

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E' NEW DELHI**

**BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SH. YOGESH KUMAR U.S., JUDICIAL MEMBER**

I.T.A. No. 3264/DEL/2018 (A.Y 2014-15)

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| JCIT Room No. 308, C. R. Building, New Delhi (APPELLANT) | Vs | M B Power (Madhya Pradesh) Ltd. 235, Okhla Industrial Estate, Phase-II, New Delhi PAN No. AAFCM6698A (RESPONDENT) |
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I.T.A. No. 4348/DEL/2019 (A.Y 2013-14)

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| DCIT Circle-16(2) Room No. 308, Cr. R. Building, New Delhi (APPELLANT) | Vs | M B Power (Madhya Pradesh) Ltd. 239, Okhla Industrial Estate, Phase-II, New Delhi PAN No. AAFCM6698A (RESPONDENT) |
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| Appellant by | Sh. Salil Aggarwal, SR. Adv & Sh. Shailesh Gupta, CA |
| Respondent by | Ms. Rinku Singh, CIT DR |

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| Date of Hearing | 26.07.2022 |
| Date of Pronouncement | 03.08.2022 |

ORDER

PER YOGESH KUMAR U.S., JM

These two appeals are filed by the Revenue against the order dated 19/02/2018 and 01/03/2019 passed by the CIT(A)-6 Delhi for Assessment Year 2014-15 and 2013-14 respectively.

2. The grounds of appeal are as under:-

I.T.A. No. 3264/DEL/2018 (A.Y 2014-15)

“1. Whether on facts and circumstances of the case, the Ld.CIT(A) is legally justified in holding that interest income of Rs. 41,69,22,738/- earned on surplus funds during the pre-commencement of business is liable to tax u/s 56 of the Income Tax Act (hereinafter referred as “the Act”)?”

2. Whether on facts and circumstances of the case, the Ld.CIT(A) is legally justified in allowing the appeal of the assessee by ignoring the fact that the assessee ratio decidendi as laid down by Hon’ble Apex Court in case of Tuticorin Alkali Chemicals and Fertilizers Ltd vs. CIT (1997) 227 ITR 172 (SC) and CIT vs. Coromandal Cement Ltd (1998) 234 ITR 412 is applicable to the facts and circumstances of the present case?”

I.T.A. No. 4348/DEL/2019 (A.Y 2013-14)

“Whether on facts and circumstances of the case, the Ld.CIT(A) is legally justified in holding that interest income of Rs 18,96,92,680/- earned on surplus funds during the pre-commencement of business is not liable to tax u/s 56 of the Income Tax Act (hereinafter referred as “the Act”)?”

Whether on facts and circumstances of the case, the Ld CIT(A) is legally justified in allowing appeal of the assessee by ignoring the fact that the ratio decidendi as laid down by Hon’ble Apex Court in case of Tuticorin Alkali Chemicals and Fertilizers Ltd vs CIT (1997) 227 ITR 172 (SC) and CIT vs. Coromandal Cement Ltd (1998) 234 ITR 412 is applicable to the facts and circumstances of the present case?”

3. Since the grounds of Appeals are identical except the amount involved thereon the appeals have been heard together.

I.T.A. No. 3264/DEL/2018 (A.Y 2014-15)

4. The brief facts of the case are that, the assessee Company is engaged in the business of power generation. The return of income declaring total income of Rs. 1,09,41,560/- was filed by the assessee. The case of the assessee was selected for scrutiny and the statutory notice u/s 143(2) of the Act and questionnaire along with notice u/s 142(1) of the Act were issued to the assessee. The representative of the assessee has participated in the assessment proceedings and furnished details.

5. The assessment order came to be passed on 27/12/2016 by making an addition of Rs. 41,69,22,731/- under the head of income from other sources by negating the contention of assessee that the deposits are inextricably linked with the funds taken for capital projects.

6. As against the assessment order dated 27/12/2016, the assessee has preferred an appeal before the CIT(A). The Ld.CIT (A) vide order dated 19/02/2018 deleted the addition made by the Ld. A.O.

7. Aggrieved by the order of the Ld.CIT(A) dated 19/02/2018, the Department of Revenue has preferred the present appeal on the grounds mentioned above.

8. The Ld. DR vehemently submitted that, the Ld.CIT(A) has not justified in holding that, the interest income of Rs. 41,69,22,738/- earned on surplus funds during the pre commencement of business is not liable to tax u/s 56 of Income Tax Act. Further submitted that, the Ld.CIT(A) has also ignored the ratio decidendi laid down by the Hon'ble Apex Court in the case of Tuticorin

Alkali Chemicals and Fertilizers Ltd vs CIT (1997) 227 ITR 172 (SC) and CIT vs. Coromandal Cement Ltd. (1998) 234 ITR 412. Further contended that, the assessee has failed to establish the fact that, how the deposits are inextricably linked with his funds taken for capital projects. In the absence of such material on record, the Ld.CIT(A) proceeded to decide the applicability of the judicial pronouncements on the issue. Therefore, submitted that, the order of the Ld.CIT(A) requires interference. Further relying on the assessment order, submitted that, the Ld. A.O has rightly held that the interest earned during the year under consideration is liable for tax under the head of income from other sources.

9. Per contra, Ld. Counsel for the assessee contended that, the money is borrowed by a newly started company which is in the process of constructing and recting its plant, the interest incurred before the commencement of production on such borrowed money can be capitalized and added to the cost of the fixed assets created as a result of such expenditure. It is further contended that as a necessary corollary, if the assessee receives any amounts which are inextricably linked with the process of setting up its plants and machinery, such receipts will go to reduce the cost of assets, cannot be taxed as income. The Ld. Counsel for the assessee has also relied on the several judgments and submitted that the order of the Ld. CIT(A) is just and proper which requires no interference.

10. We have heard the parties, perused the material on record and gave our thoughtful consideration. It is found that, the Ld. Assessing Officer brought to tax of income of Rs. 41,69,22,738/- earned by the assessee on “margin money deposit for bank guarantee” and “ deposits for foreign currency buyer’s credit”. The Ld. Assessing Officer found that the said FDRs had been made out of surplus fund available to the assessee. Further observed that, the assessee has failed to established that, the deposits are inextricably linked with the

funds taken for capital projects. The relevant portion of the said observation of the A.O is as under:-

“3.5 In this case the assessee has also failed to establish the fact that how such deposits are inextricably linked with the funds taken for capital projects. The assessee has also failed to substantiate the case on facts. In view of the above discussion, the submission of the assessee has been found not to be acceptable and accordingly, interest earned during the year under consideration is being taxed under the head income from other sources.”

11. Further, Ld. A.O by finding support from the Judgment of the Apex Court in the case of Tuticorin Alkali Chemicals and Fertilizers Ltd vs. CIT (1997) 227 ITR 172 (SC) and CIT vs. Coromandal Cement Ltd. (1998) 234 ITR 412, computed the income of the Assessee by making addition under the head from other sources of Rs. 41,69,22,738/-.

12. On the other hand, in the Appeal proceedings, the Ld. CIT(A) has deleted the said addition made by the Ld.AO, by making following observations:

“It is noted that in the previous year, the audited financial statements reflect that appellant had "Non-current liabilities" of Rs. 3,917 crores and "Current Liabilities" of Rs. 1282.34 crores. It is also noted that the assessee had a corresponding "Cash and Bank Balance" of Rs. 693.46 crores. Further, during the period under consideration, the appellant raised "long term borrowings" in form of term loans from banks/financial institutions amounting to Rs. 3762.61 crores and had outstanding current liabilities of Rs. 1,282.34 as on 31.03.2014. It cannot be conclusively said that there was availability of surplus fund for the purpose of investment into deposits for earning interest.”

13. In our opinion, the above observation made by the Ld. CIT (A) without bringing on record of any materials and without appreciation of the relevant records on the issue to come to such conclusion and decided the Appeal in favour of the assessee. The Ld. CIT (A) while relying on the documents produced by the Assessee, ought have called for the remand report from the Assessing Officer and should have examined issue. But on going though the Order of the CIT (A), we are unable to understand the basis for such observations and the conclusion arrived by the CIT(A) in favour of the Assessee. Thus, the said approach of the CIT (A) is found to be erroneous.

14. The CIT (A) should examine the cash/fund flow statement to decide as to whether the interest on FDR's from the surplus funds or not. Further the Ld. CIT(A) has to call for the remand report from the AO and after providing the opportunity to the Assessee and there after shall come to the conclusion in the matter. If the Assessee is found with any earned interest on FD made out of the surplus funds, such income should be treated and assessed as income from other sources as held in the case of Tuticorin Alkali Chemicals and Fertilizers Ltd vs. CIT (1997) 227 ITR 172 (SC). The principles laid down in the said Judgment are hereunder:

- a) If a company has not commenced business that does not means that until and unless the company commences its business its income from any other source will not be taxed; (refer first paragraph on page 179 of the order)
- b) If the capital of a company is fruitfully utilized instead of keeping it idle the income thus generated will be revenue nature and not an accretion to capital. Whether the company raised capital by issue of shares or debentures or by borrowing will not make any difference to this principle; (refer last paragraph on page 179 of the order)

- c) The assessee is entitled to capitalize the interest payable by it but it cannot be allowed as deduction out of interest income u/s 57 of the Act; (refer second paragraph on page 180 of the judgment)
- d) The expenditure incurred by the assessee for the purpose of setting up its business cannot be allowed as deduction, nor can it be adjusted against any other income under any other head; (refer last paragraph on page 180 of the judgment)
- e) The cost of the construction will be the amount actually spent and also the interest payable on the amount borrowed during period of construction; (refer last paragraph on page 185 of the judgment)
- f) The application or destination of the income has nothing to do with its accrual or taxability. It is also well settled that interest income is always of a revenue nature unless it is received by way of damages or compensation. (refer second paragraph on page 186 of the judgment)."

15. In view of the above discussions and on the facts and circumstances of the case, we deem it appropriate to remit the issue in dispute to the file of Ld. CIT(A) to decide in light of our above observations. Accordingly we partly allow the revenues Grounds of Appeal in ITA No. 3264/Del/2018 for statistical purpose.

ITA No. 4348/Del/2019

16. Since, we have already decided the issue involved the appeal of the Revenue in ITA No. 3264/Del/2018 by remanding the matter to the file of CIT(A) (supra), there being no change in facts and circumstances of the case except the amount involved, we deem it fit to partly allow the grounds of Appeal in ITA No. 3264/Del/2019 filed by the Revenue for statistical purpose.

17. In the result, Appeal filed by the Revenue in ITA No. 3264/Del/2018 and 4348/Del/2019 are allowed for statistical purpose.

Order pronounced in the Open Court on this 3rd Day of August , 2022

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Sd/-
(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

Dated: 03/08/2022
R. N * Sr. P.S

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI