

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'B' अहमदाबाद ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, AHMEDABAD**

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
& SHRI MAHAVIR PRASAD, JUDICIAL MEMEBR**

आयकर अपील सं./I.T.A. No. 1430/Ahd/2015

WITH

CROSS OBJECTION No. 114/Ahd/2015

(निर्धारण वर्ष / Assessment Year : 2011-12)

ITO, WD.1(1)(1), Ahmedabad	बनाम/ Vs.	M/s. Adani Power Rajasthan Limited Adani House, Nr. Mithakhali Six Road, Navrangpura, Ahmedabad 380006
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAGCA9379P		
(Appellant / Respondent)	..	(Respondent / Cross Objector)

राजस्व की ओर से/Revenue by :	Shri Mudit Nagpal, Sr. D.R.
अपीलार्थी ओर से /Assessee by :	Shri S. N. Soparkar & Shri Parin Shah, A.R.

सुनवाई की तारीख / Date of Hearing	20/12/2018
घोषणा की तारीख /Date of Pronouncement	18/01/2019

आदेश/ORDER

PER PRADIP KUMAR KEDIA - AM:

The captioned appeal has been filed at the instance of the Revenue against the order of the Commissioner of Income Tax (Appeals)-6, Ahmedabad ('CIT(A)' in short), dated 09.03.2015 arising in the assessment order dated 26.02.2014 passed by the Assessing Officer (AO) under s. 143(3) of the Income Tax Act, 1961 (the Act) concerning assessment year 2011-12.

2. The assessee has also filed cross objection in the Revenue's appeal as captioned above.

ITA No. 1430/Ahd/2015 (Revenue's appeal)

3. The grounds of appeal raised by the Revenue reads as under:-

"1. The ld. CIT(A) has erred in deleting the addition of Rs.1,45,50,007/- made u/s 56 of the Act being interest received from SBI without appreciating the fact that the same has earned before commencement of the business."

4. Briefly stated, the assessee company is subsidiary company of Adani Power Ltd. (APL) which owns majority of the issued share capital in it. The assessee company is engaged in power sector and has undertaken a project of construction of power plant to generate electricity. The power plant was stated to be in the process of being set up during the year. The assessee company thus has not begun any commercial activities whatsoever during the year. The expenses incurred for the purpose of setting up of project were shown in the balance sheet as 'project development expenditure' and 'capital work in progress'. The expenditure incurred were capitalized and income generated were reduced from the cost of project. The return was thus filed by the assessee declaring the total income of Rs. Nil. The return so filed for AY 2011-12 was subjected to scrutiny assessment. On scrutiny of the 'project development expenditure' and 'capital work in progress', the AO inter alia noticed that the assessee has made adjustment of interest income of Rs.3,68,56,918/- against financial charges (included in project development expenditure) of Rs.1,36,80,38,638/-. It was noticed in the course of the assessment that certain deposits were parked by the assessee company with State Bank of India and IDBI Bank Ltd. to avail various credit facilities for construction of power plant and interest was earned thereon. The assessee company characterized the aforesaid interest income as

capital receipt and hence reduced the project development expenditure to this extent. It was the case of the assessee that such deposits are inextricably linked with highly capital intensive power project as such mega projects require use of state of art technology, substantial imports, planning and execution of installation and commission over a substantial long period of time. It was claimed that the assessee has also *inter alia* incurred very heavy interest costs on borrowed funds to the tune of Rs.84,26,19,593/-. The assessee thus claimed that both interest incurred on borrowed funds and interest income derived from temporary deposits form part of project development expenditure and both outgo and receipt bears the character of capital item. The AO however held that interest earned on temporary deposits amounting to Rs.3,68,56,918/- derived from deposits placed with bank are in the nature of revenue income and thus cannot be reduced from project costs of capital nature. While holding so, the AO denied nexus between the deposits made and setting up of plant / acquisition of assets. The AO accordingly assessed aggregate interest income of Rs.3,68,56,918/- as independent revenue income of taxable nature and denied its set off against the project development expenditure (capital work in progress).

5. Aggrieved, the assessee preferred appeal before the CIT(A).

6. The CIT(A) revisited the facts and circumstances of the case and found merit in the plea of the assessee for adjustment of interest income derived from State Bank of India Rs.1,45,50,007/- as adjustable against the project and development expenditure (capital work in progress). It was consequently held that the interest income so derived to the aforesaid extent would go to reduce the cumulative project development expenditure of capital nature which also *inter alia* includes interest expenditure to the tune of Rs.84.26 Crores. The CIT(A) however did not agree with the plea of the assessee towards

reduction of interest income derived from deposits with IDBI Bank amounting to Rs.2,23,06,911/- from the project development expenditure aggregating to Rs.145.55 Crores (including interest costs Rs.84.26 Crores) on the ground that assessee failed to demonstrate that interest earned is inextricably linked with the setting up of power plant.

7. It will be apt to reproduce the relevant paras dealing with the controversy:

“9.1 As discussed above, the appellant-company has earned interest income from the following two sources:-

Sr. No.	Particulars	Amount (in Rs.)
1.	IDBI Bank Ltd.	2,23,06,911
2.	State Bank of India	1,45,50,007
	Total	3,68,56,918

“9.2 INTEREST INCOME FROM IDBI BANK LTD. - Rs. 2,23,06,911/-:

The appellant-company had placed a fixed deposit of Rs 36 crores with the bank for the purpose of availing credit facilities of Rs.360 crores. Copy of the Term Sheet between IDBI Bank Ltd. and the appellant-company is attached herewith as per Annexure-1. On perusal of the above Term Sheet, it may be seen that the appellant-company had obtained bank guarantee which was utilized for the purpose of issuance of contract performance guarantee in respect of the request for proposal floated by Rajasthan Rajya Vidyut Prasaran Nigam Ltd. for supply of upto 1200 MW power. The above bank guarantee had been made available to the appellant-company on a condition that the appellant-company places a margin of 10% of the total credit facility it had availed. The appellant-company had availed the credit facility of Rs.360 crores from IDBI Bank Ltd., for which it had deposited Rs.36 crores as margin money. To summarize, the appellant-company would like to reproduce the relevant part of the Term Sheet entered into between IDBI Bank Ltd. and the appellant-company as under:-

“1. Bank Guarantee Limit:

Sr. No.	Particulars	Terms & Conditions
I	Type of Facility	Bank Guarantee Limit (Contract Performance

		<i>Guarantee)</i>
<i>Ii</i>	<i>Limit/Amount</i>	<i>Rs.360 crore (Rupees Three Hundred Sixty crores only)</i>
<i>Iii</i>	<i>Purpose</i>	<i>The Bank Guarantee would be utilized for the purpose of issuance of the Contract Performance Guarantee in respect of the Request for Proposal (RFP) floated by Rajasthan Rajya Vidyut Prasaran Nigam Ltd. for supply of upto 1200 MW power by APRL, with specific validity period.</i>
<i>Iv</i>	<i>Commission</i>	<i>1% p. a. on pro rata basis</i>
<i>V</i>	<i>Commitment charges</i>	<i>Nil"</i>

On perusal of the above Term Sheet, your goodselves will appreciate that there is in fact a direct nexus between the fixed deposit placed as margin money with the performance bank guarantee given to State Electricity Utility Company, This fact has not been questioned by the Assessing Officer as well. The Assessing Officer has, without taking into consideration the above factual position, relied upon the decision of Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra) and made the addition in respect of the interest income earned. In doing so, he has completely overlooked the facts on record mainly with a preconceived notion of making the addition.

9.3 INTEREST INCOME FROM STATE BANK OF INDIA Rs. 1,45,50,007

The appellant-company had earned Rs.1,45,50,007/- from the margin money placed with State Bank of India in order to avail bank guarantee limit of Rs.150 crores. The Term Sheet between State Bank of India and the appellant-company is attached herewith as per Annexure-2. On perusal of the above Term Sheet, it may be seen that the appellant-company was required to place 10% of the bank guarantee availed by it. Relevant portion of the Term Sheet dated 20th August, 2010 is reproduced below for ready reference:

<i>A</i>	<i>Facility</i>	<i>Bank Guarantee</i>
<i>B</i>	<i>Amount</i>	<i>Rs.150cr.</i>
<i>C</i>	<i>Security</i>	<i>Same as Term Loan facility</i>
<i>D</i>	<i>Margin</i>	<i>10%</i>
<i>E</i>	<i>Tenor</i>	<i>As per the Bank's norm.</i>

<i>F</i>	<i>Type</i>	<i>For the project related works</i>
<i>G</i>	<i>Charges</i>	<i>As prescribed by the Bank from time to time</i>

Copy of the above agreement between State Bank of India and the appellant-company was already submitted to the Assessing Officer vide letter dated 17.2.2014. The Assessing Officer nowhere in the body of the assessment order denied the fact that the above banking facility availed in lieu of margin money were not inextricably linked to the setting up of the power plant. In fact, the only contention of the Assessing Officer is that the interest income earned during the pre-commencement stage not being exempt u/s.10 would be taxable. In doing so, the Assessing Officer has grossly erred, on the facts as well as in law.

In support of the contention of the appellant-company that the income which is inextricably linked to the setting up of the plant is a capital receipt, reliance is placed on the following decisions:-

(i) CIT vs. Bokaro Steel Ltd., 236 ITR 315 (SC).

On analysis of the above decision, it may be seen that Bokaro Steel Ltd. had earned income through rent from contractors for housing workers and staff-employees, hire charges on plant and machinery given to contractors and interest on advances made to contractors for facilitating the work of construction. The principle laid down by the Hon'ble Apex Court is reproduced below: "5, We will take the first three heads under which the assessee has received certain amounts. These are the rent charged by the assessee to its contractors for housing workers and staff employed by the contractor for the construction work of the assessee including certain amenities granted to the staff by the assessee. Secondly, hire charges for plant and machinery which was given to the contractors by the assessee for use in the construction work of the assessee, and thirdly, interest from advances made to the contractors by the assessee for the purpose of facilitating the work of construction. The activities of the assessee in connection with all these three receipts are directly connected with or are incidental to the work of construction of its plant undertaken by the assessee. Broadly speaking, these pertain to the arrangements made by the assessee with its contractors pertaining to the work of construction. To facilitate the work of the contractor, the assessee permitted the contractor to use the premises of the assessee for housing its staff and workers engaged in the construction activity of the assessee's plant. This was clearly to facilitate the work of construction. Had this facility not been provided by the assessee, the contractors would have had to make their own arrangements and this would have been reflected in the charges of the contractors for the construction -work. Instead, the assessee has provided these facilities. The same is true of the hire charges for plant and machinery which was given by the assessee to

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

6. In the case of Addl. CIT v. Indian Drugs & Pharmaceutical[^] Ltd. [1983] 141 ITR 134, the Delhi High Court considered a case where the work of construction of the factory of the assessee was in progress and production had not commenced. Receipts from the sale of tender forms and supply of water and electricity to the contractors engaged in construction as also receipts on account of sale of stones, boulders, grass and trees were held to be receipts not from independent sources but were considered as inextricably linked with the process of setting up of business. These were directly related to the capital structure of business and were held to be capital in nature. We agree with this view taken by the Delhi High Court.

7. The appellant, however, relied upon the decision of this Court in Tuticorin Alkali Chemicals & Fertilizers Ltd.'s case (supra). That case dealt with the question whether the 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 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 rented house and gets rent, such rent will be assessable to tax under section 22 as income from house property. Likewise, the 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 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 apart 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 cost affixed 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.

8. 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 assessee's steel plant. The cost of the plant to the extent of such royalty received is reduced for the assessee. It is, therefore, rightly taken as a capital receipt. "

The underlining principle of law laid down by Hon'ble Apex Court is that the receipts which are inextricably linked to setting up of power plant go on to reduce the cost of the project. Applying the same principle in the facts of the appellant's case it may be noted that the margin money was placed in order to avail credit facilities mainly used for construction of the power plant and advancing performance bank guarantee to the State Electricity Utility Company. Further the operations of the company have not yet begun. The only activity which is carried on is setting up of power plant at Kawai, Rajasthan. This is also accepted by the Assessing Officer. The appellant has given a performance Bank guarantee to IDBI Bank Ltd.

to This establishes the nexus ratio of the Hon'ble Apex Court decision in Bokaro Steel Ltd. (supra) the interest receipt should go on to reduce the cost of construction/development of the power plant.

(ii) CIT vs. Karnal Co-operative Sugar Mills Ltd., 243 ITR 2 (SC)

The relevant part of this decision is reproduced below:

"1. Leave granted.

2. 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 & Fertilizers Ltd. v. CIT [1997] 227ITR 172, will not be attracted. The more appropriate decision in the factual situation in the present case is in CIT(A) v. Bokaro Steel Ltd. [1999] 236 ITR 315 (SC). The appeal is dismissed. There will be no order as to costs. "

In this case the assessee had earned interest on deposits placed to avail a credit facility for purchase of machinery for setting up a plant. The Hon 'ble Apex Court held that the deposit of money was directly linked with the purchase of plant and machinery and therefore the income earned on such deposit was incidental to the acquisition of the asset. As narrated above, the appellant-company has placed the above margin money with the bank in order to avail credit facilities for giving performance bank guarantee to the State Electricity Utility Company and to avail other credit facilities for developing and construction of power plant. Therefore, the appellant has proved beyond any doubt the inextricable nexus between deposit/margin money with the construction of power plant. Therefore the interest income is capital receipt which should go on to reduce the capital cost of the project.

(iii) CIT vs. Jaypee DSC Ventures Ltd., 35 ITR 132 (Del.).

The relevant part of this decision is reproduced below:

"FACTS:

The assessee filed its return of income for the relevant assessment year declaring nil income. It had furnished performance guarantee in favour of NHAI to get the contract awarded in its favour and to

procure the said guarantee, it had kept the amount in a fixed deposit in the bank. The amount of interest income from fixed deposits was set off against the project expenses. The assessee's case was that the furnishing of bank guarantee had a direct nexus with the carrying on of the project and, therefore, the said set off deserved to be allowed.

The Assessing Officer held that interest received by the company on the bank deposit was taxable as income under the head 'Income from other sources'. According to the Assessing Officer, project expenses did not have even remote proximity with the earning of interest and, thus, the same could not be allowed to be set off against the interest income. On second appeal, the Tribunal, however, allowed the assessee 's claim.

Finding:

21. Keeping in view the aforesaid pronouncements in the field, the present controversy is to be adjudged. As is noticeable from the stipulations in the agreement, the performance guarantee by way of bank guarantee was required for faithful performance of its obligations. The non-submission of the guarantee would have entailed termination of the agreement and NHAI would have been at liberty to appropriate the bid security. That apart, the release of such performance security depended upon certain conditions. Thus, it is clearly evincible that the bank guarantee was furnished as a condition precedent to entering into the contract and further it was to be kept alive to fulfil the obligations. Quite apart from the above, the release of the same was dependent on the satisfaction of certain conditions. Thus, the present case is not one where the assessee had made the deposit of surplus money lying idle with it in order to earn interest; on the contrary, the amount of interest was earned from fixed deposits which were kept in the bank for furnishing the bank guarantee. It had an inextricable nexus with securing the contract. Therefore, we are disposed to think that the factual matrix is covered by the decisions rendered in Bokaro Steel Ltd. (supra), Karnal Co-operative Sugar Mills Ltd. (supra) and Koshika—Telecom Ltd. (supra) and, accordingly, we hold that the view expressed by the Tribunal cannot be found fault with.

22. Resultantly, we do not find any substantial question of law being involved in the present appeal and, accordingly, the same stands dismissed without any order as to costs. "

From the above, it is seen that performance bank guarantee has been given by Jay pee DSC Ventures Ltd., for faithful performance obligation to NHAI. In order to give such performance bank guarantee the assessee had placed a fixed deposit as margin money. The bank guarantee was furnished on a condition precedent to enter a contract and therefore the Hon'ble Delhi High Court held that the interest earned on the fixed deposit used for furnishing bank guarantee as having inextricable nexus in securing the contract and hence interest was held as capital receipt not liable to tax as income

from other source. The facts of the case in regard to the interest earned by the appellant-company from IDBI Bank Ltd. is exactly the same wherein it has earned interest income on fixed assets placed with the bank for furnishing performance bank guarantee to the State Electricity Utility Company . At this juncture it would also be relevant to refer to clause pertaining to "Contract Performance Guarantee " entered into between State Electricity Companies and the appellant company. Copy of relevant portion of the agreement is attached herewith vide Annexure 3. On perusal your good self would appreciate that the Performance Guarantee has been advanced for guaranteeing the commencement and continuity of the supply of power up to the contracted capacity.

(iv) NTPC Sail Power Co. (P) Ltd. vs. CIT 25 taxmann.com 401 (Del.).

The relevant part of this decision is reproduced below:

Facts

- The assessee-company was in the business of running power plant. Under its expansion plan it proposed to set up a new unit. It raised term loan for setting up new plant. Separate books of account were maintained for the same.*
- The assesses had worked out the amount of interest payable or paid relating to the borrowings utilized for expansion purposes. It also worked out the earning of interest on temporary deposits of surplus fund and interest on margins/advances made for the purposes of expansion. The assessee adjusted the said interest towards the incidental expenses during construction by adopting matching principle.*
- However, the Assessing Officer treated the said interest as 'income from other sources' which was affirmed by the Tribunal.*

Held

Interest on temporary is not income from other sources

- This Court, in Indian Oil Panipat Power Construction Ltd. v. ITO [2009] 315ITR 255/181 Taxman 249 (Delhi) 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 which is to be set off against pre-operative expenses, is admissible, as the funds received by the assessee-company from 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. [Para 9]*

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Interest earned was related to setting up of plant

- *In the instant case, the funds invested by the assessee company and the interest earned were inextricably linked with the setting up of the power plant. It may further be added that the Tribunal has not found that the deposits made as margin monies were not limited to the activity of construction connected with the expansion of the business by way of setting up of a totally new power generation plant [Para 10]*
- *The Tribunal and the lower authorities committed 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. [Para 11]*

On perusal of the above case law, your good self may appreciate that the only requirement to justify whether the receipt is a capital receipt or otherwise is to test whether the receipt is inextricably linked with setting up of power plant or not. The appellant company has brought on record all relevant facts to prove the direct nexus between the Fixed deposit (on which interest income is earned) with setting up of power plant. Therefore on application of the above case law interest income may be characterized as a capital receipt."

4.2 In the assessment order A.O. observed that the appellant was engaged in the business of manufacturing power in the state of Rajasthan; the project was under implementation stage; the generation of power had not commenced in the year under consideration; therefore the interest earned by the appellant on the fixed deposits kept with the banks was assessable as income from other sources (and the interest income cannot be reduced from the cost of the project). Accordingly he assessed the interest income of Rs. 3,68,56,918/- as income from other sources u/s 56. This amount comprises of the interest income from IDBI Bank of Rs. 2,23,06,911/- and interest income from SBI of Rs. 1,45,50,007/-. My findings issue wise are as under:

4.3 INTEREST INCOME FROM IDBI BANK Rs 2,23,06,911

Identical issue came up in the case of Adani Power Ltd. in A.Y. 2009-10. Vide the order dated 25/03/2014 in appeal no. CIT(A)-VI/DCIT/Cir-1/311/11-12, it was held by me as under:

"4.3 At para - 3 of the Assessment Order Assessing Officer observed that Appellant earned interest income of Rs. 8,60,12,309 in the Return of Income out of the said sum Appellant admitted interest income of Rs. 2,41,55,630; Appellant was show-caused as to why the difference amount of Rs. 6,18,56,679 shall not be assessed as income from other

sources and in the light of the Supreme Court decision in the case of Tuticorin Alkali Chemicals and Fertilizers Ltd. [2278 ITR 172] the difference amount was being assessed as income from other sources. However, as seen from the computation of income the addition made was of Rs. 5,52,01,133.

4.4 The contentions of the Learned AR are that as may be seen from Schedule — 7 of the audited balance sheet Appellant had earned income of Rs. 8,17,50,319; out of it, it had admitted interest income of Rs. 2,59,19,961; the balance amount was Rs. 5,58,40,358; out of the balance amount, Assessing Officer assessed Rs. 5,52,01,133 as income from other sources; the interest earned on (i) Bid bonds for the purpose of PPA (power purchase agreement), (ii) fixed deposits kept as margin money with the banks for getting bank guarantee for purchase of capital assets, and (iii) other fixed deposits and in view of the case-laws relied on the interest income cannot be assessed as income from other sources.

4.5 Interest income assessed as income from other sources consists of three components. My finding issue-wise are as under:

*(i) **Bid-Bonds for the purpose of PPA [Power purchase agreement] (Rs.1,46,60,271):***

It is seen that identical issue came up for consideration in Appellant's I case in the immediately preceding Assessment Year 2008-09. Vide the Appellate Order dated 07-09-2011 in Appeal No. CIT(A)-VI/Addl.CIT./R-1/199/10-11 my predecessor has held as under:

"3.3 I have considered the facts of the case; Assessment Order and Appellant's submission. It is not in dispute that Appellant's business is being set up and accordingly Appellant did not offer any business income. Appellant raised funds for setting up project, however, 'during the construction period of the project, surplus funds were invested on which interest and other income were received. In the Return of Income field Appellant offered interest income of Rs. 7,9151,306 and claimed that interest income of Rs. 1,3981,841 was earned from deposits which were given as lien against opening of LC, bid bonds and bank guarantees. This income was not offered for tax \on the ground that the same is inextricably linked with capital projects and hence to be reduced from capital cost. Assessing Officer after examining the various issues found that Appellant's claim is not justified in view of the Supreme Court decision in the case of Tuticorin Alkalies, Chemicals and Fertilizers Ltd., 227 ITR 172. Appellant relied upon the other decisions. However, the following extract from the decision of

Apex Court in the case of Tuticorin Alkalies, Chemicals and Fertilizers Ltd., is quite relevant to decide the issue.

"For the purpose of setting up of the factories, the company has taken term loan from various banks and financial institutions. That part of borrowed funds which were not immediately required by the Company but are kept invested in short term deposits with banks. Such investments were specifically permitted by the memorandum and articles of association of the Company.

The Company has also deposited certain sums with the Tamil Nadu electricity board. It has also given interest-bearing loans to its employees to purchase vehicles. -----

It is well settled that tax is attracted at the point when income is earned. Taxability of income is not dependent upon its destination or the manner of its utilization. It has to be seen whether at the point of accrual, the amount is of revenue nature. If so, the amount will have to be taxed."

From the above it is clear that apart from investment of temporary surplus funds, the deposit with electricity board or loan to employees also provided interest income which was not considered a part of the

*project but treated as revenue receipt taxable under Section 56 of I.T. Act. In the case of Appellant also the investment in bonds might be required for the purpose of entering into power purchases agreement but revenue is flowing from investment in bonds and not from the implementation of projects or purchases of Plant & Machinery. LC margin money interest was considered inextricably linked to the project by the Assessing Officer and accordingly he allowed the same to be reduced from project cost. Apart from this no other interest income is directly coming from implementation of the project or purchases of Plant & Machinery. **Power purchases agreement may require some security in the form of bond but that does not mean that investment was linked to the implementation of project.** Since Hon'ble Supreme Court in the case of Tuticorin Alkalies Chemicals and Fertilizers Ltd., had considered even interest on deposit 'with electricity board as taxable income, there is no basis for not offering the same as taxable in other sources head. None of the decision referred by the Appellant has overruled the landmark decision of Supreme Court in the case of Tuticorin Alkalies, Chemicals and Fertilizers Ltd. In view of this, unless the income is inextricably linked to the implementation of the project, the same cannot be reduced from the cost of the project and accordingly the income will be taxed. The decision of Hon'ble Supreme Court in the case of Bokaro Steel Ltd., and Karnal Co-operative Sugar Mills Ltd., do not support the Appellant's*

claim since in both the cases, interest income was directly coming from the implementation of the project. In the Appellant's case, the same is from investment in bond required as security for PPA and not for setting up the project. PPA is not for implementation of the project but the same is for sale of electricity after commencement of business. Therefore, Appellant does not get benefit from these decisions. The other decisions relied upon by the Appellant are on the interpretation of apex court decisions referred earlier. Since facts of the Appellant's case are similar to the decisions of apex court, Appellant is liable for tax on interest. The addition made by the Assessing Officer is accordingly confirmed.

Facts remaining the same in the year under consideration, following the above order, assessment of interest earned on Bid-Bonds of Rs. 1,46,60,271 as income from other sources is upheld. "

In the instant case, the appellant had made fixed deposit with IDBI Bank for obtaining Bank guarantee for the purpose of issuance of the Contract Performance Guarantee in respect of the Request for Proposal (REP) floated by Rajasthan Rajya Vidyut Prasaran Nigam Ltd. for supply of upto 1200 MW power by appellant, with specific validity period. Power purchase agreement may require some security in the form of Bank guarantee, but that does not mean that the investment is inextricably linked to the implementation of the Project. Therefore, following the above mentioned order, A.O.'s action in assessing the interest income received from IDBI Bank of Rs. 2,23,06,911/- u/s 56 as income from other sources is upheld.

4.4 INTEREST INCOME FROM STATE BANK OF INDIA Rs. 1,45,50,007

Identical issue came up in the case of Adam Power Maharashtra Ltd., in A.Y. 2009-10 vide order dated 11.11.2013 in appeal no. CIT(A)-VI/ITO/Wd.1(1)/194/11-12, it was held by me as under:

"3.2 In the Assessment Order, Assessing Officer observed that the Appellant had earned interest of Rs. 46,12,671; it had shown interest income of only Rs. 4,15,371; all was asked-to explain as to why the difference amount of Rs. 41,97,298 was not offered to tax under the head income from other sources; after considering the explanation furnished, the interest income earned on the fixed deposits (on margin money with SBI in full and with Axis Bank partly) of Rs. 33,35,591 was found to be directly linked with purchase of Plant & Machinery; as regards the interest earned of Rs. 5,01,028 from Axis Bank, Appellant had not been able to establish the purpose of keeping the FDs as margin money and, therefore,

the said interest was to be assessed as income from other sources; as regards the interest income of Rs. 3,60,678 earned on security deposit with Maharashtra State Electricity Distribution Co. Ltd. (MSEDC), the deposit had nothing to do with the purchase of plant and machinery and, therefore, the interest was assessable as income from other sources and accordingly both the sums totaling to Rs. 8,61,706 were being assessed under the head income from other sources.

3.3 The contentions of the Learned AR are that the Appellant had offered interest income of Rs. 4,15,371 as income from other sources, since this interest was earned on the surplus funds invested in FDs; balance interest income of Rs. 41,97,298 was adjusted against financial charges and net interest expenditure was capitalized as project development expenditure; such balance interest earned on FD/security deposit was inextricably linked with the implementation of the power project; Assessing Officer taxed the interest income earned on FD with Axis Bank and security deposit with MSEDC as income from other sources; the margin money kept with Axis Bank was against the letter of credit as confirmed by the certificate issued by the bank; this deposit was directly linked to the acquisition of Plant & Machinery; Assessing Officer accepted part of the deposit pertaining to the same loan as linked with the business and did not accept part of the same certificate; as regards the security deposit with MSEDC, it was not with the intention of earning interest income; rather it was a pre-requisite for securing electricity connection to implement the project; therefore, this deposit was inextricably linked with the power project of the Appellant Company and in view of various case laws relied on, impugned assessment under the head income from other sources is not in accordance with law.

3.4 The contentions of the Learned AR are cogent and tenable. Appellant itself offered Rs, 4,15,371 as income from other sources. As regards the margin money kept with SBI and Axis Bank, it was able to demonstrate that the margin money was for the purposes of obtaining loan for acquisition of Plant & Machinery and against letter of credit. Similarly, security deposit was mandatory for obtaining electricity connection and, therefore, it cannot be said that the interest was on the surplus funds invested. Keeping in view the facts of the case and the various case laws relied on by the Learned AR, A. O. is directed to deleted impugned addition made under the head income from other sources. These grounds of appeal are allowed. "

Further it is seen that in the case of CIT V/s L.G. Electronics India P. Ltd. (2009) (309 ITR 265) (Delhi), it was held as under:

"4. It appears that the Assessee had deposited with the bank certain amounts towards margin money for insurance of letters of credit for import of capital goods. On this amount, the Assessee earned an interest of Rs. 5,25,385.87. The Assessing Officer treated this amount as income from other sources and taxed it accordingly.

5. The Commissioner of Income Tax (Appeals) [CIT(A)] decided against the Assessee but the Tribunal decided in favour of the Assessee and held that the amount cannot be taxed as income from other sources. That is how, the Revenue is before us.

6. We have heard Learned Counsel for the parties and find that the issue is squarely covered in favour of the Assessee in view of the decision of the Supreme Court in CIT V/s Karnal Co-operative Sugar Mills Ltd. (2000) 161 CTR (SC) 241: (2000) 243 ITR 2 (SC). In that case also the Assessee had deposited some money with the bank for opening a letter of credit for the purchase of machinery required for setting up its plant in terms of the Assessee's agreement with the supplier. The Assessee had earned interest on the amount deposited and the Supreme Court held that since it was not an investment of money that was lying idle with the Assessee, the interest had to be adjusted against the cost of the machinery.

7. Insofar as the present case is concerned, the Assessee commenced its business in the subsequent Assessment Year and there is no dispute about the fact that the amount deposited by the Assessee was not idle money on which it was earning interest.

8. Under the circumstances, the interest earned to the tune of Rs. 5,25,385,87 is required to be credited against pre-operative expenses incurred by the Assessee."

In the instant case, appellant kept fixed deposit as margin money with SBI for obtaining Bank guarantee to avail term loan facility for the project related works. The margin money kept is 10 % of the Bank guarantee of Rs. 150 crores obtained from SBI. Keeping these facts and the above mentioned decisions I am of the view that the interest earned is required to be credited against pre operative expenses incurred by the appellant. Therefore assessing the interest income as income from other sources u/s 56 is not in accordance with law. Addition of the interest received from SBI of Rs. 1,45,50,007/- is deleted.

These grounds of appeal are partly allowed.

5. Ground no. 4 & 5 are as under:

4. *Without prejudice to the above, the Assessing Officer ought to have allowed netting off of interest income of Rs.3,68,56,918/- against huge interest expenditure of Rs.842,619,593 incurred by the appellant-company.*

5. *Without prejudice and without admitting, that the income is taxable as income from other sources, even if it is held that interest income is taxable u/s, 56, the Assessing Officer may be directed to allow expenses of Rs.9,54,35,279/- incurred towards interest expenses on borrowed funds utilized for making deposits, guarantee fees, bank charges and other expenses incurred in order to avail the credit facilities from State Bank of India and IDBI Bank Ltd, under section 57 (iii) of the Act.*

5.1 Written submission filed is as under:

Without prejudice to what is stated above, and as stated earlier in the Statement of facts, the appellant company had raised secured as well as unsecured loans for the purpose of setting up of the power plant. The outstanding loan as on 31.03.2011 amounts to Rs. 12,867,966,800/-, and the appellant company has incurred an expenditure of Rs.842,619,593/- towards interest which has been debited to "Project Development Expenditure" under schedule-6 of the balance sheet.

3.1. *Even if the appellant's contention regarding set off of interest income against capitalized expenses is not accepted and the Ld. A.O.'s addition u/s 56 of the Act is sustained, then the appellant is entitled to claim deduction of interest and financial charges on borrowed funds u/s 57 of the Act. Subsequently, the interest and financial charges capitalized shall be reduced from the head "Project Development Expenditure". Section 57(iii) of the Act is reproduced here under for your kind reference.*

"57(iii) any other expenditure (not being in the nature of capital expenditure) laid out or expended wholly and exclusively for the purpose of making or earning such income;"

Thus, once it is established that the expenditure has been laid out wholly and exclusively for the purpose of earning such income, the same must be set off against the income earned u/s. 56 of the act.

3.2. *The appellant further submits the following facts to establish the direct nexus between borrowed funds and fixed deposit placed for providing bank guarantees:*

3.3.1 For fixed deposit placed for providing margin money for PPA:

(i) On 11.01.2010, the appellant company received an unsecured loan amounting to Rs.41 crores from Adani Power Ltd an such loan was used for making investments in FD required for providing margin money for PPA with **Rajastham Rajya Vidyut Prasaran Nigam Ltd.**

(ii) The interest has been charged on such loan during the current assessment year.

(iii) A bank statement showing transfer of funds (Rs.41 crore) from Axis Bank to IDBI bank has been attached herewith . It is submitted that aforesaid FD was kept from IDBI Bank account.

3.3.2 Fixed deposit with SBI used for providing bank during construction of power project:

(i) The deposit made in SBI was also out of borrowed funds.

(ii) Vide letter dated 11.02.2014, annexure-6 submitted during the course of assessment proceedings, it is clearly seen that the appellant has received money from Adani Power Ltd. Amounting to Rs.10 crore-which was credited to IDBI Bank Ltd. And out of the same, Rs.8.5 crore has been transferred to SBI from which FD of 7,51,03,000/- has been made.

(iii) From the above facts, your good self may appreciate that the appellant company has brought on record all facts which show that the interest expenses incurred are wholly and exclusively for the purpose of earning income and the same must be allowed to be set off within the purview of section 57 (iii) of The Act.

3.3. It is further submitted that the same issue had arisen in the case of **M/s. Adani Power Ltd. (A.Y.2009-10)**, in which the appellant had taken the same alternative claim. **The CIT(A), vide order dated 25/03/2014**, relying on the decision of **the Hon'ble ITAT in the case of JCIT vs. Steelco Gujarat Limited (99 ITD 408)**, stated that "As regards balance interest income of Rs.1,92,87,348/- offered to tax in the return of income, the contention of the Learned AR is that long term loan taken was kept as short term deposit with the banks (pending finalization of purchase of plant and machinery) and the interest income was earned on the said deposit. It is contended that the nexus between the interest income and the interest expenditure is clearly demonstrated.....netting of interest is to be allowed if the interest expenditure was related to the interest income earned. A. O. is directed to verify the contentions of the Ld.A.R. that there is a close nexus between the interest expenditure and interest income and that the interest paid is more than the interest earned. If it is found to be correct, he shall reduce the amount of Rs.1,92,87,348/-from the income assessed under the head "Income from other sources"

Considering the above, the appellant must be allowed to set off the interest on borrowed funds in accordance with the provisions of section 57(iii).

5.2 Identical issue came up in the case of Adani Power Limited in A.Y. 2009-2010. Vide the order dated 25/03/2014 in appeal no. CIT(A)-VI/DCIT/Cir-1/311/11-12, it was held by me as under:

"5.6 However, in the year under consideration, Appellant has taken a new plea that the interest expenditure incurred to earn the interest income is allowable expenditure under Section 57(iii). In this regard, it is seen that the said amount of interest income admitted in the Return of Income of Rs. 2,59,19,961 comprises of Rs. 17,63,014 being the interest earned on inter-corporate deposits out of unutilized funds in the form of equity share capital and Rs. 1,317 being other interest. Out of the balance amount, interest income of Rs. 48,68,282 was earned on the surplus own funds kept as deposits. In respect of these three amounts netting of interest is not permissible as there is no nexus between the interest income earned and the interest expenditure incurred. The Learned AR fairly conceded that no interest expenditure was incurred in connection with earning of these three sums of interest income. Assessing the said sums totaling to Rs. 66,32,613 as income from other sources is upheld. As regards the balance interest income of Rs. 1,92,87,348 offered to tax in the Return of Income, the contention of the Learned AR is that term loan taken was kept as short term deposit with the banks (pending finalization of purchase of Plant & Machinery) and the interest income was earned on the said deposit. It is contended that the nexus between the interest income earned and the interest expenditure incurred is clearly demonstrated. In support thereof he relied on the Ahmedabad Tribunal decision in the case of JCIT V/s Steelco Gujarat Limited (99 ITD 408), wherein it was held that netting of interest is to be allowed if the interest expenditure was related to the interest income earned. Assessing Officer is directed to verify the contentions of the Learned AR that there is a close nexus between the interest expenditure and the interest income and that the interest paid was more than the interest earned. If it is found to be correct he shall reduce the amount of Rs. 1,92,87,348 from the income assessed under the head 'Income from the other sources'.

Subject to verification, this ground of appeal is partly allowed."

These alternate grounds of appeal are to the effect that netting of interest may be allowed while assessing the interest as income from other sources. The fixed deposits with the IDBI Bank were kept out of the borrowed funds (as seen from the appellant's reply to the A.O.

reproduced at para 2 of the assessment order). Therefore following the above mentioned order, A.O. is directed to verify and compute the interest expenditure on the money borrowed (and invested with IDBI in the form of fixed deposits) and allow deduction of the said amount from the interest income earned on the FDs with IDBI. As regards the interest received from SBI, in view of my finding at para 4.4, this plea of the appellant has become infructuous and is dismissed as such. These grounds of appeal are treated as partly allowed.”

8. The CIT(A) accordingly accepted the grievance of the assessee affirmatively in part in terms of preceding paras.

9. Aggrieved by the order of the CIT(A), both Revenue and assessee are in appeal before the Tribunal. While the Revenue has challenged the action of the CIT(A) in accepting the plea of the assessee that interest Rs.1,45,50,007/- earned on temporary deposits with SBI would go to reduce the project development expenditure (Rs.145.52 Crores) and thus, is not liable to be treated as taxable income of revenue nature. The assessee, on the other hand, has questioned the stand of the CIT(A) in confirming the action of the AO that interest income amounting to Rs.2,23,06,911/- derived from deposits placed with IDBI is taxable income of revenue nature and not liable to be reduced against the ongoing power project development costs.

10. When the matter was called for hearing, the learned DR for the Revenue relied upon the order of the AO and submitted that the interest earned on money parked with SBI pending its utilization in set up the power plant cannot be claimed for adjustment and reduction from the project costs in the light of the decisions of the Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. Vs. CIT (1997) 227 ITR 172 (SC).

11. The learned Senior Counsel for the assessee, on the other hand, professed that the issue stands squarely covered in favour of the assessee by the decision of the Hon'ble supreme Court in the case of CIT vs. Bokaro Steel Ltd. (1999) 236 ITR 315 (SC) and Karnataka Power Corporation 247 ITR 268 (SC). To buttress its claim on merits that accrued interest on earmarked funds would go to reduce the cost of the project and does not represent revenue nature and chargeable nature, the learned AR submitted that on the similar analogy, assessee has simultaneously capitalised interest and finance costs of Rs.136.80 Crores and added the same to the capital costs incurred for development of power project of highly capital intensive nature involving long gestation period. The learned AR submitted that there is no reason to treat interest costs and interest income on different footings in the similarly placed circumstances. The learned AR thereafter adverted our attention to the decision of the co-ordinate bench rendered in the case of holding company in the identical facts in DCIT vs. Adani Power Ltd. ITA No. 1663/Ahd/2014. The learned AR pointed out that the co-ordinate bench in the aforesaid case has adjudicated the issue in favour of the assessee and upheld the action of the CIT(A) after taking note of host of judicial precedents. It was thus contended that the issue is no longer *res integra*. The learned AR next emphatically referred to financial statement and pointed out that it is pertinent to note that entire project is nearly financed by borrowed funds (1396.86 Crores) and own capital is merely Rs.4.90 crores only. Thus, it was argued that the interest earned has only gone to reduce the cost of borrowings.

12. We have carefully considered the rival submissions. The essential controversy involved in the instant case is; whether interest income derived from certain deposits placed with banks [while the power project construction is under progress and in the process of

being set up and has not commenced generating electricity] can be set off against the ongoing power project costs incurred of capital nature and consequently; whether such interest income would go to reduce the project costs prior to its commencement or not.

13. It is the case of the assessee that while the AO committed error in characterizing interest income earned Rs.3,68,56,918/- comprising of interest income from IDBI Bank Rs.2,23,06,911/- and interest income from SBI Rs.1,45,50,007/- on deposits placed for availing credit facilities are liable to be taxed as 'income from other sources' under s.56 of the Act, the CIT(A) was partly right to the extent of holding that the interest income earned amounting to Rs.1,45,50,007/- from SBI bears the character of capital nature and would consequently go to reduce the power project costs being set up. The assessee however has simultaneously faulted the CIT(A) in not allowing the interest income of Rs.2,23,06,911/- to be reduced from the project costs. It is primarily the case of the assessee that both interest expenditure (amounting to Rs.3.68 Crore) as well as impugned interest income are inextricably linked to the project being set up. Hence, where the interest expenditure has been regarded as capital expenditure for the purposes of project, same principle requires to be acknowledged for treatment of interest income. Pending completion of power project, the interest income thus is also on the same pedestal (capital nature) similar to interest outgo. It is thus the case of the assessee that while the interest outgo has been added to the capital costs on power project in progress; interest income so earned on deposits placed with banks have been rightly reduced from the 'project development expenditure' incurred for set up of power plant in the same measure. We find that the identical issue came up for consideration of the co-ordinate bench in a group case in a similarly placed situation.

14. It will be apt to reproduce the relevant operative para of the decision in Adani Power Ltd. (supra) relied upon by the Assesee:

"16. Next question relates to quantification of interest income available with the assessee for set off against pre-operative expenditure in power project implementation. We find that the ld.CIT(A) has not independently examined any issue in this order, rather followed order of his predecessor in the assessment year 2008-09. The ITAT did not approve the order of the ld.CIT(A) in the assessment year 2008-09 and respectfully following the order of the ITAT in the assessment year 2008-09, we are of the view that interest income of Rs.8,17,60,319/- is available with the assessee for set off against pre-operative expenditure which is titled as "project development expenditure". Discussion made by the Tribunal in the assessment year 2008-09 on this issue reads as under:

"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 ITA No. 2755/Ahd/2011 Adani Power Ltd vs. ACIT AYs 2008-09 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 here 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 ITA No. 2755/Ahd/2011 Adani Power Ltd vs. ACIT AYs 2008-09 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. (underlined ours to supply emphasis)

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."

17. There is no disparity on facts. The ld.CIT(A) has simply followed the order of the ld.CIT(A) in the assessment year 2008-09. Therefore, respectfully following the order of the ITAT in the assessment year 2008-09, we reject the ground of appeal taken by the Revenue and allow the grounds of appeal taken by the assessee."

15. Apart from the decision of co-ordinate bench adjudicating the issue in favour of the assessee, we also take notice of the process of reasoning applied by CIT(A) and approve his action affirmatively in so far as interest generated on deposits placed with SBI. The CIT(A) has rightly held that interest income to be of capital nature linked with the process of setting up of its power plant and such receipts would go to reduce the cost of the project which also includes huge interest costs as capitalized. For coming to such conclusion, the CIT(A) has taken cognizance of the decision of the Hon'ble Supreme Court in the case of Bokaro Steel Ltd. (supra), Karnataka corporation Sugar Mills Ltd. & Bongaigaon Refinery & Petro Chemicals Ltd. vs. CIT [2001] 251 ITR 329 which in turn distinguish the decision of the Hon'ble Supreme court in Tuticorin Alkali Chemicals Fertilizers Ltd. (supra). The CIT(A) has observed on facts that assessee kept fixed deposit as margin money with SBI for obtaining bank guarantee to avail term loan facility for the project related works. The margin money kept is 10% of the bank guarantee of Rs.150 Crores obtained from SBI. The CIT(A) thus found that deposits were integrally connected with the setting up of power plant. Thus, we find ourselves in complete agreement with the action of the CIT(A) in upholding the action of AO to reduce interest income arising from deposits placed with SBI out of project development expenditure and in reversing the action of the AO in treating the same as revenue income de hors the projects

development in progress. The grievance of the Revenue thus is bereft of any merits.

16. The appeal of the Revenue is dismissed.

17. We now advert to the cross objection filed by the assessee to impugn the action of the CIT(A) in sustaining the interest income on funds kept as fixed deposits amounting to Rs.2,23,06,911/- to be revenue income and consequently not liable to be set off against project development costs. In this regard, we take note of the significant plea on behalf of the assessee that it has not carried out any activity other than construction of the power plant and therefore the making of deposit is inevitably linked with the setting of the project. The deposits have been placed out of funds predominantly mobilized by way of borrowed funds only for the purposes of setting up of the power plant. This being so, where the interest and finance charges on borrowed funds (Rs.136.80 Crores) are to be treated as cost of the project i.e. capital expenditure, the interest income on fixed deposits also requires to be treated in the identical manner i.e. income of capital nature deserving to be set off against the project costs. The CIT(A) in our view, has failed to take notice of the plea that interest expenditure and interest income arise from the same source i.e. borrowed funds. The income and expenditure are thus inextricably linked. We thus are of the view that when the facts are seen in perspective, the action of the CIT(A) appears to suffer from this cardinal error. In the absence of any other activity other than the construction of power plant, the interest expenditure on borrowed funds and incidental income by way of interest mobilized are required to be treated at par. The interest income therefore in our view is eligible for set off against the corresponding interest costs and

consequently, such income should be reduced out of interest costs which also form part of the capital expenditure.

18. This apart, we also observe that the CIT(A) itself has observed that fixed deposits with IDBI Bank were placed with an object to obtain when guarantee for the purpose of issuance of the Contract Performance Guarantee in respect of Request for Proposal (REP) floated by Rajasthan Rajya Vidyut Prasaran Nigam Ltd. for supply upto 1200 MW power by assessee, with specific validity period. The CIT(A) while admitting that power purchase agreement may require some security in the form of bank guarantee but inexplicably held that such act does not mean that investment is inextricably linked to the implementation of project. In our view, the conclusion drawn by the CIT(A) adverse to the assessee is outright bizarre; and totally unpalatable judicially. The CIT(A) has ignored the vital consideration that the fixed deposits have not been placed to park idle and surplus fund but borrowed money has been utilized by way of fixed deposit for obtaining the bank guarantee for the purpose of the project being set up. The action of the assessee merely reduces the interest costs on borrowed funds to some extent. Therefore, interest on borrowed funds and interest earned on fixed deposits cannot be given varied treatment where the interest costs have been capitalized to the power project. We do not visualize any justifiable reason for holding the interest income on fixed deposits out of borrowed funds and utilized for furtherance of the project to be of revenue character. The conclusion drawn by the CIT(A) is thus manifestly mis-conceived and thus deserves to be set aside and reversed. The action of the CIT(A) in upholding the interest income received from IDBI Bank as taxable revenue income under s.56 of the Act is thus wholly untenable and consequently, the treatment adopted by the assessee in this regard requires to be

restored. In this view of the matter, we set aside the action of the CIT(A) and direct the AO to delete the addition made on this score.

19. In the result, cross objection of the assessee on this score stands allowed.

20. In the combined result, Revenue's appeal is dismissed and cross objection of the assessee is allowed.

This Order pronounced in Open Court on 18/01/2019

Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER
Ahmedabad: Dated 18/01/2019

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अद्येषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।