

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD òDò BENCH

**Before: Shri Rajpal Yadav, Judicial Member
And Shri Amarjit Singh, Accountant Member**

**ITA No. 1613/Ahd/2016
Assessment Year 2012-13**

GSPC Pipavav Power Company Ltd. 3 rd Floor, Block No. 15, Udhyog Bhavan, Gandhinagar PAN: AACCG6179R (Appellant)	Vs	The ITO, Ward-2, Gandhinagar (Respondent)
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**Revenue by: Shri/Ms. Sonia Kumar, Sr. D.R.
Assessee by: Shri S.N. Soparkar &
Shri Parin Shah, A.Rs.**

Date of hearing : 29-08-2019
Date of pronouncement : 17-10-2019

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

This assessee's appeal for A.Y. 2012-13, arises from order of the CIT(A), Gandhinagar, Ahmedabad dated 05-04-2016, in proceedings under section 143(3) of the Income Tax Act, 1961; in short òthe Actö.

2. The assessee has raised following grounds of appeal:-

"ITEM NO. I: Not Considering Interest Income Of Rs. 21,36,598/- As Inextricably Linked With The Process of Setting Up The Project Which Has Yet Not Commenced And Thereby Making Addition By Treating The Same As Revenue Receipt

1.1 The learned CIT(A) has grossly erred in facts and circumstances of case & in upholding the decision of learned A.O. by confirming the addition on account of Interest Income of Rs. 21,36,598/-.

1.2 The learned CIT(A) has grossly erred in law and on facts by not considering the fact that appellant has rightly considered interest income of Rs. 21,36,319/- as income inextricably linked with the process of setting up the project which has yet not commenced i.e. considered as capital receipt relying on the decision of Supreme Court of India in case of Commissioner of Income Tax Vs. Bokaro Steel Ltd. [1999] 236 ITR 315 (SC).

1.3 The learned CIT(A) has grossly erred in stating that for the interest income of Rs. 21,36,319/- the facts of the case of Tuticorm Alkalies are squarely applicable to interest income received on FDRs and thereby grossly erred in making addition of the interest income of Rs. 21,36,319/-.

1.4 The learned CIT(A) has failed to appreciate that the appellant has earned interest income from Fixed Deposits by making temporary investment from borrowed funds for its project. The receipt of interest income will go to reduce the cost of assets

1.5 Without prejudice to our claim & contentions, the learned A.O. has grossly erred in facts by allowing Rs. 21,36,598/- instead of Rs. 21,36,319/-.

1.6 The appellant respectfully prays that the interest income of Rs. 21,36,598/- be considered as capital receipt being inextricably linked with the process of setting up of the project as the same is going to reduce the cost of assets and in turn impugned addition of Rs. 21,36,598/- may kindly be deleted. Without prejudice to our claim & contentions, if the addition is confirmed then the same be restricted to Rs. 21,36,319/- instead of Rs. 21,36,598/-.

ITEM NO. II: INITIATION OF PENALTY PROCEEDINGS U/S 271(1)(c) OF THE ACT

2.1 The Learned CIT(A) has grossly erred in law and on facts in not deciding the issue by stating that the "initiation of penalty proceedings u/s. 271(1)(c) of the Act being premature is not entertained and is rejected" The learned CIT(A) ought to have appreciated that the appellant has not furnished any inaccurate particulars either with the return of income or during assessment proceedings and also appellant has not concealed any particulars of income. The Learned CIT(A) ought to have appreciated that the additions are made on account of difference of opinion in interpretation of the provisions of law and therefore question of initiation of penalty proceeding does not arise.

2.2 The appellant submits that initiation of penalty proceedings is clearly contrary to law and the same may kindly be quashed.

3. The appellant reserves its right to add, amend, alter, substitute or modify all or any of the grounds stated hereinabove as the facts and circumstances of the case may justify.

PRAYER The appellant therefore respectfully prays that: -

(i) The interest income of Rs. 21,36,598/- be considered as capital receipt being inextricably linked with the process of setting up of the project as the same is going to reduce the cost of assets and in turn the decision of the learned CIT (A) to uphold the decision of learned A.O regarding addition on account of Interest Income Rs. 21,36,598/- may kindly be deleted.

Without prejudice to our claim & contentions, if the addition is confirmed then the same be restricted to Rs. 21,36,319/- instead of Rs. 21,36,598/-.

(ii) Initiation of penalty proceedings under Section 271(1) (c) be quashed.

(iii) Such and further relief as the nature and circumstances of the case may justify."

3. The fact in brief is that return of income declaring income at Rs. nil was filed on 28th Sep, 2012. The case of the assessee was subject to scrutiny assessment and notice u/s. 143(2) of the act was issued on 7th August, 2013. The assessee company was a special purpose vehicle promoted by Gujarat Petroleum Corporation, set up a power project at village Kovaya Dist Amreli. The assessing officer has noticed that assessee has shown other

interest of Rs. 15.87 lacs as per schedule 26, however, under the head other income, the assessee had shown interest income of Rs. 0.50 only. Therefore, the assessee was asked to explain the differences. The assessee has explained that total income of Rs. 21,36,319/- (Rs. 15,36,598 + Rs. 5,99,721/-) has been considered as capital receipt and Rs. 50,405 has been considered revenue receipt. In this regard, the assessing officer has given a show cause notice to the assessee stating that interest of Rs. 21,36,319/- has been considered as capital receipt stating that GPPC has not commenced its project, however, as per director's report the GPPC's 5 MW Solar Power has started generating revenue since March, 2012. Therefore, assessee was show caused by referring the decision of Hon'ble Supreme Court in the case of CIT vs. Bokaro Steel Ltd. as to why the interest earned by it during the year should not be treated as revenue receipt under the head income from other sources. The assessee has explained that there were two purchases undertaken by the company (i) 702 MW combined cycle power project and (ii) 5 MW Solar Photovoltaic Power Project and it is stated that during the year GPPC 702 MW combined cycle power plant at Pipavav was still under advance stage of implementation and has not been commissioned. It is further submitted that GPPC has borrowed funds during the year from various banks for its project. GPPC has earned interest income on temporary investment of same funds in FD till the utilization of the same funds in project. Therefore, the interest income of Rs. 15,36,598/- earned on the temporary investment in respect of 702 MW combined cycle power project has been considered as capital receipt as GPPC has not commissioned this project. It is also explained that interest income of Rs. 5,99,721/- earned on temporary investment in respect of 5MW solar

photovoltaic project till the commencement of the project has been considered as capital receipt and further Rs. 50,405 has been considered as revenue receipt. The assessing officer has not accepted the explanation of the assessee stating that as per director's report, assessee has commenced this project and started generating revenue since March, 2012

4. Aggrieved assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has dismissed the appeal of the assessee

5. We have heard both the sides and perused the material on record. It is undisputed fact that assessee has borrowed funds from various banks for its projects. The assessee has earned interest income on temporary investment of same fund in FD till the utilization of the same funds in the project. The total interest income of Rs. 21,36,319/- has been considered by the assessee as capital receipt which ought to have been inextricably linked with the process of setting up plant and machinery, such receipt will go to reduce the cost of its assets. The interest income has been reduced from CWIP project development cost of respective projects. In this regard, the Id. counsel has referred the decision of Hon'ble ITAT vide ITA No. 1663/Ahd/2014, ITA No. 1686/Ahd/2014 with CO 252/Ahd/2014 in the case of DCIT vs. Adani Power Ltd. dated 28/06/2018 and contended that on identical issue and identical fact the ITAT Bench in the above cited case has decided the issue in favour of the assessee. With the assistance of Id. representatives, we have gone through the aforesaid decision of Co-ordinate Bench of the ITAT and considered that the identical issue on similar facts

has been adjudicated in favour of the assessee. Relevant part of the decision is reproduced as under:-

"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 dear 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 Id.CIT(A) has simply followed the order of the Id.CIT(A) in the assessment year 2008-09. Therefore, respectfully following the order of the IT AT 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."

Respectfully following the decision of the Co-ordinate Bench as cited on identical issue on similar facts, the appeal of the assessee is allowed.

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

Order pronounced in the open court on 17-10-2019

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER
Ahmedabad : Dated 17/10/2019

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

आदेश क० तालिम अ० षत / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलार्थ आधिकरण,
अहमदाबाद