy Vs. Controller of Capital Issuer [1991(3) SCC 153]. The whole process of coming into existence of a contract in such a context has been explained by Madras High Court in Official Liquidator of Bellary Electric Supply Co.Ltd Vs. Kanniram Rawoothmal (AIR 1933 Mad 310) that the application for subscription is an offer and the contract is concluded when the company or intermediary accepts the offer by allotting the shares applied for and communicates the investor. Though the said Court decisions are with reference to issue of shares of companies through prospectus, the principle is applicable to issue of units to investors in response to the application made by them for units, responding to mutual funds' invitation seeking offer from the public to buy units. By accepting the offer and by allotting the units a firm contract binding on the parties came into being. One cannot ignore the rights and liabilities arising out a valid contract. Unilaterally one cannot vary the terms and conditions of the contract entered into between the parties. The following principle laid down more than a century ago in Printing and Numerical Registering company Vs. Sampson (1875) LR 19, 462 at pg 465, in the words of Jessel MR, is relevant even today.

> "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract".

The Appellant's contention that since open-ended scheme providing unrestricted entry and exit facility to the investors cannot have a restrictive provision denying right of redemption for a period of 7 years, is untenable. On a perusal of the Regulation it is clear that the mutual funds have been given considerable flexibility in operating and managing their schemes. As far as disclosure requirements are concerned no such flexibility is available. Requirements are stringent. It is a measure of protection to investors. Requirement of disclosure of material facts governing the scheme has been given utmost weightage, as is evident from the mandate in regulation 29 (1) that the offer document shall contain disclosures which are adequate in order to enable the investors to make informed investment decision. Precisely that is why the standard offer document has been designed by SEBI and the stipulation for filing the same with it before issue of units, reserving the right to suggest modification which the concerned mutual fund is required to incorporate in the document. It is a must that investors should be pre informed of the terms and conditions governing the investment in the scheme. Since the mutual funds are required to state in the offer document as per the standard offer documents the restrictions, if any, on the right of disposal/redemption of the units, it is to be believed that mutual funds are entitled to put reasonable restrictions on the redemption of units. Further, since the offer documents containing restrictive provisions were submitted to SEBI by Respondent mutual funds and that SEBI, the statutory regulatory authority of mutual funds, had not suggested any change therein, need also be noted. In these circumstances, it can be safely concluded that the restrictive provisions attached to the units, stated in the offer document are in order.

Shri Kirpal had submitted that the restriction on redemption attached to the unit is against the provisions of section 23 of the Contract Act. It appears from the language used in section 23 that it would apply only if the consideration or object of the agreement is unlawful in the sense that it is forbidden by law or is faudulent or involves or implies injury to person or property to another or in the opinion of the Court is immoral or opposed to public policy. As none of these elements has been established, it is difficult to hold that the underlying contract between the Appellant and Respondent mutual funds is opposed to section 23 of the Contract Act, as alleged by the Appellant.

It is clear that the schemes are open ended and the investors were at liberty to enjoy the facility available to them under such open ended scheme that the restriction on redemption was only in the event of investors choosing to invest in those units falling in the category of long term specified assets. The Respondent mutual funds provided an option to lock in the units for 7 years to those desiring of availing the benefit of capital gains tax under section 54EB of the Income Tax Act. It is not that such a condition on redemption of units was imposed on everybody or on the Appellant in particular. Such a facility was offered and the Appellant of its own opted to have it for its own benefit. The schemes appear to be

"open ended cum tax benefit schemes".

It is a well-settled principle that a legal right can be given up provided its being giving up under a contract is not hit by section 23 to the Contract Act. Assuming for a while that the open ended scheme as such gave the Appellant liberty to exit at its will, that liberty has been waived by the Appellant by agreeing to keep the units frozen for a period of 7 years. The proposition that a contracting party can waive the statutory benefit in certain circumstances has been upheld by the Supreme Court in Lachoomal Vs. Radheshyam (1971 (1) SCC 619). The Court had held that if a provision is enacted for the benefit of a person or class of persons there was nothing, which precludes him or them from contracting to waive the benefit. While reaching at the said conclusion the court had referred to the following paragraph in Halsbury's Law of England, Third Edn. (para 248 at page 143).

> "As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to the public policy. Statutory conditions, may, however, be imposed in such terms that they cannot be waived by agreement, and in certain circumstances, the Legislature has expressly provided that any such agreement shall be void"

In this context it is also pertinent to note the following extract from 'Craies on Statute Law', 7th Edn, pp 269-270 as quoted by the Supreme Court in Muralidhar Aggarwal's case (1974) 2 SCC 472 at pg. 480).

> "If the object of a statute is not one of general policy or if the thing which is being done will benefit only a particular person or class of persons then the conditions presented by the statute are not considered as being in dispensable. This rule is expressed by the maxim of law, *quilibet protest renuntiare juri pro se introducte*. As a general rule, the conditions imposed by statutes, which authorise legal proceedings are treated as being indispensable to giving the court jurisdiction. But if it appears that the statutory conditions were inserted by the legislature simply for the benefit of the parties to the action themselves, and that no public interests are involved such conditions will not be considered as indispensable and either party may waive them without affecting the jurisdiction of the court……."

In the Maxwell's Interpretation of Statutes, ed. (1962) pp 2375-376 it has been stated:

> "Another maxim which sanctions the non observance of a statutory provision is that *quilibet licet renuntiare juri pro se introducte*. Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy. Wherein an Act there is no express prohibition against contracting out of it, it is necessary to consider whether the Act is one which is intended to deal with private rights only or whether it is an Act, intended as a matter of public policy, to have a more extensive operation".

So the question is whether the Regulation prescribing the characteristics of open-ended scheme was made for the benefit of the investors in the mutual funds or whether there is a wider public policy underlying it which precludes an investor from waiving the benefit. On a careful perusal of the Regulation it is clear that the Regulation has limited scope in its application. It is meant to protect the interest of investors participating in the mutual fund scheme, it is intended to protect the private rights of the investors. A benefit normally available to an investor in an open ended scheme to redeem the funds invested in the units free of restriction if dispensed with by him for his own benefit, would not be infringing any public policy. In the instant case the Appellant had consciously waived its unrestricted right of redemption and opted to accept units bearing restrictive provisions on redemption to enjoy the benefit of tax exemption. It has been stated in "Chitty on Contracts" that "waiver is the abandonment of a right, which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to release. It signifies nothing more than an intention not to insist upon the right. It may be deduced from acquiescence or may be implied (Chitty on Contracts 28th Edn. Vol.I para 23 – 040). In the instant cases, it is seen that the Appellant had explicitly waived the said right by subscribing to the condition in the agreement, under lying the purchase of the units. In fact the Appellant also had admitted before the Delhi High Court, in the context of it waiving the benefit available under section 54EB, that any provision of law which is neither mandatory nor is a matter of public policy can be waived (para 0-p 2.7 of the WP). The right of easy exit normally available to an investor in an open-ended scheme was waived by the Appellant to avail of another benefit. In the light of the above discussion it is difficult to agree with the Appellant's view on the legal sustainability of the provision in the scheme keeping units under specified lock in period. It can be safely concluded that since the Appellant had accepted the said restrictive provision fully

knowing the implications, it had waived its right of redemption normally available to the investment in the units of an open ended scheme, as envisaged under the Regulation.

It cannot be said that giving an option to an investor in tune with the tax law would frustrate the SEBI Act or the Regulation. The fact that it was only an option is writ large on the face of the documents itself. The documents, clearly provide for redemption of units on a day to day basis based on the prevailing NAV. Deferment of redemption of locked investment is a specific one applicable only to those who had elected to take advantage of the tax benefits. In fact what the mutual funds had offered is a product to meet with the requirements of the eligibility criterion of long term specified assets stated in the government notification dated 19.12.1996 and it was left to the investor to invest therein or go for 'the plain vanila units' available without any such restrictions. I do not see any force in the Appellant's contention that an option providing lock in period for investment as provided in the schemes is against the very nature of the scheme and against the law governing the scheme.

The submission that the Appellant had invested in the long term specified assets only to avail tax benefit provided under section 54EB and in the event of giving up the said benefit it is not necessary to hold on the specified securities for the rest of the lock in period and that any view contrary to the same would defeat the very purpose of the provisions of section 54EB (2) providing the exit route is lacking force. There is no doubt that to avail the benefit of exemption from capital gains tax, one is required to invest in the long term specified assets prescribed by the Government. Sub section (2) explains the consequences of not adhering to the requirement of keeping the long - term specified asset on hold till the expiry of the stipulated period. It does not mandate any course of action on the concerned mutual funds, which had issued the units. The Government notification dated 19.12.1996 has inter alia recognised "units repurchasable after a period of 7 years issued or to be issued by the mutual funds" as one of the long term specified assets for the purpose of section 54EB. What is to be remembered in this context is the scope of section 54EB read with the said Government notification. Specified asset is the "product" in which long term investment is required to be made to avail of tax exemption and since the recognised mutual funds have also been provided opportunity to provide the long term specified assets in their units by providing 7 years lock in period, guided by their own business interests they offered a tailor made "product" in the market along with the other customary 'products'. The Appellant invested its funds in the 'tailor made units' or say in those 'designer units' to claim exemption. It is incorrect to say that as a result of investment in the units, lock in period was attracted. It is the other way around, as the unit was repurchasable after 7 years of the issue, it became long-term specified asset and since it was a long term specified asset the Appellant decided to invest therein. In view of this, seven-year lock in period attached to the unit will not get detached, even if the investor decides to forgo midway the tax benefit under section 54EB. Seven-year restriction on redemption is a basic attribute of the unit made available to avail tax exemption. A product will not loose its characteristics only because the buyer of the same did not use it for the purpose for which it was purchased. The Appellant had contracted with Respondent mutual funds while buying the units agreeing that redemption of the same will be deferred for a period of 7 years and such a valid contract under lying the transaction between the Appellant and each of the Respondent mutual funds cannot be unilaterally changed at the will of the Appellant. The terms and conditions of the schemes do not confer on the Appellant any right to redeem the units before the expiry of the specified period.

It is also pertinent to mention that for whatever reason, CBDT has also taken identical view, as could be seen from its letter dated 28.6.2000 to Respondent 1 and letter dated 19.7.2000 addressed to DSP Merril Lynch in identical set of facts. In fact I find that the final conclusion arrived at by CBDT is in tune with the conclusion arrived at by me independently, on the premature redemption of the units. In this context it is pertinent to note that the Appellant itself had recognised CBDT as the proper authority to issue necessary instructions or clarifications relating to the provisions of section 54EB, as could be seen from the statement made by it in its Writ Petition in the Delhi High Court. The Appellant had also written to CBDT for clarification.

Ms Mody's submission that there is an express bar on the mutual funds redeeming the units issued with the clear understanding that they are purchasable after 7 years appears to be of some merit as could be seen from the expression 'units repurchasable after 7 years' used in the notification. On a perusal of the text of several notifications issued by the Government prescribing the long term specified assets for the purpose of section 54EB (1), furnished by Respondent 3 at Annexure 1 and 2 (at pg 20 to 24) to the reply, it could be seen that in certain cases there is a specific prohibition on the issuer of assets in transferring/converting/redeeming certain assets. But in certain cases it is not so as could be seen in the case of shares/bonds, etc. issued by certain companies or deposits made with Banks etc., and in such

cases there is no onus on the issuers to ensure that the specified assets are preserved for 7 years. This clearly suggests that certain specified assets, which are not specifically debarred from encashing within the 7 year period, though came under the category of long term specified assets the same can be encashed with attendant consequences. 54EB (2) talks about such assets, which are not specifically prohibited from encashing in the specified period. It cannot reach other assets specifically prevented from converting to money, etc. Expression "long term specified assets" need be taken into consideration while deciding the characteristics of 'units' and embargo on repurchase as stated in the notification. If the intention had not been to prohibit the mutual funds from redeeming the units, the expression 're-purchasable' would not have been used. 'Repurchase' of units is a function of the issuer mutual fund.

Referring to the submission made by the learned Counsel for Respondent 3 that, this Tribunal cannot interpret circulars and orders of CBDT, I would like to make it clear that the said submission is patently wrong. This Tribunal is competent to interpret the provisions of any statute, in case it is needed for the purpose of deciding the appeals before it. It is also stated that this Tribunal is not bound by the clarifications and instructions issued by the administrative authorities like CBDT, though the Tribunal will definitely give due weightage to the same while interpreting such statutes, rules and regulations, following the principle of contemporanea expositio as observed by the Supreme Court in K.P.Varghese's case (supra). However, the observation made by the Supreme Court in Ellerman's case (supra) relied on by Respondent 1 has no application to the Tribunal as the Tribunal is not "an officer or person employed in the execution of the Income Tax Act to observe and follow the orders, instructions and directions of the Central Board of Revenue".

The Respondent mutual funds had urged to dismiss the appeal on the ground that CBDT has not been arrayed as a respondent in the appeal, though it was a party before the Delhi High Court. This argument is devoid of any merit. The representation before Respondent 1 filed by the Appellant was not against CBDT and the Tribunal is not deciding an appeal in which any action or relief has been sought against CBDT. CBDT's presence before the Tribunal is not considered necessary to dispose of the present appeal.

The Appellant's contention that the offer document is a contract of adhesion which the Appellant was obliged to sign without any chance of negotiation or bargaining is contrary to the facts borne out of the records. As rightly pointed out by Shri Dwarkadas there was no compulsion of any sort from Respondent mutual funds on the Appellant to invest its funds in the units with the lock in period. The Appellant was at liberty to invest in the "plain vanila units" also available under the schemes, if it so wanted. The Appellant of its own volition opted for the 'designer product' to avail of the benefit of tax exemption. The Appellant being an institutional investor, with requisite expertise at its command cannot feign ignorance of the terms and conditions attached to the units offered by Respondent mutual funds. In fact there is a solemn statement from the Appellant in each of the three cases that it had read and understood the terms and conditions attached to the scheme and applied for the units. Further the Appellant had also agreed to abide by the terms, rules and regulations of the scheme.

The Appellant did not produce any evidence to show that other mutual funds and in particular Unit Trust of India were allowing premature redemption. The Appellant did not even produce offer document of any of those funds to show that the terms and conditions of those funds are identical to those in the offer documents issued by Respondent mutual funds.

I do not find any reason to disagree with the Respondents' submission that the Appellant is estopped from seeking premature redemption of the units as the Respondents had acted on the Appellant's representation that the units will remain 'locked in' for7 years. The investment portfolio of Respondent mutual funds was designed on the said representation. Withdrawal of funds at the mid stage of the schemes could disturb the investment portfolio of the scheme to the detriment of the other fellow investors of these schemes. Mutual funds, as stated earlier is a mutual scheme of the investors, for the investors. One cannot ignore the interests of other unit holders vis-à-vis the interest of the Appellant. Decision of the Supreme Court in Delhi Cloth & General Mills (supra) relied on by Shri Dwarkadas, supports the Respondents viewpoint. The Court had therein held:

> "All that is now required is that the party asserting the estopped must have acted upon the assurance given to him. Must have relief upon the representation made to him. It means the party has changed or altered the position by relying on the assurance or the representation. The alternation of position by the party is the only indispensable requirement of the doctrine. It is not

necessary to prove further any damage detriment or prejudice to the party asserting the estoppel. The Court, however, would compel the opposite party to adhere to the representation acted upon or abstained from acting. The entire doctrine proceeds on the premise that it is reliance based and nothing more. …….

The concept of detriment as it now stands is whether it appears unjust, unreasonable or inequitable that the promisor should be allowed to resile from his assurance or representation, having regard to what the promise has done or refrained from doing in reliance on the assurance or represenation".

The Appellant's contention that denial of premature withdrawal of funds would be contrary to public policy is of no merit. On the contrary the Respondents' submission that premature redemption would adversely affect the interests of other investors as the NAV of the fund will suffer as a result of such premature redemption is convincing. In fact from CBDT's letter dated 28.6.2000, relied on by Respondent 1, it is seen that the 7 year lock in period was stipulated by the Government in view of the underlying policy that exemption from capital gains provided in sections 54EA and 54EB was aimed at giving an impetus to investment in the priority sectors of the economy and consequently premature redemption within lock in period could disturb the developmental activities. In the said view of the matter in fact it will be against the public policy to release funds before the prescribed maturity period.

In the light of the facts and circumstances and the legal position discussed above, it is felt that the Appellant is not entitled to redeem before the stipulated period, the units attached with 7 years lock in period issued by Respondent mutual funds. Since it is concluded, that the Appellant is not at present entitled to prematurely redeem the units carrying 7 years lock in period in the schemes, the question as to at what NAV rate the units are to be redeemed has become redundant. Therefore, I am not expressing any view thereon.

For the reasons stated above the impugned order survives. The appeal is dismissed.

(C.ACHUTHAN)
PRESIDING OFFICER

Place: Mumbai
Date: February 15, 2001.