

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, MUMBAI
BEFORE SHRI PRAMOD KUMAR, VP AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No. 7022/Mum/2013
(निर्धारण वर्ष / Assessment Year: 2007-08)

Mumbai SEZ Ltd. 1 st Floor, Jai Centre, 34, P.D. Mello Road, Opp. Red Gate, Masjid, Mumbai- 400009.	बनाम/ Vs.	DCIT, Central Circle-39 Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCG2739C		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Madhur Agarwal	
Revenue by:	Shri A. K. Kardam (DR)	

सुनवाई की तारीख / Date of Hearing: 15/12/2021
घोषणा की तारीख /Date of Pronouncement: 18/02/2022

आदेश / ORDER

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 12.03.2012 passed by the Commissioner of Income Tax (Appeals)-41, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the A.Y. 2007-08.

2. The assessee has raised the following grounds: -

“1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in confirming the disallowance of Rs.11,26,507/- under section 14A r.w. Rule 8D of the Income tax Act, 1961.



2. *On the facts and circumstances of the case and in law, the learned CIT(A) erred in confirming the disallowance of Rs.41,02,40,470/- claimed under section 57(iii) of the Income Tax Act, 1961.*

3. *Each one of the above grounds of appeal is independent and without prejudice to each other.*

4. *The appellant craves leave to add, to alter or to amend any of the grounds of appeal mentioned hereinabove."*

3. The assessee has raised the following additional grounds: -

"1. On the facts and circumstances of the case and in law, the income earned on interest on ICD's ought to have been considered as business income as the business of the appellant is set up. On the facts and circumstances of the case and in law, interest expenses in relation to earning of interest/other income should be allowed as business expenses.

2. The appellant craves to add, alter, amend or withdraw any of the grounds of appeal herein above and to submit such further arguments, statements, documents and paper as may be considered necessary either at or before the hearing of the appeal."

4. The brief facts of the case are that the assessee filed its return of income on 31.10.2007 declaring total income to the tune of Rs.3,06,61,438/-. The case of the assessee was reopened by issuance of notice dated 19.08.2008 u/s 143(2) of the Act. Subsequently, notice u/s 142(1) of the Act was also issued and served upon the assessee. The



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assessee is in the business to develop and operate infrastructure facilities in India like development of Special Economic Zones at Navi Mumbai. The company is also engaged in the setting up and developing of SEZ project at Khopta in the State of Maharashtra i.e. Maha Mumbai SEZ. The project is at the initially stage and the company did not commence revenue operation and no profit & loss account was prepared. In the computation of income, the assessee has shown income under the head Short Term Capital Gains amounting to Rs.3,09,31,438/-. The assessee has also disclosed the income under the head 'Other Sources' amounting to Rs.41,02,40,470/- against which deduction u/s 57(iii) being interest and finance charges paid to bank amounting to Rs.41,02,40,470/- was also resulting Nil income under this head. In addition to this dividend income of Rs.9,60,37,896/- was declined which was claimed as exempt income u/s 10(35) of the I. T. Act, 1961. No disallowance of expenses in view of the provisions u/s 14A r.w.r 8D was made by assessee. The gross total income of Rs.3,09,31,438/- was offered for taxation. The assessee paid the self-assessment tax of Rs.15.48 crores on 31.10.2007 i.e. the date on which the return of income was filed. Nothing was explained about the tax liability after the adjustment of all the taxes. The AO assessed the expenditure to earn the exempt income to the tune of Rs.11,26,507/- and the assessee earned the interest in sum of Rs.41.02 crores which was treated as income of the assessee and added to the income of the assessee. The total income of the assessee was assessed to the tune of Rs.44,20,28,420/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who dismissed the appeal of the assessee, therefore, the assessee has filed the present appeal before us.



5. The assessee moved an application for condonation delay for 338 day's delay. The assessee explained the reason for delay that the CIT(A) has passed the order on 26.03.2012 and accordingly the appeal was to be filed on 25.05.2012. The person handling the matter had left the organization on short notice and there was not proper hand over of job. Meanwhile, the PCIT has passed the order on 30.03.2012 in view of the provisions u/s 263 of the Act which was challenged well-in-time. The assessee filed an appeal before Hon'ble ITAT on 14.05.2012 bearing ITA. No.3429/Mum/2012. The applicant was in the bona fide belief that the matter was under consideration before the CIT(A). The delay was on account of bona fide mistake. The Ld. Representative of the assessee has placed reliance upon the decision in the case **Anil Kumar Nehru Vs. ACIT (101 Taxmann.com 191)** in which it has been held that on identical issues raised by appellant in respect of earlier assessments, the appeal is pending before the High Court so the delay is liable to be considered. Anyhow, the matter of controversy u/s 263 of the Act is pending before the Hon'ble ITAT. In this case, the delay is liable to be condoned in view of the provisions decision in the case of **Anil Kumar Nehru (supra)**. Accordingly, we condoned the delay.

ISSUE NO.1

6. At the time of argument, this issue has not been pressed by the Ld. Representative of the assessee, therefore, this issue is being decided in favour of the revenue against the assessee being not pressed.

ISSUE NO.2



7. Issue no. 2 is formal in nature which nowhere required any adjudication.

ADDITIONAL GROUND NO.1

8. We have heard the argument advanced by the Ld. Representative of the parties and perused the record. The contention of the appellant is that the appellant is in the business of setting up developing and infrastructure facilities in India. The appellant started the development of Special Economic Zones(SEZ) in the earlier years. For the purpose of developing the SEZ, the assessee invested own fund as well as borrowed funds. The funds were not immediately required, therefore, the assessee deposited the funds in ICD's. The appellant debited the interest expenses to WIP and corresponding reduced the interest income earned on intercorporate deposit from the WIP accounts. The appellant did not prepare the profit and loss account of the relevant year. The AO arrived at this conclusion that the interest income earned on intercorporate deposit is taxable as income from other sources and no deduction of interest is liable u/s 57(iii) of the Act. The CIT(A) confirmed the order. The contention of the Ld. Representative of the assessee is that the business has been set up in the A.Y.2003-04 in view of the order of the ITAT in the assessee's own case for the A.Y. 2003-04 bearing ITA. No.804/Ahd/2010 dated 25.04.2014, therefore, the claim of the assessee is liable to be considered in accordance with law. The relevant finding is hereby reproduced as under.: -

“5. We have heard both the sides at some length. As far as the question of setting up of the business is concerned, we may like to mention at the outset that in a decision pronounced by Respected



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Third Member ITAT Pune Bench in the case of Styler India Pvt. Ltd., 113 ITD 55 (Pune) wherein (JM is the party). It was pronounced that the assessee company being incorporated for rendering advisory and consultancy services in the field of automobiles and having a place of business and employed qualified people to render advice and having contacted various clients who entered into agreement with the assessee then it could be held that the assessee had set up its business. However, it was also held that the expenditure on building was capital in nature, therefore, not allowable. In the present case, facts of the case have revealed that the assessee-company was constituted to develop and operate infrastructure facilities in India towards development of Special Economic Zones at Positra, in the State of Gujarat. The assessee had obtained an approval from the Gujarat State and Union Government. The assessee has commenced the process of land acquisition from private parties. The assessee had conducted a survey and started rehabilitation activities to perform the above activities. The assessee had recruited employees, on rental basis office was occupied, engaged few professionals and certain administrative as well as expenditure were incurred. There was sociopolitical development in Gujarat; hence, the assessee has faced some problem but the management had started contemplating an integrated SEZ at Mumbai. Although, the Gujarat Project was not started with full swing but the setting up of Maha Mumbai SEZ was in full swing. The requisite approval was also obtained from the government. After obtaining the approval from the Ministry of Commerce, Government of India, immediately thereafter the project was launched on 9th August, 2003. Because of these facts, we hereby hold following the decision of Styler India Pvt. Ltd. (supra), wherein



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this issue of “setting up of business” had been discussed at length that the assessee’s business was set up and the expenses were incurred to propagate the business of the assessee. It is worth to mention that in one of the case ITAT ‘J’ Bench Mumbai pronounced in the case of De Beers India Prospecting Pvt. Ltd., being ITA Nos.40/Mum/2006, 6560, 6561 & 6562/Mum/2007, order dated 16.12.2011 has held as under:

“The reason for disallowance of the expenditure and permitting it to be capitalized by AO is on the opinion that the assessee has not commenced its business activities. Commencement of the business activities has various facts. As permitted by the Department of Industrial policy and promotion, the assessee is permitted to undertake prospecting and mining activities for diamonds originally and subsequently prospecting for other minerals also (except coal and iron ore) for private participation. This indicate that the assessee was permitted to indulge in mining activities only with reference to diamonds whereas it was not permitted to involve in mining activities for other minerals. Prospecting is an activity prior to activity of mining. Without prospecting and without examining whether particular precious stones/minerals, were available in a particular area, it is not possible to undertake mining activities Hon'ble Madras High Court in the case of CIT vs. Franco Tosi Ingegneria (2000) 241 ITR 268 considered that assessee has commenced its business from the time it opened its site office and allowed the expenditure under section 37(1). In view of the principles decided in above cases, we are of the opinion that the assessee's activities of prospecting which is a permitted activity by the FIPB in which the assessee



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has considerable expertise and further, considering that various permissions granted by the Govt. of Andhra Pradesh was only for reconnaissance with reference to exploration of diamonds, it can be concluded that the assessee has commenced its business from the time it started the prospecting activity. It is also seen from the permissions granted by the FIPB that in some cases the assessee was permitted to undertake for prospecting only for other minerals (except coal and iron ore). Therefore, prospecting activity itself is to be considered as assessee's business activity. There is no dispute with reference to the expenditure being spent on prospecting activities in the year under consideration. Accordingly, it is held that the assessee has commenced its business activities.”

5.1 Considering the totality of the facts and circumstances of the case and the details of the “Project Development Expenditure” as annexed to the balance sheet of the assessee, we hereby hold that for the year under consideration the business was set up by the assessee.”

9. It has been held that the business of the assessee has been set up in the A.Y. 2003-04. The issue of interest on intercorporate deposit either it to be taxed as business income or other sources has been decided by Hon’ble ITAT in the assessee’s own case bearing ITA. No.4939/M/2014 for the A.Y.2010-11, bearing ITA. No.2830/M/2017 for the A.Y.2011-12, bearing ITA. No.3073/M/2017 for the A.Y.2011-12 and bearing ITA. No.5515/M/2017 for the A.Y.2012-13 dated 26.07.2019. The relevant finding is hereby reproduced as under.: -



“7. We have considered rival submissions and perused the material on record. Though, the Assessing Officer has treated the interest income received by the assessee as income from other sources on the reasoning that assessee’s business has not yet commenced, however, learned Commissioner (Appeals) has given a factual finding that assessee’s business has commenced. Further, learned Commissioner (Appeals) has also accepted assessee’s claim of interest earned on fixed deposits with bank as business income. The only reason on which he has rejected assessee’s claim of interest earned on ICDs as business income is, the assessee is not in money lending business. In our view, the aforesaid reasoning of the learned Commissioner (Appeals) defies logic. There is no dispute that the assessee has parked surplus business funds, which is not immediately required for utilization in business, in short term deposits with bank or IDCs. The entire purpose of such deposits was not to keep the funds idle and earn some income. If the aforesaid reasoning of the assessee is valid for the interest earned on fixed deposits, the same cannot be invalid or unacceptable in case of interest earned on ICDs. When it is accepted that the assessee has taken a prudent business decision to earn some income by utilizing the idle business funds, no differentiation can be made between the investments made in banks and ICDs. In view of the aforesaid, we hold that the interest income earned on ICDs should be treated as income from business. This ground is allowed.”

10. The said decision was also followed by the Hon’ble ITAT in the assessee’s own case for the A.Y. 2008-09 in ITA. No.4852/M/2014 & for the A.Y 2009-10 in ITA. No.4853/M/2014 dated 01.03.2021. The relevant finding is hereby reproduced as under: -



“17. Under this issue the assessee has challenged the allowance of Interest expenditure claim u/s 57(iii) of the I. T. Act, 1961 only to the extent of Rs.23,84,07,417/- as against Rs.42,42,35,075/-. The assessee has made an alternative claim of deduction under section 57(iii) of the Act in respect of interest expenditure of Rs.23,84,07,417 as against Rs.42,42,35,075/-. As discussed earlier, income earned from ICDs was held by the Departmental Authorities as income from other source as against business income claimed by the assessee. The alternative claim made by the assessee for deduction of interest expenditure under section 57(iii) of the Act in respect of such income was rejected on the ground that such interest expenditure has no nexus with the interest earned on ICDs. While deciding grounds no.1 and 3, of assessee’s appeal, we have held that interest earned on ICDs are to be treated as income from business. Consequently, the interest expenditure claimed by the assessee has to be allowed. Therefore, the alternative claim of deduction under section 57(iii) of the Act becomes redundant. Suffice it to say, assessee’s claim of deduction under section 57(iii) of the Act in respect of interest expenditure has been allowed by learned Commissioner (Appeals) and the issue has attained finality as neither the assessee nor the Revenue has contested the order of learned Commissioner (Appeals). Therefore, even otherwise also, assessee’s claim of deduction under section 57(iii) of the Act is allowable. The ground is disposed of accordingly.”

11. It has been specifically held that the interest income earned on ICD’s should be treated as income from business. Since the issue is squarely covered by the decision of the Hon’ble ITAT in the assessee’s own case, therefore, this issue is decided in favour of the assessee against the revenue.



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12. In the result, the appeal filed by the assessee is hereby partly allowed.

Order pronounced in the open court on 18/02/2022

Sd/-
(PRAMOD KUMAR)
उपाध्यक्ष / VICE PRESIDENT
मुंबई Mumbai; दिनांक Dated : 18/02/2022
Vijay Pal Singh (Sr. PS)

Sd/-
(AMARJIT SINGH)
न्यायिक सदस्य/JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai