

**IN THE INCOME TAX APPELLATE TRIBUNAL
RAIPUR BENCH, RAIPUR
BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No.271/RPR/2014
Assessment Year : 2011-12**

ITO, Ward- 1(1), Raipur (CG).	Vs.	CMDC ICPL Coal Ltd., Rajbandha Maidan, G. E. Road, Raipur (CG).
		PAN : AADCC4374P
(Appellant)		(Respondent)

Department by : Shri Ajit Kumar Laskar, DR
Assessee by : Shri R. B. Doshi, CA
Date of hearing : 09-08-2018
Date of pronouncement : 12-10-2018

ORDER

PER R. K. PANDA, AM :

This appeal filed by the Revenue is directed against the order dated 02.07.2014 of the Id. CIT(A), Raipur (CG) relating to assessment year 2011-12.

2. The only effective ground raised by the Revenue reads as under :-

“Whether in law and on facts & circumstances of the case, the learned CIT(A) has erred in deleting the addition of Rs.1,22,54,520/- made by the AO on account of interest earned in surplus funds parked with banks, treating it as income from other sources being a revenue receipt?”

3. Facts of the case, in brief, are that the assessee company is a joint venture company between Chhattisgarh Mineral Development Corporation Limited (CMDCL) and IFFCO Chhattisgarh Power Limited (ICPL). The object of this

joint venture is to undertake mining of coal from TARA Coal Block Mine in Sarguja district of Chhattisgarh. The entire share capital of the assessee company is jointly held in ratio of 51:49 by its promoters i.e. CMDCL and ICPL respectively. The return of income for the impugned assessment year was filed on 29.02.2012 declaring Nil income. During the course of assessment proceedings, the Assessing Officer observed that the assessee company earned income from interest on short term deposits on the funds temporarily parked in the Bank which are out of the funds received by way of share capital. On being questioned by the Assessing Officer, it was submitted that the share capital funds were temporarily parked to productively exploit the funds thereby effectively reduce the cost of project. It was explained that during the year under consideration, the assessee company was in the process of obtaining mining lease and mining rights for Tara Coal Block Project for which various administrative and statutory approvals/ clearances were under progress and the assessee had not started any business or commercial activities during this period. Since the assessee earned interest income from the short term investment made in the bank from the parking of funds which are awaiting its disbursement for land acquisition and other purposes/ activities, the income earned by the assessee from interest is not taxable in the hands of the assessee as “Income from other sources” and the same was inextricably linked with the

process of setting-up of its Tara Coal Block Project and such receipts will go to reduce the cost of its project and pre-operative expenses.

4. However, the Assessing Officer was not satisfied with the explanation given by the assessee. Relying on various decisions including the decision of the Hon'ble Supreme Court in the case of Tuticorin Alkalies Chemicals Fertilizers Ltd. vs. CIT reported in 227 ITR 172, the Assessing Officer held that the interest of Rs.1,22,54,520/- earned by the assessee from fixed deposits kept in various banks during the year under consideration was an independent income being interest on investment of surplus funds in fixed deposits etc. which is clearly a revenue receipt liable to tax. Rejecting the various explanation given by the assessee and relying on the decision of the Hon'ble Supreme Court cited (supra) and various other decisions, the Assessing Officer made addition of Rs.1,22,54,520/- to the total income of the assessee.

5. In appeal, the Id. CIT(A) deleted the addition by observing as under :-

“7. I have carefully gone through the assessment order and written submissions of the appellant. The appellant has claimed that the interest income on short term deposits is a capital receipt not chargeable to tax and the same has been reduced from the pre-construction expenses. On the contrary, according to the A.O, the interest income is a revenue receipt and taxable under the head "Income From Other Sources" as the share capital fund of the appellant was not and is not meant for any specific purpose/project.

8. The issue to be decided in the present case lies in a narrow compass, whether the "interest" earned by the appellant from terms deposits with banks is a Capital Receipt not chargeable to tax or a revenue receipt taxable under the head "income from other sources"? For determining the nature of receipt as aforesaid, firstly, the issue that needs to be decided is whether or not the share capital funds parked in term deposits yielding interest income were inextricably linked with the setting up of any

specific project/purpose. This again requires ascertainment of the fact whether or not there was any specific project/purpose.

9. *In the factual background of the instant case, it is pertinent to advert to the legal position emerging from the provisions of the Act and judicial pronouncements: Section 4 brings to charge tax on total income. Prima facie, in order to come within the scope of the charging provision, the receipt in question should bear the character of income. In the absence of any specific provision, like those pertaining to capital gains, a capital receipt shall be outside the scope of section 4.*

10. *While determining the nature of a receipt as being a trading receipt taxable as income from business or profession or otherwise, one should be guided by the terms of the agreement genuinely entered into between the parties. The Revenue authorities cannot ignore the genuine agreements. In the absence of any suggestion or allegation of collusion, fraud or camouflage, the Revenue cannot resort to any attempt to rewrite the agreement with a view to imposing the levy of tax especially when the transactions between the parties are at arms length. This has been made clear by the Delhi High Court in D.S. Bist & Sons vs. CIT (1984) 149 ITR 276 (Del) : TC14R.573 therein it was observed that "the Act does not clothe the taxing authority with any power or jurisdiction to rewrite the terms of agreement entered into, particularly in view of the finding of the Tribunal that there is nothing to suggest that the parties were not dealing with each other at arms length and there is no suggestion of any collusion ; the commercial expediency of the contract is to be adjusted by the contracting party as to its terms." It was further made clear that "under the taxing system it is upto the assessee to conduct his business in his wisdom. The assessee may enter into commercial transactions with another party who is ad idem with the assessee as to terms and conditions. In the absence of the any collusion between the two, it is not possible to vary the terms".*

11. *I have carefully gone through the letter from the Office of Ministry of Coal, Government of India dated 14.08.2003 addressed to the Principal Secretary, Department of Mining, Commerce, Industry and Public Undertakings, Chhattisgarh downloaded from the website i.e. Public Domain. From the perusal of said letter, it is seen that the Government of Chhattisgarh had made a request to the Ministry of Coal, Government of India and in pursuance of the said request, consent was accorded by the Central Government to work the Tara Block in the State of Chhattisgarh through Chhattisgarh Mineral Development Corporation Limited" It is also seen that in the said letter itself, a condition was stipulated that the mining in Tara Coal Block will be done by Joint Venture Company wherein Chhattisgarh Mineral Development Corporation Limited (for short "CMDC) shall be holding more than 50% of voting equity in the joint venture, it is also seen that there is an explicit stipulation in the said letter whereby CMDCL has to supply coal produced from the Tara Coal Block mainly to Chhattisgarh State Electricity Board for the proposed Power Plant.*

12. *I have also carefully perused the Memorandum of Understanding entered in to between the Government of Chhattisgarh, Chhattisgarh State Electricity Board (CSEB) and Indian Farmers Fertilizers Cooperative Limited OFFCO) dated 04.06.2005. From the perusal of said Memorandum of Understanding, following facts are noted:-*

- i. *Vide this Memorandum of Understanding itself, foundation was laid for the formation of the appellant company as well as IFFCO Chhattisgarh Power Limited (ICPL), in fact, it is also seen that vide this Memorandum of Understanding itself a decision was taken to form a company to be reckoned as "Power Company" to be named as IFFCO Chhattisgarh Power Limited (being a Joint Venture Company with 26% equity share holding of Chhattisgarh State Electricity Board and 74% equity share holding of Indian Farmers Fertilizers Cooperative Limited). It is seen that the power project was expected to commission in the F.Y. 2009-10.*
- ii. *It is also seen that vide the said Memorandum of Understanding itself, foundation was laid for formation of the appellant company and it was agreed between Government of Chhattisgarh, Chhattisgarh State Electricity Board and Indian Farmers Fertilizers Cooperative Limited that a company to be reckoned as "Coal Company" will be incorporated with 51% equity share holding of Chhattisgarh Mineral Development Corporation Limited and 49% equity share holding of the Power company namely IFFCO Chhattisgarh Power Limited.*
- iii. *Vide this Memorandum of Understanding itself, it was agreed that requirement of coal for the Power Project will be met from Tara Coal Block allotted to Chhattisgarh Mineral Development Corporation Limited by Ministry of Coal.*

13. *I have also carefully perused the Joint Venture Agreement dated 31.01.2008 between Chhattisgarh Mineral Development Corporation Limited and IFFCO Chhattisgarh Power Limited. From the perusal of para 3.17 of the said agreement, it is seen that Chhattisgarh Mineral Development Corporation Limited and IFFCO Chhattisgarh Power Limited had bound themselves by the said agreement and it was agreed that till the execution of mining lease in favour of the company, the company, infact the appellant company shall not undertake any activity other than those required for timely implementation of the project and that the said joint venture agreement shall have overriding effect over the contents of Memorandum of Association and thus, in my considered view, regardless of what is stated in the object clause of Memorandum of Association, the parties to the said agreement namely Chhattisgarh Mineral Development Corporation Limited and IFFCO Chhattisgarh Power Limited had bound themselves and to make efforts towards timely implementation of the project i.e. Tara Coal Block Project.*

14. *I have also taken note of the fact that one of the joint venture partner namely Chhattisgarh Mineral Development Corporation Limited which is essentially a holding company of the appellant company had already spent sum of Rs.16.15 crores even prior to the formation of the appellant company i.e. between 01.04.2002 to 10.04.2008, it is also seen that Chhattisgarh Mineral Development Corporation Limited had spent about Rs.6.62 crores in the financial year 2006-07 itself for land acquisition.*

15. *I have also carefully perused the Gazette Notification dated 26.06.2009 and various correspondence between Ministry of Environment and Forest and*

Government of Chhattisgarh, similarly between Government of Chhattisgarh and the Prime Minister etc. I have also perused the return of income and financial statements of the appellant for the preceding assessment years & assessment orders passed under section 143(3) of the Act for the Assessment Year 2009-10. On a thoughtful consideration of the entire material on record before me which were very well before the AO during the course of assessment proceedings also, it is an undisputed fact that a Memorandum of Understanding (MOU) was executed on 4/6/2005 with an objective of setting up Power Project and as its extension, Coal Project through Tara Coal Block.

16. *Cumulatively considering the underlying facts and history since 2003, in my considered view, the terms of Memorandum of Association cannot be viewed in isolation, particularly, when the case of the appellant, directly or indirectly, involves involvement of Ministry of Coal, Government of India and Government of Chhattisgarh regulating use of coal and stipulations have been laid down for supply of coal to the Power Project to IFFCO Chhattisgarh Power Limited and therefore, I am convinced that the appellant company was formed to undertake a specific project i.e. Tara Coal Block Project whereby the appellant company was to obtain mining lease and mining rights in its favour and thereafter supply coal from Tara Coal Block to the Power Project of IFFCO Chhattisgarh Power Limited in Surguja District.*

17. *It is also seen that the appellant company was constituted with initial equity contribution of Rs.37.00 crores, out of which, Rs.16.15 crores had already been spent even prior to the formation of the appellant company and the said sum i.e. Rs.16.15 crores was spent exclusively for Tara Coal Block Project by the holding company namely Chhattisgarh Mineral Development Corporation Limited as has been certified by a Chartered Accountant.*

18. *It is also seen that the sum of Rs.37.00 crores was a mere initial equity contribution and the appellant company had to raise additional share capital in the subsequent years for obtaining statutory clearances and land acquisition. Keeping in view the aforesaid facts, I am convinced that there is an inextricable link between the share capital funds and Tara Coal Block Project, conversely, the share capital funds were infused for specific project i.e. Tara Coal Block Project in the instant case. I am convinced that the rider was imposed by the Ministry of Coal, Government of India way back in 2003 while allotting Tara Coal Block to Chhattisgarh Mineral Development Corporation Limited.*

19. *It is a settled law that the construction of a particular document, i.e. the MOA in the instant case, depends upon its pith and substance and the paramount test in this regard should be the predominant intention of the parties while executing that particular document. Such intention has to be inferred from the underlying circumstances and factual background of the case and any document should not be read in isolation. In the present case, in my considered opinion, the object clause of the MOA has to be necessarily viewed in the light of the circumstantial and documentary evidences and factual background, particularly, in the light of the restrictions imposed by the JVA dated 31.1.2008 prior to formation of the appellant company wherein they have categorically confirmed in unambiguous terms as reproduced here-in-below:-*

3.17 *Conduct of Business till Execution of Mining Lease.*

Parties agree that on and from the date hereof and till the execution of Mining Lease in favour of the Company:

3.17.1 *The Company shall not undertake any activity other than those required for timely implementation of the project or as may hereafter be agreed in writing by and between CMDC and ICPL;*

1.3 *Overriding Effect of the Agreement*

1.3.1 *The Parties agree that their rights and obligations in relation to the Company including the operation, control and management of the Company shall be interpreted, acted upon and governed by the provisions of this Agreement.*

1.3.2 *In so far as contractual relationship inter se between the Parties is concerned, :*

- a) *this Agreement shall prevail and have an overriding effect, notwithstanding anything contained in any other document or agreement(s) including the Memorandum of Association and the Articles of Association of the Company;*
- b) *the understanding reflected in this Agreement shall prevail in case of any ambiguity or inconsistency between this Agreement and any other document(s) or agreements or the Memorandum of Association and the Articles of Association of the Company; and,*
- c) *to the extent possible and permissible, any such ambiguity / inconsistency (referred to in b) above will be removed (and the Parties will so endeavour), by causing necessary modifications to be carried out to the Memorandum of Association or the Articles of Association or other relevant document(s) or agreements), as the case may be, to ensure that the same are in conformity with the provisions of this Agreement, to the extent permitted by the Act."*

20. *In my considered opinion, such clarification is sufficient to draw an inference that the appellant company was not free to utilize the funds for any purpose except for TCB Project, however, the AO, despite the said clarification and other documentary evidences filed on record thereby constituting vital aid in construction of the MOA, has not properly appreciated the pith and substance of the said evidences and has reached an erroneous conclusion that there was no string attached to the share capital of the appellant company. In my considered opinion, there is no merit in the action of the A.O in trying to find out the strings / rider attached to the share capital under the provisions of Income Tax Act and the Companies Act, 1956. Furthermore, as the Companies Act and Income Tax Act is common for all, including the appellant company and Indian Oil Panipat Power Consortium Limited, it is not understood as to what made the A.O accept strings / rider attached to the share capital of Indian Oil Panipat Power Consortium Limited and absence of any such string / rider to the share capital of the appellant company.*

21. *The A.O ought to have applied the same bench mark while construing and analyzing nexus of share capital fund of the appellant with specific purpose / project which has been applied by the A.O in the case of NTPC Sail Power Company Limited*

as well as Indian Oil Panipat Power Consortium Limited and IFFCO Chhattisgarh Power Limited. It is seen that the A.O has, except referring to the generality of the object clause of Memorandum of Association of the appellant company, not brought on record any evidence which can lead to even an iota of doubt that the share capital was meant for multiple purposes and not for specific purpose / project. It is not the case of the A.O that the appellant ever even occasionally used funds for purposes other than Tara Coal Block Project. It is not the case of the A.O that there is apparent and material difference in the Memorandum of Association of the appellant company and other companies viz, NTPC Sail Power Company (P) Limited, Indian Oil Panipat Power Consortium Limited and IFFCO Chhattisgarh Power Limited, as far as generality of the contents of object clause in Memorandum of Association is concerned. I find that while arriving at the conclusion that there were no strings attached to the share capital of the appellant company and that the appellant was free to use the funds as per its will and that Memorandum of Association permits the appellant to pursue some other business/purpose, the A.O merely relied upon the generality of Memorandum of Association and disregarded the chronology of facts of the case as emerging from the various documentary evidences brought on record by the appellant.

22. Now, advertent to the submission of the appellant that there is a direct nexus even between the interest income and interest cost on compensation against land acquisition, considering the fact that the Gazette Notification u/s 4 of the Land Acquisition Act was published in the F.Y. 2009-10 itself, particularly, the provisions of Section 23 of Land Acquisition Act providing for payment of interest on compensation since the date of publication of the notification u/s 4, I am convinced that there is a direct nexus between the interest income on term deposits and interest cost on compensation. I do find considerable force in the submissions of the appellant that if the award u/s 23 of the Land Acquisition Act had been passed earlier as was envisaged in the MOU dated 04.06.2005, the appellant would have had to make payment against land acquisition by way of compensation much earlier and in that eventuality, the appellant would not have been left with any funds to invest in the term deposits yielding interest income. It is also seen that the award u/s 23 was finally passed in the F.Y. 2011-12 and the appellant company was asked to pay interest since F.Y. 2009-10, the submission of the appellant that the sum of Rs.98.42 crores had been spent up to F.Y. 2013-14 cannot be ignored, this is clearly implied that the initial equity contribution was awaiting disbursement against land acquisition and other activities related to Tara Coal Block Project. Therefore, I am convinced that the share capital funds had to be earmarked by the appellant company to ensure that it should have sufficient funds / liquidity to make payment against land acquisition and other project related activities and in such a case, the earning of interest on temporary parking of funds and term deposits cannot be said to give rise to an independent source of income. I am convinced with the explanation of the appellant while distinguishing following decisions relied upon by the A.O in view of the divergent facts,

- (i) Tuticorin Alkali Chemicals & Fertilizers Ltd. v, CIT [1997] 227 ITR 172/93 Taxman 502;

- (ii) *M.P. State Industries Corpn. Ltd. v, CIT [1968] 69 ITR 824;*
- (iii) *Bharat Oman Refineries Ltd. v. Commissioner of Income-tax-I, [2013] 35 taxmann.com 187 (Madhya Pradesh);*

23. I have also carefully gone through the latest decision in *Commissioner of Income-tax -IV v. Indian Vaccines Corporation Ltd.* reported in 44 taxmann.com 130 (Delhi) dated March 5, 2014 dealing with identical issue in which it was held that:

"The investment of the funds has nothing to do and was not inextricably linked with the construction of the project. It was an investment under the 'portfolio management scheme' operated by banks under which an assured return was guaranteed by the banks. It was a conscious act of investment of funds by the assessee and if such investment results in income, the same must be brought to tax under the residual head, even if the company has not commenced its business. The Tribunal erred in placing reliance upon the fact that the present case is not one where borrowed funds were used for parking them to earn interest and that the funds were those of the promoters. [Para 7]

The Tribunal placed undue emphasis on the source of the funds instead of focussing its attention to the utilisation of the fund - whether they were invested in activities which are inextricably linked with the construction of the project. In fact, the assessee in the present case had invested the funds under the scheme operated by the banks for an assured return. That had nothing to do with the project and there was no inextricably link between the investment and the project. The interest income could not, therefore, be permitted to be adjusted against the capital work-in-progress on pre-operative expenses. Both the Assessing Officer and the Commissioner (Appeals) were right in bringing the interest to tax under the head 'Income from other sources'. [Para 7]"

24. However, even the said decision is also not supporting the contention of the A.O in view of divergent facts inasmuch as, in the said case, the Hon'ble High Court took note of the fact that the investment of the funds has nothing to do and was not inextricably linked with the construction of the project, on the contrary, in the case of the appellant, funds are inextricably linked with the process of setting up of the project. Secondly, in the said case, there was an investment under the 'portfolio management scheme' (PMS) operated by banks under which an assured return was guaranteed by the banks, thus, it was a conscious act of investment of funds by the assessee, whereas, in the case of the appellant, the investment was in short term bank deposits awaiting disbursement against land acquisition and other project related cost, the investment was not by choice of the appellant but by compulsion so as to reduce the project cost. The investment in PMS presupposes longer period, thus, it is a fair presumption that the said company had substantial surplus funds with no immediate need of funds, however, no such facts are found existing in the case of the appellant. Moreover, in the case of the appellant, it is seen that the liability of the appellant to pay compensation against land acquisition and interest thereon had arose by virtue of Gazette Notification u/s 4 of Land Acquisition Act, 1894 dated 26.6.2009. Hence, I am in agreement with the submission of the appellant that there was a direct nexus between interest earned by the appellant and interest payable on compensation in view of provisions of Section 23 of Land Acquisition Act, 1894.

25. *I am convinced that the case of the appellant is certainly deriving strength from the following decisions:-*

- (i) *NTPC Sail Power Company Pvt. Ltd Vs. Commissioner Of Income Tax (2012) 210 TAXMAN 358 (Delhi)*
- (ii) *Indian Oil Panipat Power Consortium Ltd vs.. ITO (2009) 315ITR 255 (Del.)*
- (iii) *CIT vs. Bokaro Steel Ltd. (1999) 151 CTR (SC) 276: (1999) 236 ITR 315 (SC)*
- (iv) *IFFCO Chhattisgarh Power Limited vs. Income Tax Officer in ITA No.6367/Del/2012*

26. *I am convinced that the case of the appellant is squarely covered by the decision of the Hon'ble ITAT Delhi Bench in the case of IFFCO Chhattisgarh Power Limited vs. Income Tax Officer in ITA No.6367/Del/2012 wherein it was held as under.-*

"In view of above, we had no hesitation to hold that in the present case, the assessee earned income from interest on term and other deposits. This interest income of Rs.1,22,96,974/- has been earned on the funds lying in the bank which are out of funds received by way of share application money. Before the authorities below, the assessee explained that it is a common practice among the business undertaking to park the surplus funds temporarily available to them while setting up new business or while undertaking a diversification / substantial expansion in a manner so as to derive certain income therefrom, thereby effectively reducing the cost of construction and interest incurred before the commencement of business. In the present case, during the year under consideration, the assessee company was in the process of setting up of 1320 MW power plant in the same district of Chhattisgarh State of India for which land acquisition activities as per relevant state laws were under progress and the assessee has not started any business or commercial activity during this period. Since the assessee earned interest income from the investment made in the banks and other institutions from parking of funds which were awaiting its disbursement for land acquisition and other activities in view of above, respectfully following the judgment of Hon'ble Apex Court in the case of Bokaro Steel Limited (supra) and recent judgment of Hon'ble High Court of Delhi in the case of NTPC Sail Power Co. Ltd. (supra) and Indian Oil Painpat Power Consortium Limited (supra), we hold that the income earned by the assessee from interest is not taxable in the hands of assessee as income from other sources and the same was inextricably linked with the process of setting up its plant and machinery and such receipts will go to reduce the cost of its assets and preoperative expenses.

Accordingly, both the grounds of the assessee are allowed with a direction to the Assessing Officer that the income earned from interest on term and other deposits during the year under consideration cannot be taxed as income from other sources but the same can be given treatment for reducing the cost of assets and for setting off preoperative expenses.

27. *It is seen that the case of the appellant was assessed in A.Y 2009-10 and the appellant did submit the ledger of Interest income before the then A.O during the course of assessment proceedings u/s 143(3), vide reply submitted before the A.O. on 24.10.2011, from the perusal of ledger of interest income, it is seen that the interest for the entire year was transferred to "Incidental expenditure incurred during construction period 2008-09 transferred to respective group of CWIP Account". It is also seen that the appellant had, vide reply submitted on 19.12.2011 during the course of proceedings u/s 143(3) for A.Y. 2009-10, submitted the ledger of sale of tender form and such income was also transferred to "Incidental expenditure incurred during construction period 2008-09 transferred to respective group of CWIP Account". In this background, I am inclined to accept the submission of the appellant that the then A.O had duly applied his mind on taxability of interest and other income and after being satisfied that the interest and other income constitutes capital receipts not chargeable to tax, the then A.O had accepted the NIL income returned by the appellant, as the facts prevailing in A.Y. 2009-10 and during the year under consideration are identical, I find no reason for the A.O to take a contrary view during the year under consideration. Hence, the addition made by the A.O deserves to be deleted even on this ground.*

28. *I am convinced that the interest income earned by the appellant is a capital receipt and rightly reduced by the appellant from its pre-construction expenses as the commercial operations have not commenced. Looking to the facts and circumstances of the case, as also decisions cited above, the addition of Rs.1,22,54,520/- on account of "Income From Other Sources" made by the A.O cannot be sustained. Hence, the addition is deleted."*

6. Aggrieved with such order of the ld. CIT(A), the Revenue is in appeal before the Tribunal.

7. The ld. DR strongly supported the order of the Assessing Officer. Referring to the decision of the Delhi Bench of the Tribunal in the case of M/s IFFCO Chhattisgarh Power Ltd. (supra), the ld. DR submitted that in that case which has been relied on by the ld. CIT(A) the assessee company was in the process of setting up of 1320 MW power plant in the same district of Chhattisgarh State of India for which land acquisition activities as per relevant

state laws were under progress and the assessee has not started any business or commercial activity during this period. However, in the instant case of the assessee, the project has not started in this year or even in the subsequent assessment year. Therefore, the entire addition should be charged as revenue receipt and the action of the assessee in reducing such income from the pre-operative expenses is not justified. The interest income is not inextricably linked with the project, therefore, the decision of the Hon'ble Supreme Court in the case of Tuticorin Alkalies Chemicals Fertilizers Ltd. (supra) is clearly applicable.

8. The ld. counsel for the assessee on the other hand heavily relied on the order of the ld. CIT(A). He submitted that the ld. CIT(A) has correctly applied the decision of the Delhi Bench of the Tribunal in the case of IFFCO Chhattisgarh Power Ltd. (supra). Referring to page 9 of the order of the Tribunal, he submitted that in that case also the assessee company was in the process of setting-up of 1032 MW power plant in the state of Chhattisgarh for which land acquisition activities as per relevant state laws were under progress and the assessee has not started any business or commercial activity during this period. The Tribunal relied on the decision of the Hon'ble Apex Court in the case of Bokaro Steel Ltd. (supra) and the recent decision of the Hon'ble Delhi High Court in the case of NTPC Sail Power Co. Ltd. (supra) and Indian Oil

Panipat Power Consortium Limited (*supra*) and held that the income earned by the assessee from interest is not taxable as “Income from other sources” and the same was inextricably linked with the process of setting-up its plant and machinery and this receipt was reduced from the cost of its assets and pre-operative expenses. Since in the instant case also no other activity other than coal activities has taken place and subsequent to cancellation of coal block by the Hon'ble Supreme Court, no business activities could be carried out, therefore, the decision of the Delhi Bench of the Tribunal is squarely applicable to the facts of the present case. Therefore, the order of the Id. CIT(A) should be upheld and the grounds raised by the Revenue should be dismissed.

9. The Id. DR, in his rejoinder, submitted that in the instant case the project did not come up therefore, the interest income from surplus funds has to be charged to tax. He submitted that in the case of IFFCO Chhattisgarh Power Ltd. (*supra*) the project has come up, however, in the instant case the project has never come up. Therefore, the decision of the Delhi Bench of the Tribunal is not applicable to the facts of the present case.

10. We have considered the rival arguments made by both the sides and perused the material available on record. We have also considered the various decisions cited before us. We find the Assessing Officer relying, on the decision of the Hon'ble Supreme Court in the case of Tuticorin Alkalies

Chemicals Fertilizers Ltd. (supra) and various other decisions taxed the interest income of Rs.1,22,54,520/- earned by the assessee from fixed deposits kept in various banks during the year under consideration as revenue receipt liable to tax during the current year. We find, in appeal, the Id. CIT(A), following the decision of the Hon'ble Supreme Court in the case of Bokaro Steel Ltd. (supra) and the decision of the Delhi Bench of the Tribunal in the case of IFFCO Chhattisgarh Power Ltd. (supra) and various other decisions held the income as capital in nature and has to be reduced from its pre-operative expenses as the commercial operations have not commenced. He accordingly deleted the addition. We find no infirmity in the order of the Id. CIT(A) on this issue. From the various details furnished by the assessee, we find that an MOU dated 04.06.2005 was entered into between Government of Chhattisgarh, CMDC and IFFCO Chhattisgarh Power Ltd. for implementing a power project on joint venture, copies of which are placed at page 1 to 3 of the Paper Book. We find a joint venture agreement between ICPL and CMDCL was entered into 31.01.2008, copies of which are placed at page 4 to 37 of the Paper Book. We find the Ministry of Environment & Forest, Government of India vide letter dated 05.07.2011 has granted Stage 1 Clearance, copy of which is placed at page 48 to 50 of the Paper Book. We find the Ministry of Environment & Forest, Government of India vide letter dated 23.05.2012 had granted

environment clearance to the assessee, copy of which is placed at page 51 to 59 of the Paper Book. We further find from the various correspondences that the assessee was directed to deposit an amount of Rs.6.61 crores for land acquisition compensation, copies of which are placed at pages 61 to 67 of the Paper Book. We further find from the letter addressed by the assessee to CMDCL for advance against equity contribution, copy of which is placed at pages 68 to 70 of the Paper Book which shows that the funds were needed for land acquisition. We, therefore, find merit in the argument of the ld. counsel for the assessee that the above evidences establish that the assessee was in dire need of funds for land acquisition. The Land Acquisition Officer kept on passing orders for land acquisition and assessee was not able to make payment. Since part payment was not possible, therefore, we find merit in the argument of the ld. counsel for the assessee that the funds were needed to be pooled and kept ready. We further find from the submissions of the ld. counsel for the assessee that the Ministry of Coal has sought explanation from CMDC Ltd. for slow progress in respect of TCB vide letter dated 03.01.2014. We, therefore, are of the view that the interest earned on deposits kept by the assessee out of surplus funds is inextricably linked with the process of setting-up its assets and it will go to reduce the cost of assets.

11. We find the Hon'ble Delhi High Court in the case of Indian Oil Panipat Power Consortium Ltd. vs. ITO reported in 315 ITR 255 has held that interest which accrued on funds deployed with the bank could not be taxed as income from other sources but constituted capital receipt liable to be set off against pre-operative expenses as the said funds were especially earmarked for purchase of land and development of infrastructure. The Hon'ble High Court while holding so considered the decision of the Hon'ble Supreme Court in the case of Tuticorin Alkalies Chemicals Fertilizers Ltd. (supra) and Bokaro Steel Ltd. (supra) and various other decisions. We find the Hon'ble Supreme Court in the case of CIT vs. Karnal Co-operative Sugarcane Mills Ltd. reported in 243 ITR 2 following the decision in the case of Bokaro Steel Ltd. (supra) has observed as under :-

“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 has been earned. This is, therefore, not a case where any surplus share capital money which is lying idle has been deposited in the bank for the purpose of earning interest. The deposit of money in the present case is directly linked with the purchase of plant and machinery. Hence, any income earned on such deposit is incidental to the acquisition of assets for the setting up of the plant and machinery. In this view of the matter the ratio laid down by this court in Tuticorin Alkali Chemicals and Fertilizers Limited v. CIT [1997] 227 ITR 172, will not be attracted. The more appropriate decision in the factual situation in the present case is in CIT v. Bokaro Steel Ltd. [1999] 236 ITR 315 (SC). The appeal is dismissed. There will be no order as to costs.”

12. We find the Delhi Bench of the Tribunal in the case of IFFCO Chhattisgarh Power Ltd. (supra) after considering the various decisions has held that income earned by the assessee from interest on deposits with bank is not taxable in the hands of the assessee as income from other sources and the same was inextricably linked with the process of setting up of its plant and machinery and, therefore, such receipts will go to reduce the cost of its assets and pre-operative expenses. The relevant observation of the Tribunal from para 8 onwards reads as under :-

“8. After careful consideration of above rival submissions, contentions and legal propositions and citations relied upon by both the parties, we observe that the main issue in this appeal is that the only income earned from investment of funds before commencement of business is an income in the hands of assessee taxable under the head “income from other sources.”

9. In the case of Bokaro Steel Limited (supra), Hon’ble Apex Court also considered the ratio of the judgment in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. vs C.I.T. (supra) and Godhra Electricity Company Ltd. vs C.I.T.(1997) 225 ITR 746 (SC) and held as under:-

“The appellant, however, relied upon the decision of this court in Tuticorin Alkali Chemicals and Fertilizers Ltd. v. CIT [1997] 227 ITR 172. That case dealt with the question whether investment of borrowed funds prior to commencement of business, resulting in earning of interest by the assessee would amount to the assessee earning any income. This court held that if a person borrows money for business purposes, but utilises that money to earn interest, however temporarily, the interest so generated will be his income. This income can be utilised by the assessee whichever way he likes. Merely because he utilised it to repay the interest on the loan taken, will not make the interest income as a capital receipt. The Department relied upon the observations made in that judgment (at page 179) to the effect that "if the company, even before it commences business, invests the surplus funds in its hands for purchase of land or house property and later sells it at profit, the gain made by the company will be assessable under the head 'Capital gains'. Similarly, if a company purchases a rented house and gets rent, such rent will be assessable to tax under section 22 as income from house property. Likewise, a company may have income from other sources. . . . The company may also, as in

that case, keep the surplus funds in short term deposits in order to earn interest. Such interest will be chargeable under section 56 of the Income tax Act". This court also emphasised the fact that the company was not bound to utilise the interest so earned to adjust it against the interest paid on borrowed capital. The company was free to use this income in any manner it liked. However, while interest earned by investing borrowed capital in short term deposits is an independent source of income not connected with the construction activities or business activities of the assessee, the same cannot be said in the present case where the utilisation of various assets of the company and the payments received for such utilisation are directly linked with the activity of setting up the steel plant of the assessee. These receipts are inextricably linked with the setting up of the capital structure of the assessee company. They must, therefore, be viewed as capital receipts going to reduce the cost of construction. In the case of Challapalli Sugars Ltd. v. CIT [1975] 98 ITR 167, this court examined the question whether interest paid before the commencement of production by a company on amounts borrowed for the acquisition and installation of plant and machinery would form a part of the actual cost of the asset to the assessee within the meaning of that expression in section 10(5) of the Indian Income tax Act, 1922, and whether the assessee will be entitled to depreciation allowances and development rebate with reference to such interest also. The court held that the accepted accountancy rule for determining the cost of fixed assets is to include all expenditure necessary to bring such assets into existence and to put them in working condition. 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 receives any amounts which are inextricably linked with the process of setting up its plant and machinery, such receipts will go to reduce the cost of its assets. These are receipts of a capital nature and cannot be taxed as income"

10. At this point, it is worthy to take guidance from the judgment of Hon'ble High Court of Delhi in the case of Indian Oil Panipat Power Consortium Ltd. vs ITO (supra) wherein para 5 reads as under:-

"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. vs C.I.T. (supra) and that of Bokaro Steel Ltd. (supra). The test which permeates through the judgment of Supreme Court in Tuticorin Alkali Chemicals & Fertilizers Ltd. vs C.I.T. (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 preoperative expenses."

11. *In another recent judgment of Hon'ble High Court of Delhi in the case of NTPC Sail power Company Pvt. Ltd. vs C.I.T.(supra), the controversy is now settled with the following observations:-*

"9. This Court, in Indian Oil Panipat Power Consortium Ltd Vs. ITO (2009) 315 ITR 255 (Del.) held that where interest on money received as share capital is temporarily placed in fixed deposit awaiting acquisition of land, a claim that such interest is a capital receipt entitled to be set off against pre-operative expenses, is admissible, as the funds received by the assessee company by the joint venture partners are "inextricably linked" with the setting up of the plant and such interest earned cannot be treated as income from other sources. The reasoning in Indian Oil is in line with Bokaro Steel Ltd. Similarly, the Supreme Court in CIT vs. Karnataka Power Corporation, 247 I.T.R. 268 (SC) and Bongaigaon v Refinery and Petro Chemical Co. Ltd. vs. Commissioner Income Tax 251 I.T.R. 329(SC) held that such receipts are not income.

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

11. As a result of the above discussion, it is held that the Tribunal and the lower authorities fell into error in holding that the interest earned on

fixed deposit of amounts borrowed, which is the subject matter of the present appeal, would have to be treated as revenue receipt. The answer is given in favour of the assessee; the appeal is consequently allowed.”

12. *In view of above, we have no hesitation to hold that in the present case, the assessee earned income from interest on term and other deposits. This interest income of Rs.1,22,96,974/- has been earned on the funds lying in the bank which are out of funds received by way of share application money. Before the authorities below, the assessee explained that it is a common practice among the business undertaking to park the surplus funds temporarily available to them while setting up new business or while undertaking a diversification/substantial expansion in a manner so as to derive certain income therefrom, thereby effectively reducing the cost of construction and interest incurred before the commencement of business. In the present case, during the year under consideration, the assessee company was in the process of setting up of 1320 MW power plant in the same district of Chhatisgarh State of India for which land acquisition activities as per relevant state laws were under progress and the assessee has not started any business or commercial activity during this period. Since the assessee earned interest income from the investment made in the banks and other institutions from parking of funds which were awaiting its disbursement for land acquisition and other activities, in view of above, respectfully following the judgment of Hon’ble Apex Corut in the case of Bokaro Steel Ltd. (supra) and recent judgment of Hon’ble High Corut of Delhi in the case of NTPC Sail Power Co. Ltd. (supra) and Indian Oil Panipat Power Consortium Limited (supra), we hold that the income earned by the assessee from interest is not taxable in the hands of assessee as income from other sources and the same was inextricably linked with the process of setting up its plant and machinery and such receipts will go to reduce the cost of its assets and preoperative expenses.*

13. *Accordingly, both the grounds of the assessee are allowed with a direction to the Assessing Officer that the income earned from interest on term and other deposits during the year under consideration cannot be taxed as income from other sources but the same can be given treatment for reducing the cost of assets and for setting off preoperative expenses.*

14. *In the result, the appeal of the assessee is allowed.”*

13. The various other decisions relied on by the ld. counsel for the assessee in the Paper Book also support the case of the assessee. Since the assessee in instant case is not free to use the funds for any purpose except TCB project and since there is no allegation that any part of fund has been used for any other purposes and since no addition was made by the Assessing Officer on this

account in assessment year 2009-10, copy of which is placed at page 170 and 171 of the Paper Book, therefore, we find no infirmity in the order of the Id. CIT(A) in deleting the addition made by the Assessing Officer by treating such interest income from fixed deposits as capital receipt which would go to reduce the pre-operative expenditure. We, therefore, uphold the same and the ground raised by the Revenue is dismissed.

14. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open Court on this 12th October, 2018.

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-
(R. K. PANDA)
ACCOUNTANT MEMBER

Dated: 12-10-2018.

Sujeet

Copy of order to: -

- 1) The Appellant
- 2) The Respondent
- 3) The CIT
- 4) The CIT(A)
- 5) The DR, I.T.A.T., Raipur.

By Order

//True Copy//

Sr. Private Secretary
ITAT, Raipur