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

BEFORE SH. AMIT SHUKLA, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER

ITA No.3405/Del/2014
Assessment Year: 2010-11

M/s. Bokaro Power Supply Co. Ltd., Ispat Bhavan, Lodhi Road, New Delhi	**Vs.**	DCIT, Circle -3(1), New Delhi
PAN : AABCB8976G		
(Appellant)		**(Respondent)**

And

ITA No. 3692/Del/2014
Assessment Year: 2010-11

DCIT, Circle -3(1), New Delhi	**Vs.**	M/s. Bokaro Power Supply Co. Ltd., 4th Floor, Ispat Bhavan, Lodhi Road, New Delhi
PAN : AABCB8976G		
(Appellant)		**(Respondent)**

Assessee by	Sh. M.P. Rastogi, Adv. & Sh. Anil Sharma, AGM
Respondent by	Sh. Sandip Kumar Mishra, Sr.DR

Date of hearing	11.10.2017
Date of pronouncement	31.10.2017

ORDER

PER O.P. KANT, A.M.:

These two cross appeals of the assessee and Revenue are directed against order dated 31/03/2014 passed by the Commissioner of Income Tax (Appeals)-VI, New Delhi [In short the CIT(A)] for assessment year 2010-11. Both the appeals, being emanated from the

same impugned order, were heard together and disposed off by way of this consolidated order.

2. The grounds raised in the appeal of the assessee in ITA No. 345/Del/2014 are reproduced as under:

"1.1 The learned CIT(A) has erred in not deleting the whole of disallowance of additional sales tax demand of Rs.35,45,033/- and penal interest of Rs.86,72,759/- aggregating to Rs.1,22,18,792/- relating to AY 2006-07 as prior period income (expenses) ignoring the fact that the demand was raised in this year and the applicability of section 43B of the Income Tax Act to statutory payments.

1.2 The learned CIT(A) erred in not deleting the disallowance of penal interest of Rs.86,72,759/- (which is compensatory in nature) on additional sales tax demand of relating to AY 2006-07 as prior period income (expenses) by the AO by holding it as penalty.

2. That the above grounds are independent and without prejudice to each other.

3. That the appellant seeks leave to add, amend, alter, abandon or substitute any of the above grounds at the time of hearing of appeal."

3. The grounds raised in the appeal of the Revenue in ITA No. 3692/Del/2014 are reproduced as under:

"1. The DCIT, Circle-3(1), New Delhi, is hereby directed to file appeal in the above mentioned case before the ITAT, New Delhi on the following ground of appeal.

1. *On the facts and in the circumstances of the case, the learned CIT(A) has erred in deleting the disallowance of Rs.48,71,000/- made on account of interest expenses being capital in nature.*
2. *The appellant craves leave for reserving the right to amend, modify, alter, ad or forego any ground(s) of appeal at any time before or during the hearing of this appeal.*

4. The facts in brief of the case are that the assessee company is a joint-venture of two Public Sector Undertakings, namely the ñDamodar Valley Corporationò and the ñSteel Authority of Indiaò (SAIL) Ltdò. The assessee company was engaged in generation of power which was supplied totally to ñBokaro Steel Plantò of SAIL. The assessee company was in the process of expansion of its business by setting up new units for generation of power for two years prior to the year under consideration. The assessee filed return of income for the year under consideration on 12/10/2010 declaring total income of Rs.85,05,74,950/-. The case was selected for scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short ñthe Actò) was issued and complied with. In assessment completed under section 143(3) of the Act on 14/03/2013, the Assessing Officer made certain additions to the returned income and assessed the total income at Rs.87,02,64,730/-. On further appeal, the Ld. CIT-(A), allowed part relief to the assessee. Aggrieved with the finding of the Ld. CIT-(A), both the assessee as well as the Revenue are in appeal raising respective grounds.

ITA No. 3405/Del/2014

5. First we take up appeal of the assessee in ITA No. 3405/Del/2014. The ground Nos. 2 and 3 being general in nature, we are not required to adjudicate specifically and accordingly dismissed as infructuous.

6. In ground Nos. 1.1 and 1.2, the only addition which has been challenged is penal interest of Rs.86,72,759/- paid to Sales-tax Department relating to assessment year 2006-07. Facts in respect of issue in dispute are that during the year under consideration the assessee paid sales tax demand and penalty amounting to Rs.1,22,18,792/-, which was related to assessment year 2006-07. The assessee provided break-up of the amount as tax amount of Rs.35,45,033/- and penalty amount of Rs.86,72,759/-. The Assessing Officer was of the view that the amount paid being related to financial year 2006-07, it was a prior period expenditure and could not be allowed in the year under consideration. The assessee contended that sales six demand of Rs.1,22,18,792/- was raised by the service tax authorities in the year under consideration, therefore, the expenditure crystallized in the year under consideration. The assessee further submitted that being a statutory dues, it was allowable in the year of payment in terms of section 43B of the Act, irrespective of the method of accounting followed by the assessee. Regarding the amount of Rs.86,72,759/-, the assessee contended that though it was termed as ópenaltyö, it was in the nature of interest for compensating the Commercial Tax Department for delay in the paying taxes due beyond the stipulated period and, thus, it was allowable in terms of Explanation -1 below section 37 of the Act. The Assessing Officer did not accept the contention of the assessee and disallowed the amount of Rs.1,22,18,792/- as expenditure not related to the year under consideration. The amount of Rs.86,72,759/- was also held as disallowable on the ground that penalty for delayed payment of sales tax was not deductible expenditure in view of the decision of the Hon'ble Supreme Court in the case of Swadeshi Cotton Mills Ltd. vs. CIT, (1967) ITR 57 (SC) and Hon'ble Delhi High Court decision in the case of CIT Vs. Bharat Steel Tubes Limited (1997) 226 ITR 750 (Del.).

The Ld. CIT-(A) allowed the payment of tax amounting to Rs.35,45,033/- on paid basis in terms of section 43B of the Act, however, upheld the finding of the Assessing Officer in respect of the amount of Rs.86,72,759/- as penalty for infraction of law. The finding of the learned CIT-(A) is reproduced as under:

"5.2.4. The accrual of statutory liability e.g. Sales Tax etc., depends upon the provisions of the respective statute. The Hon'ble Supreme Court in the case of Kedarnath Jute Mfg Co. Ltd. Vs. CIT (1971) 82 ITR 363 (SC) observed that, under sales-tax laws, the moment a dealer makes either purchase or sales which are subject to taxation, the obligation to pay the tax arises & tax ability is attracted. The liability for payment of tax is independent of the assessment which quantifies the demand at a later point of time. The assessee maintaining accounts on the mercantile system is to be allowed the deduction for the amount of sales tax in the year of sale, though the demand was made in a later year. Moreover, the statutory liability which is disputed is allowable either in the year in which sales are made (CIT Vs. Kalinga Tubes Ltd. (1996) 218 ITR 64 (SC) or in the year of assessment in which, the Sales Tax Demand is raised (CIT Vs. Bharat Carbon & Ribbon Mfg Co (P) Ltd. (1999) 239 ITR 505 (SC), so far as provisions of section 43B are concerned. Therefore, any expenses pertaining to prior period that are debited in the profit & loss account are not allowed as business expenditure. The exception to the same is where the liability in respect of such expenses has been crystallized in the year under consideration e g disputed liability or additional statutory liability. It has been held that liability in respect of such expenditure accrues in the year in which the demand is raised & such expenditure is not in the nature of prior period expenses, even if, it pertains to an earlier year due tc the applicability of provisions of Section 43B of the Act. In the case of CIT Vs. Central Provinces Manganese Ore Co. Ltd. (1978) 112 ITR 734 (Bom), it was held that, the assessee can claim the additional demand made for export duty in the year in which the said demand was raised by the department, even if it was being disputed. However, in a case, where assessee repaid the refund of excise duty along with interest due to an order of the court such interest could not be treated as statutory liability & therefore, does not partake the character of tax, cess, duty or fee as covered by u/s 43B as held in CIT Vs. Dinesh Mills Ltd. (2008) 302 ITR 164 (Guj).

Therefore, the same cannot be allowed in the year in which demand is raised due to non applicability of the provisions of Section 43B. However, the Hon'ble Rajasthan High Court in Shreepipes Vs. CIT(2007) 162 Taxman 442 (Raj) has held that interest payable to Sales Tax determined is tax i.e. interest accrued on delayed payments of Sales Tax under the Rajasthan Sales Tax Act, 1954, is part of tax within the meaning of Section 43B. However, Penal Interest is in the nature of penalty for infraction of law & therefore, cannot be allowed otherwise, as per the expenditure to Section 37(1) of the Act. In Haji Aziz & Abdul Shakoor Bros Vs. CIT(1961) 41 ITR 350 (SC), it was held that a penalty imposed for breach of any law during the course of trade etc., cannot be described as a commercial loss. If a sum is paid by an assessee conducting his business, because in conducting it he has acted in a manner which has rendered him liable to penalty, it cannot be claimed as a deductible expense. Infraction of law is not a normal incident of business & therefore, no expense which is paid by way of penalty for a breach of law can be said to be an amount wholly & exclusively laid out for the purpose of business. Moreover, the Finance (No.2) Act, 1998 with retrospective effect from 01.04.1962 has clarified that any expenditure, incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of the business or profession & no deduction or allowance shall be made in respect of such expenditure. Therefore, also considering the ratio of judgment in Swadeshi Cotton Mills Vs. CIT Ltd. of the Hon'ble Supreme Court (Supra), where it was held that where the amount paid is partly penal and partly compensatory, the amount to the extent that is compensatory could be allowed as deduction & jurisdictional High Court in CIT Vs, Bharat Steel Tubes Ltd 193 ITR 597, that penalty for delayed payment of sales tax is not a deductible expenditure, addition to the extent of Rs.86,72,759/- is hereby sustained while additional payment of Sales Tax liability of Rs.35,45,033/- is hereby directed to be deleted. The appellant shall get part relief on this ground of appeal."

6.1 Before us, the Ld. counsel of the assessee filed a paper book containing pages 1 to 16 and also filed separately detailed breakup of the amount of Rs.86,72,759.42/-, which has been challenged before us, as under:

S.No.	Particulars	Amount in rupees
1.	Penalty for delay in filing of revised/amended VAT return under section 30(4)(d) of the Jharkhand VAT Act, 2005	Rs. 5,000.00
2.	Penalty for delayed filing of G-VAT 409 u/s 63(3) of the Jharkhand VAT Act, 2005	Rs.35,07,407.40
3.	Penalty for delayed payment of VAT Tax u/s. 30(3) of the Jharkhand VAT Act, 2005	Rs.35,13,907.06
4.	Interest u/s 30(1) of the Jharkhand VAT Act, 2005	Rs.16,46,444.96
	Total	**Rs.86,72,759.42**

6.2 The Ld. counsel has also filed copy of the tax assessment order and penalty order for assessment year 2006-07 issued by the Commercial Tax Officer having jurisdiction over the case. Regarding the penalty of Rs.35,07,407/-, the Ld. counsel admitted that the said amount of penalty under section 63(3) of the Jharkhand VAT Act, 2005 is not compensatory in nature and therefore not allowable in terms of Explanation -1 to section 37 of the Act.

6.3 Regarding the other penalties at serial No. 1, 3 and 4 of the above table, the Ld. counsel submitted that same are compensatory in nature being specified at the rate per month of the tax. The Ld. counsel drawn our attention towards section 30 of the Jharkhand VAT Act, 2005. The Ld. counsel submitted that penalty is imposed to compensate the delay in payment of VAT by the assessee and therefore, being in the nature of compensatory penal interest, same is allowable under section 37 of the Act.

6.4 On the other hand, Ld. Senior Departmental Representative (Sr. DR) drawn our attention to various clauses of Sec. 30 of Jharkhand VAT Act, 2005 and submitted that penalties have been levied in addition to the tax and interest payable by the assessee and therefore same were

not compensatory in nature and therefore, not allowable in terms of Explanation -1 to section 37 of the Act.

6.5 We have heard the rival submission and perused the relevant material on record. The relevant Explanation to Section 37 of the Act, which has specified non-allowance of payments in the nature of penalty, is reproduced as under:

> ***"37.*** *(1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".*
>
> *Explanation 1.—For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.*

6.6 In the case of Swadeshi Cotton Mills Vs. CIT Ltd. (supra) the Hon'ble Supreme Court has held that, *'where the amount paid is partly penal and partly compensatory, the amount to the extent that it is compensatory could be allowed as deduction'.* Further, Hon'ble Jurisdictional High Court in the case of CIT Vs. Bharat Steel Tubes Limited (supra) has held that *'the penalty for delayed payment of sales tax is not a deductible expenditure'*. In the instant case, the Ld. counsel has claimed that penalty paid is compensatory in the nature and therefore, allowable, in terms of Explanation -1 to section 37 of the Act. Now, we have to examine in the light of various sections of the Jharkhand VAT Act 2005, whether the penalty paid by the assessee is compensatory in the nature.

6.7 First, we take up the amount of penalty of Rs. 5000 paid for delay in filing of revised/amended VAT return under section 30(4)(d) of the

Jharkhand VAT Act, 2005. The relevant clause of the said section is reproduced as under:

*"**30. Return defaults-***

(1)……..

(2)……

(3)……..

(4) if a registered dealer or any other dealer required to furnish written under subsection(1) and subsection (2) of section 29; without any sufficient cause:

- *(a) fails to comply with the requirements of the notice issued under sub-section (2)of Section 29; or*
- *(b) fails to furnish any return by the prescribed date as required under sub-Section (2) of Section 29; or*
- *(c) being required to furnish revised return, fails to furnish the revised return by the date prescribed under sub-section (3) of Section 29;*
- *(d) the prescribed authority shall, after giving such a dealer an opportunity of being heard in the manner prescribed, impose a penalty at the rate not exceeding rupees twenty for every day of such default for any month or any tax period, subject to a maximum of rupees five thousand in a year.*

Explanation – Return for this purpose shall mean and include the Monthly Abstract, Return for any tax period, Revised Return(s) as well as the Annual Return."

6.8 It is evident from clear language of the relevant section that the penalty levied is not compensatory in the nature, as it is for default of failure to furnish return under the VAT Act. Accordingly, contention of the learned counsel in respect of amount of penalty of Rs. 5000 is rejected.

6.9 Regarding the second amount of Rs.35,07,407.40 paid as penalty for delayed filing of form i.e. G-VAT 409 under section 63(3) of the Jharkhand VAT Act, 2005, the Ld. counsel himself has admitted as not being in the nature of compensatory. For clarity, the relevant section of the Jharkhand VAT Act is reproduced as under:

"63. Audit of Accounts:-

(1) Where in any particular year, the gross turnover of a dealer exceeds 40 lakh rupees or such other amount as the prescribed authority may, by a

Notification in the Official Gazette specify, then such dealer shall get his Accounts audited for the purpose of this Act, in respect to that year, by an —Accountant‖ or —Tax Practitioners‖, within nine months# from the end of that year and obtain a report of such Audit in the Prescribed Form, duly signed and verified by such —Accountant‖ or —Tax Practitioners‖, and setting forth such particulars, as may be prescribed."

(2) A true copy of such report shall be furnished by such Dealer to the Prescribed Authority by the end of the month after expiry of the period of nine months during which the Audit would have been completed.

(3) If any dealer liable to get his Accounts audited under sub-Section (1) fails to get his Accounts audited and furnish a true copy of the Audit Report within the time specified in sub-Section (2), the Prescribed Authority shall, after giving the Dealer a reasonable opportunity of being heard, impose on him, in addition to any Tax Payable, a sum by way of penalty equal to 0.1% of the turnover as he may determine to the best of his judgment in his case in respect of the said period.

6.10 On perusal of the above provision of the VAT Act, it is clear that the penalty was for not getting the accounts audited and furnishing a true copy of the audit report within the time specified. Thus, we agree with the contention of the Ld. counsel that the penalty of Rs.35,07,407.40 is not compensatory in the nature and accordingly, not allowable in terms of Explanation -1 to section 37 of the Act.

6.11 Regarding penalty of Rs.35,13,907.06/-, the relevant provisions of section 30(3) of the Jharkhand VAT Act, 2005 is reproduced as under:

"30. Return Defaults-

(1) ……...

(2) ……

(3) If a registered dealer, without sufficient cause, fails to pay the amount of tax due and interest along with return or revised return in accordance with the provisions of subSection (1), the prescribed authority may, after giving the

dealer reasonable opportunity of being heard, direct him to pay in addition to the tax and the interest payable by him a penalty, at the rate of 2% per month on the tax and interest so payable from the date it has become due to the date of its payment or to the date of order of assessment, whichever is earlier.

(4) ……..

(5) ……..”

6.12 It is evident from the clear language of above section that the penalty is in addition to the tax and interest payable by the taxpayer, though it is computed at the rate of 2% per month on the tax and interest payable. The penal amount being in addition to the interest payable for delay in deposit of the tax, it cannot be said as compensatory in the nature and accordingly, we reject the contention of the Ld. counsel in this regard and hold the amount of Rs.35,13,907.06 as disallowable in terms of Explanation -1 to section 37 of the Act.

6.13 As regard to the payment of Rs.16,46,444.96, the relevant clause of section 30(1) of the Jharkhand VAT Act, 2005 is reproduced as under:

“(1) If a dealer required to file return under sub-Section (1) or sub-Section (2) of Section 29,

(a) fails without sufficient cause to pay the amount of tax due as per the return for any tax period; or

(b) furnishes a revised return under sub-Section (3) of Section 29 showing a higher amount of tax to be due than was shown by him in the original return; or

(c) fails to furnish return;

*such dealer shall be liable to pay Interest and penalty** in respect of;*

(i) the tax payable by him according to the return; or

(ii) the difference of the amount of tax according to the revised return; or

(iii) the tax payable for the period for which he has failed to furnish return;

(iv) for the period he fails to furnish return including monthly abstract; at the rate of 1% per month from the date the tax payable has become due to

the date of its payment or to the date of order of assessment, whichever is earlier and penalty as specified in clause (d) of sub-section (4) of this Section."

6.14 On perusal of the clause 30(1) above, it is evident that amount paid is toward interest at the rate of 1% per month, for the period from the tax payable has become due to the date of payment or to the date of order of assessment whichever is earlier. Thus, the interest amount paid is towards delay in payment of tax, is compensatory in nature. Penalty of Rs.5,000/- for the default under section 30(4)(d) of the Jharkhand VAT Act, 2005, has already been upheld by us as not in the nature of compensatory. Accordingly, the amount of Rs.16,46,444.96 being compensatory in the nature, is allowable in terms of the decision of the Hon'ble Supreme Court in the case of Swadeshi Cotton Mills Ltd. Vs.CIT (supra).

6.15 In view of above discussion, we summarise that out of amount of Rs.86,72,759.42, amount of Rs.70,26,314.46 is directed to be disallowed and amount of Rs.16,46,444.96 is directed to be allowed. The ground of the appeal of the assessee is accordingly partly allowed.

ITA No. 3692/Del/2014

7. Now, we take up the appeal of the Revenue challenging the deletion of the disallowance of interest of Rs.48,71,000/- made on account of interest expenses being of capital nature.

7.1 The facts in respect of issue in dispute are that the assessee raised additional capital and loans for financing the expansion plans by way of setting up new unit for generation of power as under:

"(a) Raised additional capital aggregating to Rs.5,000/- lakhs (Rs.2,000/- lakhs during the year under consideration and Rs.3,000/- lakhs in the preceding year), by way of share application money from its two shareholders namely the SAIL and DVC.

(b) It has raised Term loans of Rs.15316.87 lakhs as on 31.03.2010 (Rs.20.647 lakhs as on 03.03.2009)

7.2 During the year, the assessee incurred total interest/financial expenses of Rs. 471.39 Lacs related to borrowing utilized for expansion purposes. During the year, the assessee earned a total interest of Rs.411.14 Lacs from banks which included a sum of Rs. 48.71 lakhs on monies deposited in banks etc. by way of margins or giving advances etc. for the purpose of expansion. The assessee company adjusted/credited said interest of Rs. 48.71 lakhs against "expenses during construction", which were capitalized to capital work in progress(CWIP) and balance interest of Rs.362.43 (Rs. 411.14 - 48.71) Lacs as earned from temporary surplus fund of the operational business was admitted as taxable income. The assessee cited various decisions of the Hon'ble High Courts/Supreme Court and submitted that the assessee has rightly reduced/netted of the interest earned relating to expansion against the expenses during construction, which has been capitalized. The assessee submitted that identical nature of expenses in the immediately preceding year AYs 2008-09 and 2009-10 were deleted by the learned CIT-(A) and accordingly prayed that the interest earned on deposits made related to the new unit (still to commence operation) be treated as capital receipt and be allowed to set off against interest paid on borrowing and other capital expenses during setting up of the unit. According to Assessing Officer, in relation to acquisition of assets,

prior to introduction of proviso to section 36 of the Act, the assessee had an option to capitalise the interest expenditure or claim it as revenue expenditure. However, with the introduction of proviso to section 36 of the Act w.e.f. 01/04/2004, by the Finance Act, 2003, the position has become clear and the interest in connection with acquisition of the asset is to be treated as part of actual cost of the asset before the asset is put to use. The Assessing Officer cited the ratio of the judgement of Hon'ble Apex Court in the case of DCIT versus Core Health Care Limited, (2008) 298 ITR 194 (SC) in this regard and accordingly, he disallowed the amount of Rs.48,71,000/-.

7.3 Before the learned CIT-(A), the assessee claimed that in accordance with relevant accounting standards and provisions of section 36(1)(iii) of the Act, the interest expenses of Rs. 471 .39 Lacs relating to the borrowing for the new unit was capitalized and transferred to the "Incidental Expenses During Construction" (IEDC) and then to Cost of Work in Progress (CWIP). He further submitted that in accordance with Accounting Standards and on the basis of the matching principle, the interest of Rs.48.71 lakhs earned on deposits kept as margins or advances given for expansion/setting of the new power generation unit was reduced from Incidental Expenses During Construction (IEDC) instead of offering as "Income from other sources". The assessee relied on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Sasan Power Ltd. (ITA No. 10/2012 dated 06/01/2012) and submitted that on an identical issue the Hon'ble High Court has decided that the interest earned is rightly to be set off against IECD. Further, the assessee relied on the decision of the Hon'ble Delhi High Court in the case of NTPC Power Company Limited Vs. CIT in ITA No. 1238/2011 dated 17/07/2012 and decision in the case of CIT Vs. Shree Ram Honda Power Equipment 289 ITR 475 (del) and submitted that the principle of

netting off the interest has been upheld by the Hon'ble Delhi High Court. In view of the submission of the assessee, the Ld. CIT-(A) directed the Assessing Officer for allowing netting off of the interest. The relevant direction of the Ld. CIT-(A) is reproduced as under:

> *"5.1.4. In the normal course, the interest expenses on expansion of an existing business was allowable as Revenue expenditure in terms of Section 36(1) of the Act & various judgment notable among them being that of India Cements Ltd. Vs. CIT(1966) 60 ITR 52(SC); CIT Vs. Alembic Glass Industries Ltd. (1976) 103 ITR 715 (Guj.) & CIT Vs. Tata Chemicals Ltd. (2002) 256 ITR 395 (Bom.), according to which, the whole of the interest, was a 'Revenue' expense. However, on account of the amendment brought in section 36(1)(iii), interest incurred in respect of an asset not put to use is not a Revenue expenditure. Accordingly, the interest expense of Rs.471.39 before adjustments of credit relating to expansion was capitalized by transfer to 'Incidental Expenses During Construction (IEDC) & in terms of the accounting standards & on the basis of matching principle, the interest of Rs.48.71 lakhs earned on deposits kept in relation to expansion were credited to/reduced from the IEDC. In the present case, the business of the assessee had already commenced & for many years for existing unit. Keeping in view the principles of consistency & by following the decision of my predecessor, on this issue & also keeping in view the ratio of decision of Hon'ble jurisdictional High Court on the related issue, the AO is directed to allow the netting off of interest before determining the business profit of the appellant company."*

7.4 Before us, the learned Sr. DR submitted that the temporary interest earned on surplus funds available has already been treated by the assessee as income from other sources and, therefore, the interest income of Rs. 48.71 lakhs earned from temporary deposits in banks of money borrowed or raised through share capital, is also in the nature of revenue receipts and taxable as income from other sources. The Ld. Sr. DR submitted that interest in respect of money borrowed for utilization in acquisition of asset is liable to be capitalized till the asset is put to use

and, thus, the said interest expenditure is capital expenditure, but if the said money is put temporarily in the bank, then the sole objective of the assessee is to earn interest on such money lying ideal him, and therefore the interest income is in the nature of revenue income and liable as taxable under the head ñIncome from other sourcesò and no netting off can be allowed against capital expenditure.

7.5 The Ld. counsel of the assessee, on the other hand, relied on the submission made before the Ld. CIT-(A) and submitted that identical issue has been decided in the favour of the assessee by the Tribunal in the case of M/s. Bokaro Power Supply Company Private Limited in ITA No. 183/Del/2013.

7.6 We have heard the rival submission and perused the relevant material on record. We find that in the case of Bokaro Power Supply Company Pvt. Ltd. (supra), the identical issue of netting off of interest income on funds linked with the setting up of plant against the interest payment is involved. The relevant part of the decision is reproduced as under:

> *3. We have heard both the sides and perused the material placed before us. The learned CIT(A) has allowed the relief with the following:-*
>
> > *"4.1 I have carefully considered the submissions made by ld.AR and have gone through the assessment order. It is seen that similar issue was decided in the case of CIT Vs. Sasan Power Ltd. on 6 January, 2012 (ITA 10/2012) by the Hon'ble High Court of Delhi as follows:-*
> >
> > > *"11. In "Indian Oil Panipat Power Consortium Ltd." (supra), it has been held that where' interest is on money received as share capital, which- is temporarily placed in fixed deposit awaiting acquisition of land, the claim that the interest is in the nature of a capital receipt liable to be set off against pre-operative expenses, is acceptable, since the funds infused in the assessee company by the joint venture partners are inextricably linked with the setting up of the plant and the interest earned cannot be treated as income from other sources. "Indian Oil Panipat Power Consortium Ltd." (supra) is squarely applicable to the present Case, as discussed. This is in consonance with "Bokaro Steel Ltd." (supra), "Karnal Cooperative Sugar Mill"*

(supra), "CIT Vs. Karnataka Power Corporation", 247 ITR 268 (SC) and "Bongaigaon Refinery and Petro Chemical Co. Ltd. vs. CIT", 251 ITR 329 (SC), wherein also, it has been laid down that any receipt inextricably linked to the setting up of the project is capital receipt not liable to tax and going to reduce the cost of the project, in the present case too, the funds infused by the assessee company were inextricably linked with the setting up of the power plant. Likewise, the interest payment was also capital expenditure, which fact was confirmed by the AO, while observing the entire income of the entire expenditure was capital in nature.

12. All these facts have been duly taken into consideration by the CIT(A) while passing the order under appeal. Therefore, there is no merit in the grievance raised by the department by way of ground nos.l & 2. Accordingly, ground nos. 1 & 2 are rejected.

It is further seen that the Jurisdictional High Court of Delhi in the case of C/T Vs. Shree Ram Honda Power Equipment, 289 ITR 475 has held that for the purposes of excluding interest receipts from business income for determining the business profit, the net interest has to be excluded and not the gross receipts. In other words, the principle of netting of has been upheld by the Hon'ble High Court of Delhi. In view of the aforesaid decision of the Hon'ble High Court of Delhi, the AO is directed to allow the netting off of interest before determining the business profit of the appellant company."

4. From the above, it is evident that the learned CIT(A) allowed the relief following the decision of Hon'ble Jurisdictional High Court in the case of CIT Vs. Sasan Power Ltd. vide ITA No.10/2012 and Shree Ram Honda Power Equipment - 289 ITR 475. The Revenue has not disputed the applicability of the above decisions to the facts of the assessee's case. From ground No.2 of the Revenue's appeal, it is evident that the Revenue is disputing the matter in appeal because the Revenue has filed the SLP against the decision of Hon'ble Jurisdictional High Court in the case of Sasan Power Ltd. (supra) which is pending for adjudication. The decision of Hon'ble Jurisdictional High Court is binding upon all the authorities working within the jurisdiction of the said High Court. Therefore, the decision of Hon'ble Jurisdictional High Court in the case of Sasan Power Ltd. (supra) is binding on the ITAT as well as the CIT(A) in Delhi irrespective of the Revenue's challenge to the above decision in SLP before the Hon'ble Apex Court. Unless and until the said decision is modified or reversed by the Hon'ble Jurisdictional High Court, the same would be binding on all the authorities within the jurisdiction of Hon'ble Delhi High Court. In view of the above, we find no infirmity in the order of learned CIT(A). The same is sustained and the Revenue's appeal is dismissed."

7.7 In the above decision, the interest earned on money received from share capital was temporarily placed in fixed deposits, which has been held as interest in the nature of capital receipt liable to be set off against preoperative expenses. In the instant case also identical issue of netting off of interest income earned on borrowed money deposited in banks, against the interest expenditure during construction is involved, thus, respectfully following the above decision of the Tribunal (supra), we uphold the finding of the learned CIT-(A) on the issue in dispute and accordingly, the ground No.1 of appeal of the Revenue is dismissed.

8. The ground No. 2 of the appeal of Revenue being general in nature, we are not required to adjudicate upon and, accordingly, dismissed.

9. In the result, appeal of the assessee is partly allowed whereas the appeal of the Revenue is dismissed.

The decision is pronounced in the open court on 31st Oct., 2017.

Sd/-	Sd/-
(AMIT SHUKLA)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 31st October, 2017.
RK/-(D.T.D)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi