

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'E' NEW DELHI**

**BEFORE SHRI O.P. KANT, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER
[Through Video Conferencing]**

ITA No.4748/Del./2017
Assessment Year: 2013-14

ITO, Ward-13(1), New Delhi	Vs.	Nabinagar Power Generating Co. Pvt. Ltd., Core-7, Scope Complex, Industrial Area, Lodhi Road, New Delhi
PAN :AACCN9448C		
(Appellant)		(Respondent)

Appellant by	Shri Atiq Ahmed, Sr.DR
Respondent by	None

Date of hearing	13.04.2021
Date of pronouncement	11.05.2021

ORDER

PER O.P. KANT, AM:

This appeal by the Revenue is directed against order dated 30/05/2017 passed by the learned Commissioner of Income-tax (Appeals)-6, New Delhi [in short 'the Learned CIT(A)'] for assessment year 2013-14, raising following grounds:

1. *Whether on the facts and circumstances of the case, the Ld. CIT(A) is legally justified in deleting the addition of Rs.5,61,63,696/- and*

Rs.28,00,638 on account of interest received from bank and on advances to contractors respectively during the year by not appreciating the fact the provisions laid down in section 5 of the Income Tax Act, 1961 (the Act) wherein it has been clearly mentioned that the total income of a person includes all the income earned/received or deemed to be earned/received by the person in the previous year?

2. *Whether on the facts and in circumstances of the case, the Ld. CIT(A) is legally justified in deleting the addition of Rs.1,61,296/- on account of 'miscellaneous income' by sale of scrap even when the receipt was squarely covered under provision to section 5 of the Act r.w.s. 56(1) & (2) of the Act which says that the total income includes all the income earned/received or deemed to be earned/received by the persons in the previous year?*
3. *Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in deleting the addition of Rs.5,61,63,696/- and Rs.28,00,638/- on account of interest received from bank and on advances to contractors respectively by ignoring the findings of the Assessing Officer (the AO) recorded in assessment order that the assessee invested surplus funds which were not immediately required by it in FDRs and earned interest on it which clearly falls in the defining of 'income from other sources' as per sub section (1) & (2) to section 56 of the Act.*
4. *That the appellant craves leave to add, amend, alter or forgo any ground(s) of appeal either before or at the time of hearing of the appeal.*

2. Briefly stated facts of the case are that the assessee company is a private limited company, which was incorporated on 09/09/2008 as a joint-venture company between 'NTPC Ltd.' and 'Bihar State Electricity Board' with an equal percentage of the shareholding and with main objective of construction of power plants for generating electricity. The joint-venture was incorporated with an authorised capital of ₹ 2000 crore. The joint-venture started preliminary work like survey investigation etc. in financial year 2009-10. The joint-venture commenced main work of construction of power plant at Shivnagar, Bihar in financial

year 2011-12. The funds for the power plant had been planned to be financed by way of 30% as equity contribution from the shareholder and the balance 70% by raising debt funds.

2.1 During the year under consideration, the assessee earned a sum of ₹ 5,29,25,630/- by way of interest from banks, contractors and miscellaneous income. The assessee contended that interest income is inextricably linked with setting up of the power plant and the money simply being lying in the bank for construction of the plant, cannot be considered as surplus money. The assessee further submitted that since the interest income was earned in the period prior to commencement of business, it was in the nature of the capital receipt and hence was required to be set-off against preoperative expenses. The assessee further submitted that purpose was to use the money in such a way so as to reduce cost of the power plant to the extent possible, by earning interest income and this would also benefit the revenue in a way that company would claim less amount of depreciation every year after completion of the project.

2.2 Whereas according to the Assessing Officer, the interest accrued on funds, which were not required immediately by the assessee company for its business purposes and which were invested in fixed deposit and for the advances given to the contractors and therefore interest was not earned out of business regularly carried out by the assessee company. The Assessing Officer assessed the interest income and miscellaneous income (for sale of a scrap) under the head 'Income from other sources'. On further appeal, the Ld. CIT(A) deleted the addition under the head 'income from other sources' observing as under:

"3.1.3 The facts of the case and the submissions of the AR have been carefully considered. It is observed that the ground of appeal relates to the receipt of Rs. 28,00,638/- on account of interest from contractor's advances, Rs. 5,61,63,696/- on account of interest income from banks and Rs. 1,61,296/- on account of Misc. Income from sale of scrap etc.. It is submitted that the company is a Private Limited Company which was incorporated on 09.09.2008 as a joint venture company between NTPC Ltd. and Bihar State Electricity Board, with an equal percentage of shareholdings with the main objective of construction of power plant(s) for generating electricity. The joint venture was incorporated with an authorized capital of Rs. 2000 Crore. It had started in the financial year 2009-10, the preliminary work like survey and investigations etc i.e. before undertaking the construction of the power generating plant of the capacity to produce 3960 MW (660 MWx6 units) of electricity at Shivanpur, Distt- Aurangabad, Bihar. The total estimated cost of the project is Rs. 12,600 crore. The main work of construction of the said power plant was started in the year 2011-12, which is now expected to be completed in the financial year 2018-19 (Stage-1). The funds for the entire power plant had been planned to be financed by way of 30% as equity contributions from the shareholders and the balance 70% by raising debt funds.

I find that going by the facts and the nature of receipts, the judgment in the case of Facor Power Limited and Indian Oil Panipat Power Consortium (Both Hon'ble High Court of Delhi), squarely applies to present case. In the case of Facor Power Limited, Hon'ble Delhi High Court held that "where assessee engaged in generating electric power, kept margin money in form of fixed deposits for procurement of various capital goods for setting up of power project, interest earned on said deposits would be in nature of capital receipt not liable to tax". In the case of Indian Oil Panipat Power Consortium, Hon'ble High Court of Delhi relied on the Hon'ble Supreme Court judgment in CIT vs. Bokaro Steel Limited that if income is earned, whether by way of interest or in any other manner on funds which are otherwise "inextricably linked" to the setting up of plant, such income is required to be capitalized to be set off against pre-operative expenses. The Hon'ble Delhi High Court had also distinguished the facts before them from those which were before the apex court in the case of Tuticorin Alkali Chemicals and Fertilizers Ltd. Vs CIT. The AO failed to establish that these were surplus funds parked in the bank to earn interest. Going by the facts of the case and various decisions cited above, the interest receipts are treated as capital in nature and the additions deserve to be deleted.

Besides, it is observed that the similar addition of interest income from bank and interest from contractor's advances in A.Y. 2011-12

and A.Y. 2012-13 was also deleted by CIT(A) in the appellant's own case. However, miscellaneous income of Rs. 1,61,296/- on account of sale of scrap etc. is also covered by Supreme Court in the case of CIT Vs. Bokaro Steel Ltd. [1999] 236 ITR 315. Therefore, the addition of Rs. 5,91,25,630/- is hereby deleted. These grounds of appeal are therefore allowed."

- 3.** Before us, none appeared on behalf of the assessee.
- 4.** The Learned Department Representative, relied on the order of the Assessing Officer and submitted that money was raised by way of share capital which was not specifically linked with the setting up of the plant, and therefore the decision of the Hon'ble Delhi High Court in the case of Indian Oil Panipat Power Consortium (supra) is not applicable over the facts of the assessee.
- 5.** We have heard submission of the Learned DR and perused the relevant material on record. We find that identical issue in the assessment year 2011-12 and 2012-13 has been decided in favour of the assessee by the Learned First Appellate Authority. On further appeal by the Revenue before the Tribunal, the issue whether the interest and other miscellaneous income is in the nature of capital receipt or income from other sources, has been decided by the Tribunal in ITA No. 4560 and 4561/Del./2014 for assessment years 2011-12 and 2012-13 respectively observing as under:

"7. We have considered the submissions of both the parties and carefully gone through the material available on the record. It is noticed that an identical issue having similar facts was a subject matter of the departmental appeal for the assessment year 2010-11 in ITA No. 6016/Del/2013 in the case of ACIT, Circle-13(1), New Delhi Vs NTPC Tamil Nadu Energy Co. Ltd., New Delhi wherein the issue has been decided in favour of the assessee and against the department vide order dated 15.02.2016 and the relevant findings have been given in para 5 & 6 which read as under:

“5. We have heard the submissions of both the parties, perused the materials available on record, case laws cited by Id. Counsel for assessee, assessment order and the order of the Id. CIT(A). We find that the Id. CIT(A) has elaborately discussed the issue and gave his finding vide para No. 4.1 to 4.9 at page No. 8 to 13 of the impugned order. For the sake of convenience, the relevant finding of the Id. CIT(A) is reproduced below:

4.1 I have carefully considered the facts of the case, the findings of the AO as well as the submissions of the A/R of the appellant. Both the Grounds of appeal are directed against additions of Rs. 175,74,129/- comprising of the interest income received from the bank(s) amounting to Rs. 1,02,740/- and interest received from contractors advances amounting to Rs. 174,71,389/-. In the P&L Account the appellant has shown under the head other income, amount of Rs. 1,02,740/- as interest income earned on short term deposits parked with Banks and an amount of Rs. 174,71,389/- as interest earned on interest bearing advance given to contractors, total Rs. 1,75,74,129/- which was adjusted against Expenditure During Construction Account in Schedule - 15 and the net Expenditure During Construction was capitalized under the Capital Work in Progress in Schedule - 4 of the balance sheet. The AO in the assessment order observed that the assessee has not offered above incomes for tax. AO observed that the facts of case are similar to the case of Tuticorin Alkali Chemical & Fertilizers Ltd. v. CIT (supra). Therefore, the AO treated the above receipt of Rs. 175.74 lakh as chargeable to tax u/s 56 of the Act as 'Income from other sources' following the decision of Hon'ble apex court in the case of CIT vs. Tuticorin Alkali and Chemicals & Fertilizers Ltd. (1997) 227 ITR 172.

4.2 Therefore, the issue to be decided in this appeal is whether the above receipts are capital receipt as claimed by the appellant or income from other sources u/s 56 of the Act as held by the AO. The whole emphasis of Apex Court decision in the Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra) was that funds were found to be surplus. The company was ready to commence trial production and the surplus funds were deposited in bank to earn interest.

4.3 In the instant case there is no dispute that project was under construction during the previous year relevant to AY 2010-11 and the business had not commenced. The appellant company was incorporated on 23-05-2003 as a joint venture

company between NTPC Ltd. and Tamil Nadu Electricity Board for the purpose of construction of power plant for generation of electricity. The total project was meant to produce 1500 mw of electricity through 3 units @ 500 mw by each unit. The said power plant was located at Vellur at the outskirts of Chennai, Tamil Nadu. The construction of the power generating unit was started on 28-03-2007. As per letter of CEO, commercial operation is declared in respect of unit - I w.e.f. 29/11/2012, unit - II w.e.f. 25/08/13 and unit 3 is yet to be commissioned. By end of financial year 31-03-2010 the assessee company had raised share holders fund of Rs. 905.5 crores and had borrowed funds in the form of secured loan of Rs. 1808.27 crores. These funds were essentially utilized during the initial period of construction from A.Y. 2004-05 to A.Y. 2010-11 for conducting survey, investigation & preliminary expenses, for purchasing land, for infrastructure development work and for disbursement as advance to the contractors engaged for construction of power plant etc.

4.4 Further, there is no finding given by the AO that advances were made by the appellant out of surplus fund. From the balance sheet it is observed that as against the above funds of Rs. 2713.77 crores (without considering amounts due to sundry creditors), sums aggregating to Rs. 2998.02 crores were used for acquiring / construction of fixed assets. Against the liabilities and provisions aggregating to Rs. 293.45 crores, bank and cash balances was Rs. 4.74 crores only. Further, the debit balance of Profit and Loss Account as appearing in the Balance Sheet as on 31.03.2010 was Rs.1.13 crores. From the above it is evident that investment in fixed assets is more than the funds available and fixed asset is partly funded by current liabilities. The liability towards sundry creditors (Rs.86.78 crores) are far more than the funds lying in bank (Rs.4.74 crores). Therefore, it is clear that advances were not given out of surplus funds available with the company. Simply because money is lying in bank meant for construction of the plant, it cannot be treated as the surplus money. The surplus money can arise only after meeting all the obligations relating to the construction of the power plant and if the money is found to be surplus after the completion of construction of the unit. In the instant case the work of construction of the power plant was under progress. Therefore, funds cannot be said to be at surplus.

4.5 Some of such funds which were lying unutilized were temporally parked by the appellant in bank to earn interest. The purpose of bank deposits yielding interest was evidently

to maintain liquidity of funds and to reduce the cost of construction of the power plant. Therefore, interest earned on such unutilized funds temporally parked with banks to maintain liquidity and to reduce cost, is inextricably linked with the setting up of the project. Similarly, the interest incomes earned on advance to contractors engaged for construction of power plant is also inextricably linked with the setting up of the power plant. These incomes have also gone on to reduce the expenses for setting up of the plant as evident from schedule 15 of annual report showing details of expenses during construction. Hon'ble Supreme Court on identical issue in CIT v. Bokaro Steel Ltd. 102 taxman 94 (SC) after considering the decision in the case of Tuticorin Alkali Chemicals and Fertilizers Ltd. (supra) held that interest from advance to contractors, rent charged on contractor, hire charges from contractors are inextricably linked to the setting up of the project and as such capital receipts. In that said decision Hon'ble Apex Court held:-

"5. We will take the first three heads under which the assessee has received certain amounts. These are the rent charged by the assessee to its contractors for housing workers and staff employed by the contractor for the construction work of the assessee including certain amenities granted to the staff by the assessee. Secondly, hire charges for plant and machinery which was given to the contractors by the assessee for use in the construction work of the assessee, and thirdly, interest from advances made to the contractors by the assessee for the purpose of facilitating the work of construction. The activities of the assessee in connection with all these three receipts are directly connected with or are incidental to the work of construction of its plant undertaken by the assessee. Broadly speaking, these pertain to the arrangements made by the assessee with its contractors pertaining to the work of construction. To facilitate the work of the contractor, the assessee permitted the contractor to use the premises of the assessee for housing its staff and workers engaged in the construction activity of the assessee's plant. This was clearly to facilitate the work of construction. Had this facility not been provided by the assessee, the contractors would have had to make their own arrangements and this would have been reflected in the charges of the contractors for the construction work. Instead, the assessee has provided these facilities. The same is true of the hire charges for plant and machinery which was given by the assessee to the contractors for the assessee's construction work. The receipts in this connection also go to compensate the assessee for the wear and tear of the machinery. The advances which the

assessee made to the contractors to facilitate the construction activity of putting together a very large project was as much to ensure that the work of the contractors proceeded without any financial hitches as to help the contractors. The arrangements which were made between the assessee-company and the contractors pertaining to these three receipts are arrangements which are intrinsically connected with the construction of its steel plant. The receipts have been adjusted against the charges payable to the contractors and have gone to reduce the cost of construction. They have, therefore, been rightly held as capital receipts and not income of the assessee from any independent source.

7. However, while interest earned by investing borrowed capital in short-term deposits is an independent source of income not connected with the construction activities or business activities of the assessee, the same cannot be said in the present case where the utilization of various assets of the company and the payments received for such utilization are directly linked with the activity of setting up the steel plant of the assessee. These receipts are inextricably linked with the setting up of the capital structure of the assessee - company. They must, therefore, be viewed as capital receipts going to reduce the cost of construction."

4.6 Hon'ble Delhi High Court in Indian Oil Panipat Power Consortium Ltd. vs. ITO (2009) 315 ITR 255 (Del.) held that where interest on money received as share capital is temporarily placed in fixed deposit awaiting acquisition of land, a claim that such interest is a capital receipt entitled to be set off against pre-operative expenses, is admissible, as the funds received by the assessee company by the joint venture partners are "inextricably linked" with the setting up of the plant and such interest earned cannot be treated as income from other sources. The Hon'ble Delhi High Court applied the ratio of Hon'ble Supreme Court in Bokaro Steel Ltd. (supra) while arriving at the above decision. Hon'ble High Court also distinguished the facts before them from the facts which were before the apex court in the case of Tuticorin Alkali Chemicals and Fertilizers Ltd. v CIT. The distinction drawn by Delhi High Court, was that that there was a finding of fact recorded in the case before the apex court that whatever money was deposited in the bank was essentially found to be the surplus funds in the hands of that company and the very purpose of making fixed deposits was to earn interest on such surplus money. Apex court under those peculiar circumstances, had held in Tuticorin Alkali Chemicals

that interest income arising on surplus funds, was chargeable to tax as income from other sources.

4.7 In identical issue in the case of NTPC Sail Power Company (P) Ltd. vs. CIT in ITA No. 1238, Hon'ble Delhi High Court in its decision on 17/07/2012 held that:-

"It is no doubt correct that the proviso to section 36 (1) (Hi) of the Income Tax Act enacts that any amount of the interest paid towards ("in respect of) capital borrowed for acquisition of an asset or for extension of existing business regardless of its capitalization in the books or otherwise, "for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use" would not qualify as deduction. However, in all these cases, when the interest was received by the assessee towards interest paid for fixed deposits when the borrowed funds could not be immediately put to use for the purpose for which they were taken, this Court, and indeed the Supreme Court held that if the receipt is "inextricably linked" to the setting up of the project, it would be capital receipt not liable to tax but ultimately be used to reduce the cost of the project, By the same logic, in this case too. the funds invested by the assessee company and the interest earned were inextricably linked with the setting up of the power plant."

4.8 Therefore, decisions of Hon'ble Supreme Court in the case of Bokaro Steel Ltd. (supra), Hon'ble Delhi High Court in Indian Oil Panipat Power Consortium Ltd. (supra) and NTPC Sail Power Company (P) Ltd. (supra) are squarely applicable in the instant case. Identical issue was raised in appeal for AY 2008-09 which was decided by me in favour of the appellant in A. No. 102/2010-12 vide decision dt. 17/12/2012 following the above decisions of Supreme Court and Delhi High Court as under:

"8.1.5 Since the work of construction of the power plant has just started and funds were essentially utilized for conducting survey, investigation & preliminary expenses, for land purchase, for infrastructure development work and for disbursement as advance to the contractors engaged for construction of power plant etc., therefore, funds cannot be said to be at surplus. Moreover, the liability towards sundry creditors (Rs.23.52 crores) are far more than the funds lying in bank (Rs.3.34 crores). Interest income is also inextricably linked with the setting up of the power plant because interest income have gone on to reduce the incidental expenses for setting up of the plant as evident from schedule 12 of balance

sheet showing details of incidental expenses during construction. In view of the above, as the interest on STD are "inextricably linked" to the setting up of the project and the fact that no surplus funds are also available with the appellant company, therefore, such income is required to be capitalized to be set off against the pre operative expenses. As such the A.O. is not justified in adding the sum of Rs. 36,06,774/- as income for other source u/s 56."

4.9 In view of the above factual and legal positions in the instant AY 2010-11 since the work of construction of the power plant was under progress, interest incomes are also inextricably linked with the setting up of the power plant and such incomes have gone on to reduce the expenses for setting up of the plant and as there was no surplus funds available with the appellant company, therefore, such income is required to be capitalized to be set off against the pre operative expenses. As such the A.O. is not justified in adding the sum of Rs. 1,75,74,129/- as income from other source u/s 56. The appeal is allowed in ground nos. 1 & 2 of appeal. "

6. In the background of the aforesaid discussion and the precedents, we are of the view that the Id. CIT(A) has passed a well reasoned order which does not need any interference on our part. Hence, we uphold the same. Accordingly, the appeal of the Revenue is dismissed. "

8. Against the aforesaid order dated 15.02.2016, the department preferred an appeal before the Hon'ble Jurisdictional High Court in ITA No. 541/2016 wherein vide order dated 20.09.2016, the order of this Bench of the Tribunal was affirmed.

9. Since the facts for the year under consideration are identical to the facts involved in the case of ACIT, Circle- 13(1), New Delhi Vs NTPC Tamil Nadu Energy Co. Ltd., New Delhi in ITA No. 6016/Del/2013 for the assessment year 2010- 11. So, respectfully following the order dated 15.02.2016 passed by this Bench of the ITAT, New Delhi, we are of the view that the Id. CIT(A) was fully justified in deleting the impugned addition made by the AO. Accordingly, we do not see any merit in this appeal of the department.

10. In ITA No. 4561/Del/2014, the facts are identical as were involved in ITA No. 4560/Del/2014 for the assessment year 2011-12 which we have already disposed off in the former part of this order. Therefore, the findings given therein for the assessment year

2011-12 shall apply mutatis mutandis for the assessment year 2012-13.

11. In the result, appeals of the department are dismissed.”

5.1 Since the issue in dispute has already been decided by the Tribunal in favour of the assessee in earlier years, respectfully following the said finding of the Tribunal, the finding of the Ld. CIT(A) on the issue in dispute is upheld. The grounds raised by the Revenue are accordingly dismissed.

6. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 11th May, 2021

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Dated: 11th May, 2021.

RK/-^(DTS)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi