

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'D' NEW DELHI**

**BEFORE SHRI G.D. AGRAWAL, HON'BLE PRESIDENT  
AND  
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No. 5489/Del/2013  
Assessment Year: 2009-10**

<b>Jaypee Powergrid Ltd., 63, JA House, Basant Lok, Vasant Vihar, New Delhi. (PAN: AABCJ8054F)</b>	<b>vs</b>	<b>ITO, Ward 4(1), New Delhi.</b>
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant by : Shri Anil Chopra, FCA  
Shri V.K. Garg, Adv.  
Shri Parveen Kumar, FCA  
Respondent by : Shri Amit Jain, Sr. DR

**Date of Hearing: 26.04.2018  
Date of Pronouncement: 24.07.2018**

**ORDER**

**PER SUDHANSHU SRIVASTAVA, J.M.**

This appeal has been preferred by the assessee against the order dated 31.07.2013 of the Ld. CIT (Appeals)-VII, New Delhi and pertains to assessment year 2009-10.

2. The sole issue under dispute is the addition of Rs. 3,40,52,432/- and pertains to interest income on FDRs for short term duration which was treated as income from other sources

by the Assessing Officer as against the same being treated as a capital receipt by the assessee. Brief facts of the case are that the assessee is a limited company incorporated on 5.10.2006 as a joint venture company between Jaiprakash Power Ventures Ltd. and Power Grid Corporation of India Ltd. The sole objective of the company was to set up a power transmission system in the State of Himachal Pradesh. The actual work of construction of the said project was started in Financial Year 2007-08 and was completed in financial year 2012-13. The total estimated completion cost was Rs. 981 crore for which equity of Rs. 300 crore and a debt of Rs. 700 crore were raised. The entire debt was received from consortium of banks under Trust and Retention Account Agreement and loan agreement. Project funds were also raised from time to time during the period of the project. Out of the project funds so raised, the funds not immediately required were temporarily parked with the bank in fixed deposit receipts for short term duration. During the year under consideration, the availability of funds was as under:-

- |   |               |
|---|---------------|
| i) Funds available from equity and debt | Rs. 295 crore |
| ii) Funds used in project               | Rs. 251 crore |

iii) Short term bank FDRs	55.16 crore
iv) Project contracts remaining to be executed	117 crore
v) Interest received on FDRs	3.40 crore
vi) Interest paid on borrowed funds	5.80 crore

2.1 In the year under consideration, since the project was at its initial stages and the assessee had not started any business, no profit and loss account was prepared for the year. The assessee received interest income of Rs. 3,40,52,432/- on temporary FDRs of Rs. 5,16,77,561/- which was credited to the Incidental Expenditure During Construction Pending Allocation account and the same was claimed as exempt being capital receipt. However, the Assessing Officer taxed the same as income from other sources.

2.2 On appeal before the Ld. Commissioner of Income Tax (A), the Ld. C.I.T. (A) confirmed the addition by following the judgment of the Hon'ble Apex Court in the case of Tuticorin Chemicals and Fertilizers Ltd. reported in 227 ITR 172 (SC).

2.3 Now, the assessee is in appeal before the ITAT against the confirmation of the addition by the Ld. Commissioner of Income Tax (A). The grounds raised by the assessee are as under:-

*“That the learned CIT(A) has erred in assessing the interest of Rs. 3,40,52,432 accruing on FDRs as income from other sources, not appreciating that –*

*1) The appellant is implementing a transmission-line construction project and its entire capital including borrowed funds has been brought in for the purposes of the said project.*

*2) The appellant has no surplus funds which may be invested with the intention of creating any independent source of income by way of interest.*

*3) The appellant has temporarily placed in fixed deposits a part of the capital meant for construction of the transmission-line.*

*4) The interest earned by the appellant is inextricably linked with the implementation of the transmission-line project and is a capital receipt which only offsets the cost of the project.*

*5) The appellant's case is governed by the rule in Bokaro Steel Ltd [1999] 236 ITR 315 (SC) and followed in Indian Oil Panipat Power Consortium Ltd v. ITO 315 ITR 255 (Del).”*

2.4 The assessee has also filed an additional ground in the appeal which reads as under:-

*“That without prejudice to the main ground that the interest income on FDRs during project implementation period is a capital receipt, Ld. Assessing Officer has erred in not netting the interest income of Rs. 3,40,52,432/- with interest paid of Rs. 5,79,93,992/- on funds borrowed for the implementation of the project while taxing the same as income from other sources. As such too, as interest paid far exceeds interest income, no income is taxable as other income.”*

3. The Ld. AR submitted that the additional ground of appeal being raised deserved to be admitted as the same pertained to a question of law. Ld. AR also relied on the judgment of the Hon'ble Apex Court in the case of National Thermal Power company Ltd. vs. C.I.T. reported in 229 ITR 383 (SC) for the proposition that additional ground pertaining to a question of law and arising from facts on record should be allowed to be raised when it was necessary to consider that question in order to correctly assess the tax liability of the assessee.

4. The Ld. Sr. DR opposed the assessee's prayer for admitting additional ground of appeal.

5. Having heard both the parties with respect to admitting of additional ground of appeal, it is our considered opinion that this ground deserves to be admitted as it essentially raises a question of law and no factual investigation is required while admitting this additional ground of appeal. Accordingly, we admit additional ground of appeal raised by the assessee.

6. The Ld. AR submitted that while dismissing the assessee's appeal, the ld. Commissioner of Income Tax (A) had made an incorrect assertion that the assessee's counsel was persuaded to

accept the judgment of the Hon'ble Apex Court in the case of Tuticorin Chemicals and Fertilizers Ltd. (supra). It was submitted that an affidavit under Rule 10 of the Income Tax Tribunal Rules has been filed by the erstwhile counsel wherein it has been averred that this observation of the Ld. Commissioner of Income Tax (A) is incorrect. The Ld. AR further submitted that in the assessee's case, the funds temporarily placed in the fixed deposits were not surplus funds and they were the funds required for setting up a transmission line project and were, therefore, inextricably linked with the project. Reliance was placed on the judgment of the Hon'ble Delhi High Court in the case of Indian Oil Panipat Power Consortium Ltd. vs. ITO reported in 315 ITR 255 wherein the Hon'ble Delhi High Court had held that interest earned on moneys raised for share capital which were temporarily put in fixed deposit awaiting acquisition of land could not have been classified as income from other sources as the interest was earned on funds primarily brought for infusion in the business. The Hon'ble Delhi High Court went on to hold that since the income was earned in a period prior to commencement of business, it was in the nature of capital receipt and hence was required to be set off against pre-operative

expenses. Reliance was also placed on the judgment of Hon'ble Apex Court in the case of CIT vs. Bokaro Steel Ltd. reported in 236 ITR 315 (SC) wherein it had been held that if any amount which is inextricably linked with the process of setting up of plant and machinery is received, such receipt will be in the nature of capital and cannot be taxed as income.

6.1 Ld. AR also submitted that the Ld. Commissioner of Income Tax (A) had solely relied upon the judgment of Hon'ble Apex court in the case of Tuticorin Chemicals and Fertilizers Ltd. (supra), ignoring numerous subsequent judgments of the Hon'ble Apex Court.

7. The Ld. Sr. DR placed reliance on the order of the Assessing Officer as well as the Ld. Commissioner of Income Tax (A) and submitted that the judgment of the Hon'ble Apex Court in the case of Tuticorin Chemicals and Fertilizers Ltd. is very clear inasmuch as it lays down that interest earned prior to commencement of business was assessable under income from other sources.

8. We have heard the rival submissions and perused the material available on record. We note that a similar issue had

come up before ITAT Ahmedabad Bench in the case of Adani Power Ltd. vs. ACIT in ITA No. 2755/AHD/2011. In its order dated 27.7.2015, the Coordinate Bench of the ITAT analysed the ratio of the judgment of the Hon'ble Apex Court in the case of Tuticorin Chemicals and Fertilizers Ltd as well as that in the case of Bokaro Steel Ltd. (supra) and the judgment of the Hon'ble Delhi High Court in the case of Indian Oil Panipat Power Consortium Ltd. (supra) along with a plethora of other related judgments on identical set of facts. The relevant observations and adjudication are contained in Para 18, 19, 20, 21, 22, 23 and 24 of the above said order of the ITAT Ahmedabad Bench in the case of Adani Power Ltd. vs. ACIT (supra). The same is being reproduced hereunder for a ready reference:-

*"18. We find that both the parties have relied upon the decisions of the Hon'ble Apex Court and in addition, the assessee has relied upon the decision of Hon'ble Delhi High Court. Therefore, it would be appropriate to first refer to those decisions. In the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra), the Hon'ble Apex Court held as under:-*

*"...that the company had surplus funds in its hands. In order to earn income out of the surplus funds, it had invested the amount for the purpose of earning interest.*

*The interest thus earned was clearly of revenue nature and would have to be taxed accordingly. The accountants might have taken some other view but accountancy practice was not necessarily good law. This was not a case of diversion of income by overriding title. The assessee was entirely at liberty to deal with the interest amount as it liked. The application of the income for payment of interest would not affect its taxability in any way. The company could not claim any relief under section 70 or section 71 since its business had not started and there could not be any computation of business income or loss incurred by the assessee in the relevant accounting years. In such a situation, the expenditure incurred by the assessee for the purpose of setting up its business could not be allowed as deduction, nor could it be adjusted against any other income under any other head. Similarly any income from a non-business source could not be set off against the liability to pay interest on funds borrowed for the purpose of purchase of plant and machinery even before commencement of the business of the assessee."*

19. *In the case of Bokaro Steel Ltd. (supra), the Hon'ble Apex Court, after considering the decision of Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra), held as under:-*

*"..., dismissing the appeal, that the first three heads of income were (i) 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, (ii) 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 (iii) 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 were directly connected with or incidental to the work of construction of its plant undertaken by the assessee. 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 hitch as to help the contractors. The arrangements which were made between the assessee-company and the contractors pertaining to these three receipts were arrangements which were intrinsically connected with the construction of its steel plant. The receipts had been adjusted against the charges payable to the contractors and had gone to reduce the cost of construction. They had, therefore, been rightly held as capital receipts and not income of the assessee from any independent source."*

20. *In the case of Karnal Co-operative Sugar Mills Ltd. (supra), their Lordships of Hon'ble Apex Court, after applying the decision of Bokaro Steel Ltd. (supra), held as under:-*

*"Held, that, in the present case, the assessee had deposited money to open a letter of credit for the purchase of the machinery required for setting up its plant in terms of the assessee's agreement with the supplier. It was on the money so deposited that some interest had been earned. This was, therefore, not a case where any surplus share capital money which was lying idle had been deposited in the bank for the purpose of earning interest. The deposit of money in the present case was directly linked with the purchase of plant and machinery. Hence, any income earned on such deposit was incidental to the acquisition of assets for the setting up of the plant and machinery. The*

*interest was a capital receipt, which would go to reduce the cost of asset. "*

*21. In the case of Karnataka Power Corporation (supra), their Lordships of Hon'ble Apex Court, following the decision of Bokaro Steel Ltd. (supra), held as under:-*

*"...also, (i) that the Tribunal was right in law in upholding the order of the Commissioner (Appeals) who deleted the addition of Rs.1,30,44,518/- being interest receipts and hire charges from contractors by holding that the same were in the nature of capital receipts which would go to reduce capital cost."*

*22. In the case of Bongaigaon Refinery & Petrochemicals Ltd. (supra), the Hon'ble Apex Court, after considering the decision of Bokaro Steel Ltd. (supra), held as under:-*

*" reversing the decision of the High Court in relation to these items of income, that these items of receipts were not taxable income but were to be adjusted against the project cost for the business of oil refinery and petrochemicals."*

*23. That the Hon'ble Delhi High Court in the case of Indian Oil Panipat Power Consortium Ltd. (supra), after considering the decisions in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra) and Bokaro Steel Ltd. (supra) at length, held at pages 258, 259 and 260 of report, i.e., 315 ITR 255, as under:-*

*5. In our opinion the Tribunal has misconstrued the ratio of the judgment of the Supreme Court in the case of Tuticorin Alkali Chemicals [1997] 227 ITR 172 and that*

*of Bokaro Steel Ltd. [1999] 236 ITR 315. The test which permeates through the judgment of the Supreme Court in Tuticorin Alkali Chemicals [1997] 227 ITR 172 is that if funds have been borrowed for setting up of a plant and if the funds are 'surplus' and then by virtue of that circumstance they are invested in fixed deposits the income earned in the form of interest will be taxable under the head 'Income from other sources'. On the other hand the ratio of the Supreme Court judgment in Bokaro Steel Ltd. [1999] 236 ITR 315 to our mind is 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 the plant, such income is required to be capitalized to be set off against pre-operative expenses.*

*5.1 The test, therefore, to our mind is whether the activity which is taken up for setting up of the business and the funds which are garnered are inextricably connected to the setting up of the plant. The clue is perhaps available in s. 3 of the Act which states that for newly set up business the previous year shall be the period beginning with the date of setting up of the business. Therefore, as per the provision of s. 4 of the Act which is the charging section income which arises to an assessee from the date of setting of the business but prior to commencement is chargeable to tax depending on whether it is of a revenue nature or capital receipt. The income of a newly set up business, post the date of its setting up can be taxed if it is of a revenue nature under any of the heads provided under s. 14 in Chapter IV of the Act. For an income to be classified as income under the head "Profits and gains of business or profession" it would have to be an activity which is in some manner or form connected with business. The word "business" is of wide import which would also include all such activities which coalesce into setting up*

*of the business. See Mazagaon Dock Ltd. vs. CIT/CEPT (1958) 34 ITR 368 (SC) and Narain Swadeshi Weaving Mills vs. CEPT (1954) 26 ITR 765 (SC). Once it is held that the assessee's income is an income connected with business, which would be so in the present case, in view of the finding of fact by the CIT(A) that the monies which were inducted into the joint venture company by the joint venture partners were primarily infused to purchase land and to develop infrastructure then it cannot be held that the income derived by parking the funds temporarily with Tokyo Mitsubishi Bank, will result in the character of the funds being changed, in as much as the interest earned from the bank would have a hue different than that of business and be brought to tax under the head 'Income from other sources'. It is well-settled that an income received by the assessee can be taxed under the head "Income from other sources" only if it does not fall under any other head of income as provided in s. 14 of the Act. The head "Income from other sources" is a residuary head of income. See S.G. Mercantile Corporation (P) Ltd. vs. CIT 1972 CTR (SC) 8 : (1972) 83 ITR 700 (SC) and CIT vs. Govinda Choudhury & Sons (1994) 116 CTR (SC) 61 : (1993) 203 ITR 881 (SC).*

*5.2 It is clear upon a perusal of the facts as found by the authorities below that the funds in the form of share capital were infused for a specific purpose of acquiring land and the development of infrastructure. Therefore, the interest earned on funds primarily brought for infusion in the business could not have been classified as income from other sources. Since the income was earned in a period prior to commencement of business it was in the nature of capital receipt and hence was required to be set off against pre-operative expenses. In the case of Tuticorin Alkali Chemicals [1997] 227 ITR 172 it was found by the authorities that the funds*

*available with the assessee in that case were 'surplus' and, therefore, the Supreme Court held that the interest earned on surplus funds would have to be treated as 'income from other sources'. On the other hand in Bokaro Steel Ltd. [1999] 236 ITR 315 (SC) where the assessee had earned interest on advance paid to contractors during pre-commencement period was found to be 'inextricably linked' to the setting up of the plant of the assessee and hence was held to be a capital receipt which was permitted to be set off against pre-operative expenses.*

*24. From the above, it is evident that the Hon'ble Delhi High Court has considered and interpreted the decisions of Hon'ble Apex Court in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra) as well as Bokaro Steel Ltd. (supra). The conclusion of the Delhi High Court is in fact the law which emerges as per the decision of Hon'ble Apex Court. Therefore, in our opinion, the CIT (A) was not justified in ignoring the decision of Hon'ble Delhi High Court by simply mentioning that the issue is covered by the decision of Hon'ble Apex Court in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra). After considering these two decisions of the Hon'ble Apex Court and also some other decisions of the Hon'ble Apex Court, their Lordships of the Delhi High Court arrived at the conclusion "it is clear upon a perusal of the facts as found by the authorities below that the funds in the form of share capital were infused for the specific purpose of acquiring land and the development of infrastructure. Therefore, the interest earned on funds primarily brought for infusion in the business could not have been classified as income from other sources. Since the income was earned in a period prior to commencement of business, it was in the nature of capital receipt and hence was required to be set off against the pre-operative expenses." That, the ratio of the above finding of the Hon'ble Delhi High Court would be squarely applicable to the facts of the assessee's case, because admittedly in the case under appeal before us the share capital as well as loans were raised for the specific purpose of setting up of the power*

*generation plants. The business of the assessee has not been commenced and therefore, as per above decision, the interest received in the period prior to commencement of business was in the nature of capital receipt and hence was required to be set off against the pre-operative expenses. The assessee has already set off the interest income against the pre-operative expenses which is titled as "project development expenditure". In view of above, we are of the opinion that the interest income of Rs.1,35,87,158/- as well as Rs.7,91,51,306/- was a capital receipt not chargeable to tax during the year under consideration. Accordingly, Ground Nos. 2 and 4 of the assessee's appeal are allowed."*

8.1 The Ld. Sr. DR could not point out any other judgment in favour of the revenue other than the judgment of the Hon'ble Apex Court in the case of Tuticorin Chemicals and Fertilizers Ltd (supra) which has been duly considered and distinguished by the Hon'ble Delhi High Court in the case of Indian Oil Panipat Power Consortium Ltd. (supra) and which covers the case of the assessee in its favour. The co-ordinate Bench of the Tribunal has also taken a view in favour of the assessee on identical facts and the same has been reproduced in the preceding paragraphs of this order. Therefore, in view of the order of the Coordinate Bench and respectfully applying the ratio of the judgment of the Hon'ble Delhi High Court in the case of Indian Oil Panipat Power Consortium Ltd. (supra), we hold that since the business of the assessee had not commenced, the interest received in the period prior to the commencement of business was in the nature of

capital receipt and was required to be set off against the pre-operative expenses. Therefore, the impugned interest income is a capital receipt not chargeable to tax during the year under consideration. Accordingly, we allow the grounds of appeal raised by the assessee.

9. In the result, the appeal of the assessee is allowed.

Order pronounced in the Open Court on 24<sup>th</sup> July, 2018.

Sd/-

**(G.D. AGRAWAL)**  
**PRESIDENT**

Sd/-

**(SUDHANSHU SRIVASTAVA)**  
**JUDICIAL MEMBER**

Dated: 24<sup>th</sup> July, 2018

‘GS’

Copy forwarded to:

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

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By Order

**ASSISTANT REGISTRAR**

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	