

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E', NEW DELHI
Before Sh. A. T. Varkey, JM AND Sh. O.P.Kant, AM**

ITA No.5428/Del./2010

Asstt. Year : 2007-08

Matrix Infrastructure, C-2/398, Janakpuri, New Delhi PAN:AAF1157B	Vs.	ITO, Ward-26(2), Delhi
(APPELLANT)		(RESPONDENT)

ITA No.5548/Del./2010

Asstt. Year : 2007-08

ITO, Ward-26(2), Room No.304-C, D- Block, Vikash Bhawan, New Delhi	Vs.	Matrix Infrastructure, D-99, Tagore Garden, New Delhi PAN:AAF1157B
(APPELLANT)		(RESPONDENT)

**Appellant by :Dr. Rakesh Gupta, Adv
Sh. Jomil Aggarwal, CA
Respondent by : Sh. P. Dam Kanunjna, Sr. DR**

Date of Hearing : 02.09.2015	Date of Pronouncement :30.09.2015
-------------------------------------	--

ORDER

PER O.P.KANT, A.M.

These cross appeals of the assessee and the revenue emanate out of the order of the learned Commissioner of Income Tax (Appeals)-XXIV, New Delhi dated 15.09.2010 pertaining to assessment year 2007-08.

2. Grounds raised by the assessee in its appeal are as under:-

“ On the facts and in the circumstances of the case, the Id CIT(Appeals) was not justified in taking the business income as ‘NIL’ as against loss of Rs.52,35,797/- by disallowing all expenses i.e. interest of Rs.67,36,671/- paid to AWHO and other expenses of Rs.11,42,700/-.

On the facts and in the circumstances of the case, the Id CIT(Appeals) was not justified in taking interest income of Rs.26,43,583/- as income from other sources as against of business income.”

3. Grounds raised by the revenue in its appeal is as under:-

“ Deleing the addition of notional interest income by holding that the Id. AO cannot dictate terms and conditions of business to the assessee for earning income on interest free advances either for business and or otherwise as a prudent businessmen is not expected to give advance free of interest after borrowing and payment huge interest.”

4. Briefly stated facts of the case as culled out from the order of the lower authorities are that the assessee filed its return of income declaring loss in the status of a partnership firm, which came into existence on 28.12.2005. As per the partnership deed, the firm was engaged in business of construction work, acquiring land, developing and constructing buildings on such land. In the previous year relevant to the assessment year, the assessee entered into an agreement with the Army Welfare Housing Organization (in short ‘AWHO’) for purchasing of land

and constructing a residential accommodation on such land and took an advance of Rs.13.0 crores from the AWHO against the Bank guarantee of Rs.13.50 crores submitted. In its profit and loss account, the assessee debited Rs.67,36,671/- towards interest on advance from AWHO and Rs.11,42,700/- towards other expenses, against credit of interest of Rs.26,43,583/- and thus computed a loss of Rs.52,35,797/-. The case of the assessee was selected for scrutiny and the assessment was completed u/s 143(3) of the Income-tax Act, 1961 (in short 'Act') on 31.12.2009. In the assessment, the learned Assessing Officer (in short 'Id. AO') held that as book results were not reliable and even the assessee did not claim carry forward of the loss and therefore, the assessee did not carry out any business activity. Accordingly, on last page of the assessment order, while computing the income, the Id. AO has taken income from business and profession as NIL. Simultaneously, the Id. AO held that out of the interest liability of Rs.67,36,671/- debited to AWHO, the interest paid of Rs 50.00 lakhs was penal in nature and therefore liable for disallowance. The Id. AO then also held that no tax has been deducted at source (TDS) on such interest of Rs.67,36,671/-, therefore same was disallowed in terms of Section 40(a)(ia) of the Act. The other expenses of Rs.11,42,700/- were also disallowed being no business activity. Further, the interest received of Rs.26,43,583/ from fixed deposit was assessed by the Id. AO as income from other sources holding that same was not related to the activities

carried out by it. Further, the Id. AO also computed a sum of Rs.38.50 lakhs as interest accrued on advance of Rs.5.50 crores given to various persons for non business purposes.

5. Aggrieved with the findings of the Id. AO, the assessee filed an appeal before the learned Commissioner of Income-Tax (Appeals) [in short 'CIT(A)']. While examining, whether the interest expenditure claimed by the assessee was allowable business expenditure, the Id. CIT(A) observed that in clause 16 of Memorandum of understanding (MOU) dated 28.08.2006 and the letter of intent (LOI) No.B/03003/15/AWHO/Mysore dated 09.08.2006, it was specifically mentioned that in case of the project was not completed within six months as per clause 9 of the said MOU, the assessee was required to pay Rs.50.00 lakhs as interest and other miscellaneous expenditure. Further, the Id CIT(A) observed that the rate of interest of 9.05 per cent on advance from AWHO claimed by the assessee was not borne out of any documents of AWHO and that was the reason for which assessee paid the sum, just after completion of six months of agreement to the AWHO. In view of observations, the Id. CIT(A) justified the disallowance Rs.50.00 lakhs by the Id. AO as penal interest. As regards to the balance interest of Rs.17,36,671/- claimed by the assessee during the year, the Id. CIT(A) held that same was not allowable u/s 36(1) (iii) of the Act because the assessee had advanced funds to one of its partner. The Id CIT(A), further

held that even if the interest is allowable otherwise as business expenditure in any other section, same cannot be allowed u/s 40(a) (ia) of the Act as the assessee has not deducted TDS on the interest, either penal or non-penal. Further, with regard to disallowance of business expenditure of Rs.11,42,700/-, the Id CIT(A) held that it was undisputed fact that the project was not completed in the relevant period and therefore all the expenditure debited in Profit and Loss Account was nothing but part of the work in progress and thus required capitalization of the expenditure. Holding so, the Id CIT(A) justified that action of the Id. AO in treating the business income at NIL. Further, the action of the Id. AO in treating the interest income of Rs. 26,43,583/- as income from other sources was also held justified by the Id. CIT(A). However, the addition made by the Id. AO of Rs. 38,50,000/- as notional interest income was deleted by the Id. CIT(A).

6. Aggrieved with the above findings, the assessee and the revenue both are in cross appeal before us. Now, first, we decide the appeal of the assessee.

ITA No. 5428/Del/10

7. At the time of hearing, the learned authorized representative (in short 'AR') of the assessee made following submissions with respect to ground no.1 :

a. As regards to the finding of the Id. AO and Id. CIT(A) that no business was carried out by the assessee , the Id AR submitted that though the Id. AO contended in the assessment order that no business activities was carried out, however, in para 2 of the order he has said that firm derived income from business and while computing the income in the last para of the assessment order he has taken the income from business as NIL, which, according to the Id AR , is contradictory to the own stand of Id. AO. Further, the Id AR submitted that the Id CIT(A) at Page 7 in Para 4.3 of impugned order has also mentioned that acquisition of land at various places was business as per MOU with AWHO and therefore, despite these contradictory findings, taking business income at NIL was not justified. The Id. AR further submitted that the assessee has already entered into an agreement with the AWHO and in furtherance of the agreement, the assessee has purchased land at one place and made agreements for purchase of land at other places, and therefore, the business was duly set up as held by the ITAT, Delhi, 'B' Bench in the case of Superlight Mktg (P) Ltd Vs ITO (2005) 4 SOT 348. Accordingly, the Id AR submitted that the expenses claimed being wholly and exclusively necessary for the business and therefore allowable as business expenditure u/s 37(1) of the Act.

b. As regards to finding of the Id Id. AO and Id. CIT(A) that the out of amount of Rs. 67,36,671/- claimed as interest, the sum of Rs.50 lakhs paid to the AWHO on 09.02.2007 was penal in nature , the Id. AR submitted that interest paid to the AWHO was against the advance received from the AWHO and as per contractual terms and conditions, therefore, the interest was not a penalty for any infraction of statutory law. Further, he submitted that the said advance was used for making payment for acquiring land, which was part of the business activity of the assessee and business was already set up , therefore, the interest was allowable as business expenditure. Further, the Id. AR relied on the following judicial pronouncements reported in 196 ITR 421(Cal), 222 ITR 772(P&H), 135 ITR 811(MP), 205 ITR 163(SC), 107 ITR 172(Guj). As regards to the balance interest expenditure of Rs.17,36,671/-, the Id. AR submitted that all the advances were made for the purpose of business and the capital was withdrawn by one of the partner M/s Chandana Developers at the fag end of the previous year i.e. 21/03/2007 out of the capital of Rs.6-7 crores contributed by the partners and therefore no disallowance of interest was called for u/s 36(1)(iii) of the Act.

c. As regard to the disallowance of interest payment u/s 40(a)(ia) of the Act, the Id AR submitted that out of the total interest claimed

of Rs.67,36,671/-, the interest of Rs.50.00 lakhs stood paid as on 09.02.2007 and was not payable at the end of the year and thus Section 40(a)(ia) of the Act was not applicable in view of the judicial pronouncements in the case of CIT Vs. Vector Shipping 357 ITR 642 (All) and others cases reported in 43 CCH 1) (Hyd), 167 TTJ 493 (Mum), 146 TTJ 1(SB) (Vizag). Further, the Id AR submitted that , in absence of any judgement of jurisdictional High Court, even if contradictory decisions are there of other courts, the view favourable to the assessee might be taken, following the decision of Income-tax Appellate Tribunal, B Bench Chennai in the case of ITO Vs. Theekathir Press in ITA no. 2076/(Mds)/2012 and decision of Income-tax Appellate Tribunal, J Bench, Mumbai in TA No. 2293 & 2294/Mum/2013 in the case of Jitendra Mansukhalal Shah Vs. DCIT. As regards to the balance interest of Rs.17,36,671/- the Id AR did not press for allowance u/s 40(a)(ia) of the Act.

d. As regards to disallowance of other expenses of Rs.11,42,700/-, the Id. AR submitted that same were allowable as the business expenditure and nothing to do with the project and once business is carried out, the expenses of the administration are allowable.

8. On the other hand, the learned Senior Departmental Representative (in short 'Sr. DR') relied on the order of the lower authorities. Further, he

stated that disallowance of interest u/s 40(a)(ia) of the Act has been made correctly and placed reliance on Circular No. 10/DV/2013 dated 16th December, 2013 issued by the Central Board of Direct Taxes (CBDT), wherein department has taken a view that in context of section 40(a)(ia) of the Act the term “ Payable” would include “ amounts which are paid during the previous year”

9.1 We have heard the rival submissions and perused the material on record. The first question which arises for consideration in the ground No. 1 of appeal is when does the assessee is said to have carried out by business activity or in other words, when the business of the assessee was set up. In this regard the Id AR has submitted of having contradictory factual findings in orders of Id.AO and Id. CIT(A). We are of opinion that such minor contradictions are not making significant impact on otherwise findings of both lower authorities that the business of the assessee was not carried out. Therefore, the main issue for us to decide when the business expense incurred becomes eligible for deduction u/s 37(1) of the Act. The Hon'ble High Court of Bombay in the case of Western India Vegetable Products Ltd. Vs. CIT (1954) 26 ITR 151 has observed as under:

"The important question that has got to be considered is from which date i are the expenses of this business to be considered permissible deductions and for that purpose the section that we have got to look to is s. 2(11) and that section defines the 'previous year' and for the purpose of a business the previous year begins from the

date of setting up of the business. Therefore, it is only after the business is set up that the previous year of that business commences and in that previous year the expenses incurred in the business can be claimed as permissible deductions. Any expenses incurred prior to setting up a business would obviously not be permissible deductions because those expenses would be incurred at a point of time when the previous years of the business would not have commenced

9.2 Further, the Hon'ble Gujarat High Court in the case of CIT Vs. Saurashtra Cement and Chemical Industries Ltd. (1973) 91 ITR 170 has made following observation on the question of setting up of business:

“... A business activity consists of three stages: the first stage relates to the activity necessary for the purpose of acquiring the raw material and establishment of plant and machinery and the second activity comprises the processing and manufacturing by using the raw material and the plants and machinery set up for the purpose and the third category consisted of the marketing thereof. The first in point of time lays the foundation for the second activity and the second activity when completed lays the foundation for the third activity. Therefore, the expenditure incurred for carrying on any of these activities including the first activity is also deductible in computing the profits and gains of the assessee for the relevant year when the activity is undertaken. In Sarabhai Management Corporation Ltd. Vs. CIT 1975 CTR (Guj) 111 (1976) 102 ITR 25 (Guj), the Gujarat High Court took the same view and held that the business commences with the first activity for acquiring by purchase or otherwise, immovable property. There may be an interval between the setting up of the business and the commencement of the business. All expenses incurred during that interval are also permissible for deduction. In CIT Vs. Sarabhai Management Corporation Ltd. (1992) 102 CTR (SC) 164 : (1991) 192 ITR 151 (SC) the decision of

the Gujarat High Court was affirmed and went a step ahead that even the activities at a preparatory stage is also admissible."

9.3 On plain reading of above findings of the Courts, it is clear that it is only after the business is set up, the expenses incurred in the business can be claimed as permissible deduction under section 37 of the Act. In the case of the present assessee, the facts that the agreement was entered into with AWHO and land was purchased at one place and advances were paid for purchase of land at other places by the assessee, have not been disputed by the Revenue. The Revenue is contending that since the project was not completed, therefore, the business of the assessee was not carried out and therefore, the business expenditure are not allowable as revenue expenditure. As against, the Id AR asserts that in facts of the case the business was set up and therefore, once the business is set up , the assessee was eligible to claim the expenses as business expenses. So, whether in the facts of the case, business was set up or not, we look into finding of the jurisdictional high court on the issue. The Hon'ble High Court of Delhi in the case of CIT Vs. Dhoomketu Builders & Development (P) Ltd. 368 ITR 680 (Del) has held as under:-

"The Tribunal has observed that having regard to the business of the assessee, which is the development of real estates, the participation in the tender represents commencement of one activity which would enable the assessee to acquire the land for development. If the assessee is in a position to commence business, that means the business has been set-up. The Acts of applying for participation in

the tender, the borrowing of monies for interest from the holding company, the deposit of the borrowed monies on the same day with NGEF Ltd. as earnest money were all Acts which clearly establish that the business had been set-up. The commencement of real estate business would normally start with the acquisition of land or immovable property. When an assessee whose business it is to develop real estates, is in a position to perform certain Acts towards the acquisition of land, that would clearly show that it is ready to commence business and, as a corollary, that it has already been set-up. The actual acquisition of land is the result of such efforts put in by the assessee; once the land is acquired the assessee may be said to have actually commenced its business which is that of development of real estate. The actual acquisition of the land may be a first step in the commencement of the business, but section 3 of the Act does not speak of commencement of the business, it speaks only of setting-up of the business. When the assessee in the present case was in a position to apply for the tender, borrowed money for interest albeit from its holding company and deposited the same with NGEF Ltd. on the same day, it shows that the assessee's business had been set-up and it was ready to commence business. The learned senior standing counsel for the revenue would, however, state that till the land is acquired, the business is not set-up. The difficulty in accepting the argument is that an assessee may not be successful in acquiring land for long period of time though he is ready to commence his business in real estate, and that would result in the expenses incurred by him throughout that period not being computed as a loss under the head "business" on the ground that he is yet to set-up his business. That would be an unacceptable position. The other argument of the learned standing counsel for the revenue that the tax auditors of the assessee have themselves pointed out that the assessee is yet to commence its business is also irrelevant because of the distinction between the commencement of the business and setting-up of the same."

10. Further, Hon'ble Delhi High Court in the case of CIT Vs. Arcane Developers (P) Ltd. (2014) 368 ITR 627, in para-7 of the judgement has held that in the real estate business, the said setting up of the business was complete when first steps were taken by the assessee to look around and negotiate with the parties.

11. In a recent judgment of the jurisdiction High Court dated 22nd September, 2014 in the case of Carefour WC &C India (P) Ltd Vs. DCIT reported in 121 DTR (Del) 249 their lordship has held as under:

"11. it is clear that it is only after the business is set up, that the expenses incurred in the business can be claimed as permissible deduction under section 37 of the Act. For commencement of business, there must be in place some income generating asset or income earning structure. In several cases, there is a gap or an interval between setting up and commencement. When the business is set up, is a mixed question of law and facts depends upon the line, nature and character of the business/ professional activity. For example, for manufacturing business, purchase of new material or electricity connection may be relevant point to determine setting up but in case of a properly dealer, the moment, he puts up a chair and table, or starts talking, his business is set up.

The present assessee was engaged and incorporated for carrying on trading activities in different commodities.

The word 'trade' even though not defined in the act is used to denote operations of a commercial character by which a trader provides to customer for reward, some kind of goods or services. In other words, when the trader start providing such goods and

services, the business is said to have commenced but the same may not hold good for set up of a business, which is a stage before the commencement. To set up a business, the following activities become relevant.

‘Preparation of business plan, establishment of a business premises, research into the likely markets or profitability of the business, acquiring assets for use in the business, registration as an entity and under the local laws etc.’ The said list of activities are not exhaustive and facts of each case need to be considered. Indeed purchase of goods would amount to commencement of business, but before the said act, spade work and efforts to commence have to be undertaken. A trader before actual purpose would possible interact and negotiate with manufacturers, landlords, conduct due diligence to indentify prospective customers, spread awareness etc. These are all integral part and parcel of the business of a trader. The said activities continue even post first sale/ purchase. When first steps and taken by a trader, the business is set up, commencement of purchase and then sales is post set up.”

12. In the instant case, the assessee has not only purchased the land at Ooty but also made agreement for the purchase of land at various places. The MOU with AWHO was put into operation and so, in view of the above judgements of jurisdiction high court, we are of considered opinion that the business of the assessee was set up, and therefore, the action of the Id. CIT(A) in holding that business activity was not carried out, is not justified. Accordingly, we hold that interest and other expenses incurred by the assessee and claimed as business expenditure are allowable subject to other provisions of the Act.

13. The Id. CIT(A) has also given a finding that the interest expenditure of Rs.67,36,671/- was not allowable being Rs.50.00 lakhs penal in nature and balance Rs.17,36,671/- being disallowable u/s 36(1)(iii) of the Act. As regards to interest paid of Rs.50.00 lacs to the AWHO , considered by the Id. AO and Id. CIT(A) as penal in nature, the Id. AO has reproduced the relevant clause of agreement between the assessee and AWHO in his order. The said clause makes the assessee liable to pay an amount of Rs. 50.00 lakhs to the AWHO in case of not adhering to the time limit of execution of agreement. It is evident from the said clause that it is merely a contractual obligation and payment of such amount for non compliance of terms and conditions of agreement, was not an infringement of the statutory law. The Hon'ble High Court of Punjab and Haryana in the case of CIT Vs Indo Asian Switch- Gears (P) Ltd reported in 222 ITR 772 has held that certain amount paid by way of penalty on account of late delivery of goods was not on account of infraction of law and therefore, it was deductible. The Hon'ble high Court of Madhya Pradesh in the case of CIT, Madhya Pradesh-I Vs. Rajkumar Mills Ltd reported in 135 ITR 811 has held that amount paid by the assessee to the Export Promotion Council for shortfall in export performance was not a penalty for infraction of law. The Hon'ble Supreme Court in the case of CIT Vs. Ahmedabad Cotton Mfg. Co. Ltd reported in [1994] 205 ITR 163 has held that payment made to textile commissioner for non fulfillment of

conditions of bond was not a penalty or something akin to penalty. Respectfully, following the above judicial pronouncements, we hold that payment of interest of Rs. 50.00 lakhs was not a penalty and therefore the same is allowable u/s 37(1) of the Act. As regards to balance interest expenditure of Rs.17,36,671/- payable to the AWHO is concerned, we agree with the contention of the Id AR that the assessee has paid advances for the purpose of purchase of land and which is one of main business activity of the assessee. Merely withdrawing capital by one of the partner at the fag end of the previous year out of the capital of partners lying in the firm, it cannot be said that the assessee has utilized interest bearing fund for the purpose of activity other than business, hence, the interest expenditure Rs.17,36,671/- is held to allowable business expenditure. Therefore, the entire interest of Rs.67,36,671/- is allowable as business expenditure subject to the allowability under the provision of section 40(a)(ia) of the Act.

14. As regards to the alternative disallowance of interest amount of Rs.67,36,671/- u/s 40(a)(ia) of the Act by the Id CIT(A) is concerned, the facts are that interest of Rs.50.00 lakhs was paid during the year and balance interest of Rs.17,36,671 was payable or outstanding at the end of the year. The Id AR has relied on the decision of the Special Bench of the Tribunal in Merilyn Shipping and Transports V. Addl. CIT (2012) 16 ITR (Trib.) 1 (SB) (Visakhapatnam) (SB) upheld by the Hon'ble High Court of

Allahabad in the case of Vector Shipping (supra) that the disallowance for non deduction of tax at source can apply only for the balance amount at the end of the accounting year. There is an adverse judgement of the Hon'ble High Court of Gujrat in the case of CIT V. Sikandarkhan N. Tunvar reported in 357 ITR 312. The Id. AR has submitted that there is no judgement of the jurisdictional High Court on this dispute, so the judgement which in favour of the assessee may be considered, in view of the decisions in the case of ITO Vs Theekathir (Supra) and Jitendra Mansukhlal Shah Vs. DCIT (Supra) . The circular cited by the Id SR DR may be binding on the department but it is not binding on the Tribunal. The decision of the Tribunal being precedent before us, respectfully following the decision, we hold that that interest of Rs. 50.00 lakhs, being already paid before the end of the relevant previous year and therefore provision of section 40(a)(ia) of the Act are not applicable in respect of said interest paid of Rs. 50.00 lakhs. As regards to the balance interest of Rs.17,36,671/- which was payable at the end of the years, the assessee has already not pressed for allowance of the same u/s 40(a)(ia) of the Act. So, although same is otherwise held as allowable business expenditure, but it is not allowed in the current assessment year in terms of section 40(a)(ia) of the Act.

15. As regards the business expenses of Rs.11,42,700/- is concerned we have already held that business of the assessee was set up and therefore,

the expenses claimed by the assessee being administrative in nature are allowable as business expenditure and no capitalization is required.

16. In nutshell, out of interest expenses of Rs.67,36,671/- interest expenses of Rs.50.00 lakhs only are held as allowed and other business expenses of Rs.11,42,700/- are held as fully allowed to the assessee. Accordingly, the ground No. 1 of the assessee stands partly allowed.

17. In ground no.2, the assessee has challenged the action of the Id. AO in considering the interest income of Rs.26,43,583/- from fixed deposit with bank as income from other sources as against the business income claimed by the assessee. The Id AR submitted that fixed deposit was made for giving guarantee to the AWHO by way of security for the purpose of receiving advance and thus said fixed deposit was made for the purpose of business and the interest income being part of business income, should not be assessed separately as income from other sources. In support thereof, he relied on the judicial pronouncements reported in *9 ITS 263 (mum)*, *345 ITR 283 (All)*, *297 ITR 70 (Kar)* , *132 ITR 70 (Del)*. Further, the Ld AR submitted that without prejudice to the above, if interest income might be treated towards the project and then same may be adjusted to reduce cost of project in terms of decision reported in *236 ITR 315 (SC)*. Further, the Id AR also contended that without prejudice to the above the interest paid to AWHO for advance, out of which the said

Fixed Deposit was made, may be allowed u/s 57 of the Act. On the other hand the Id DR relied on the order of the Id. AO and CIT(A) and stated that interest being earned from fixed deposit was correctly assessed under the head 'Income from other sources'.

18. Rival submissions have been heard and material on record perused. In the case of the assessee, the fact that fixed deposit was made for giving a bank guarantee, is not in dispute. Once it is demonstrated by the assessee that the making of fixed deposit was requirement of business necessity, the interest income falls under the head "profit of business" as has been held in numerous judicial pronouncements. In the case of ITO Vs. Param 9 ITD 263 (ITAT) (Bombay), the assessee was engaged in construction of building on the land which had taken on lease from the State Government and the assessee had given certain guarantee to the State Govt. and for that purpose the assessee had to kept certain amount in the fixed deposit. In that case the interest received from fixed deposit was held to be income from business by the Tribunal. Similarly in the case of Shayam Bihari Vs. CIT reported in 345 ITR 283 (Patna), the assessee was a contractor and in order to secure the contract, he was required to offer a bank guarantee to the contractee. In this case the Hon'ble High Court relying on the decision of the Karnataka High Court in the case of Commissioner Of Income-Tax And Vs. Chinna Nachimuthu Constructions (2008) 297 ITR 70 and also on the judgement of Supreme

Court in the case of CIT vs Govinda Choudhury and Sons(SC) reported in 203 ITR 881(SC) held that the investment of amount in fixed deposit by the assessee was for the purpose of providing a bank guarantee to the contractee in order to acquire contract work and therefore, the interest received on fixed deposit was in the nature of business income. In the instant case also the assessee has made fixed deposit for the purpose of bank guarantee to be submitted to the AWHO for the purpose of getting advance. Further the Id AR has also relied on the judgement of the Hon'ble jurisdictional High Court in the case of Snam Progetti Vs. Additional CIT reported in 132 ITR 70. In that case the assessee was an Italian company and came to India as a Contractor and extra funds available were deposited in Bank. The interest earned on funds with bank has been held as business income by the Hon'ble Court. In view of the above judgements of the various courts, we are of the considered opinion that the assessee was required to make a fixed deposit for the purpose of business necessity and therefore, the interest income earned thereon falls under the head "Profit and Gains of business and Profession". As the interest income as been held as part of business income, the alternative arguments of the Id. AR are rendered otiose. Accordingly, this ground of the assessee is allowed.

19. In the result the appeal of the assessee is partly allowed.

20. Now, we take up the appeal of the Revenue.

ITA No.5548/Del./2010

21. In the solitary ground, the revenue has agitated the issue of notional interest income of Rs. 38,50,000/- deleted by the Id CIT(A). The Id SR. DR relied on the order of the Id. AO. On the other hand, the Id AR relied on the finding of the Id CIT(A) and submitted that funds of Rs.5.50 crores were utilized for the purpose of business only as against claim of the Id. Id. AO that same were utilized elsewhere, and therefore, hypothetically estimating interest income at the rate of 12% on Rs.5.5 crores, was not justified. The Id. AR also relied on the judicial pronouncement in the case of B & A Plantations & Industries Ltd. Vs. CIT (2000) 242 ITR 22 (Gau).

22. We have heard the rival submissions and perused the material on record. The finding of the Id. Id. AO that the fund of Rs.5.50 crores was invested elsewhere and details of which was not disclosed, is found not to be correct. The assessee has submitted details of utilization of the funds before the Id CIT(A) and according to which it is clear that the funds were invested for the purpose of purchasing land or investment in Fixed Deposit. The Id. CIT(A) has rightly held that the Id. AO cannot dictate terms and conditions of business to the assessee . The Hon'ble Gauhati High Court in the case B&A Plantation (supra) held that no notional amount of interest could be assessed on loan given to sister concern on the ground that interest ought to have been charged .Therefore, in our

considered opinion, charging of notional interest has rightly been deleted by the Id CIT(A) and no interference is required in the finding of the Id CIT(A). Accordingly the ground of revenue is dismissed.

23. In the result the appeal of the assessee is partly allowed and the appeal of the revenue is dismissed.

Order Pronounced in the Court on 30/09/2015.

-Sd/-

(A. T. Varkey)
JUDICIAL MEMBER

Dated:30/ 09/2015

Ajay

Copy forwarded to:

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

-Sd/-

(O.P.Kant)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR
Delhi Benches, New Delhi