

आयकर अपील अाधिकरण, अहमदाबाद ँयायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
"D" BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
Ms. MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./ITA No.1710/AHD/2016

With

C.O. 120/Ahd/2016

अाधरण वष/Asstt. Year: 2012-2013

ITO, Ward-1(1), Ahmedabad.	Vs.	M/s. Adani Power Rajasthan Ltd., Adani House, Nr. Mithakhali Six Road, Navrangpura, Ahmedabad-380002. PAN: AAGCA9379P
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(Applicant)	(Responent)
Revenue by :	Shri Ranjan Kumar Singh, Sr. D.R
Assessee by :	Shri S.N. Soparkar & Parin Shah, A.Rs

सुनवाई क तारख/Date of Hearing : 12/02/2019

घोषणा क तारख /Date of Pronouncement: 20/02/2019

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The Revenue has filed the Appeal against the order of the Learned Commissioner of Income Tax (Appeals)-1 Ahmedabad, [CIT(A) in short] vide appeal no.CIT(A)-1/92/ITO, Wd-1(1)(1)/2015-16 dated 26/04/2016, arising in the matter of assessment order passed under s.143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 30/03/2015 relevant to Assessment Year (AY) 2012-13. Assessee has filed Cross

Objection in the Revenue's appeal bearing no.120/Ahd/2016 for the Assessment Year 2012-2013.

2. The Revenue has raised following grounds of appeals.

1. *The Ld.CIT(A) has erred in law and on facts in deleting the addition of Rs.2,85,92,150/- made on account of "Interest Income treated as income from other sources u/s.56 of the I.T. Act.*
2. *That the Id. CIT(A) has substantially erred in not considering the facts of the case that the assessee company has earned interest income on fixed deposits made with IDBI Bank before commencement of business activity i.e generation of power*

3. The assessee has raised following grounds in its Cross Objection as follows:

1.1 In law and in the facts and circumstances of the respondent's case, the learned CIT(A) has grossly erred in dismissing Ground No. 3 of the respondent's appeal before him reading as under:

"3. In law and in the facts and circumstances of the appellant's case, the Ld. Assessing Officer has erred in charging excess interest u/s. 234B for Rs 21,57,336 , 234D for Rs 3,23,646 and withdrawing interest u/s 244A for Rs 3,11,990, when no such interest is chargeable. The appellant denies its liability to pay interest."

*1.2 The learned CIT(A) ought to have appreciated, inter alia, that when he had ordered for the deletion of the **entire** addition of Rs.2,85,92,150 made in the assessment order impugned before him, he ought to have ordered for the cancellation of the impugned levy/withdrawal of interest. He ought **also** to have appreciated that the impugned levy/withdrawal of interest were unwarranted/unjustified since the nature of the **sole** addition of Rs.2,85,92,150 to the respondent's returned income was such as to attract the ratio of the decision of the Gujarat High Court in Bharat Machinery and Hardware Mart's case (136 ITR 875).*

2. In law and in the facts and circumstances of the respondent's case, the

*learned CIT(A) has grossly erred in dismissing Ground No. 4 of the respondent's appeal before him challenging the initiation of penalty proceedings u/s. 271(1)(c), on the ground of being premature. He ought to have appreciated, inter alia, that in the **peculiar** facts and circumstances of the respondent's case, there being **absolutely no** warrant/justification for initiating the penalty proceedings, they deserved to be dropped, thereby saving both the appellant and the Department from long drawn unnecessary litigation.*

3. *The respondent craves leave to add, amend and/or alter the ground or grounds of Cross-objections either before or at the time of hearing''*

4. The facts, in brief, are that the assessee is a limited company and engaged in the business of power/ energy. The assessee during the year has earned interest income on the fixed deposits made the IDBI Bank amounting to Rs. 2,85,92,148.00 only. The assessee has adjusted such interest income against the project cost. However, the AO found that such interest income was treated as income from other sources in the immediately preceding assessment year 2011-12. Accordingly the AO did not allow the adjustment of the interest income against the project cost. As such the AO treated the interest income as income from other sources and added to the total income of the assessee.

5. Aggrieved assessee preferred an appeal to learned CIT-A who reversed the order of the AO by allowing the adjustment of interest income against the project cost.

6. Being aggrieved by the order of learned CIT-A, the Revenue is in appeal before us. Before us, both the learned DR and the AR relied on the order of authorities below as favorable to them.

7. We have heard the rival contentions and perused the materials available on record. At the outset, we note that the ITAT in the own case of the assessee in the identical facts and circumstances has decided the issue in favor of the assessee in ITA No. 1430/ AHD/2015 vide order dated 18th January 2019. The relevant extract of the order is reproduced as under:

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 Assessee:

"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 petro- chemicals."

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.

7.1 As there is no change in the facts and circumstances of the case on hand, therefore the principles laid down by the ITAT in the own case of the assessee in the earlier year will be applied mutatis mutandis. Therefore respectfully following the same we do not find any reason to interfere in the

finding of learners CIT-A. Hence the ground of appeal of the Revenue is dismissed.

8. Coming to the grounds raised by the assessee in its Cross Objection.

9. The ground No. 1 raised in the CO by the assessee is consequential, and therefore no separate adjudication is required.

10. The ground No. 2 raised in the CO by the assessee relates to the penalty which is premature to decide as of now.

11. In the result, the appeal of the Revenue, as well as Cross Objection filed by Assessee both, are dismissed.

Order pronounced in the Court on 20/02/2019 at Ahmedabad.

-Sd-

(Ms MADHUMITA ROY)

JUDICIAL MEMBER (True Copy)

Ahmedabad; Dated 20/02/2019

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आदेश का प्रत/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. प्रभागीय प्रबंध, आयकर अपील अधीकरण / DR, ITAT,
6. गार्डफाइल / Guard file.

-Sd-

(WASEEM AHMED)

ACCOUNTANT MEMBER

आदेशानुसार/BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपील अधीकरण, अहमदाबाद / ITAT, Ahmedabad