

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B', NEW DELHI**

**BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No.9200/Del/2019
(Assessment Year : 2015-16)

ACIT Circle – 8(2), New Delhi PAN No. AACCE 8963 D (APPELLANT)	Vs.	Etawah Chakeri (Kanpur) Highway Pvt. Ltd. OSE Commercial Block, Asset 5B, Aerocity, Hospitality, District, IGI Airport, New Delhi – 110 037 (RESPONDENT)
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Assessee by	Shri K. V. S. R. Krishna, C.A.
Revenue by	Shri Javed Akhter, CIT-D.R.

Date of hearing:	22.05.2023
Date of Pronouncement:	25.05.2023

PER ANIL CHATURVEDI, AM :

This appeal filed by the Revenue is directed against the order dated 11.09.2019 passed by the Commissioner of Income Tax (Appeals)-3, New Delhi for Assessment Year 2015-16.

2. Brief facts of the case as culled out from the material on record are as under :-

3. Assessee is a company which is stated to be engaged in the business of construction, operation and maintenance of six laning of Etawah Chakeri (Kanpur) Highway. Assessee electronically filed its return of income for A.Y. 2015-16 on 25.11.2015 declaring total income at Rs. Nil. The case of the assessee was selected for scrutiny

and thereafter assessment was framed u/s 143(3) of the Act vide order dated 31.12.2018 and the total income was determined at Rs.1,08,82,40,918/-.

4. Aggrieved by the order of AO, assessee carried the matter before CIT(A) who vide order dated 11.09.2019 in Appeal No.3/10316/2018-19 granted substantial relief to the assessee. Aggrieved by the order of CIT(A), Revenue is now in appeal before the Tribunal and has raised the following grounds:

- “1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.108,74,52,438/- made by the AO treating toll charges as revenue receipts.*
2. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.7,88,480/- made by the AO on account of interest income on fixed deposit.*
3. *The appellant craves leave to add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.”*

5. **Ground No.1** is with respect to the addition of Rs.108,74,52,438/- by treating toll charges as revenue receipts.

6. During the course of assessment proceedings, AO noticed that assessee had received Rs.221,64,64,769/- as toll charges collection which it had reduced from the total cost of construction (WIP). Assessee had thus adjusted the cost of capital assets in the books of accounts. Assessee was also asked to explain as to how the receipts from toll collections was reflected in computation of income. Assessee made the detailed submissions which were not found acceptable to AO. AO was of the view that the nature of toll receipts are of revenue in nature. AO noted that during the year under consideration

assessee had received a contract for construction, operation and maintenance of six-laning of Etawah- Chakeri (Kanpur) section of NH-2 on D.B.F.O.T (Design, Build, Finance Operate and Transfer) Toll basis. He also noted that the existing highway was of 4 lane highway which was to be made 6 lane highway. Assessee also got the right to collect toll charges from the existing 4 lane highway and it had earned Rs.210,05,39,694/- from such toll charges. The submissions of the assessee that the toll charges were in the nature of Assistance/Grant/subsidy towards the construction expenses was not found acceptable to AO for the reason that the toll charges received from the existing 4 lane highway was recurring income on day to day basis and inherent nature of the receipt was revenue in nature and not capital receipts. AO for the reasons noted in the order concluded that toll charges receipt of the assessee were revenue receipts and chargeable to tax. He, thereafter, considered the net amount of Rs.108,74,52,438/- (Rs.210,05,39,694/- received by the assessee from Toll charges – premium amount of Rs.101,30,87,256/- paid by the assessee to NHAI) as income of the assessee and accordingly made the addition of Rs. 108,74,52,438/-.

7. Aggrieved by the order of AO, assessee carried the matter before CIT(A). CIT(A) after considering the submissions of the assessee, the concession agreement furnished by the assessee and various decisions cited in the order by noting the following had deleted the addition made by AO :

“6.4 I have considered the facts of the case and the submission made by the AR. As already observed above, the appellant company was awarded a contract by NHAI for six laning of an existing four lane Toll Highway on Etawah Chakeri (Kanpur) section of National Highway No. 2 (NH2) on Design, Build, Finance, Operation and Transfer (DBFOT) basis. As per the concession agreement (CA), the appellant got the concession rights for collection of toll fee for the period of 16 years

including the construction period. NHAI remains the owner of the project and the appellant only got the concession right for the period of 16 years towards consideration of the project. During the year, the project was under construction only and was not completed. As per the terms and contentions of the CA, the appellant was entitled to collect toll for existing 4 lane Road from the appointed date i.e. from the date from which the construction of the project starts which was 13 March 2013 and a portion of the toll collected is also payable to NHAI towards premium payable to NHAI as per quotation given to NHAI for the project. The net amount of toll collected (Toll receipts less premium paid to NHAI out of such toll receipts) during the construction period was NHAI's contribution to the PPP project and was compulsorily required to be used for the purposes of the construction of the project during construction period as per the terms of the C.A and Escrow Agreement. As per the agreement, the appellant was not entitled to use the net toll receipts for itself or for any purpose other than construction of the project and there was an Escrow Agreement on the toll receipts, I have perused the concession agreement as well as the Escrow Agreement furnished by the AR and the above facts are found to be as per the agreement. The AR has contended that since the net toll receipts during construction period with overriding obligations being on capital account, the same was claimed as capital receipt and was reduced from the cost of the project held as "Intangible Asset under Development" in the books of account. It is also observed that all the expenditure incurred on the project during the year has also been capitalized by the appellant. After perusal of the detailed submission made by the AR and the discussion held during the course of appellate proceedings, it is observed that the main contentions/arguments of the appellant for treating the net toll receipts as capital receipts are as under:

- i) Income tax is a tax on real income which in the case of business has to be seen on commercial principles. No hypothetical income can be taxed.*
- ii) Amount/Grant/Capital Subsidy received for capital asset is a capital receipt not liable for tax.*
- iii) If there is diversion of receipt to other party by overriding obligation on the assessee, the same cannot be taxed in assessee's hands.*
- iv) If purpose of subsidy or grant given by Government is capital in nature, it is a capital receipt - this is to be determined by the purpose test.*

- v) *Receipts during Project Construction and inextricably linked to the project under construction are capital receipts not liable to tax and need to be reduced from the project cost.*
- vi) *As per correct accounting principles, as there was no revenue during construction/development period, no P&L Account was made and only balance sheet was made. Note 26 to Audited Balance Sheet reads as under:-*

"The company has started its construction activity & toll collection from FY 2012-13 & the construction of the road is likely to be completed by September 2015. All the construction expenses & expenses incurred for the toll collection & maintenance of highway during the year have been shown under capital work in progress less toll collection, work utility shifting receipts and other income during that period"

- vii) *After completion of development of the said project in September 2015, it was shown as "Intangible Asset (Road) in the books and in the years thereafter, appropriate amounts have been amortized from the said capitalized asset.*

6.4.1 *As against the above arguments of the AR, the AO has treated the toll receipt was revenue in nature by stating that the net toll receipts are not in the nature of capital grant from NHAI but constitute revenue receipts on day to day basis.*

6.4.2 *It is observed from Article 31 of the CA that all the fee and payments received in respect of the project are mandatorily required to be deposited in the Escrow account opened in Axis Bank as per the agreement and all the funds so deposited are required to be utilized entirely for the purposes of the project only. These terms & conditions have again been reiterated in the Escrow agreement entered by the appellant with Axis Bank and NHAI. It has been contended that due to these conditions there is an overriding obligation on the appellant for diversion of all receipts for the purposes of the project only and therefore, there was no real income arising or accruing to the appellant. In this regard, it is to be noted that as per law, diversion of Income is the process of diverting income before it is earned by the assessee. Such amount shall be excluded from the Total Income of the assessee as the income is diverted to someone else before being earned by the assessee. In case of diversion of Income, there is an overriding title of any other person on such income. So the income before being earned by the assessee reaches such person and hence not chargeable to tax in hands of the assessee.*

Diversion of income by overriding title is to be distinguished from the application of income after it is earned. Application of Income means spending of Income after it is being earned by the assessee. Such amount shall not be excluded from total income of the assessee as it is merely application of earned income. In other words, applied income shall be taxable in the hands of the assessee. In this regard, reference is made to the decision of Hon'ble Allahabad High Court in the case of Bhumi Sudhar Nigam vs CIT 2005 144 TAXMAN 94 All, in which the Hon'ble court has discussed the various decisions of Supreme Court in the cases of State Bank of Travancore v. CIT (1986) 158 ITR 102, State of Maharashtra v. Ramdas Shrinivas Nayak AIR 1982 SC 1249, Shiv Prakash Janak Raj & Co. (P) Ltd., etc. and has held as under.

“20. In the case”

6.4.3 In the present case, as per the terms of CA, the appellant was under an obligation to construct the project and to utilize the toll receipts deposited in the Escrow account during construction period in construction of the project only. It has been contended that the right to collect toll fee in the construction stage granted by NHAI is nothing but in the nature of grant or a subsidy given to the appellant to meet part of the construction cost of the project. The aforesaid mechanism is a mode of contribution by NHAI of the part of the cost of the project, which has to be borne by NHAI considering that the NHAI is the owner of the project and the appellant is only a contractor/developer for the project. In view of these facts, I am of the view that the appellant has rightly reduced the toll fee collected during the construction period from the project cost capitalized by it. Due to the terms & conditions of the CA and the Escrow agreement, the appellant is not earning any real income. The AR has rightly relied upon the decision of Hon'ble Supreme Court in the case of Poona Electric Supply Co. Ltd. vs. CIT, 57 ITR 521 (SC) and other decisions in this regard.

6.4.5 It is also observed that in the remand report, the AO has also relied upon the judgment of Hon'ble Madras High Court in the case of Tuticorin Alkali Chemicals and Fertilisers Ltd. vs. CIT, 227 ITR 172. In this regard, it is observed that in the case of Tuticorin Alkali vs. CIT, funds were found to be surplus funds which were invested to earn interest income which is not the case in the present case where funds are neither surplus nor invested for earning any income but were invested in construction of the project as per the overriding obligation under the terms of concession agreement and escrow agreement. It is further

observed that the Apex Court has distinguished this case in the case of *CIT v. Bokaro Steel Ltd.* [1999] 236 ITR 315 (SC) and has held as under:

"The appellant, ,.....

In this case of the Appellant also, as against the facts in the case of Tuticorin, during construction of the six lane toll road, the appellant was not free to utilize the toll receipts whichever way it liked. Until completion of construction of six lane toll road project, the appellant was obliged to use the toll receipts in construction of the project as per the overriding obligation under the Concession Agreement and Escrow Agreement. The company was not free to use toll receipts in any manner it liked. In fact, the Appellant utilized the toll receipts in project construction before the completion of the project. As against facts in Tuticorin, the toll receipts were connected with the construction activities of the project & were to be used for construction of the project as aforesaid. It is vital to note that in Tuticorin case, it was held that there were surplus funds which was invested to earn interest income, which is not the case here.

6.4.7 In view of the above facts and the legal position as discussed in detail and based on the various decisions of Hon'ble Supme Court and High Court, I am of the opinion the toll receipts received during the period of project construction are inextricably linked to the project because the same are mandatorily required to be used for the construction of the project and the appellant does not have any right to use the receipts in any manner it may like but all the receipts are first required to be deposited in the Escrow account and can only be utilized for the purposes of the project only. Accordingly, these receipts are nothing but capital receipts and the appellant has rightly reduced the same from the cost of project. Therefore, the addition made by the AO is deleted and the grounds of appeal are allowed."

8. Aggrieved by the order of CIT(A), Revenue is now in appeal before Tribunal.

9. Before us, Learned DR took us through the findings of AO and strongly supported the order of AO.

10. Learned AR on the other hand reiterated the submissions made before AO and CIT(A) and further submitted that CIT(A) after considering the detailed submissions made by the assessee, the agreement entered by assessee with NHAI and after relying on the various decisions cited in the order has decided the issue in favour of the assessee. He thus supported the order of CIT(A).

11. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the treatment to the amount of toll collection charges received by the assessee. It is the contention of the assessee that the toll receipts are capital receipt as against the claim of the Revenue to be revenue receipts. We find that CIT(A) by detailed and well reasoned order which have been reproduced hereinabove has given a finding that during the construction of the 6 lane toll road, assessee was not free to utilize the toll receipts but was obliged to use the toll receipts in construction of the project as per the overriding obligation under the Concession Agreement and Escrow Agreement and assessee had in fact utilized the toll receipts in the project construction. He has further given a finding that toll receipts received during the period of project construction were inextricably linked to the project because it was mandatorily required to be used for the construction of the project. He accordingly concluded the receipts to be capital receipts and held that assessee had rightly reduced the same from the cost of project. Before us, Revenue has not pointed to any fallacy in the findings of CIT(A) nor has placed any material on record to demonstrate that the ratio of various decisions relied upon by the CIT(A) were not applicable to the facts of the present case. In such a

situation, we find no reason to interfere with the order of CIT(A) and **thus the ground of Revenue is dismissed.**

12. **Ground No.2** is with respect to the addition of Rs.7,88,480/- being interest income on fixed deposit which was treated by AO as taxable income.

13. During the course of assessment proceedings, AO noticed that assessee had earned Rs.7,88,480/- from interest on fixed deposits which was adjusted against the Capital Cost of Construction (WIP). AO was of the view that the interest income was Revenue in nature and it had no relation with the construction of capital assets which was 6 laning of highway. He was of the view that since the income from interest on fixed deposit had no nexus with the construction activity, it cannot be treated as capital receipts. He therefore considered that the interest income that was earned from fixed deposits to be taxable income and made addition of Rs.7,88,480/-.

14. Aggrieved by the order of AO, assessee carried the matter before CIT(A). CIT(A) decided the issue in favour of the assessee by observing as under:

“7.3 I have considered the facts of the case and the submission made by the AR. It has been contended that the appellant was required to provide bank guarantee of Rs 191.07 Crores to NHAI for the performance of its obligations under the concession agreement and for the purpose of opening such bank guarantee, the appellant had to open an FDR worth Rs 9.55 Crores with Canara Bank as margin money being 5% of Rs.191.07 Crore. During the relevant assessment year, the appellant earned interest of Rs 7,88,480/- from such FDRs kept as margin money under business compulsions. It is further contended that as per the terms of the Article 31 of the concession agreement (CA), such interest income was to be transferred to the Escrow account to be mandatorily used for the construction of the project. Accordingly, such interest being inextricably linked to the construction of the project to be

mandatorily used for the construction of the project. is a capital receipt that go on to reduce the cost of the project and accordingly, the appellant has reduced the same from the cost of construction of the project. On perusal of Article 31.2 of the CA, it is observed that all fees and any other revenue including the proceeds of any deposit are required to be deposited in the Escrow account, which is required to be utilized only for the purposes of the project. In my view, the AR has rightly relied upon the decision of Hon'ble Delhi High Court in the case of CIT v. Jaypee DSC Ventures Ltd., [2011] 335 ITR 0132 (Del.), which has the same facts and in which it has been held that furnishing of a bank guarantee was the sine qua non for initiation of the project and only on furnishing the bank guarantee, the assessee could enter into the contract for construction of the project and the interest earned by the assessee on the fixed deposit receipts must go to reduce the pre-production expenses.

7.3.1 Reference is also made to the decision of Hon'ble Delhi High Court in the case of Indian Oil Panipat Power Consortium Limited v. Income-tax Office [2009] 315 ITR 255 (Delhi), in which it has been held that –

“5.2 It is clear upon a perusal of the facts as found by the authorities below that the funds in the form of share capital were infused for a specific purpose of acquiring land and the development of infrastructure. Therefore, the interest earned on funds primarily brought for infusion in the business could not have been classified as income from other sources. Since the income was earned in a period prior to commencement of business it was in the nature of capital receipt and hence was required to be set off against pre-operative expenses. In the case of Tuticorin Alkali Chemicals (supra) it was found by the authorities that the funds available with the assessee in that case were surplus” and, therefore, the Supreme Court held that the interest earned on surplus funds would have to be treated as income from other sources”. On the other hand in Bokaro Steel Ltd (supra) where the assessee had earned interest on advance paid to contractors during pre-commencement period was found to be inextricably linked to the setting up of the plant of the assessee and hence was held to be a capital receipt which was permitted to be set off against pre-operative expenses.”

7.3.2 In view of the above facts and keeping in view the decisions of Hon'ble Delhi High Court as referred above, it is held that the appellant has rightly treated the interest earned from the fixed deposits maintained for providing bank guarantee, as capital receipts and has reduced the same from the project cost. Accordingly, the addition made by the AO is deleted and the grounds of appeal are allowed.”

15. Aggrieved by the order of CIT(A), Revenue is now before Tribunal.

16. Before us, Learned DR supported the order of AO. Learned AR on the other hand reiterated the submissions made before lower authorities and supported the order of CIT(A).

17. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the deletion of interest income on fixed deposit. CIT(A) has noted that assessee was required to provide Bank Guarantee of Rs. 191.07 crores to NHAI for the performance of its obligations under the concession agreement and for the purpose of opening such bank guarantee, assessee had to open an Fixed Deposit worth Rs.9.55 crores with Canara Bank as margin money and on such margin money assessee had received impugned interest. He therefore agreed with the contention of assessee that interest earned was inextricably linked to the construction of the project. He thereafter placing reliance on the decisions of Hon'ble Delhi High Court in the case of Indian Oil Panipat Power Consortium Limited vs. ITO [2009] 315 ITR 255 (Delhi) had decided the issue in favour of the assessee. Before us, no fallacy in the findings of CIT(A) has been pointed out by Revenue nor has Revenue placed any material on record to point out that the reliance placed by the CIT(A) on the decisions cited in the order are not applicable to the present facts. In such a situation, we find no reason to interfere with the order of CIT(A) and **thus the ground of Revenue is dismissed.**

18. In the result, appeal of Revenue is dismissed.

Order pronounced in the open court on 25.05.2023

Sd/-

**(ANUBHAV SHARMA)
JUDICIAL MEMBER**

Sd/-

**(ANIL CHATURVEDI)
ACCOUNTANT MEMBER**

Date:- 25.05.2023

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Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI