

**IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 1408/MUM/2020 (A.Y. 2015-16)

M/s. Mellona Developers Pvt. Ltd., 514, Dalamal Towers, 211 F.P.J. Marg, Nariman Point Mumbai - 400021 PAN: AAFCM3780K	v.	Income Tax Officer – Ward – 3(2)(2) Room No. 673A, Aayakar Bhavan M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Assessee by	:	Shri K. Gopal
Department by	:	Shri Mahita Nair
Date of Hearing	:	12.07.2022
Date of Pronouncement	:	08.08.2022

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of Learned Commissioner of Income Tax (Appeals)-8, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 05.02.2020 for the A.Y.2015-16.

2. Brief facts of the case are, assessee filed its return of income for the A.Y. 2013-14 on 24.09.20105 declaring total loss of ₹.15,31,234/- under

normal provisions and declared loss of ₹.12,72,563/- u/s. 115JB of Income-tax Act, 1961 (in short "Act"). The case was selected for scrutiny under CASS and notice u/s. 143(2) and 142(1) of the Act were issued and served on the assessee. In response AR of the assessee attended and submitted the relevant information as called for.

3. The assessee is a private company engaged in the business of construction and development of properties. During the assessment proceedings Assessing Officer observed from the financial statements submitted by the assessee that assessee has earned interest on FDR(OBC) of ₹.1,56,56,467/- received from Oriental Bank of Commerce which was shown as other income and transferred to inventories project work-in-progress. The assessee reduced the above said interest from the interest expenses of ₹.9,33,73,144/- incurred on borrowed funds. The assessee was show caused vide notice u/s. 142(1) of the Act, as to why the interest received from Fixed Deposits out of borrowed funds which are not utilized for the business and development of properties, should not be treated as "income from other sources" and taxed accordingly.

4. In response assessee vide letter dated 01.12.2017 has submitted as under: -

"The company has purchased property at Walkeshwar, Mumbai and is in process of developing the same. Company had taken loan of Rs.80 crores from HDFC for purchase of said property and paid interest of Rs. 9,33,73,144/-. During the year company has incurred running expenditure, which along with interest paid is treated as project work in progress and capitalised.

Company is awaiting permission from various authorities and negotiating with tenants for development of property. In meantime to reduce interest burden company opened a Fixed Deposit with OBC bank and earned interest on the same. The interest received of Rs. 1,56,56,467/ on the said Fixed Deposit has been reduced from project work in Progress.

In this respect we rely on following case laws :

- (i). Commissioner of Income Tax vs Bokaro Steel Limited 236 ITR 315 (Supreme Court)*
- (ii). Commissioner of Income Tax vs Maharashtra Electrosmelt Limited 214 ITR 489 (Bombay High Court)*
- (iii). Commissioner of Income Tax vs A.P. Forest Development Corporation 171 ITR 663 (Andhra Pradesh High Court)*
- (iv). Snam Progetti S.P.A vs Additional Commissioner of Income Tax, New Delhi -II, and others 132 ITR 70 (Delhi High Court)*
- (v). Gamma Constructions Pvt Ltd vs ITO 3(3)(4), Mumbai ITA No. 530/Mum/2012, Mumbai Tribunal*
- (vi). Gamma Constructions Pvt Ltd vs ITO 3(3)(4), Mumbai ITA No. 530/Mum/2012, Mumbai Tribunal*
- (vii). Indian Oil Panipat Power Consortium Ltd Vs ITO [181 Taxman 249]*
- (viii). CIT v. VGR Foundation (298 ITR 132).*
- (ix). Sears Constructions Pvt Ltd vs ITO, Ward 3(3)(2), ITA No 6173/Mum/2014 in A Y 2011-12.*

5. After considering the submissions of the assessee, Assessing Officer rejected the same and observed that the case law relied by the assessee

is not applicable to the facts of the case. Further, by relying on the case of Tuticorin Alkali Chemicals & Fertilizers Ltd., v. CIT [(1997) 141 CTR SC 387] observed as under: -

"In the instant case under consideration the assessee company has borrowed funds for purchase of land and development. That part of the borrowed surplus funds which was not immediately required by the company was kept invested in short-term deposits with banks and earned Interest Income of Rs. 1,56,00,000/-. The interest income was capitalized and adjusted against the interest paid on borrowed funds. The adjustments made by the assessee was not allowable as the interest thus earned is clearly of revenue nature and will have to be taxed accordingly.

The expenditure would have been deductible as incurred for the purpose of business if the assessee's business had commenced. But that is not the case here. The assessee may be entitled to capitalise the interest payable by it. But what the assessee cannot claim is adjustment of this expenditure against interest assessable under s. 56. Sec. 57 of the Act sets out in its cls. (i) to (iii) the expenditures which are allowable as deduction from income assessable under s. 56. It is not the case of the assessee that the interest payable by it on term loans are allowable as deduction under s. 57 of the Act.

If a company has not commenced business, there cannot be any question of assessment of its profits and gains of business. That does not mean that until and unless the company commences its business, its income from any other source will not be taxed. If the company, even before it commences business, invests the surplus fund in its hand for purchase of land or house property and later sells it at profit, the gain made by the company will be assessable under the head Capital gains. The company may also, as in this case, keep the surplus fund in short-term deposits in order to earn interest. Such interests will be chargeable under s. 56 of the Act. In other words, if the borrowed funds of a company is fruitfully utilised instead of keeping it idle the income thus generated will be of revenue nature and not accretion of capital. Whether the company raised the capital by issue of shares or debentures or by borrowing will not make any difference to this principle. If borrowed capital is used for the purpose of earning income that income will have to be taxed in accordance with law. The amount of interest received by the

company flows from its investments and is its income and is clearly taxable even though the interest amount is earned by utilising borrowed fund. It is well-settled that tax is attracted at the point when the income is earned. Taxability of income is not dependent upon its destination or the manner of its utilisation. It has to be seen whether at the point of accrual, the amount is of revenue nature. If so, the amount will have to be taxed.

The case law relied upon by the assessee In Commissioner of Income Tax Vs. Bokaro Steel Limited 2361TR the Supreme Court has held that "During the relevant assessment years, the respondent-assessee had invested the amounts borrowed by it for the construction work which were not immediately required, in short-term Deposits and earned interest. In any case, question is concluded by the decision of the Court in Tuticorin Alkali Chemicals and Fertilizers Ltd. Vs. CIT (1997) 227 ITR 172. Hence the Supreme Court is not called upon to examine that issue. In this case the receipts have been adjusted against the charges payable to the contractors and have gone to reduce the cost of construction. In the instant case the surplus borrowed funds have been utilized for investment in Fixed Deposits which cannot be termed as capital in nature.

The case laws relied upon by the assessee is not applicable in the case of assessee company due to the facts as mentioned above as the decision relied upon by the assessee in Tuticorin Alkali Chemicals and Fertilizers Ltd. Vs. CIT (1997) 227 ITR 172 is of the Apex Court. Therefore, an amount of Rs. 1,56,56,467/- is added to the total income of the assessee."

- 6.** Aggrieved assessee preferred an appeal before the CIT(A)-8, Mumbai, after considering the detailed submissions of the assessee he sustained the addition made by the Assessing Officer and dismissed the grounds raised by the assessee.
- 7.** Aggrieved assessee is in appeal before us raising following grounds in its appeal: -

"1) *The Learned Commissioner of Income Tax (Appeals) failed to understand that the order passed by assessing officer is beyond jurisdiction as being a limited scrutiny case, the learned officer has travelled beyond the issues for which the case was selected and the same therefore, deserves to be quashed.*

2) *The Learned Commissioner of Income Tax (Appeals) erred in confirming assessment of Rs. 1,56,56,467/- being interest received as income from other sources.*

3) *The appellant prays that:*

- i) Addition of Rs. 1,56,56,467/- being interest received may be deleted;*
- ii) personal hearing may be granted;*
- iii) any other relief your honours may deem fit.*

4) *The Appellant craves leave to add, alter, amend or delete any of the above grounds of appeal."*

8. At the time of hearing, Ld. AR raised issue of scope of assessment proceedings before the Assessing Officer. The assessee has raised Ground No. 1 raising this jurisdictional issue and before us Ld. AR brought to our notice 143(2) notice issued by the Assessing Officer which is placed on record at Page No. 7 and 8 of the Paper Book in which it is clearly written that the assessment was initiated for limited scrutiny and accordingly, the notice was issued. In this regard he brought to our notice Page No. 2 of the Assessment Order and Ld. AR submitted that Assessing Officer discussed the issue of interest income earned and which is chargeable to tax under the head "income from other sources". However, the notice 143(2) of the Act was issued on three grounds which are

(i) minimum Alternate Tax (MAT) Liability mismatch, (ii) income from heads of income other than business / profession mismatch and (iii) unsecured loans. Therefore, the issue raised by the Assessing Officer is not falling into any of the above mentioned issues based on which the limited scrutiny was initiated. Ld. AR submitted that CBDT had vide its instructions dated 29.12.2015 stated that questionnaire in limited cases shall remain confined only to specific issues for which cases has been picked up and further scope of enquiry shall be restricted to the limited scrutiny cases. However, we observe that this submission of the Ld. AR is not proper and the issue raised by the Assessing Officer is falling within the second issue raised in 143(2) notice, accordingly, this ground of appeal is accordingly dismissed.

9. With regard to Ground No. 2, Ld. AR submitted that, assessee had taken loan of ₹.80 crores from HDFC for purchase of said property and paid interest of ₹.9,26,48,721/- (Refer Paper Book I Page 06). During the year assessee has incurred running expenditure, including interest paid and treated the same as project work in progress and capitalised the same as project work-in-progress. In meantime in order to reduce interest burden, company opened a Fixed Deposit with OBC bank and earned

interest on the same. The interest received of ₹.1,56,56,467/- on the said Fixed Deposit has been reduced from project work in Progress. (Refer Paper Book I Page 06)

10. Ld. AR submitted that during the course of assessment proceedings vide notice u/s 142(1) dated 24.11.2017 (Refer Paper Book I Page 11) assessing officer had asked to explain why the interest received of ₹.1,56,56,467/ was not added back as Income from Other Sources. In response to the same vide letter dated 01.12.2017 (Refer Paper Book I Page 12-18) it was explained that "The company opened a Fixed Deposit with OBC bank and earned interest on the same. The interest received of ₹.1,56,56,467/- has been netted off with its interest expenses being part of project development cost.

11. Ld. AR further submitted that Assessing Officer has relied on judgment in case of Tuticorin Alkali Chemicals and Fertilizers Ltd v. CIT (1997) 227 ITR 172 (Refer Paper Book II Page 01-05). The facts of the present case are completely different than the facts in the case of Tuticorin [1997] 227 ITR 172 (SC). In that case, the business of the assessee-company had not commenced and, therefore, the apex court held that there could be no income from business.

12. Ld. AR in support of his contention relied on the following case laws:-

- (i). *Commissioner of Income Tax vs Bokaro Steel Limited 236 ITR 315 (Supreme Court)*
- (ii). *Commissioner of Income Tax vs Maharashtra Electrosmeelt Limited 214 ITR 489 (Bombay High Court)*
- (iii). *Commissioner of Income Tax vs A.P. Forest Development Corporation 171 ITR 663 (Andhra Pradesh High Court)*
- (iv). *Snam Progetti S.P.A vs Additional Commissioner of Income Tax, New Delhi -II, and others 132 ITR 70 (Delhi High Court)*
- (v). *Gamma Constructions Pvt Ltd vs ITO 3(3)(4), Mumbai ITA No. 530/Mum/2012, Mumbai Tribunal*
- (vi). *Indian Oil Panipat Power Consortium Ltd Vs ITO [181 Taxman 249]*
- (vii). *CIT v. VGR Foundation (298 ITR 132).*
- (viii). *Sears Constructions Pvt Ltd vs ITO, Ward 3(3)(2), ITA No 6173/Mum/2014 in A Y 2011-12.*

13. On the other hand, Ld. DR relied on the findings of the Assessing Officer and further, he relied on the case of Thermo Powertech Corporation India Ltd., v. DCIT [(2017) 81 taxmann.com 168 (Hyderabad-Trib.)]

14. Considered the rival submissions and material placed on record, we observe that assessee is in the business of dealing, construction and development of properties and assessee is into business from past several

years and in the present assessment year it has purchased a property at Walkeshwar, Mumbai and is in process of developing the same. The assessee is awaiting permission from various authorities and meantime negotiating with tenants for development of the property. In relation to the development of the property assessee has taken a loan of ₹.80 crores from HDFC for purchasing of the said property and paid interest of ₹.9.26 crores. The above said interest was charged to the cost of the project and the same is capitalised. However, during this year assessee has opened Fixed Deposit account with Orient Bank of Commerce and earned income of ₹.1.56 crores from the above said Fixed Deposits. We observe that Assessing Officer treated the above said earning of interest income from Fixed Deposits as the additional income chargeable to tax under the head "income from other sources" by relying on the decision of the Tuticorin Alkali Chemicals and Fertilizers Ltd v. CIT (supra) case, and he observed that the facts of the assessee are similar to the above case and he also observed in Assessment Order that the business of the assessee is not commenced therefore the assessee cannot claim any profit and gains of business unless and until the company commences its business.

15. We observe from the record that assessee has already into construction and development of the business and taken a loan from the bank to purchase a property and accordingly purchased the property also. Therefore, as soon as the assessee has purchased the property for the purpose of development the business of the assessee is already commenced, therefore it cannot be treated as that business of the assessee is not commenced.

16. Further, we observe that assessee has already declared Profit or Loss and declared revenue from operations in its financial statements for the A.Ys. 2014-15 and 2015-16. From the Balance Sheet submitted before us which is placed at Page No. 4 of the Paper Book it clearly indicates that assessee has declared income from operation in previous assessment year and claimed expenditure like cost of employees, financed cost, etc., Therefore business of the assessee is already commenced and assessee as a part of business started a project in Walkeshwar, Mumbai for development of a new building. Therefore, as far as assessee is concerned the business is already commenced and it is only new project which is under construction. Therefore, the cost incurred is relating to the project under construction and declared as work-in-progress. Therefore,

the borrowings made by the assessee relating to the project and incurred interest expenditure which is charged to the above project. The surplus in borrowed funds were deposited in Fixed Deposit and that gave the interest income which is part and parcel of the borrowing cash incurred by the assessee for the project. Therefore, there is a direct link of earning of interest income to the project. Therefore, assessee has adjusted the income in the cost of the project. In our considered view the above facts are not similar to the facts in the case of Tuticorin Alkali Chemicals and Fertilizers Ltd v. CIT (supra).

17. We observe that the Hon'ble Supreme Court Tuticorin Alkali Chemicals and Fertilizers Ltd v. CIT (supra) held as under: -

"1. Tuticorin Alkali Chemicals and Fertilizers Ltd., Vs CIT, [1997] 227 ITR 172 (SC): If funds have been borrowed for setting up of a plant and the funds are 'surplus', then by virtue of that circumstances they are invested in fixed deposits, the income earned in the form of interest will be taxable under head 'income from other sources'.

The above ratio shows that the business was not commenced.

18. Further, we observe from the decision in the case of CIT v. Bokaro Steel Limited (236 ITR 315) the Hon'ble Supreme Court held as under: -

"During the relevant assessment years, the respondent-assessee had invested the amounts borrowed by it for the construction work which were not immediately required, in short-term deposits and earned

interest. In any case, question is concluded by a decision of the Court in Tuticorin Alkali Chemicals and Fertilizers Ltd. vs. CIT (1997) 227 ITR 172. Hence, the Supreme Court is not called upon to examine that issue. The receipts have been adjusted against the charges payable to the contractors and have gone to reduce the cost of construction. They have been rightly held as capital receipts and not income of the assessee from any independent source. If the assessee receives any amounts which are inextricably linked with the process of setting up its plant and machinery, such receipts will go to reduce the cost of its assets. These are receipts of capital nature and cannot be taxed as income."

19. Further, the Hon'ble Jurisdictional High Court in the following cases

held as under: -

- (i). *In the case of CIT vs. Indo Swiss Jewels Ltd. [2006] 284 ITR 389 (Bom) wherein the Hon'ble Court has held the interest received on the short-term deposits made from surplus funds kept for the purpose of business should be treated as Income from business and profession and not income from other sources.*
- (ii). *Hon'ble Bombay High Court in the case of CIT vs. Green Infra Ltd. [2017] 392 ITR 7 (Bombay) wherein the Hon'ble Court has held that once the business of assessee has commenced, the interest income earned on short term fixed deposits awaiting use of funds in business operation was to be charged as business income.*
- (iii). *Commissioner of Income Tax vs Maharashtra Electros melt Limited 214 ITR 489 the Bombay High Court has held that "Interest income earned by the assessee before commencement of the business cannot be assessed as Income from other sources."*

20. Respectfully following the above said decisions, it is clear that once the business is commenced the interest income earned on short term fixed

deposits awaiting use of funds in business operation was to be charged as business income. Therefore, assessee can adjust the same in the interest expenditure. We are inclined to agree with the submissions of the assessee and accordingly, the facts of the case are distinguishable to the facts of the Tuticorin Alkali Chemicals and Fertilizers Ltd v. CIT (supra). Further, the case law relied by the Ld. DR are also distinguishable to the facts of the present case. Accordingly, Ground No. 2 raised by the assessee is accordingly, allowed.

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

Order pronounced in the open court on 08th August, 2022.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai / Dated 08.08.2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER
(Asstt. Registrar)
ITAT, Mum