

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI
BEFORE SHRI B. R. BASKARAN, AM AND SHRI ABY T. VARKEY, JM

आयकर अपील सं/ I.T.A. No. 2542/Mum/2021

(निर्धारण वर्ष / Assessment Year: 2012-13)

DCIT, Central Circle-5(3) Room No. 1906, 19 th Floor, Air India Building, Nariman Point, Mumbai- 400021.	बनाम/ Vs.	M/s. IRB Jaipur Deoli Tollway Ltd. IRB Complex, Chandivali Village, Andheri, East, Mumbai-400072.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCI1724Q		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Revenue by:	Shri P. D. Chougule (Sr. AR)	
Assessee by:	Shri Nishit Gandhi & Ms. Dhanalaxmi Iyyar	

सुनवाई की तारीख / Date of Hearing: 06/10/2022

घोषणा की तारीख /Date of Pronouncement: 10/11/2022

आदेश / O R D E R

PER ABY T. VARKEY, JM:

This is an appeal preferred by revenue against the order of the Ld. Commissioner of Income Tax (Appeals)- 53, Mumbai dated 03.06.2021.

2. The main grievance of the revenue is against the action of the Ld. CIT(A) to have deleted the addition of Rs.4,70,67,196/- which was added by the AO u/s 56 of the Income Tax Act, 1961 (hereinafter "the Act").

3. Brief facts as noted by the Ld. CIT(A) is that in this case, the assessee company has filed its original return of income for AY. 2012-13 on 24.09.2012 declaring total income of Rs.1,75,89,975/-.



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The assessment u/s 143(3) of the Act was completed on 16.03.2015 accepting the returned income. Subsequently the assessment was re-opened after recording '*the reasons for reopening*' the assessment. The reason for reopening the assessment was that during the year, the assessee company had received interest income of Rs.4,70,67,196/- from Fixed Deposit (FD) maintained with ICICI bank and the said interest income was not offered for taxation in its return of income for AY. 2012-13, despite the assessee's claim of TDS credit of Rs.47,04,668/-. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) wherein the assessee has challenged the legality of reopening u/s 147 of the Act which was dismissed by Ld. CIT(A). However, the Ld. CIT(A) has deleted the addition on merits by holding as under: -

"7.3 The facts recorded and the findings of the AO in the assessment order and the submission made by the appellant has been considered.

The issue under the dispute is whether interest income from Fixed Deposit is business income or income from other sources. The appellant has considered the interest from FD as business income whereas the AO has considered it as income from other sources. The AO has primarily relied upon the decision of the Supreme Court in the case of **Tuticorin Alkali Chemicals & Fertilizers Ltd. vs Commissioner of Income Tax [1997] 93 Taxman 502(SC)** To decide the issue it is relevant to examine the facts of the present case. The Appellant company is engaged in the business of Construction, operation & maintenance of existing road on the Jaipur Deoli section of the National Highway No. 121 (NH-I2) on DBFOT (Design, Built, Finance, Operate and Transfer) basis. During the A.Y, 2012-13, the appellant company had started the construction of that project. To finance the project, the appellant had borrowed funds from the banks.



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During the year the appellant, part of the borrowed funds to the extent of Rs. 37,88,61,451/- kept in fixed deposits which earned the interest of Rs. 4,70,67,196/-. The appellant also paid interest on borrowed funds and net sum of Rs. 46,00,68,243/- was capitalized in the books of accounts.

The Appellant had submitted a detailed statement of the borrowing which was placed in escrow to the AO. As per the terms of the borrowings, the appellant was required to put part in fixed deposits and the usage of the borrowing for the escrowed purpose. It is also submitted by the appellant that the terms of the Escrow agreement specifically provided that all the amounts deposited, including the interest earned and deposited, in the Escrow Account should be utilised-exclusively for the purpose of the project. The appellant has no discretion with respect to utilization of funds.

The AO has considered interest income from FD as income from other sources mainly relying upon the decision of the Apex Court in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. vs CIT (supra). In the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. vs CIT (supra), the business of the assessee was not started and the assessee was at liberty to invest the surplus idle funds. Under these peculiar facts, the Hon'ble Supreme Court had held that the interest income from short term investment of borrowed funds was "income from other sources".

In the case of the present appellant, the business of the appellant was started and the appellant was not at liberty to use borrowed fund at its will. Similarly, the decisions in the cases of Shree Maheshwar Hydrel Power Corporation Ltd. vs Commissioner of Income Tax [2018] 96 taxmann.com 167 and CIT vs Rajasthan Land Development Corporation (1995) 211 ITR 597 (Raj) were rendered in the context of non-commencement of the business.

In the case of Mathew Joseph vs Assistant Commissioner of Income Tax Circle-1 [2017] 87 taxmann.com 317 (Kerala), the assessee diverted borrowed funds to sister concerns without consent of the bank.

Therefore, the facts of the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. vs Commissioner of Income Tax (supra), Shree Maneshwar Hydrel Power Corporation Ltd. vs Commissioner of Income



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Tax (supra), CIT vs Rajasthan Land Development Corporation (supra) and Mathew Joseph vs Assistant Commissioner of Income Tax Circle-1 (supra), are not applicable to the facts of the present case of the appellant.

7.3.1 Whether the interest income from "Investment from borrowed funds is taxable as business income or income from other sources has to be decided on the basis of the facts of each case. In number of the decisions the courts have held interest income from investment from borrowed funds as either business income or income from other sources, on the basis of the facts of each case.

High Court of Delhi In The case of CIT v. Jaypee JDSC Ventures Ltd. [2012] 17 taxmann.com 257 (Delhi) has held as under:

" As is noticeable from the stipulations in the agreement, the performance guarantee by way of bank guarantee was required for faithful performance of its obligations. The non-submission of the guarantee would have entailed termination of the agreement and NHAI would have been at liberty to appropriate the bid security. That apart, the release of such performance security depended upon certain conditions. Thus, it is clearly evincible that the bank guarantee was furnished as a condition precedent to entering into the contract and further it was to be kept alive to fulfill the obligations. Quite apart from the above, the release of the same was dependent on the satisfaction of certain conditions. Thus, the instant case is not one where the assessee had made the deposit of surplus money lying idle with it in order to earn interest; on the contrary, the amount of interest was earned from fixed deposits which were kept in the bank for furnishing the bank guarantee. It had an inextricable nexus with securing the contract. Accordingly, the view expressed by the Tribunal cannot be found fault with, [Para 21]

In the result, the revenue's appeal has to be dismissed. [Para 22]..."

The facts of the decision in the case of Commissioner of Income-tax v. Lok Holdings [2010] 189 Taxman 452 (Bombay) are that the assessee-firm was involved in the business of development of properties. In the course of its business it received monies in advance from its customers intending to purchase flats in the properties developed by it. Since those monies could not be utilized immediately for the business of the firm, the assessee



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invested the surplus amount temporarily in the banks and other concerns and earned interest on such deposits. For the relevant assessment year, the assessee had returned the income from such interest under the head 'Income from business'. The Assessing Officer, however, assessed that interest income as 'income from other sources'. High Court of Bombay in the case of Commissioner of Income-tax v. Lok Holdings [2010] 189 Taxman 452 (Bombay) has held as under:

"... In the instant case, income from interest, admittedly, arose out of running business of the assessee. Interest was earned out of monies accruing from the business of the assessee and the same was also utilized for the purpose of its business. [Para 6]

In view of the judgment of the Bombay High Court the case of CIT v. Paramount Premium (P.) Ltd. [1991] 190 ITR 259 in which an identical issue was decided in favour of the assessee and, which was squarely applicable to the facts of the instant appeal, the interest income earned by the assessee would be assessable as income from business and not as income from other sources. [Para 7]

Therefore, there was no dismissal. [Para 9]...."

High Court of Bombay in the case of CIT v. Varun Shipping Co. Ltd. [2011] 16 taxmann.com 8 (Bom.) has held as under:

"... 4. As far as the second question is concerned, the Tribunal in its order dated December 27, 2007 in paragraphs 18 and 20 has clearly given a finding that the borrowing made by the appellant were very much part and parcel of the assessee's investment in acquiring the ship. Even the R.B.I.'s permission was obtained for the same and interest was acquired with regard to the unutilized portion of the said borrowing. In view thereof, the Tribunal has clearly given a finding of fact that the aforesaid income by way of interest was for business purpose and in view of the said finding of fact there was no question of law involved in the above appeal..."

The High Court of Delhi in the case of CIT v. Petronet LNG Ltd. [2011] 10 taxmann.com 257/199 Taxman 118 (Mag.) (Delhi) has decided a similar issue where the funds were parked with the bank and in the process, it generated the interest income and as to how such income should be treated.



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In the said case, the money was contributed by the four promoters in the form of share application money for which shares were to be allotted and the said money was to be utilized for the purpose of purchasing requisite plant and machinery and this application money was thus to be utilized for the purchase of capital assets. In the said case, pending purchase of said plant and machinery, money was primarily parked with the bank and in the process, it generated the interest income. Taking note of the decision in *Indian OH Panipat Power Consrotium Ltd. (supra) and CIT v. Panem Coal Mines Ltd. [IT Appeal No. 639 of 2008 dated 17-9-2009]* it was held that if the interest earned on the funds which are to be utilized for purchase of capital asset/setting up of the business and that it is inextricable linked with the setting up of the business, said interest will not be treated as income under the head 'Income from other sources'.

In the case of the appellant the business of the appellant has started in A.Y. 2012-13. The borrowed funds were kept in the escrow account and some part of it was kept as FD. The entire borrowed funds including interest earned was to be utilized for the purpose of project work only. The appellant had no liberty to utilize such funds for purpose other than the purpose for which the bank has borrowed the funds to the appellant. Thus, in the facts of the case of the appellant and the judicial pronouncements, the interest income from FD is held business income and the same is allowed to be netted off against the interest paid to the banks. Thus, the addition of interest income from FD made u/s 56 of the Act by the AO is deleted”

4. Aggrieved by the aforesaid action of the Ld. CIT(A), the revenue is before us.

5. We have heard both the parties and perused the records. We find that the issue is whether the interest income from fixed deposit is business income or income from other sources. The assessee has



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treated the interest from Fixed Deposit (FD) as business income, whereas according to AO, the same ought to have been treated as income from other sources. For justifying his action, the AO had relied upon the decision of the Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra). However on appeal, the Ld. CIT(A) has given relief to the assessee by accepting its view by distinguishing the Supreme Court's decision/ratio in Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra) and other case laws cited by AO in his impugned order. For that the Ld. CIT(A) has noted that the assessee company has started construction of Jaipur Deoli section of the National Highway No. 12 (NH-12) on DBFOT basis and during the relevant assessment year under consideration, the assessee has started the construction of its project; and to finance the project, the assessee has borrowed funds from the banks; and during the year, part of the borrowed funds to the tune of Rs.37,88,61,451/- was kept in fixed deposits which earned interest of Rs.4,70,67,196/-. At the same time, the assessee also paid the interest on the borrowed funds and the net sum of Rs.46,00,68,243/- was capitalized in the books of accounts. The Ld. CIT(A) has looked into the details viz statement of borrowing which was placed in escrow. It was also brought to the notice of the Ld CIT(A), that AO was aware of the terms of the borrowings and as per the same, the assessee was required to put part of it in fixed deposits and the usage of the borrowing for the escrow purpose. The Ld. CIT(A) has taken note that as per the terms of escrow agreement all the amounts deposited,



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including the interest earned and deposited, in the escrow account should be utilized-exclusively for the purpose of the project. And therefore, the assessee had no discretion with respect to utilization of borrowed funds. The Ld. CIT(A) in the light of the aforesaid facts has returned the finding of fact that the entire borrowed funds including interest earned was to be utilized for the purpose of project work only and that the assessee had no liberty to utilize such funds for purpose other than the purpose for which the banks has borrowed the funds to the assessee. In the light of the aforesaid facts and circumstances, the Ld. CIT(A) after taking note of the judicial precedents cited & discussed by him (supra) upheld the claim of the assessee and allowed the assessee's appeal of treating the interest income from fixed deposit as business income. We note that as per the terms of the escrow agreement, the amounts deposited to the escrow accounts shall be utilized exclusively for the purpose of the National Highway Project which assessee has to run on DBFOT basis. And therefore, the interest earned and deposited by the assessee in the escrow account has to be compulsorily utilized for the purpose of the project. Therefore, the assessee has netted the interest expenditure with the interest earned from the FD which was rightly capitalized. This action of the assessee, we note is for the benefit of assessee's business and the case is covered by ratio of decision of the Hon'ble Supreme Court in the case of CIT vs. Bokaro Steel Limited 236 ITR 315 (SC), and moreover the finding of fact made by the Ld. CIT(A) while giving relief to the assessee has not been challenged before us. Therefore,



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finds of facts as noted by the Ld. CIT(A) crystalized. Therefore, we fully agree with the view expressed by the Ld. CIT(A) and so we do not give any other reason for upholding the same, and for taking such a course, we rely on the decision of the Hon'ble Supreme Court in the case of CIT Vs. K. Y. Pilliah and Sons (1967) 63 ITR 411 and dismiss the grounds of appeal raised by the revenue.

9. In the result, the appeal filed by the revenue stands dismissed.

Order pronounced in the open court on 10/11/2022.

Sd/-
(B. R. BASKARAN)
लेखा सदस्य / ACCOUNTANT MEMBER
मुंबई Mumbai; दिनांक Dated : 10/11/2022.
Vijay Pal Singh, (Sr. PS)

Sd/-
(ABY T. VARKEY)
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//

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आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai