IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A' BENCH, KOLKATA

Before Shri P.M. Jagtap, Vice-President
and Shri A.T. Varkey, Judicial Member

I.T.A. No. 150/KOL/2018
Assessment Year: 2012-2013

West Bengal State Electricity Distribution Co. Limited,.....Appellant
(Formerly West Bengal State Electricity Board),
Bidyut Bhawan, Sector-II, Block-DJ,
Bidhan Nagar, Kolkata-700 091
[PAN:AAACW6953H]

-Vs.-
Deputy Commissioner of Income Tax,.....Respondent
Circle-2(2), Kolkata,
Aayakar Bhawan, 7th Floor, P-7, Chowringhee Square,
Kolkata-700069

&

I.T.A. No. 386/KOL/2018
Assessment Year: 2012-2013

Assistant Commissioner of Income Tax,..... .Appellant
Circle-2(2), Kolkata,
Aayakar Bhawan, 7th Floor, P-7, Chowringhee Square,
Kolkata-700069
-Vs.-

West Bengal State Electricity Distribution Co. Limited,..... Respondent
(Formerly West Bengal State Electricity Board),
Bidyut Bhawan, Sector-II, Block-DJ,
Bidhan Nagar, Kolkata-700 091
[PAN:AAACW6953H]

Appearances by:
Shri N.K. Poddar, Sr. Advocate, for the assessee
Dr. A.K. Nayak, CIT (D.R.), for the Revenue

Date of concluding the hearing : November 27, 2019
Date of pronouncing the order : December 31, 2019

O R D E R

Per Shri P.M. Jagtap, Vice-President:-

These two appeals, one filed by the assessee being I.T.A. No. 150/KOL/2018 and the other filed by the Revenue being I.T.A. No. 386/KOL/2018 are cross appeals, which are directed against the order of ld. Commissioner of Income Tax (Appeals)-1, Kolkata dated 12.12.2017.

2. First we take up the Revenue's appeal being **I.T.A. No. 386/KOL/2018**, wherein the following substantive ground is raised by the Revenue:-

> *"That in the facts and circumstances of the case, the ld. CIT(A) has erred in law by deleting of additions on account (1) Additional depreciation of Rs.77,78,79,369/- , (2) ERPC charges of Rs.15,00,000/- and (3) disallowance u/s 14A of Rs.97,37,654/- and thereby holding that the AO was not justified in making the disallowance as whatever expenses claimed by the appellant are already disallowed by the AO separately".*

3. We have heard the arguments of both the sides and also perused the relevant material available on record. It is observed that even though a single ground is raised by the Revenue in its appeal, the same involves three issues relating to the deletion by the ld. CIT(Appeals) of the additions made by the Assessing Officer on account of additional depreciation, ERPC charges and disallowance under section 14A. As agreed by the ld. Representatives of both the sides, all these issues are squarely covered in favour of the assessee by the decision of this Tribunal rendered in assessee's own case for A.Y. 2010-11 and 2011-12 vide its common order dated October 31, 2017 passed in ITA Nos. 871, 872, 1001 & 1002/KOL/2015. A copy of the said order is placed on record before us and perusal of the same shows that the issue relating to the deletion of addition on account of additional depreciation was decided by

the Tribunal in favour of the assessee vide paragraphs no. 6 to 9 of its order, which read as under:-

> *"6. We have heard the arguments of both the sides on this issue and also perused the relevant material available on record. The learned counsel for the assessee has made a detailed submission in support of the assessee's case on this issue by relying on various judicial pronouncements of the Hon'ble Supreme Court as well as several High Courts to make out a case that the generation of electricity is akin to manufacturing a new product. He has also relied on the decision of Madras Bench of this Tribunal in the case of ECIT vs M. Satish Kumar (2012) 19 ITR (Trib.) 646 wherein it was held by relying on the various decisions of the Hon'ble Supreme Court as well as High Courts that electricity falls within the definition of 'goods' and the process of generation of electricity is akin to manufacture of article or thing. It was held that generation of electricity thus is a manufacturing activity and the assessee engaged in the business of generation of electricity was entitled for additional depreciation under section 32(1)(iia). The learned counsel for the assessee has also pointed out that the effect of amendment made in section 32(1)(iia) with effect from 01.04.2013, which is relied upon by the Ld. CIT (A) in his impugned order to decide the issue against the assessee, was also considered by the Tribunal in the case of M. Satish Kumar (supra) and it was held that the said amendment give impetus to the view that the generation of electricity is a manufacturing process eligible for the benefit under section 32(1)(iia).*
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> *7. The learned counsel for the assessee has also relied on the decision of Bangalore Bench of this Tribunal in the case of DCIT vs Hutti Gold Mines Co. Ltd. (2013) 26 ITR (Trib.) 600 wherein it was held that the power generated by the windmill was a product by the assessee company and since it was covered under the words 'article' or 'thing' which was tradable or identifiable, the process of generation of electricity was akin to manufacture of 'article' or 'thing'. It was also held that the power generated need not necessarily be used in the production of assessee's own products and the use of electricity in manufacturing activity of the core business of the assesses was not a precondition for the grant of additional depreciation under section 32(1)(iia). It was further held that the amendment brought about in section 32(1)(iia) by the Finance Act 2012 with effect from 01.04.2013 to include the business of generation of distribution of power to give benefit of additional depreciation was only clarificatory. As submitted by the learned counsel for the assessee, the decision of Bangalore Bench of this Tribunal in the case of Hutti Gold Mines Co. Ltd. (supra) has been upheld by the Hon'ble Karnatake High Court (IT Appeal No 08 of 2014 dated 16.09.2014) by holding that section 32(1)(iia) of the Income Tax Act, 1961 includes the business of generation and distribution of power to avail the benefit of additional depreciation.*

> *8. The learned counsel for the assessee has also relied on the decision of Hon'ble Madras High Court in the case of CIT vs Hi Tech Arai Ltd. 321 ITR 477 wherein the assessee company had set up two windmills in addition to already exceeding four windmills and thereby increased its generation activity by above 50%. The assessee company was engaged in the business by manufacture of oil-seeds, moulded rubber parts etc. and it was using wind energy for generating power for its captive consumption apart from selling surplus power generated to Tamil Nadu Electricity Board. In these facts and circumstances of the case, one of the questions raised before the Hon'ble Madras High Court for consideration was whether the entire new machinery or plant purchased for windmills was eligible for additional depreciation under section 32(1)(iia) of the Act or only those plant and machinery purchased and used in its main business. While answering this question in favour of the assessee, Hon'ble Madras High Court held that section 32(1)(iia) does not state the setting up of new machinery or plant, which was acquired and installed after 31.03.2002, should have any operation connectivity to the article or thing that was already being manufactured by the assessee. It was held that the contention that the setting up of a windmill has nothing to do with the Power Industry, namely, manufacture of oil-seeds thus was totally not germane to the specific provision contained in section 32(1)(iia) of the Act and the assessee was entitled for additional depreciation under section 32(1)(iia) on plant & machinery installed in windmills.*
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> *9. Keeping in view the submissions made by the learned counsel for the assessee, we find that the issue involved in the present case relating to the assessee's claim for additional depreciation under section 32(1)(iia) is squarely covered in favour of the assessee inter alia by the decision of coordinate benches of this Tribunal in the case of M. Satish Kumar (supra) and Hutti Gold Mines Co. Ltd. (supra) as well as by the decision of Hon'ble Madras High Court in the case Hi Tech Arai Ltd. (supra) and that of Hon'ble Karnataka High Court Gold Co. Ltd. (supra). The learned DR, on the other hand, has not been able to bring to our notice any judicial pronouncements on this issue either of the Hon'ble Jurisdictional High Court or any other High Court which is in favour of the revenue. We, therefore, respectfully follow the aforesaid judicial pronouncements cited by the learned counsel for the assessee which are in favour of the assessee and delete the disallowance made by the AO and confirmed by the Ld. CIT (A) on account of assessee's claim for additional depreciation under section 32(1)(iia). Ground no 1 & 2 of the assessee's appeal for A.Y. 2011-12 are accordingly allowed".*

4. It is also observed that the issue relating to the deletion by the ld. CIT(Appeals) of the addition made by the Assessing Officer on account of ERPC charges was also decided by the Tribunal dated October 31, 2017 in

ITA Nos. 871, 872, 1001 & 1002/KOL/2015 in favour of the assessee in A.Y. 2010-11 vide paragraph no. 13 as under:-

> *"13. As regards the issue involved in ground no 2 of the revenue's appeal for A.Y. 2010-11 relating to the deletion by the Ld. CIT (A) of the disallowance made by the A.O. under section 40(a)(ia) on account of payment of ERPC charges without deduction of tax at source, it is observed that the relief on this issue was allowed by the Ld. CIT (A) to the assessee in the year under consideration i.e. A.Y. 2010-11 by relying on the order of his predecessor in assessee's own case for A.Y. 2008-09. As agreed by the learned representatives of both the sides, the decision rendered by the Ld. CIT (A) giving relief to the assessee on the similar issue in A.Y. 2008-09 has been upheld by the Tribunal vide its order dated 04.05.2016 passed in ITA No. 1428/Kol/2013. This issue thus now stands squarely covered in favour of the assessee by the decision of this Tribunal in assessee's own case for A.Y. 2008-09 and respectfully following the same, we uphold the impugned order of the Ld. CIT (A) deleting the disallowance made by the A.O. under section 40(a)(ia) on account of payment of ERPC charges. Ground no 2 of the revenue's appeal for A.Y. 2010-11 is accordingly dismissed.*

The aforesaid decision rendered for A.Y. 2010-11 was followed by the Tribunal to decide the similar issue involved in assessee's own case for A.Y. 2011-12.

5. As regards the issue relating to disallowance under section 14A of the Act, it is observed that a similar issue was also involved in assessee's own case for A.Y. 2010-11 and the same was decided by the Tribunal in favour of the assessee vide paragraph no. 12 of its order dated 31.10.2017 (supra) which reads as under:-

> *"12. We have heard the arguments of both the sides on this issue and also perused the relevant material available on record. The learned counsel for the assessee has submitted that the dividend income of Rs.25,46,900/- was received by the assessee only by one cheque on the shares held in New Town Electricity Co. Ltd. He has contended that there was thus no expenditure whatsoever incurred by the assessee foe earning the said dividend income and this stand of the assessee was never disputed wither by the A.O. or by the Ld. CIT(A) by recording any dissatisfaction before making disallowance under section 14A read with Rule 80. In this*

> *regard, he has relied on the provision of sub-section (2) of section 14A which stipulates that the Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under the Act in accordance with such method as may be prescribed (Rule 8D) if the Assessing Officer having regard to the accounts of the assessee is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under the Act. The assessing Officer thus was required to record his dissatisfaction with the correctness of the claim of the assessee in respect of expenditure incurred in relation to exempt income before invoking Rule 8D and since there was no such dissatisfaction recorded by the AO as agreed even by the Ld. DR, we find merit in the contention of the learned counsel for the assessee that the disallowance under section 14A made by applying Rule 8D is not sustainable. We, therefore, delete the disallowance made by the A.O. under section 14A read with Rule 8D and sustained by the Ld. CIT (A). Ground no. 3 of the assessee's appeal is accordingly allowed while ground no 1 of the revenue's appeal for A.Y. 2010-11 is dismissed".*

The aforesaid decision rendered for A.Y. 2010-11 was followed by the Tribunal to decide the similar issue involved in assessee's case for A.Y. 2011-12 vide its order dated October 31, 2017 (supra).

6. As all the three issues involved in Revenue's appeal for the year under consideration as well as all the material facts relevant thereto are similar to that of A.Ys. 2010-11 and 2011-12, we respectfully follow the order of the Coordinate Bench of this Tribunal for the said years and uphold the impugned order of the ld. CIT(Appeals) giving relief to the assessee on these issues. The appeal of the Revenue is accordingly dismissed.

7. Now we shall take up the assessee's appeal being **ITA No. 150/KOL/2018**. Although as many as six grounds are raised by the assessee in this appeal, the common solitary issue involved therein

relates to the addition of Rs.21,48,33,731/- made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on account of interest on Fixed Deposits made by the assessee out of capital subsidy received from the Government of India under Rajiv Gandhi Gramin Vidyutikaran Yojana (in short RGGVY).

8. The assessee in the present case is a Company, which is engaged in the business of distribution of electricity. The return of income for the year under consideration was filed by it on 29.09.2012 declaring total income at 'NIL'. During the course of assessment proceedings, it was noticed by the Assessing Officer that the assessee has earned interest of Rs.21,48,33,731/- on the Bank Term Deposits kept with Punjab National Bank and UCO Bank and even though credit for the tax deducted at source amounting to Rs.2,14,83,373/- from the said interest was claimed by the assessee, the interest earned was not offered as income. In this regard, it was explained by the assessee that the Government of India had sanctioned a Project under Rajiv Gandhi Gramin Vidyutikaran Yojana for the construction of capital asset in the rural areas of West Bengal. It was submitted that the Government of India had allotted funds for the said Project and as per the terms and conditions of the Scheme, the said funds were to be utilized exclusively for the Project. It was further stipulated that the unutilized funds were to be kept temporarily in Bank Fixed Deposits and interest earned on the said deposits was to be credited to Rajiv Gandhi Gramin Vidyutikaran Yojana Project. It was contended that the said interest thus was in the nature of funds received by the assessee from the Government of India under the Scheme to be utilized for the Project work and the same, therefore, constituted a capital receipt, which was not chargeable to tax. This stand of the assessee was not found acceptable by the Assessing Officer. According to him, the assessee in order to avail the claim of TDS was required to offer the corresponding

income for taxation and since the assessee had failed to do so, he brought to tax the interest amounting to Rs.21,48,33,731/- in the hands of the assessee in the assessment completed under section 143(3) vide an order dated 30.03.2015.

9. The addition made by the Assessing Officer amounting to Rs.21,48,33,731/- on account of interest was challenged by the assessee in the appeal filed before the ld. CIT(Appeals). During the course of appellate proceedings before the ld. CIT(Appeals), the following submission was made by the assessee in writing in support of its case on this issue:-

> *"60. For construction of capital asset required for electrification in the rural areas, Government of India sanctioned a project called Rajiv Gandhi Gramin Vidyutikaran Yojana (RGGVY). This is plan scheme of the Government of India.*
>
> *61. The said scheme was initiated Wholly and exclusively for development of Rural Electricity Infrastructure and Household Electrification. The main emphasis under the scheme was given to effect electricity connection to all rural household belonging to Below Poverty Line (BPL).*
>
> *62. Rural Electrification Corporation Limited (RECL) is acting as Nodal agency of the project. State owned power utilities and Central Public Sector Undertakings (CPSUs) are acting as implementing agencies of the RGGW Project.*
>
> *63. Funding of the project is done by Government of India through the Nodal agency RECL.*
> *64. The entire fund of the project was available to the implementing agencies from Government of India through Rural Electrification Corporation Limited (REEL).*
>
> *65. 90% of the cost of the project is available to the implementing agencies as Capital Subsidy.*
>
> *66. Balance 10% of the project cost is available to the implementing agencies as loan from RECL.*

67. As per the terms arid conditions of the scheme, funds provided by the Central Government are required to be utilized wholly and exclusively for the projects; and unutilized funds are to be kept in Bank fixed deposits. This fact is evident from the copy of letter dated 25th September, 2008 addressed by the Government of India, Ministry of Power, New Delhi to the Pay & Accounts Officer, New Delhi. A copy of the said letter was duly filed before the Assessing Officer in course of impugned assessment proceedings for the year under appeal.

68. It may be noted that originally it was clearly stipulated that the interest earned on fixed deposits, as aforesaid would be used for the project by way of adjustment against the last instalment of capital subsidy to be received from the Government of India. However, subsequently in May, 2014, Government of India decided that interest earned by the Project Implementing Agency (PIA) on deposit of unutilized funds would be remitted back to the designated account of the Government of India. This fact is also corroborated from the letter dated 21st May, 2014 addressed by Mr. K.K. Mishra, Deputy Secretary (RE), Government of India, Ministry of Power, New Delhi to the Chairman and Managing Director of the appellant assessee company, which letter is also on the records of the Assessing Officer.

69. In the facts and circumstances of the instant case, the appellant assessee company states and respectfully submits that the interest of Rs.21,48,33,731/- is not the real income of the appellant assessee company, since it is diverted at the very inception by overriding title in favour of the Government of India. Accordingly, no portion of the said sum of interest of Rs.21,48,33,731/- can be lawfully included in the total income of the appellant assessee company. Reliance in this connection is placed on the decision of the Hon'ble Calcutta Jurisdictional High Court in CIT –vs.- A. Tosh & Sons Pvt. Limited (1987) 166 ITR 867 (Cal.), which decidsion has already been accepted by the CBDT; and no appeal there against was ever preferred before the Hon'ble Supreme Court of India".

10. The ld. CIT(Appeals) did not find merit in the submissions made on behalf of the assessee and proceeded to confirm the addition made by the Assessing Officer on account of interest for the following reasons given in his impugned order:-

"I have considered the material before me. It is observed that there is no dispute on the fact the appellant

company was maintaining its accounts on mercantile basis, and the impugned interest income of Rs.21,48,33,731/- had arisen and accrued to the appellant for the relevant financial year ending 31.03.2012. The appellant has mainly argued that the interest income was not taxable being capital receipts in its hands and alternatively was not real income on account of diversion of income at source. It is not in dispute that the appellant company had invested the amount of grant received by it in fixed deposits with commercial banks, on which interest income of Rs.21,48,33,731/- was received/accrued during the previous year relevant to the AY 2012-13 under consideration. In the appellant's case, no material was placed on record by the appellant that there was any surrender of the impugned interest income to the Central Government or the sanctioning authority by the company.

The appellant has stated that as per the terms and conditions of the RGGVY scheme, funds provided by the Central Government are required to be utilized wholly and exclusively for the projects; and unutilized funds are to be kept in Bank fixed deposits. The AO in this regard, observed that as per terms and conditions of the scheme funds are to be utilized exclusively for the projects and temporary unutilized funds are to be kept in bank fixed deposits. It is also observed that the assessee is found to have been depositing the amount of sanctioned for a project called Rajib Gandhi Gramin Vidyut Yayona (RGGVy) by the Central Govt as fixed deposits in commercial banks i.e PNB & SBI and enjoying Interest Income thereon and has not bothered to pay amount of interest to the Central Government or the sanctioning authority, except making a provision in its books of account towards liability for payment of interest to the Central Government. The Central or state Government have also not bothered to treat the interest accrued/ received by the appellant company on the amount of grants invested in fixed deposit with commercial bank as its income. Once the corpus of capital is sanctioned to the appellant company as grants and interest is earned on surplus funds, on day-to- day basis, then the Central Government has no control over the corpus of the assessee company. The Government order dated

25.09.2008, contains general direction for being carried out by the recipients of the grants for their utilization. It does not specifically regulate the working of the assessee company. Similar is the position with regard to the Government order dated 21.5.2014. The amount of interest does not partake the characteristic of grant-in-aid as this amount has not been sanctioned by the Central Government as grant-in-aid nor there is any decision or order of the Government to consider the amount in question as grant- in-aid given to the assessee company. It is pertinent to that in a case of diversion of income by overriding title the person in whose favour the income is to be diverted should be aware about the exact amount of such income which it has earned. In the present case there is no material brought on record to establish that the Central Government was at any point of time aware about the interest income received/ accrued by the assessee company over which it can lay any claim. These Government Orders appear to have been issued just to take out the interest income earned by the assessee from the taxation under the Income Tax Act.

On the issue of diversion of income, the factors to be considered were enunciated by the Hon'ble Apex Court in the case of Moti Lal Chhadami Lal Jain v. Commissioner of Income-tax in [199.1] 56 TAXMAN 4A (Se), wherein it was held that,

"Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied."

The appellant has stated that as per the terms and conditions of the RGGV scheme, funds provided by the Central Government are required to be utilized wholly and exclusively for the projects and unutilized funds are to be kept in Bank Fixed Deposits. It is also observed that the assessee is found to have been depositing the amount of sanctioned for a project called Rajib Gandhi Gramin Vidyut Yayona (RGGVY) by the Central Govt. as fixed deposits in commercial banks i.e PNB & SBI and enjoying interest income thereon and has not bothered to pay amount of interest to the Central Government or the sanctioning authority , except making a provision in its books of account towards liability for payment of interest to the Central Government. The Central or state Government have also not treated the Interest accrued/ received by the appellant company on the account of grants invested in fixed deposit with commercial bank as its income during the relevant period under consideration. Once the funds are sanctioned to the appellant company as grants on day-to-day basis then the sanctioning authority/ Central Government has no control over the capital/funds of the assessee company. The Government order dated 25.09.2008, contains general direction for being carried out by the recipients of the grants for their utilization. It does not specifically regulate the working of the assessee company. The A/R has also relied upon the Government order dated 21.5.2014, which is found to have been passed after the end of the relevant financial year nor does it have retrospective effect on the interest already received by the appellant company. Hence, the amount of interest income in question does not partake the characteristic of grant-in-aid as this amount has not been sanctioned by the Central Government as grant-in-aid nor there is any decision or order of the Government to consider the amount in question as grant-in-aid given to the assessee company. It is pertinent to that in a case of diversion of income by overriding title, the person in whose favour the income is to be diverted should be aware about the exact amount of such income which it has earned. In the present case, the obligation to divert the income has admittedly arisen after the interest income has reached the assessee and not before and would thus comprise

application of the said interest income after it was received by the appellant company. The said Government Orders appear to have been issued just to take out the interest income earned by the assessee from the taxation under the Income Tax Act.

The A/R has relied upon the ratio of decision of the Calcutta High Court in CIT v. A. Tosh & Sons Pvt. Ltd. (1987) 166 ITR 867 (Cal), which is found to be distinguishable as the facts of the said case are found to be distinct from the facts and circumstances of the appellant's case wherein the interest earned on fixed deposit made out of surplus left with the assessee out of the taxes and rebate raised on behalf of foreign buyers and paid to the Government was held as not taxable in its hands. However, in the appellant's case, the interest income has not been paid to the Central Government by the appellant company. Thus, the ratio of the said decision is found to be not applicable to the appellant's case.

In the case of CIT –vs.- Sunil J. Kinariwala (2003) 259 ITR 10, the Apex Court, after referring to the decisions of the Privy Council in the case of Raja Bejoy Singh Dudhuria –vs. – CIT (1933) 1 ITR 135 (PC) and P.C. Mullick –vs.- CIT (1938) 6 ITR 206 (PC); of the Apex Court in the case of Sitaldas Tirathdas (supra), K.A. Ramachar –vs.- CIT (1961) 42 ITR 25 (SC); Motilal Chhadami Lal Jain (supra); CIT –Vs.- Baagyalakshmi & Co. (1965) 55 ITR 660 (SC) and Murlidhar Himatsingka v. CIT (1966) 6.2-iTR 323 (SC), has held that if a third person becomes entitled to receive an amount under an obligation of an assessee even before he could claim to receive it as his income, there would be a diversion of income by overriding title, but when after receipt of the income by the assessee, the same is passed on to a third person in discharge of t4he obligation of the assessee, it will be a case of application of income by the assessee and not of diversion of income by overriding title.

The principle which emerges from these decisions is that if a third person becomes entitled to receive an amount under an obligation of an assessee even, before he could claim to receive it as his income, there would be a

diversion of Income by overriding title, but when after receipt of the income by the assessee, the same is passed on to a third person in discharge of the obligation of the assessee, it will be a case of application of income by the assessee and not of diversion or income by overriding title.

Moreover, in the case of State Bank of Travancore, (1986) 158 ITR 102 (SC), the Hon'ble Supreme Court has laid down the following propositions:

"(1) It is the Income which has really accrued or arisen to the assessee that is taxable. Whether the income has really accrued or arisen to the assessee must be judged in the light of the reality of the situation. (2) The concept of real income would apply where there has been a surrender of income which in theory may have accrued but: in the reality of the situation no income had resulted because the income did not really accrue. (3) Where a debt has become bad, deduction in compliance with the provisions of the Act should be claimed and allowed. (4) Where the Act applies, the concept of real income should not be so read as to defeat the provisions of the Act. (5) If there is any diversion of income at source under any statute or by overriding title, then there is no income to the assessee. (6) The conduct of the parties in treating the income in a particular manner is material evidence of the fact whether income has accrued or not. (7) Mere improbability of recovery, where the conduct of the assessee is unequivocal, cannot be treated as evidence of the fact that income has not been resulted or accrued to the assessee. After debiting the debtors account and not reversing that entry but taking the interest merely in suspense account cannot be such evidence to show that no real Income has accrued to the assessee or been treated as such by the assessee. (8) The concept of real income is certainly applicable in judging whether there has been income or not but, in every case, it must be applied with care and within well-recognized limits.

In the case of Kedarnath Jute Mfg. Co. Ltd. (1971) 82 ITR 363 (Se), the Hon'ble Apex Court has held that whether

the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights; nor can the existence or absence of entries ill his books of account be decisive or conclusive in the matter. In tile case of Kedarnath Jute Mfg. Co. Ltd. (supra) the Apex Court has held the provision of law relating thereto and not on the view which the assessee might take of his rights; nor can the existence or absence of entries in his books of account be decisive or conclusive m the matter.

Therefore, I am of the view that there is no overriding title in favour of the appellant company members because there was neither a prior statutory obligation nor an agreement with the Central Govt. or sanctioning authority for depositing their fund with the bank and for passing on the interest to them. The appellant has merely claimed that it was obliged to do so on account of letter from the Central Government to recipients of grants, which was found to be antecedent to the receipt of the impugned interest income in the appellant's hands. Thus, this cannot be said to be equivalent to an overriding title. This view is supported by the decision of Hon'ble Allahabad High Court in Addl. CIT –vs.- Rani Pritam Kumar (1980) 125 ITR 102 (All.), wherein it was held that for diversion of income at source through an overriding title, it is necessary that payment or diversion should be under some legal obligation which should be attached with the source of income. In other words, for such a payment there should be an overriding charge, which is exacted under any law for the time being in force, or by virtue of any Court's decree by an agreement, or by a voluntary settlement, or the obligation should be such which can be enforced in a court of law. In the instant case, these facts are not present and hence it cannot be said that there was diversion at source through an overriding title. No charge has been created on the interest income in favour of the sanctioning authority either by an agreement, or by a Court's decree, or by operation of law or by a settlement. Hence, the ratio of the case laws cited by the appellant's A.R on this issue are found to be not applicable to the facts of the instant case.

> *In view of the above discussion, and applying the principles laid down by the Apex/High Courts in the aforesaid cases to the facts of the present case, it is found that no material has been placed on record by the appellant to indicate that there was any stipulation that the interest earned on such grant/aid if kept in fixed deposit in commercial bank would not accrue to the appellant but to the Central Government. Moreover, there is also no material on record to indicate that the interest income was transferred or passed on to a third person by the appellant company during the financial year, under an existing obligation. In fact, the orders Issued by the Central Government were for treating the amount of interest after its receipt in the hands of the appellant company. In view thereof, I am of the opinion that the appellant's alternative claim of the theory of real income is also not applicable to the facts of the present case inasmuch as the interest has accrued to the appellant which it had retained as income in its own hands, and the interest income has arisen from the fixed deposits are liable to be taxed as income in the hands of the appellant company as held by the Hon'ble Supreme Court in. the case of State Bank of Travancore, (supra). Therefore, it is held that the A.O was correct in treating the impugned amount of interest income Rs.21,48,33,731/- as revenue receipts in the hands of the appellant company, and addition thereof is confirmed. Thus, ground no. 5 & 6 are not allowed".*

11. The ld. Counsel for the assessee invited our attention to the copy of letter dated 25.09.2008 issued by the Government of India, Ministry of Power while releasing the funds to Rural Electrification Corporation Limited (REC) under Rajiv Gandhi Gramin Vaidutikiran Yojona (RGGVY) and pointed out that as per paragraph no. 5 of the said letter, REC and Implementing Agencies were required to keep the funds in interest bearing deposits of Nationalised Banks only and the interest earned on such deposits was to be accounted for and used for cost of the Project by way of adjustment in the last instalment. He contended that the assessee-company thus had no right or title in the interest amount in question

received during the year under consideration on the deposits made in the Banks out of funds received under Rajiv Gandhi Gramin Vidyutikaran Yojana (RGGVY) and the question of treating the same as the income of the assessee does not arise at all. He contended that this position gets further fortified by the fact that the REC vide its letter dated 26.12.2012 asked all the Implementing Agencies including the assessee to remit the amount of such interest to the Government Account immediately. He invited our attention to the copy of the said letter placed at pages no. 65 to 66 of his paper book and also to the letters subsequently issued by REC dated 15.01.2013 and 23.08.2013 reminding the Implementing Agencies to remit back the amount of interest to the Government Account immediately. He submitted that another letter dated 20.11.2013 was sent by the REC to the assessee (copy at page no. 70 of the paper book) asking the remittance of the interest amount and when the assessee still failed to remit the interest amount, a letter dated 02.05.2014 (copy at page no. 71 of the paper book) was received by the assessee from the Government of India, Ministry of Power informing that the non-remittance of interest was viewed seriously by the Ministry and asking for the remittance of the interest amount within two weeks time. He submitted that the assessee finally paid the entire interest amount received upto 31st March, 2014 amounting to Rs.73.54 crores to the Government Account and informed REC about the same vide its letter dated 13.06.2014 (copy at page no. 73 of the paper book). The ld. Counsel for the assessee contended that this entire correspondence is sufficient to establish that the assessee never had any right or title in the interest and the interest amount in question was received by it on behalf of the Government of India, which was earlier liable to be adjusted against the last payment of capital subsidy and latter was liable to be remitted back to the Government Account, which was duly done by the assessee. He contended that the said interest thus was not in the nature of income earned by the assessee and as per

the specific terms of the Government of India, it was diverted even at the inception by an overriding charge in favour of the Government of India. In support of this contention, he relied on the decision of the Hon'ble Calcutta High Court in the case of CIT –vs.- A. Tosh & Sons Pvt. Limited [166 ITR 867], wherein it was held that when it was clear under the agreements that the assessee would be entitled to receive the excise duty rebate and customs duty drawback only on the account of the foreign buyers and not on its own account and the assessee was also under an obligation under the agreements to remit the said amounts received to the foreign buyers, It, followed that the said amounts never reached the hands of the assesese as its own receipt or income and the assessee had received the same on behalf of its foreign buyers. It was held that the said amounts were never the real income of the assessee as they were diverted even at the inception by an overriding title in favour of the foreign buyers.

12. The ld. D.R., on the other hand, submitted that the entire correspondence of the Ministry of Power, Government of India as well as REC relied upon by the ld. Counsel for the assessee in support of the assessee's case on this issue refers to the Implementing Agencies whereas the assessee-company is an Executing Agency. He pointed out from the said correspondence that there is a specific mention of Implementing Agency only and there is no reference whatsoever to the Executing Agency. He contended that the said correspondence, therefore, is not a relevant evidence for deciding the case of the assessee-company, which is an Executing Agency and the reliance of the ld. Counsel for the assessee on the same is clearly misplaced. He contended that the interest in question was not only accrued to the assessee but the same was also received by the assessee and that is why other agencies were remanding back the said interest amount. He strongly relied on the impugned order

passed by the ld. CIT(Appeals) in support of the revenue's case that there was no diversion of interest income by overriding title as claimed on behalf of the assessee. He also relied on the Accounting Standard-12 dealing with accounting for government grants and contended that the interest amount in question not being held by the assessee-company as Trustee or Custodian was chargeable to tax as the income earned. He also relied on the decision of the Ahmedabad Bench of this Tribunal in the case of National Dairy Development Board –vs.- Additional CIT [114 TTJ 145] to contend that interest income has to accrue to somebody and since the same had accrued to the assessee-company in the present case, the addition made by the Assessing Officer on account of such interest was rightly confirmed by the ld CIT(Appeals).

13. In the rejoinder, the ld. Counsel for the assessee submitted that there is no difference between the Executing Agency and Implementing Agency as sought to be pointed out by the ld. D.R. He submitted that REC was the Nodal Agency and there were various Implementing Agencies including the assessee-company. To support and substantiate this stand, he invited our attention to the letter dated 20.11.2013 issued by the REC (copy at page no. 70 of the paper book) and the letter dated 02.05.2014 issued by the Government of India, Ministry of Power (copy at page no. 71 of the paper book) and pointed out that the said letters were specifically addressed to the assessee giving the reference of the earlier correspondence, which is sufficient to show that the assessee-company was involved in the Project as Implementing Agency and the correspondence of REC and Government of India, Ministry of Power relied upon by him is a relevant evidence to decide the issue under consideration involved in the assessee's case.

14. We have heard the arguments of both the sides and also perused the relevant material available on record. It is observed that the Rural Electrification Programme was implemented by the Government of India, Ministry of Power through Rural Electrification Corporation Limited (in short REC) called Rajiv Gandhi Gramin Vidyutikaran Yojana and for implementation of the same, various Implementing Agencies were appointed by the REC including the assessee-company. While releasing funds for the said Programme in the form of capital subsidy vide letter dated 25.09.2008, it was specifically stipulated by the Government of India, Ministry of Power that a separate account will be maintained in respect of the capital subsidy and REC and Implementing Agencies will keep the funds in interest bearing deposits of Nationalised Banks till the payments are made to the Contracting Agencies. It was also stipulated that the interest earned on such deposits was to be accounted for and used for cost of the Project by way of adjustment in the last instalment. The interest so earned thus was received by REC as well as all the Implementing Agencies including the assessee-company for and on behalf of the Government of India, Ministry of Power and since the same was to be used for cost of the project by way of adjustment in the last instalment of capital subsidy, the REC as well as all the Implementing Agencies including the assessee-company never had any title or right in the interest so earned as they were under an obligation to use the amount of interest for cost of the Project by way of adjustment in the last instalment of capital subsidy receivable from the Government of India, Ministry of Power. It is thus not a case where the interest income was earned by the assessee-company and the same was applied to discharge any obligation after such income reached the assessee. On the other hand, the amount of interest in question, going by the nature of obligation as stipulated by the Government of India, Ministry of Power in the letter dated 25.09.2008 did not form part of the income of the assessee as the same was liable to be

used for the cost of Project by way of adjustment in the last instalment of capital subsidy and the same thus was in the nature of capital receipt being capital subsidy received from the Government of India, Ministry of Power.

15. In the case of Motital Chhadamilal Jain –vs.- CIT [56 Taxman 4A(SC)(supra) relied upon by the ld. CIT(Appeals) in his impugned order, it was held by the Hon'ble Supreme Court while deciding the issue of diversion of income, the nature of the obligation is the decisive fact and where by the obligation, income is diverted before it reaches the hands of the assessee, the same is not chargeable to tax. As per the conditions stipulated by the Government of India, Ministry of Power, the interest amount in question received by the assessee was liable to be adjusted against the capital subsidy receivable under the programme and since the assessee-company was under an obligation to adjust the interest amount against the capital subsidy, there was an overriding charge, which was enforceable in law. This position gets further fortified by the fact that the Government of India, Ministry of Power subsequently decided to recover the amount of interest in question earned by the REC as well as the Implementing Agencies including the assessee-company and the same was indeed remitted back by the assessee-company finally to the Government of India, Ministry of Power.

16. At the time of hearing before us, the ld. D.R. has contended that the assessee-company was an Executing Agency and not the Implementing Agency. However, as rightly contended by the ld. Counsel for the assesese, there is no difference between the Implementing Agency and the Executing Agency and both of them are one and the same. Moreover the fact that the relevant correspondence meant for Implementing Agencies was addressed by the Ministry of Power, Government of India as

well as REC specifically to the assessee-company clearly establishes that the assessee-company was an Implementing Agency and the interest in question received by it for and on behalf of the Government of India, Ministry of Power and subsequently remitted back was in the capacity as an Implementing Agency.

17. The ld. D.R. has relied on Accounting Standard 12 in support of the Revenue's case on the issue under consideration. A careful perusal of the said Accounting Standard, however, shows that the exact situation arising in the present case has not been specifically dealt with in the said Accounting Standard. Moreover, the said Accounting Standard deals with the accounting treatment to be given to the Government grants and its disclosure in the final accounts. It is, therefore, not relevant to decide the issue relating to the taxability of the interest received by the assessee on the surplus funds temporarily available on account of Government grants as involved in the present case.

18. The ld. D.R. has also relied on the decision of Ahmedabad Bench of this Tribunal in the case of National Dairy Development Board (supra) in support of the Revenue's case. It is observed that the assessee in the said case had earned interest on the deposits made out of funds received for different Projects. In the case of funds received for the first Project, no details were submitted by the assessee either before the revenue authorities or even before the Tribunal and in the absence of the said details, the Tribunal upheld the action of the revenue authorities in assessing the interest relatable to the said Project. As regards the funds received from the second project, there was no specific condition stipulated in the relevant letter about the accrual of interest and the Tribunal, therefore, found it fit to restore the matter to the file of the Assessing Officer to verify as to what would happened to the interest

earned and whether it was actually refunded to the authority of the Government. As regards the funds received for the third Project, there was a letter issued by the concerned Government Department, wherein it was stipulated that the funds released by Government of India shall be kept in a separate account for the desired purpose and the amount of interest earned by the assessee was to be refunded to the Government of India. As per the said stipulation, interest was actually refunded by the assessee in the next year and keeping in view the same, it was held by the Tribunal that the interest might not have accrued to the assessee or otherwise it should not have refunded in the subsequent year. It was held that the interest belonged to Government of India and was diverted at source. In our opinion, this decision of the Ahmedabad Bench of this Tribunal in the case of National Dairy Development Board (supra) relied upon by the ld. D.R. actually supports the case of the assessee, inasmuch as, the assessee-company as per the letter dated 25.09.2008 issued by the Government of India, Ministry of Power while releasing the funds was under an obligation to adjust the interest amount in question against the capital subsidy receivable from the Government and the said interest amount having been finally remitted back by it entirely to the Government of India, Ministry of Power, it cannot be said to have accrued to the assessee as income and it was a case of diversion of interest income at source.

19. It is observed that the decision of the Hon'ble Calcutta High Court in the case of CIT –vs.- A. Tosh & Sons Pvt. Limited (supra) relied upon by the ld. Counsel for the assessee also fully supports the case of the assessee. In the said case, the assessee had exported tea to foreign countries and under the agreements entered into with the foreign buyers, any refund or rebate of taxes and duties payable by the foreign buyers was liable to be remitted to them by the ld. CIT(Appeals). In these facts

and circumstances of the case, it was held by the Hon'ble Calcutta High Court that the amount of rebate and duty draw back was received by the assessee on behalf of its foreign buyers and since the foreign buyers were entitled to the same, the same were never the real income of the assessee and they were diverted even at the inception by an overriding title in favour of the foreign buyers.

20. Keeping in view all the facts of the case in the light of judicial pronouncement as discussed above, we are of the view that the addition made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on account of interest in question by treating the same as income of the assessee is not sustainable. We accordingly delete the said addition and allow this appeal of the assessee.

21. In the result, the appeal of the Revenue is dismissed, while the appeal of the assessee is allowed.

Order pronounced in the open Court on December 31, 2019.

Sd/-	**Sd/-**
(A.T. Varkey)	**(P.M. Jagtap)**
Judicial Member	**Vice-President)**

Kolkata, the 31st day of December, 2019

Copies to: *(1)* ***West Bengal State Electricity Distribution Co. Limited, (Formerly West Bengal State Electricity Board), Bidyut Bhawan, Sector-II, Block-DJ, Bidhan Nagar, Kolkata-700 091***

(2) ***Deputy /Assistant Commissioner of Income Tax, Circle-2(2), Kolkata, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-700069***

(3) *Commissioner of Income Tax (Appeals)-1, Kolkata;*

(4) Commissioner of Income Tax, Kolkata- , Kolkata;

(5) The Departmental Representative

(6) Guard File

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.