IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

BEFORE SHRI B. R. BASKARAN, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.3667/Mum/2016

(**निर्धारण वर्ष** / Assessment Year: 2011-12)

Jorabat Shillong Expressway Ltd. The IL&FS Financial Center, Plot No. C-22, G Block, Bandra-Kurla Complex, Bandra(E), Mumbai-400051.	**बनाम**/ Vs.	ITO 14(2)(1) (erstwhile Income Tax Officer-10(1)(4) Mumbai Room No. 457, 4th Floor, Aaykar Bhavan, Maharshi Karve Road, Marine Lines, Mumbai-400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCJ3827H		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri Dilip V. Lakhani (AR)
Revenue by:	Shri Suman Kumar (DR)

सुनवाई की तारीख / Date of Hearing: 20.06.2018
घोषणा की तारीख /Date of Pronouncement: 12.09.2018

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 09.02.2016 passed by the Commissioner of Income Tax (Appeals)-22, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y. 2011-12.

2. The assessee has raised the following grounds: -

1. On the facts & circumstances of the case the Learned Commissioner of Income Tax (Appeals) has erred in confirming that the interest income of Rs.31,13,010/- The appellant prays that the interest income earned by the appellant amounting to

Rs.25,87,808/- be considered in place of the interest income of Rs.31,13,010/- as determined by the Ld. AO and confirmed by the Ld. CIT(A).

2. *On the facts & circumstances of the case the Ld. CIT(A) has erred in confirming that the interest income of Rs.31,13,010/- is chargeable to tax under the head income from other sources. The appellant prays that the addition made by the Ld. AO and confirmed by the Ld. CIT(A) be deleted.*

3. *On the facts & circumstances of the case the Learned Commissioner of Income Tax (Appeals) has erred in not allowing the deduction of interest payment of Rs.22,96,439/- against the determination of taxable income of Rs.31,13,010/- under the head Income from other sources. The appellant prays that the deduction of Rs.22,96,439/- be allowed while computing the taxable income under the head Income from other sources.*

4. *On the facts & circumstances of the case the Learned Commissioner of Income Tax (Appeals) has erred in not adjudicating on ground raised before him on the subject of allowability of the revenue expenditure of Rs.66,77,379/- The appellant prays that the deduction of Rs.66,77,379/- be allowed in computing the income under the head Income from business and profession.*

5. *On the facts & circumstances of the case the Learned Commissioner of Income Tax (Appeals) has erred in not adjudicating on ground raised before him on the subject of capitalization of the revenue expenditure of Rs.66,77,379/- and adding the same to the capital work in progress. The appellant prays that if the claim made in ground no.4 is not accepted, then the said expenditure of Rs,66,77,379/-be capitalized and be added to the capital work in progress.*

6. *On the facts & circumstances of the case the appellant prays that the appellant is not liable to pay interest u/s 234B of Income Tax Act, 1961 and the levy of the said interest be deleted."*

3. The brief facts of the case are that the assessee filed his return of income on 29.09.2011 declaring total income to the tune of Rs.Nil. Thereafter the case was selected for scrutiny under CASS. Notices u/s

143(2) & 142(1) of the Act were issued and served upon the assessee. The assessee company is engaged in infrastructure business and a special purpose vehicle (SPV) promoted by IL&FS Transportation Networks Ltd. The company has entered into a Concession Agreement on 16.06.2010 with the National Highways Authority of India for rehabilitation, strengthening and four lining of Jorabat Shillong section of NH-40 in the state of Assam and Meghalaya on BOT basis. Under the year of consideration, the project of the assessee company was in process and the company did not commence his business. The expenditure has been shown under capital work in progress. On verification, the assessee company have received the interest upon the deposit to the tune of Rs.31,13,006/-. The interest was credited by the Indian Bank in account of the assessee. The assessee did not offer for the same for taxation but reduced the same from its capital in progress. However, the amount of interest received has been reflected in the capital work in progress at Rs.25,87,808/-. The assessee was asked the justify his claim but the claim of the assessee was not found justifiable, therefore, the said income was treated as income from other sources and accordingly brought into tax. The income of the assessee was assessed to the tune of Rs.31,13,010/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who confirmed the addition raised by the AO, therefore, the assessee has filed the present appeal before us.

ISSUES Nos. 1 & 2:-

4. We have heard the argument advanced by the Ld. Representative of the parties and perused the record. The Ld. Representative of the assessee has argued that the interest income from deposit is required to be treated as business income in accordance with law and in this regard the Ld. Representative of the assessee has placed reliance upon the law settled by the different authorities cited as **Indian Oil Panipat Power Consortium Ltd. Vs. ITO reported in 181 Taxmann page 249, 315 ITR 255 (Delhi High Court), Bokaro Steel Ltd. 236 ITR pg. 315 (SC), The Road Infrastructure Development Company of Rajasthan Ltd. ITA. No. 628/JP/2014 Jaipur, Andhra Pradesh Expressway Ltd. ITA. No. 663/M/2015 & Karnataka Power Corporation Ltd. 247 ITR 268.** However, on the other hand, the Ld. Representative of the revenue has refuted the said contention. The factual situation is not in dispute to the fact that the assessee received the loan and credited in his account lies with Bank of India who credited the interest in the account of the assessee. It is to be seen whether the said interest income is required to be treated as income from business or income from other sources. The assessee company is a special purpose vehicle (SPV) promoted by IL&FS Transportation Network Ltd. The company has entered into a Concession Agreement on 08.10.2009 with the National Highways Authority of India to Design, Engineers, Finance, Procure, Construct,

Operate and Maintain 4 laning, Hazaribagh-Ranchi section of NH-33 on BOT basis in the state of Jharkhand. In the year of assessment, the assessee did not commence its business. All the expenses have been shown under capital work in progress. The assessee took the loan for the project and kept its fund with Bank of India which was utilized thereafter, therefore, the Bank of India credited the interest in favour of the assessee company which is in question. The law relied by the Ld. Representative of the assessee has decided this controversy by holding this fact that the interest income is in connection with the business exigency, therefore, the same is liable to be treated as business income. In the case decided by Hon'ble ITAT 'D' Bench in ITA. No. 663/M/2015 The Hon'ble ITAT has treated the said income as income from business. The relevant para no. 5 is reproduced as under.: -

> *"5. Having heard rival submissions, we are of the view that there is merit in the later submissions made by Ld A.R. From the financial statements, we notice that the assessee has borrowed loans for executing the project and the amount of loan outstanding as on 31.3.2010 stand at Rs.824.73 crores. The loan taken from banks alone stands at Rs.503.29 crores. It is an admitted fact that the term loans have to be repaid in fixed installments and hence there is merit in the contentions of the assessee that it was constrained to keep the funds in fixed deposits to earn interest, which will meet a portion of interest burden of bank loans. Further, we find merit in the contentions of the assessee that it had to keep some surplus funds in hand in order to meet the maintenance requirements of the roads. In these set of facts, we are of the view that there were business exigencies in keeping the funds in fixed deposits and hence there is merit in the contentions of the assessee that interest income earned on those*

fixed deposits is assessable as income from business. In the case of Lok Holdings (supra), the assessee therein collected advances from the customers who intended to purchase the flats in the properties as developed by the assessee. Since the construction was going on, the surplus funds available with the assessee out of the advances so received was deposited in Fixed deposits. The Hon'ble jurisdictional Bombay High Court, after considering the decision of Hon'ble Supreme Court rendered in the case of Tuticorin Alkali Chemicals and Fertilizers Ltd (supra), held that the interest income is assessable under the head Income from business."

5. In the similar circumstances, the Hon'ble ITAT Jaipur Bench in the case of ITA. No. 628/JP/2014 title as Infrastructure Development Company of Rajasthan Ltd. Vs. DCIT dated 11.08.2016 has held that the interest income upon the deposit by the assessee for the utilization of fund for the project, is liable to be treated as business income. The finding is hereby mentioned below for ready reference.: -

"2.10 We have heard the rival contentions and pursued the material available on record. We find that both the parties have relied upon the decisions of the Hon'ble Supreme Court and in addition, the assessee has relied upon the decisions of Hon'ble Delhi High Court. Therefore, it would be appropriate to first refer to these decisions and some of the other recent decisions of Hon'ble High Courts and Coordinate Bench decisions. 2.11 In the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra), the Hon'ble Supreme Court held as under:—

"The facts of this case were not in dispute. In the usual course, interest received by the company from bank deposits and loans would be taxable as income under the head Income from other sources' under section 56. It was argued on behalf of the company that it had not yet commenced its business and in any event if the income was derived from funds borrowed for setting up the factory of the company, it should be adjusted against the interest payable on the borrowed funds. Neither of the two factors can affect taxability of the income earned by the company the total income of the company is chargeable to tax

under section 4. The Total income has to be computed in accordance with the provisions of the Act. Section 14 lays down that for the purpose of computation, income of an assessee has to be classified under six heads. In the instant case, the company had chosen not to keep its surplus capital idle, but had decided to invest it fruitfully. The fruits of such investment will clearly be of the revenue nature. If the capital of a company is fruitfully utilised instead of keeping it idle, the income thus generated will be of the revenue nature and not accretion of capital Whether the company raised the capital by issue of shares or debentures or by borrowing will not make any difference to this principle. If borrowed capital is used for the purpose of earning income, that income will have to be taxed in accordance with law. Income is something which flows from the property. Something received in place of the property will be capital receipt. The amount of interest received by the company flows from its investments and is its income and is clearly taxable even though the interest amount is earned by utilising borrowed capital. It is true that the company will have to pay interest on the money borrowed by it. But that cannot be a ground for exemption of interest earned by the company by utilising the borrowed funds as its income. The company was at liberty to use the interest income as it liked it was under no obligation to utilise this interest income to reduce its liability to pay interest to its creditors. It could re-invest the interest income in land or shares, it could purchase securities, it could buy house property, it could also setup another line of business, it might even pay dividends out of this income to its shareholders. There was no overriding title of anybody diverting the income at source to pay the amount to the creditors of the company. It is well-settled that tax is attracted at the point when the income is earned Taxability of income is not dependent upon its destination or the manner of its utilisation. It has to be seen whether at the point of accrual, the amount is of the revenue nature and if so, the amount will have to be taxed. It is true that the Supreme Court has very often referred to accounting practice for ascertainment of profit made by a company or value of the assets of a company. But when the question is whether a receipt of money is taxable or not or whether certain deductions from that receipt are permissible in law or not, the question has to be decided according to the principles of law and not in accordance with accountancy

practice. Accounting practice cannot override section 56 or any other provision of the Act. Whether a particular receipt is of the nature of income and falls within the charge of section 4 is a question of law which has to be decided by the Court on the basis of the provisions of the Act and the interpretation of the term 'income' given in a large number of decisions of the High Courts, the Privy Council and also this Court. It is well-settled that income attracts tax as soon as it accrues. The application or destination of the income has nothing to do with its accrual or taxability. It is also wellsettled that interest income is always of a revenue nature unless it is received by way of damages or compensation." 2.12 In the case of Bokaro Steel Ltd. (supra), the Hon'ble Supreme Court, after considering the decision of Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra), held as under:— "The activities of the assessee in connection with first three receipts were directly connected with or were incidental to the work of construction of its plant undertaken by the assessee. Broadly speaking, these pertained 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 had provided these facilities. The same was true of the hire charges for plant and machinery which was given by the assessee to the contractor for the assessee's construction work. The receipts in this connection also went to compensate the assessee for the wear and tear on the machinery. The advances which the assessee made to the contractor 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 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. In case money is borrowed by a newly-started company which is in the process of constructing and erecting its plant, the interest incurred before the commencement of production on such borrowed money can be capitalised and added to the cost of the fixed assets created as a result of such expenditure. By the same reasoning if the assessee received any amounts which were inextricably linked with the process of setting up its plant and machinery, such receipts would go to reduce the cost of its assets. These were receipts of a capital nature and could not be taxed as income. The same reasoning would apply to royalty received by the assessee company for stones, etc., excavated from the assessee-company's land. The land had been allowed to be utilised by the contractors for the purpose of excavating stones to be used in the construction work of the assessee's steel plant. The cost of the plant to the extent of such royalty received, was reduced for the assessee. It was, therefore, rightly taken as a capital receipt."

2.13 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 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 & Fertilizers Ltd.'s case (supra) and that of Bokaro Steel Ltd. (supra). The test which permeates through the judgment of the Supreme Court in Tuticorin Alkali Chemicals & Fertilizers Ltd.'s case (supra) 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.'s case (supra) 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 section 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 section 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 section 14 in Chapter IV of the Act. For an income to be classified as income under the head "profit 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. v. CIT & EPT [1958] 34 ITR 368 (SC), and Narain Swdeshi Weaving Mills v. 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, inasmuch 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 section 14 of the Act. The head "income from other sources" is a residuary head of income. See S.G. Mercantile Corpn. (P.) Ltd. v. CIT [1972] 83 ITR 700 (SC) and CIT v. Govinda Choudhury & Sons [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 & Fertilisers Ltd. (supra) 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.'s case (supra) where the assessee had earned interest on advance paid to contractors during precommencement 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. 6. There is another perspective from which the present issue can be examined. Under section 208 of the Companies Act, 1956 a company can pay interest on share capital which is issued for a specific purpose to defray expenses for construction of any work and which cannot be made profitable for a long period subject to certain restrictions contained in subsections (2) to (7) of section 208. This section was specifically noted by the Supreme Court in Challapalli Sugars Ltd. v. CIT [1975] 98 ITR 167. 6.1 In our view the situation in the instant case is quite similar except here instead of paying interest on funds brought in for specific purpose interest is earned on funds brought in by way of share capital for a specific purpose. Could it be said that in the former situation interest could have been capitalized and in the later situation it cannot be capitalized. To test the principle we could extend the example, that is, would our answer be any different had assessee passed on the interest to the respective shareholders. If not, then in our view the only conclusion possible is that interest earned in the present circumstances ought to be capitalized. 7. In view of the discussion above, in our opinion the Tribunal misdirected itself in applying the decision of the Supreme Court in Tuticorin Alkali Chemicals & Fertilizers Ltd.'s case (supra) in the facts of the present case. In our opinion on account of the finding of fact returned by the CIT(A) that the funds infused in the assessee by the joint venture partner were inextricably linked with the setting up of the plant, the interest earned by the assessee could not be treated as income from other sources. In the result we answer the question as framed in favour of the assessee and against the revenue. These appeals are allowed and the impugned judgment is set aside." 2.14 That the Hon'ble Delhi High Court in the case of Sasan Power Ltd (supra) following the decision in case of Indian Oil Panipat Power Consortium Ltd. (supra), has held as under: "14. It is clear from the facts stated above that Commissioner of Income Tax (Appeals) and tribunal have specifically held that the interest income was on capital account. We have gone through the grounds of appeal and do not find any reason or justification to upset the said finding. The factual findings recorded by the CIT(Appeals) and tribunal are not under challenge. The CIT(Appeals) and the tribunal have held that in view of the factual position quoted above the decision of the Supreme Court in CIT v.

Bokaro Steel Ltd. [1999] 236 ITR 315 / 102 Taxman 94 was applicable as the Commitment Advance, which had been paid to PFC. This is not a case of surplus funds, which were available and investment were made in fixed deposits to earn interest. The interest paid to the power procurement utilities on commitment advances was capitalized. Interest paid and interest received were inextricably linked and have a commonality about their nature and character. The appellant cannot treat them differently. Commitment Advances and interest paid and received had reference to bidding process and linked to the project/purpose for which the respondent was set up. In view of the factual matrix, interest received on unutilized commitment advances cannot be taxed as revenue income and interest paid on commitment advance treated as a capital expense. This will be contradictory. The entire expenditure for inviting bids etc. and even documentation was paid to PFC. The amounts received from the prospective bidders on account of sale of tender documents was also transferred to PFC. As noticed above, Revenue has not challenged and has accepted the order of the tribunal deleting addition of Rs. 1,35,81,234/-paid by the respondent-assessee to PFC for preparation of tender documents. In view of the factual matrix, the tribunal has rightly followed the ratio in Indian Oil Panipat power Consortium Ltd.'s case (supra).”

2.15 In a recent decision, the Delhi High Court in case of Pr. Commissioner of Income-tax v. Facor Power Ltd. [2016] 66 taxmann.com 178 (Delhi) following the decision in case of Indian Oil Panipat Power Consortium Ltd. (supra), has held as under:

> 11. From the above extract, it is evident that the test that is required to be employed 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 same. In the present case, findings of fact have been returned by the Commissioner of Income Tax (Appeals) and have been confirmed by the Income Tax Appellate Tribunal to the effect that the funds were inextricably connected with the setting up of the power plant of the assessee. The learned counsel for the revenue has also not been able to point out any perversity in such finding and, therefore, the factual findings have to be taken as those accepted by the Income Tax Appellate Tribunal which is the final fact finding authority in the income tax regime. That being the case, the decision of the Division Bench in Indian Oil Panipat Power Consortium Ltd. (supra) would squarely apply to the facts of the present case and the Tribunal was right in

applying the same. 13. In the present case, there is a finding of fact that the money placed in the fixed deposit was inextricably linked with the setting up of the power plant. Thus, the revenue generated on account of interest on the said fixed deposits would be in the nature of a capital receipt and not a revenue receipt. This case has been decided on the basis of this principle and not on the basis that the source of the funds was through raising of share capital and not through borrowings."

2.16 The Coordinate Bench in case of Adani Power Ltd. v. Assistant Commissioner of Income-tax, Range-1, Ahmedabad [2015] 61 taxmann.com 355 (Ahmedabad - Trib.) has held as under:

"2.16 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 preoperative 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.1,64,07,481/- was a capital receipt not chargeable to tax during the year under consideration. Accordingly, Ground Nos. 1 of the assessee's appeal is allowed."

2.17 Further, we drawn guidance from the decision of Hon'ble Rajasthan High Court in case of Commissioner of Income-tax-I v. Kansara Modler Ltd. [2012] 20 taxmann.com 641 (Raj.) wherein it was held that:

> "13. In that view of the matter, what we are required to consider is, as to whether the Tribunal was legally justified in not applying the judgment rendered in Tuticorin's case (supra), or that, the Tribunal was justified in applying the judgments given in Bokaro Steel, and Karnal Cooperative Sugar Mill's case. If this question were to come originally before us, perhaps we might have taken a task of undertaking the exercise, as to which of the views is required to be followed, and may be, that we might have come to any conclusion, either ways. In such circumstances, when the learned Tribunal, after examining all the three judgments, in Tuticorin's case (supra), Karnal Cooperative Sugar Mill's case (supra), and Bokaro Steel's case (supra), has examined the question, and found Karnal Cooperative's case (supra) to be the nearest, and latest case, on facts, in our view, it cannot be said, that the Tribunal was wholly wrong in adopting this course. It would have been equally the same situation, if the learned Tribunal would have adopted the other line of reasoning, following the judgment in Tuticorin's case (supra). 14. Therefore, when there are two sets of judgments of Hon'ble Supreme Court, proceeding on different lines of reasoning's, and both stand on their own logical footing, and in that event, if the learned Tribunal has accepted one line of reasoning, supported by one set of judgments, it cannot be said, that the learned Tribunal was legally not justified in following the decision, as followed by it, simply because it might have been possible, or might be more appropriate to follow the other set of judgment, by following the other line of reasoning."

2.18 From the above, it is evident that there are two sets of judgments of Hon'ble Supreme Court, proceeding on different lines of reasonings. The Hon'ble Delhi High Court in case of Indian Oil Panipat Consortium Ltd (supra) has considered and interpreted the decisions of Hon'ble Supreme Court in case of Tuticorin Alkali Chemicals & Fertilizers (supra) as well as Bokaro Steel ltd (supra). After analyzing both the decisions of Hon'ble Supreme Court, it held that "the test which permeates through the judgment of the Supreme Court in Tuticorin Alkali Chemicals & Fertilizers Ltd.'s case (supra) 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.'s case (supra) 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."

2.19 The facts in the instant case are pari materia with the facts of the Indian Oil Panipat (supra) and the ratio decidendi of Hon'ble Delhi High Court in that case will squarely apply to the facts of the assessee. In the instant case, undisputedly, the funds have been borrowed for the specific purpose of execution of the mega road projects and as per the loan agreement executed between the consortium of bankers and the assessee dated 23.11.2005, all the disbursements shall be deposited in the trust and retention account which shall be subject to strict control and verification by the Senior lenders and all disbursements shall be utilised solely for the purposes of implementation of the project and no other purpose. The funds are thus inextricably linked to the setting up of the mega road projects and interest earned on such borrowed funds infused in the business could not be classified as income from other sources. We also note a distinguishing feature in the instant case that the assessee is not at liberty to use the interest so earned as per its will and discretion unlike the case in Tuticorin Alkali Chemicals & Fertilizers (supra) and the interest has to be used solely for the purposes of implementation of the specified projects only. The impunged interest receipt of Rs. 35,39,479/- on such borrowed funds relates to the mega road projects/stretches which were under construction and the completed road projects/stretches upto the date of commencement of commercial operations. Therefore, the interest received prior to commencement of commercial operations of the specified mega road projects will be in the nature of capital receipt

> and will be required to be set off against the pre-operative expenditure capitalized under the head "Capital work in progress" and the same cannot be brought to tax under the head "income from other sources". Hence, ground no. 1 of the assessee is allowed.
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> 3. In ground No.2, the assessee has challenged the action of the Ld.AO in double taxation of interest income of Rs. 1,64,07,481/-."

6. In the above mentioned law, the Hon'ble ITAT has discussed the law relied by the Ld. Representative of the assessee. The facts are not distinguishable at this stage also. In the instant case, the assessee company has been incorporated for setting up of infrastructure facilities being construction of toll road between Hazaribag and Ranchi which is under construction. The assessee earned the interest income upon the borrowed funds of Rs.46,03,457/- which was deducted from the borrowing cost to arrive at the figure of capital work in progress of Rs.1,86,25,83,284/-. The promoters of the company had introduced money by way of share capital and also obtained credit facilities from the banks and institutions. The total funds were exclusively meant for use for setting up of the infrastructure facility. The lenders disbursed the funds at specified intervals and the said funds were required to be used for the purpose of setting up of the project. Needless to say that the on account of the time difference, the funds may lies with the bank resultantly earning the interest income in dispute. These funds were deposit in the bank for a short period for the purpose of utilizing the same in the project. Eventually, raising the interest is clearly on account of business exigency. Taking into account, all the facts and circumstances, we are

of the view that the finding of the CIT(A) is not justifiable hence the same is hereby ordered to be set aside and we treat the interest income as business income of the assessee.

ISSUE NO. 3:-

8. Issue no. 3 is alternative issue of issue no 1 and 2 and the issue no.1 and 2 have been decided in the favour of the revenue against the assessee, therefore, there is no need to decide the same.

ISSUE NOs. 4 & 5:-

8. Under these issues the assessee has raised the claim of revenue expenses of Rs.66,77,379/-. At the very outset, the Ld. Representative of the assessee has argued that the CIT(A) has not decided the matter of controversy, therefore, this issue is required to be remanded before the CIT(A) to decide the controversy in accordance with law. However, on the other hand, the Ld. Representative of the Department has refuted the said contention. On appraisal of the order passed by the CIT(A), we noticed that the CIT(A) has not decided the issue on the basis of this fact that the same was not raised before the AO. Anyhow this issue is required to be adjudicated in accordance with law. In the said circumstances, we set aside the finding of the CIT(A) and the issues are required to be adjudicated at the end of the CIT(A) in the interest of justice in accordance with law by giving an

opportunity of being heard to the assessee. Accordingly, these issues are decided in favour of the assessee against the revenue.

ISSUE NO. 6:-

9. Issue no. 6 is in connection with the interest u/s 234B of the I.T. Act, 1961 which is consequential and depends upon the demand raised against the assessee hence need not required to be adjudicated.

9. In the result, the appeal filed by the **assessee is hereby ordered to be partly allowed.**

Order pronounced in the open court on 12.09.2018.

Sd/- Sd/-

(B. R. BASKARAN) **(AMARJIT SINGH)**
लेखा सदस्य / ACCOUNTANT MEMBER **न्यायिक सदस्य/JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 12.09.2018.
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आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**