

IN THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD BENCH

**Before: Shri Sandeep Gosain, Judicial Member  
And Shri Amarjit Singh, Accountant Member**

**ITA Nos. 1642 & 1643/Ahd/2018  
Assessment Year 2013-14 & 2014-15**

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| BTW-Atlanta<br>Transformers India Pvt.<br>Ltd. Survey No. 192/1,<br>192/3, 193 to 199 & 209,<br>Ankhi Jambusar Bharuch,<br>Gujarat-392150<br>PAN: AAECB9579N<br>(Appellant) | Vs | The ACIT,<br>Circle-1(1)(1),<br>Vadodara<br>(Respondent) |
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**Revenue by: Shri Vidhyut Trivedi, Sr. D.R.  
Assessee by: Shri S.N.Soparkar, A.R.**

Date of hearing : 03-03-2020  
Date of pronouncement : 06-03-2020

**आदेश/ORDER**

**PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-**

These two appeals filed by assessee for A.Y. 2013-14 & 2014-15, arise from order of the CIT(A)-1, Vadodara dated 06-04-2018, in proceedings under section 143(3) of the Income Tax Act, 1961; in short the Act.

2. These two appeals pertaining to different assessment years are filed by the assessee against the order of Id. CIT(A). Since both these appeals are based on similar issue and identical facts, therefore, for the sake of convenience, both these appeals are adjudicated together by taking ITA No. 1642/Ahd/2018 pertaining to assessment year 2013-14 as lead case and its findings will be applicable to the other appeal of the assessee pertaining to the assessment year 2014-15.

3. The fact in brief is that the return of income declaring total income of Rs. -68,27,726/- was filed on 16<sup>th</sup> October, 2014 and book profit u/s. 115JB of the Act of Rs. Nil. The case was subject to scrutiny assessment and notice u/s. 143(2) of the act was issued on 2<sup>nd</sup> Sep, 2014. During the course of assessment, the assessing officer noticed that during the year under consideration the assessee has not entered into any business transaction and was not having any business income. The assessing officer noticed that assessee has claimed various expenses like salary/entertainment expenses/foreign travelling expenses etc., however, the assessee has not shown any income from its operations. The assessee had shown income of Rs. 1,80,56,955/- from interest on fixed deposit held with bank. Accordingly, the assessing officer has asked the assessee vide notice dated 29<sup>th</sup> August, 2016 to explain as to why the expenses claimed should be not disallowed by treating as capital expenses as no operational revenue had been shown during the year under consideration. The explanation of the assessee furnished vide letter dated 12<sup>th</sup> Sep, 2016 was reproduced by the assessing officer at page no.7 to 8 of the assessment order. In his written submission, the assessee has briefly stated that the company was

incorporated on 13<sup>th</sup> March, 2012 and the revenue expenses have been incurred for day to day running of the company in order to meet the operational cost. It was also stated that expenses have not been incurred directly or indirectly attributable to cost of new asset. The assessee has also referred various judgments in its submission made before the assessing officer. The assessing officer has not accepted the submission of the assessee. The assessing officer has stated that assessee had not shown any operational income since its inception, therefore, claim of allowability of operational expenditure cannot be allowed. The assessing officer has also stated that it can be verified from point no. 4.0 of the 3CD report wherein it was mentioned that details regarding turnover/gross profit etc. for the previous year and preceding years were not available as the assessee was neither engaged in manufacturing nor in trading activities. The assessing officer has also stated that by point No. 1(c)(ii) of the annexure to auditor's report, a statutory auditor had reported that assessee company did not have any inventory. In the light of the above facts, the assessing officer has stated that no activities have been commenced in the F.Y. 2012-13 and the assessee has not commenced its operation, therefore, revenue expenditure claimed were treated as preliminary expenses. Thereafter, the assessee has filed an rectification application u/s. 154 of the act stating that in the assessment order the assessing officer has disallowed expenditure to the amount of Rs. 3,45,80,142/- including the expenditure totaling to the amount of Rs. 1,18,68,120/- had already been disallowed by the assessee company suo moto in the return of income. Subsequently, the assessing officer has passed rectification order u/s. 154 of the act and reduced disallowance of expenses amounting to Rs. 1,18,68,120/- which had already been disallowed by the

assessing officer in his return of income. In this manner disallowed expenses has been reduced to Rs. 2,33,36,067/- stating that business activity or commercial activity have not been started during the year under consideration.

4. Aggrieved assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has dismissed the appeal of the assessee. The assessee has also raised alternative ground of appeal before the Id. CIT(A) stating if the disallowance of claim of expenses made by the assessing officer is upheld then the interest earned by the assessee prior to the commencement of business should also be treated as capital receipt. However, the Id. CIT(A) has stated that since the assessing officer has not adjudicated upon the nature of interest income, therefore, he held that alternative ground was not arised from the order of assessment. The Id. CIT(A) has also stated that the decision of Indian Oil Panipat Power Consortium ltd. and Adani Power Ltd. 315 ITR 255 referred by the assessee was distinguishable from the facts in the case of the assessee as whole amount of share capital was not invested in fixed deposit in the case of the assessee. Accordingly, the Id. CIT(A) has also dismissed the alternative ground of appeal of the assessee.

5. During the course of appellate proceedings before us, the Id. counsel has submitted paper book comprising detail of information and copies of documents furnished before the assessing officer and CIT(A) during the course of assessment and appellate proceedings. The Id. counsel has contended that during the year the assessee has started construction of the factory incurred various expenses for day to day running of the company

and earned interest income from fixed deposits. The ld. counsel has submitted that concept of commencement of business and set off of business are two different concepts and expenditure incurred post set up of business and prior to commencement of business are allowable expenses. The assessee has placed reliance on the following pronouncements:-

- *Western India Vegetable Products Limited v. CIT (1954) 26ITR151 (Bombay HC)*
- *CIT vs. Samsung India Electronics Limited (2013) 356 ITR 354 (Delhi HC)*
- *CIT v. Hughes Escorts Communications (2007) 165 Taxman 3i8(Delhi HC)*
- *CIT vs. Saurashtra Cement & Chemical Industries Ltd. (1973) 91 ITR 170 (Gujarat HC)*

The ld. counsel has submitted that assessee company has obtained necessary regulatory registration and approval required for commencement of its business and also set up its administrative office and recruited employees for the purposes of business. The assessee company has also incurred expenses of foreign travel of its employees for selection of vendors for plant and machinery. The assessee has also entered into an agreement with its parent company for licensing of technical knowhow in relation of manufacturing process etc.

6. In respect of alternative ground of appeal, the ld. counsel has contended that interest income should be considered as capital receipt and not chargeable to tax. In this regard, the ld. counsel has submitted that assessee company has also made a submission on this point before the ld. CIT(A) that interest income earned from pre-commencement period should not be subject to tax and it is capital in nature and should be reduced from the cost of project. In this regard, the assessee has also placed reliance on the following judicial pronouncements:-

*a.HonT)le Delhi High Court in the case of Indian Oil Panipat Power Consortium Ltd. v. ITO [(2009) 315 ITR 255]*

*b. Hon'ble Ahmedabad ITAT in the case of Adani Power Ltd. v. ACIT [(2015) 155 ITD 239]*

*c. Hon'ble Ahmedabad ITAT in the case of GSPC Pipavav Power Company Ltd. Vs. ITO vide ITA No. 1613/Ahd/2016 dated 17-10-2019*

The ld. counsel has also referred various pages of paper book i.e. audited balance sheet of the company on 31<sup>st</sup> March, 2013, P & L A/c of the assessee for the year ended 31<sup>st</sup> March, 2013 and schedule of fixed assets of the company as on 31<sup>st</sup> March, 2013 and schedule for other income vide which the interest on bank deposit was shown to the amount of Rs. 1,80,56,955/-. On the other hand, ld. departmental representative placed reliance on the finding of ld. CIT(A).

7. We have heard both the sides and perused the material on record. During the assessment year, the assessing officer noticed that assessee has claimed various expenses in the P & L account on account of employees benefit expenses, finance cost, depreciation and other expenses against income from fixed deposit at Rs. 1,80,66,955/-. The assessing officer has disallowed the claim of revenue expenditure of the assessee to the amount of Rs. 2,33,36,067/- stating that business activities or commercial operations have not been started during the year under consideration. The ld. CIT(A) has sustained the disallowance made by the assessing officer stating that assessee company has not yet commenced its business, therefore, the claim of expenditure cannot be allowed. In respect of alternative claim of the assessee that if the disallowance of expenditure made by the assessing officer is upheld, then, the interest income prior to the commencement of business should be treated as capital receipt, the ld. CIT(A) has dismissed this ground of the assessee stating that assessing officer has not adjudicated

upon the nature of interest income and this ground was not arised from the order of assessment. The assessee company has pointed out that it has set up its business and it has undertaken the following activities:-

- (i) Obtained necessary regulatory registration and approval required for commencement of its business
- (ii) Set up administrative office and recruited employees for the purpose
- (ii) Incurred expenses for foreign travelling of its employees for selection of vendors for plant and machinery
- (iv) Entered into agreement with its parent company for licensing of technical know-how in relation to manufacturing process.
- (v) Sent its employees to parent office to undertake manufacturing and procurement process.

After perusal of the material on record, we observe that it is not substantiated with relevant evidences that business has been set up. We have also gone through the judicial pronouncements referred by the Id. counsel and noticed that facts of these cases are distinguishable from the case of the assessee. In the case of *Western India Vegetables Product Ltd. Vs. CIT (1954) 26 ITR 151 (Bom.)* it is held that first purchase of raw material was made in end of Sep. 1946 from which inference could be drawn that assessee had set up its business by that date. In the case of *CIT Vs. Samsung India Electronics Ltd. (2013) 37 taxmann.com 239 (Delhi)* the assessee company was ready to commence trading operation as on the date of incorporation viz. 3.8.1995. In the case of *Prem Conductors (P) Ltd. Vs. CIT (1977) 108 ITR 654 (Guj.)* it was seen that assessee company has started accepting orders for production of goods since very date of its

incorporation. In the light of the facts of the case, material on records and judicial findings, we consider it is not substantiated that assessee has commenced its business operations during the year under consideration and the expenses claimed by the assessee company appeared to be at the stage of setting up of its business, therefore, this ground of appeal is dismissed.

8. Regarding alternative ground of appeal the ld. counsel has submitted that interest income earned from temporary deposit of the fund brought by way of share capital are inextricably linked to setting up of manufacturing facilities and same should be considered as capital in nature and should be reduced from the cost of the project. The ld. counsel has placed reliance on the various judicial pronouncements as cited above in this order. In respect of alternative claim of the assessee, we are of the view that once it has been considered that assessee has not commenced its business, therefore, the interest income earned by the assessee prior to the commencement of the business is required to be treated as capital receipt. In this regard, we have gone through the judicial pronouncement referred by the ld. counsel in the case of Indian Oil Panipat Power Consortium Ltd. vs. ITO 181 taxman 249 wherein Honøble Delhi High Court has held that income earned in a period prior to commencement to its business it was in nature of capital receipt and as well as was required to be set off against pre-operative expenses. We have also gone through the judicial pronouncements referred by the ld. counsel in the case of NTPC, SAIL Power Company Pvt. Ltd. vs. CIT (2012) 25 taxman.com 401 Delhi wherein it is held that funds invested by assessee company and interest earned were inextricably linked with setting up new power plant and therefore, interest earned shall be treated as capital

interest receipt not to tax. We have also gone through the judicial pronouncement referred by the Id. counsel in the case of CIT vs. Petronet LNG (2011) 10 taxman.com 257 Delhi wherein it is held that interest earned on fund which ought to be utilised for purchase of capital asset/setting up of business should be treated as capital receipt not exigible to tax under the head income from other sources. In addition to above, the Id. counsel has also referred the various decisions of the Co-ordinate Benches of the ITAT in the case of Adani Power Ltd. vs. ACIT (2015) 61 taxman.com 335 (Ahmedabad Tri) wherein it is held that interest receipt related to prior period to commencement of business was in nature of capital receipt and was required to be set off against pre-operative expenses. The Co-ordinate Bench of the ITAT in the case of ITO Adani Power Naharatra Ltd. ITA No.2401/Ahd/2014 dated 13<sup>th</sup> Dec, 2018 has held that similar interest income is to be treated as capital expenditure. Then, the Co-ordinate Bench of the ITAT in the case of GSPC Power Company Ltd. vs. ITO vide ITA No. 1613/Ahd/2016 dated 17-10-2019 after following the decision of Co-ordinate Benches has held that interest income was a capital receipt not chargeable to tax during the year under consideration. Relevant part of the decision of the Co-ordinate Bench is as under:-

*“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 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."

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

In the light of the above facts and after considering the various judicial pronouncements of the Hon'ble High Courts and Co-ordinate Benches of the ITAT as cited above, we consider that the impugned interest receipt by the

assessee company is related to the prior period to commencement of business which is in nature of capital receipt and was required to be set off against pre-operative expenses. Therefore, first ground of appeal of the assessee for treating expenses to the amount of Rs. 2,33,36,037/- as revenue expenditure is dismissed. However, the alternative ground of appeal of the assessee for treating the interest income earned on fixed deposit pertaining to prior period commencement of business is allowed by treating the impugned interest income as capital receipt which is adjusted against pre-operative expenses of the assessee. Therefore, the alternative ground of appeal of the assessee is allowed.

9. In the result, the appeal of the assessee is partly allowed.

ITA No. 1643/Ahd/2018 for A.Y. 2014-15

10. This appeal of the assessee is based on similar issue and identical facts to the ITA No. 1642/Ahd/2018 for A.Y. 2013-14 as adjudicated above in this order. Therefore, without reiterating the facts and findings as discussed above in this order the claim of treating expenses of Rs. 1,54,01,064/- as revenue expenses is dismissed. However, the alternative ground of appeal of the assessee for treating the interest income earned on fixed deposit pertaining to prior period commencement of business is allowed after applying the finding elaborated in adjudicating assessee's appeal vide ITA No. 1642/Ahd/2018 as above in this order by treating the interest income as capital receipt which is to be adjusted against preoperative expenses of the assessee. Therefore, this ground of appeal of the assessee is partly allowed.

11. The ground no. 4 of the appeal pertaining to ITA No. 1642/Ahd/2018 & 1643/Ahd/2018 are not contested by the ld. counsel. Therefore, ground no. 4 pertaining to ITA No. 1642/Ahd/2018 & 1643/Ahd/2018 are dismissed.

12. In the result, the appeal of the assessee is partly allowed.

13. In the combined result, both the appeals of the assessee are partly allowed.

Order pronounced in the open court on 06-03-2020

Sd/-  
(SANDEEP GOSAIN)  
JUDICIAL MEMBER

Ahmedabad : Dated 06/03/2020

आदेश क० त० ल० म० अ० षत / Copy of Order Forwarded to:-

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

Sd/-  
(AMARJIT SINGH)  
ACCOUNTANT MEMBER

By order/आदेश से,

उप/सहायक पंजीकार  
आयकर अपील अथ अधिकरण,  
अहमदाबाद