आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'A' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENTAND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.:2018/CHNY/2019**

निर्धारण वर्ष /Assessment Year: 2013-14

The JCIT (OSD), Corporate Circle -2(2), Chennai – 34.	vs.	**IL & FS Tamilnadu Power Company Ltd.,** New No.2, (Old No.21), 4th Floor, KPR Tower, 1st Street, Subba Rao Avenue, College Road, Chennai – 600 006. **PAN: AABCF 1176A**
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

&

आयकर अपील सं./**ITA Nos.:1989, 1990 & 3217/CHNY/2019**

निर्धारण वर्ष /Assessment Years: 2012-13, 2013-14 & 2014-15

IL & FS Tamilnadu Power Company Ltd., New No.2, (Old No.21), 4th Floor, KPR Tower, 1st Street, Subba Rao Avenue, College Road, Chennai – 600 006. **PAN: AABCF 1176A**	vs.	**The JCIT (OSD),** Corporate Circle -2(2), Chennai – 34.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

निर्धारिती की ओर से/Assessee by	:	Shri Raghunath, CA
राजस्व की ओर से /Revenue by	:	Shri AR.V. Sreenivasan, Addl.CIT

सुनवाई की तारीख/Date of Hearing	: 03.08.2022
घोषणा की तारीख/Date of Pronouncement	: 03.08.2022

आदेश /O R D E R

PER MAHAVIR SINGH, VICE PRESIDENT:

The cross appeal by the Revenue and assessee for the assessment year 2013-14 in ITA Nos.2018 & 1990/CHNY/2019 are arising out of order of Commissioner of Income Tax (Appeals)-5, Chennai in ITA No.422/CIT(A)-5/2016-17, dated 23.04.2019. The assessment was framed by the DCIT, Corporate Circle-2(2), Chennai u/s.143(3) r.w.s. 92CA(3) of the Income-tax Act, 1961 (hereinafter the 'Act') vide order dated 19.12.2016. The appeals by the assessee for the assessment years 2012-13 & 2014-15 in ITA Nos.1989 & 3217/Chny/2019 are arising out of orders of CIT(A)-5 / CIT(A)-6, Chennai in ITA No.63/CIT(A)-5/2017-18 & 399/CIT(A)-6/2016-17 dated 23.04.2019 & 03.09.2019 respectively. The assessments were framed by the DCIT, Corporate Circle 2(2), Chennai for the assessment years 2012-13 & 2014-15 u/s.143(3) r.w.s. 92CA(3) of the Act vide orders dated 29.03.2016 & 19.12.2016 respectively.

Revenue's Appeal in ITA No.2018/CHNY/2019, AY 2013-14

2. The only issue in this appeal of Revenue is as regards to the order of CIT(A) deleting the disallowance of expenses made by the

AO of expenses relatable to exempt income by invoking the provisions of section 14A r.w.rule 8D of the Income Tax Rules, 1962 for the reason that there is no exempt income in the case of the assessee.

2.1 We have heard rival contentions and gone through the facts and circumstances of the case. We noted that the CIT(A) deleted the addition by noting the fact that the assessee has not earned any exempt income and following the decision of Hon'ble Jurisdictional High Court in the case of CIT v. Chettinad Logistics (P) Ltd., [2017] 80 taxmann.com 221 and Redington (India) Ltd., vs. Addl.CIT, [2017] 77 taxmann.com 257 and held as under:-

> 6. As regards to issue of disallowance u/s.14A, the appellant before me has submitted that no dividend income is earned during the assessment year under consideration, and therefore no disallowance u/s.14A can be made. The appellant has relied on the judgement of Jurisdictional High Courtin the case of Redington (India) Ltd. (2017) 77 taxman. Com 257 (Madras) in support of the ground taken against the said disallowance. The assessing officer has computed the disallowance u/s.14A at Rs. 1,84,57,282 in accordance with rule 8D of I.T. Rules.
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> 7. Matter is considered. This issue is covered in favour of the appellant by the judgement of Apex Court in the case of Chettinad Logistics (P) Ltd. (2019) 95 taxmann.com 250(SC) whereby the judgement of Hon'ble Madras High Court in the same case in (2017) 80 taxmann.com 221 (Madras) has been upheld by dismissing the SLP filed by the Revenue on the ground of delay as well as merits. Now the law is if the appellant did not earn any exempt income like dividends, section 14A cannot be invoked. Respectfully following this judgement, subject to the condition that the

> appellant did not earn any exempt income during Asst. Year 2013-14, I direct the assessing officer to delete the addition made on account of disallowance u/s.14A at Rs.1,84,57,282/-. Ground taken is allowed.

2.2 Since the issue is covered in favour of assessee and against Revenue by the decision of Jurisdictional High Court, we dismiss this appeal of Revenue.

Assessee's Appeals in ITA Nos. 1989, 1990 & 3217/ CHNY/2017, AYs 2012-13, 2013-14 & 2014-15

3. The only common issue in these three appeals of assessee is as regards to the order of CIT(A) confirming the action of AO in making addition of interest income earned during pre-operative period and assessed under the head 'income from other sources' by holding the same as revenue receipt as against the claim of assessee as capital receipt. The facts and circumstances are exactly identical in all the years and hence, will take the facts from assessment year 2012-13 and will decide the issue.

4. Briefly stated facts are that the assessee is engaged in the business of power generation and during these three assessment years, the assessee was in the process of setting up of its 3600 MW thermal power project, which is proposed to be implemented in two phases. In order to meet the initial cost for setting up power plant

i.e., acquisition of land and construction related activities, the shareholders infused advance towards equity of Rs.89 crores during the previous year ended 31.03.2010 and during the preceding year ending 31.03.2011, the assessee company obtained specific term loans from banks and financial institutions to the extent of Rs.887 crores. Further, during previous year ending 31.03.2012 i.e., year under consideration, the assessee company obtained such specific term loans from banks amounting to Rs.554 crores and received FCCD's amounting to Rs.146 crores. The assessee claimed that such funds were kept ready for purchase of land, plant & machinery and construction activity. Since the assessee was setting up a mega power plant it required huge extent of land and same was not available easily. Since the assessee was in the process of acquiring land, setting up plant & machinery and carrying out construction activity in these three assessment years, the assessee kept this idle fund i.e., loan taken from banks of Rs.550 crores and FCCD of Rs.146 crores in its bank account in the FDs and earned interest of Rs.6,27,70,128/- in this year. The assessee in its account capitalized the same and accordingly reduced the cost of the assets and the AO while framing assessment treated this interest as revenue receipt and assessed the same as 'income from other

sources' in the financial year 2011-12 relevant to assessment year 2012-13. The CIT(A) also confirmed the addition by observing in para 6 as under:-

> 6. Before me, the Authorised Representative (AR), Shri Deepak Bharadwaj, C.A., has made written submissions, wherein relying on certain case laws argued that the interest earned on fixed deposits during pre-operative period cannot be taxed. However, on careful consideration of the submissions made with reference to case laws cited, I am of the considered opinion, all those case laws cited by the AR are not applicable to the facts of the appellant's case as the judgement of jurisdictional High Court in the case of VGR Foundation in 298 ITR 132 is rendered in the context of share-application money, not falling under the category of borrowed fund. But, in the appellant's case, the funds are borrowed from banks which carry interest-cost. Similarly, FCCDs issued by the appellant are debt instruments. Therefore, the appellant has deployed interest bearing funds in fixed deposits with the banks and group companies. I agree with the findings of the assessing officer that the judgement of Tuiticorin Alkali Chemicals & Fertilizers Ltd. is squarely applicable to the facts off the appellant's case. The addition made at Rs.6,27,70,128/- stands confirmed. Ground taken is dismissed.

Aggrieved, assessee is in appeal before Tribunal.

5. Before us, the ld.counsel for the assessee stated that the issue is covered by the decision of Hon'ble Supreme Court in the case of CIT vs. Bokaro Steel Ltd., 236 ITR 315 and CIT vs. Karnal Co-operative Sugar Mills, [2000] 243 ITR 2.

6. On the other hand, the ld. Senior DR stated that issue is covered by the Hon'ble Supreme Court decision in the case of

Tuticorin Alkali Chemicals & Fertilizers Ltd., vs. CIT, 227 ITR 172. The ld.Senior DR also filed written submissions consisting of 13 pages but the Revenue in its written submissions could not distinguish the case laws of Hon'ble Supreme Court in the case of Karnal Co-operative Sugar Mills and Bokaro Steel Ltd., *supra.*

7. After hearing rival contentions and going through the facts, we noted that the facts are undisputed and the assessee has earned interest income by depositing the loans received from banks as temporary deposit of funds with banks and group companies. We also noted that it is undisputed fact that this interest earned will go to reduce the expenditure incurred during construction period and as such, it should be deposited against capital work-in-progress. This view of ours is supported by the decision of Hon'ble Supreme Court in the case of Bokaro Steel Ltd., supra wherein the Hon'ble Supreme Court has considered the identical issue and observed as under:-

> "The company may also, as in that case, keep the surplus funds in short-term deposits in order to earn interest. Such interest will be chargeable under Section 56 of the Income-tax Act. This Court also emphasised the fact that the company was not bound to utilize the interest so earned to adjust it against the interest paid on borrowed capital. The company was free to use this income in any manner it liked. However, while interest earned by investing borrowed capital in short-term deposits is an independent source of income not connected with the construction activities

or business activities of the assessee, the same cannot be said in the present case where the utilisation of various assets of the company and the payments received for such utilisation are directly linked with the activity of setting up the steel plant of the assessee. These receipts are inextricably linked with the setting up of the capital structure of the assessee-company. They must, therefore, be viewed as capital receipts going to reduce the cost of construction. In the case of Challapalli Sugars Ltd. v. Commissioner of Income-tax, A.P. ([1975] 98 ITR 167), this Court examined the question whether interest paid before the commencement of production by a company on amounts borrowed for the acquisition and installation of plant and machinery would form a part of the actual cost of the asset to the assessee within the meaning of that expression in Section 10(5) of the Indian Income-tax Act, 1922 and whether the assessee will be entitled to depreciation allowances and development rebate with reference to such interest also. The Court held that the accepted accountancy rule for determining cost off fixed assets is to include all expenditure necessary to bring such assets into existence and to put them in working condition. In case money is borrowed by a newly started company which is in the process of constructing and erecting its plant, the interest incurred before the commencement of production of such borrowed money can be capitalised and added to the cost of the fixed assets created as a result of such expenditure. By the same reasoning 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 a capital nature and cannot be taxed as income."

7.1 Similarly, the Hon'ble Supreme Court in the case of Karnal Co-operative Sugar Mills,*supra* held as under:-

2. In the present case, the assessee had deposited money to open a letter of credit for the purchase of the machinery required for setting up its plant in terms of the assessee's agreement with the supplier. It was on the money so deposited that some interest has been earned. This is, therefore, not a case where any surplus share capital money which is lying idle has been deposited in the bank for the purpose of earning interest. The deposit of money in the present case is directly linked with the purchase of plant and machinery. Hence, any income earned on such deposit is incidental to the

> acquisition of assets for the setting up of the plant and machinery. In this view of the matter the ratio laid down by this court in Tuticorin Alkali Chemicals and Fertilizers Limited v. CIT , will not be attracted. The more appropriate decision in the factual situation in the present case is in CIT v. Bokaro Steel Ltd. . The appeal is dismissed. There will be no order as to costs.

8. Respectfully following these two Supreme Court decisions, we delete the addition and allow capitalization of the same. Similar are the facts on the other two assessment years on this issue, hence taking a consistent view, we allow this issue of assessee's appeals.

ITA No.1989/CHNY/2019, Assessment year 2012-13

9. The next issue in this appeal of assessee is as regards to the order of CIT(A) confirming the action of the AO in restricting the claim of depreciation of computer software at 25% as against the claim of assessee at 60%. For this, assessee has raised Ground No.3, which we need not to reproduce.

10. At the outset, we noted that the assessee has claimed depreciation on computer software i.e., license is purchased amounting to Rs.2,27,400/- @ 60%. The AO restricted the claim of depreciation on licenses @ 25% by holding that the assessee is eligible for claim of depreciation at 25% on the intangibles. For

this, he observed that license for use of computer being an intangible asset as per Part B Appendix-1 to Income Tax Rules is eligible for depreciation @25%. The AO further stated that this position of law was upheld by ITAT, Delhi Bench in the case of Sony India Private Limited vs. Addl.CIT, in ITA Nos.4008 & 4994/Del.2010, order dated 8th April, 2011. On appeal, the CIT(A) also confirmed the order of AO. Aggrieved, assessee is in appeal before the Tribunal.

11. We have heard rival contentions and gone through the facts and circumstances of the case. We noted that the AO and the CIT(A) has wrongly applied the rules and the income-tax of depreciation on license softwares that falls in Entry III(5) to New Appendix I to Income Tax Rules, 1962. As per the new Appendix I to Rules, 'computer software' means any computer program recorded on any disc, tape, perforated media or other information storage device. In the present case before us, the project management software which was purchased by assessee as a product in the form of disc / other information i.e., storage device is a computer software and as such cannot be used without the aid of the computer and therefore this project management software is a

computer software eligible for depreciation @ 60% as per Entry III(5) to New Appendix I of the Rules. This view is covered by various Co-ordinate Bench decisions of this Tribunal and various High Court decisions and by the decision of the Hon'ble Madras High Court in the case of CIT vs. Computer Age Management Services (P.) Ltd. [2019] 109 taxmann.com 134 (Madras), wherein it is held as under:-

> 7. As noticed above, the assessee is in the business of registrar and transfer agent as licensed by the SEBI handling large volume of market sensitive data and information, which is available only through general customized application software. The assessee acquired software licenses capitalized during the relevant years in the books of accounts and claimed depreciation at 60%. In paragraph 20 of the order passed by the Tribunal, the nature of items, on which, the assessee claimed depreciation at 60%, has been listed out and they are 17 in number, from which, we find that substantial amount of server licences, which have been obtained by the assessee are customized and some of which are single user licenses.
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> 8. The question would be as to whether the software application, which was acquired by the assessee would fall under Entry 5 of Part A of New Appendix I, which states that computers including computer software are entitled to depreciation at 60%. Note 7 of the Appendix defines the expression 'computer software' to mean any programs recorded on CD or disc, tape, perforated media or other information storage devices.
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> 9. The case of the Revenue is that software are licences and that they are intangible assets and would fall under Part B of New Appendix I, which deals with knowhow, patents, copyrights, trademarks, licenses, francises or any other business or commercial rights of similar nature.
> 10. We find that Part B of New Appendix I is a general entry whereas Entry 5 of Part A of New Appendix I is a specific entry read with Note 7. In the instant case, the Tribunal, in our considered view, rightly held that the assessee is eligible to claim depreciation at 60%.
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> 11. In the decision rendered by a Division Bench of this Court in the case of CIT Vs. M/s. Cactus Imaging India Private Limited [reported in (2018) 406 ITR 406], to which, one of us (TSSJ) was a party, an identical question

came up for consideration wherein the object was printer (computer printer). This Court, after taking into consideration as to how the entries would be interpreted, referred to the decision in the case of Bimetal Bearings Ltd. Vs. State of Tamil Nadu [reported in (1991) 80 STC 167] and held as hereunder :

> *"9. The Hon'ble Division Bench took note of the decision of the Hon'ble Supreme Court pointing out that the 'entry' to be interpreted is in a taxing statute; full effect should be given to all words used therein and if a particular article would fall within a description, by the force of words used, it is impermissible to ignore the description, and denote the article under another entry, by a process of reasoning.*
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> *10. It was further pointed out that the rule of construction by reference to contemporanea expositio is a well-established rule for interpreting a statute by reference to the exposition it has received from contemporary authority, though it must give way where the language of the statute is plain and unambiguous.*

11. By applying the rule of interpretation, we find that the relevant entry under old appendix I Clause III (5) states computers including computer software and the Notes under the Appendix defines 'computer software' in Clause 7 to mean any computer program recorded on disc, tape, perforated media or other information storage http://www.judis.nic.in device. Noteworthy to mention that the notes contained in the appendix, the term 'computer' has not been defined. Therefore, as pointed out by the Division Bench in Bimetal Bearings Ltd. (supra), if a particular article would fall within the description by the force of words used, it is impermissible to ignore the word description. Thus, going by the usage of the equipment purchased by the petitioner, we have to take a decision."

12. As held in the above decision, if a particular article would fall within the description by the force of the words used, it is impermissible to ignore the word 'description' and going by the usage of the equipment purchased by the assessee, a decision has to be arrived at. We find that there is no error in the decision arrived at by the Tribunal by taking note of the specific entry in contra distinction with the general entry. Therefore, the first substantial question of law has to be necessarily answered against the Revenue.

As the issue is covered in favour of assessee, we direct the AO to allow depreciation @ 60% on the computer software. This issue of assessee's appeal is allowed.

12. The next issue in this appeal of assessee for the assessment year 2012-13 is as regards to disallowance of interest on delayed remittance of TDS u/s.40(a)(ii) of the Act.

13. At the outset, we noted that the AO disallowed a sum of Rs.24,178/- towards interest paid on account of delayed remittance of TDS u/s.40(a)(ii) of the Act claimed by assessee by stating that this interest is TDS and is not in penal in nature but only consequential in nature and hence, allowable as deduction u/s.37(1) of the At. The AO as well as the CIT(A) disallowed the claim of assessee by stating that interest paid u/s.201 of the Act is penal in nature and not compensatory. According to the CIT(A), this interest paid is for statutory default and cannot be allowed as deduction u/s.37(1) of the Act. Aggrieved, assessee came in appeal before the Tribunal.

14. We have heard rival contentions and gone through the facts and circumstances of the case. The issue before us is whether the interest paid on delayed remittance of TDS u/s.40(a)(ii) of the Act is in the character of income-tax or not. As contented by the ld.counsel for the assessee, the assessee wants to file certain details

whether this is interest or TDS it is not clear and hence, he only requested that matter can be remitted back to the file of the AO for verification. In term of the above, we set aside the orders of lower authorities on this issue and remit the matter back to the file of the AO to ascertain the true character of this expenditure claimed by assessee whether this is interest or it is in the character of income-tax and accordingly, decide the issue.

15. In the result, the appeal filed by the Revenue in ITA No.2018/CHNY/2019 is dismissed and the appeals filed by the assessee in ITA No.1990 & 3217/CHNY/2019 are allowed and in ITA No.1989/CHNY/2019 is partly allowed for statistical purposes.

Order pronounced in the open court on 3rd August, 2022 at Chennai.

Sd/-	Sd/-
(मनोज कुमार अग्रवाल)	(महावीर सिंह)
(MANOJ KUMAR AGGARWAL)	**(MAHAVIR SINGH)**
लेखा सदस्य /ACCOUNTANT MEMBER	उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,
दिनांक/Dated, the 3rd August, 2022

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. निर्धारिती/Assessee 2. राजस्व/Revenue 3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त /CIT 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF.