

**IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCH ' C '**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER AND  
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

I.T. A. No.1507/Bang/2015  
(Assessment Year : 2010-11)

M/s. GMR Power Corporation Ltd.,  
25/1, Skip House, Museum Road,  
Bangalore.  
PAN AAACG 6037G

... Appellant.

Vs.

Addl. Commissioner of Income Tax,  
Range 11, Bangalore.

..... Respondent.

Appellant By : Shri Sunil Jain, C.A.

Respondent By : Shri Sanjay Kumar, CIT-III (D.R)

Date of Hearing : 26.4.2016.

Date of Pronouncement : 13.05.2016.

**O R D E R**

**Per Shri Vijay Pal Rao, J.M. :**

This appeal by the assessee is directed against the order dt.13.11.2015 of Commissioner of Income Tax (Appeals) for the Assessment Year 2010-11.

2. The assessee has raised the following effective grounds as under :

**“ Disallowance of deduction under Section 57(iii) of the Act.**

*On the facts and circumstances of the case and in law, the learned CIT (Appeals) has erred in upholding the action of the Assessing Officer in holding that the amount of interest expense of Rs.;12,66,13,762 is to be allowed as deduction under the head income from business of power generation as against the claim of the appellant that the same is to be allowed as deduction under Section 57(iii) while computing the income under the head ‘income from other sources’ since the interest expenditure was incurred wholly and exclusively for the purpose of earning interest income which is assessed to tax under the head ‘income from other sources.’*

**Deduction under Section 80IA**

*On the facts and circumstances of the case and in law, the learned CIT (Appeals) has erred in not deciding the alternative claim of the appellant in Ground NO.IV that deduction under Section 80-IA should be allowed on the income from business of power generation as increased by the amount of interest of Rs.12,66,13,762 even if the said amount is held to be allowable under the head business and the corresponding interest income of Rs.15,05,74,247 is to be taxed under the head “Other Sources” since the said amount of interest expense of Rs.12,66,13,762 was not incurred for the purpose of eligible business entitled to deduction under Section 80-IA of the Income Tax Act, 1961.*

**Ground 3 :** *On the facts and circumstances of the case and in law, the learned CIT (Appeals) has erred in not deciding the appellant Ground No.V that when the interest expenditure of Rs.12,66,13,762 is to be considered for deduction under the head business then the corresponding interest income of Rs.15,05,74,247 would also be chargeable to tax under the head business instead of taxing the same under the head income from other sources.*

**Excess levy of Dividend Distribution Tax**

*On the facts and circumstances of the case and in law, the learned CIT (Appeals) has erred in confirming the action of the Assessing Officer that the effective rate of Dividend Distribution Tax (DDT) on the amount dividend declared for the F.Y. 2009-10 on August 13, 2010 is 16.995% (DDT 15% + surcharge 10% + education cess 3%) as against the*

*applicable rate of DDT of 16.60875% (DDT 15% + Surcharge 7.50% + Education Cess 3%).*

*The appellant prays that the A.O. be directed to compute the tax on distributed profits declared on August 13, 2010 considering the surcharge at 7.50%”*

3. Ground Nos.1 & 2 are regarding disallowance of interest expenditure against the income from other sources and consequently restriction of deduction under Section 80IA of the Income Tax Act, 1961 (in short 'the Act').

3.1 We have heard the learned Authorised Representative as well as learned Departmental Representative and considered the relevant material on record. We note that an identical issue has been considered by this Tribunal in assessee's own case for the Assessment Year 2009-10. The facts relating to this issue are identical except the quantum of disallowance. The Tribunal has recorded the relevant facts for the Assessment Year 2009-10 in paras 5 & 5.1 are as under :

“ 5. The AO noted that the assessee has claimed expenditure of Rs.9,72,59,364/- under the head 'income from other sources'. The assessee claimed before the AO that interest income earned by the assessee is assessable as 'income from other sources' and the interest expenditure of Rs.9,72,59,364/- being interest incurred on proportional borrowed fund of Rs.130 crores utilised for earning such interest income is deductible u/s 57(iiii) of the Act. The AO disallowed the claim of expenditure u/s 57(iiii) under the head 'income from other sources' but allowed the same under the head 'income from business' and thereby reduced eligible profit u/s 80-IA of the Act.

5.1 The assessee challenged the action of the AO before the CIT(A) and submitted that when borrowed fund was utilised for making deposits and other investment which has yielded interest income assessable to tax as 'income from other sources', then interest expenditure on borrowed fund is allowable u/s 57(iiii) of the Act. The CIT(A) did not agree with the contention of the assessee and confirmed the action of the AO."

Therefore the issue involved in the appeal before us is based on the identical facts as for the Assessment Year 2009-10. We further note that this issue was adjudicated by the co-ordinate bench of this Tribunal for the Assessment Year 2009-10 vide order dt.29.12.2015 in ITA Nos.1556, 1072 & 1629/Bang/2012 in para 5.4 as under :

" 5.4 We have considered the rival submissions as well as relevant material on record. The total interest expenditure claimed by the assessee is Rs.15.79 crore under the head interest and financial charges out of which Rs.14.70 crore is interest on fresh loans. Out of this total interest expenditure, assessee itself has made disallowance of Rs.61,52,481/- u/s 14A as per computation of income at page 1 of the paper book and a sum of Rs.1,27,54,616/- was claimed as business expenditure. The AO has also considered an amount of Rs.11.61 crore as the total amount of interest on loan amount of Rs.130 crore. The assessee furnished details that out of total borrowed fund of Rs.130 crore, a sum of Rs.71.30 crore was utilised for fixed deposit and the corresponding interest on said amount comes to Rs.9.72 crores which the assessee claimed as deduction u/s 57(iiii) against 'income from other sources'. The said amount used for fixed deposit has not been disputed by the AO as well as the CIT(A). The CIT(A) in para.4.4 of the impugned order has accepted this fact that pending utilisation of loan, the amount was temporarily kept in fixed deposit with various banks and interest income of Rs.10.59 crores was earned. The details of deposit made by the assessee during the year are given at page 134 of the paper book as under:

Particulars	Amount in Rs Lakhs										
	Loan As on 31/03/1997	Loan As on 31/03/1998	Loan As on 31/03/1999	Payment made During FY 1999-00	Loan As on 31/03/2000	Payment made During FY 2000-01	Loan As on 31/03/2001	Payment made During FY 2001-02	Loan As on 31/03/2002	Payment made During FY 2002-03	Loan As on 31/03/2003
<b>A SECURED LOANS</b>											
I) <b>Rupree Term Loan</b>											
a) From Financial Institutions	1,153.89	7,318.00	12,318.28	811.28	11,507.00	1,316.00	10,191.00	1,316.00	8,875.00	1,316.00	7,559.00
b) From Banks		8,315.68	10,837.88	1,188.83	9,449.05	762.72	8,488.08	1,134.60	7,353.48	1,315.75	6,037.73
II) <b>Foreign Currency Loan</b>											
a) From Financial Institutions	2,058.27	6,921.66	8,540.38		9,618.00	1,086.74	8,531.26	1,237.03	7,294.23	1,313.10	5,981.13
b) From Banks			2,716.60		2,792.45		2,785.99	268.70	2,527.29	435.70	2,091.59
III) <b>Supplier's Credit</b>		14,705.62	30,848.84	2,968.59	27,880.25	1,412.88	26,468.17	2,313.63	24,154.54	3,904.60	20,249.94
IV) <b>Cash Credit and Demand Loans from Banks</b>					618.16		1,370.40	401.22	969.18		3,096.96
<b>TOTAL Secured Loan</b>	<b>3,212.16</b>	<b>37,260.97</b>	<b>65,061.98</b>	<b>3,197.07</b>	<b>61,864.91</b>	<b>4,020.00</b>	<b>57,844.91</b>	<b>6,671.18</b>	<b>51,173.73</b>	<b>6,157.38</b>	<b>45,016.35</b>
<b>B UNSECURED LOANS</b>											
a) From Banks											2,000.00
b) From Others											92.00
<b>TOTAL unsecured Loan</b>											<b>2,092.00</b>
<b>TOTAL</b>	<b>3,212.16</b>	<b>37,260.97</b>	<b>65,061.98</b>	<b>3,197.07</b>	<b>61,864.91</b>	<b>4,020.00</b>	<b>57,844.91</b>	<b>6,671.18</b>	<b>51,173.73</b>	<b>4,065.38</b>	<b>47,108.35</b>

From the above details, it is clear that only part of this loan was used by the assessee for making investment in securities which yielded exempt income by way of dividend. Therefore, when the assessee has earned interest on fixed deposit amounting to Rs.10.59 crore, then corresponding claim of interest expenditure of Rs.9.72 crore is not an unusual claim of earning said income. Once the assessee has established that borrowed fund was used for making deposit and earning interest income then corresponding expenditure on the borrowed fund on account of interest is allowable u/s 57(iiii). The co-ordinate bench of this Tribunal in the case of Prestige Garden Construction (supra), had considered an identical issue in para 5.5.1 to 5.5.6 as under:

“5.5.1 We have heard the rival contentions and perused and carefully considered the material on record. In the case on hand, the facts as emanate from the record are that, the assessee borrowed a loan of Rs.81.30 Crores from JP Morgan Chase Bank on 18.12.2006 for the purpose of construction of ‘Forum Value Mall’ at Whitefield, Bangalore on which interest was payable on a monthly basis @ 12.25% per annum. The assessee then entered into a currency swap arrangement with ABN Amro Bank to reduce the burden of interest cost and for hedging the interest rate risk. This is evident from para 10 of Notes to the Accounts forming part of the audited financial statements for the year ending 31.3.2008 (placed at page 20 of the assessee's paper book), wherein it is stated as under:-

“10. The company had taken a term loan of Rs.813,000,000 in the previous year. In order to reduce its interest cost, the company had entered into a currency swap arrangement with its bankers, wherein the INR loan was notionally swapped with CHF. The currency swap arrangement was structured along with USD / CHF embedded options. The company entered into this arrangement with the intention of hedging the interest rate risk and not for speculation or trading purposes. The arrangement was settled during the current year and gain on settlement of the contract amounting to Rs.17,528,315 has been credited to the profit and loss account. There are no other outstanding derivative contracts as at the balance sheet date.”

5.5.2 The construction and development of Forum Value Mall’ was in the initial stage of development where the loan of Rs.81.30 Crores was borrowed from JP Morgan Chase Bank on 18.12.2006. The assessee therefore placed an amount of Rs.63 Crores out of the loan of Rs.81.30 Crores with M/s. Prestige Estate Projects Ltd., as inter corporate deposit on 20.12.2006 on which interest thereon was receivable @ 13% per annum on the day to day

balance. The inter corporate deposit was repaid by Prestige Estate Projects Ltd., as and when funds were required by the assessee after the construction and development of 'Forum Value Mall' commenced in January, 2007. The balance of the inter corporate deposit as on 1.4.2007 was Rs.45.75 Crores which was squared off by 26.1.2008 and the entire loan of Rs.81.30 Crores taken by the assessee from JP Morgan Chase Bank was repaid on 1.2.2008.

5.5.3 Interest paid on the loan of Rs.81.30 Crores for the period 1.4.2007 to 31.3.2008, (viz. the period under consideration) totally amounted to Rs.8,49,32,272. Out of this interest amounting to Rs.5,32,82,402 was determined as interest cost relatable to the inter-corporate deposit and the same was debited to the profit and loss account. The remaining interest amounting to Rs.3,16,47,870 was capitalised to Building in the Balance Sheet and no deduction was claimed in respect of this capitalised interest. According to the assessee, the interest capitalised represented proportionate cost of borrowings deployed for construction of Forum Value Mall. The Assessing Officer does not dispute the working and question of both the interest debited to profit and loss account and that portion which is capitalised. In view of the fact that interest was payable on a monthly basis on the loan of Rs.81.30 Crores taken, the interest cost relatable to the borrowings placed as inter corporate deposits should also be computed @ 12.25% on a monthly basis, which works out to Rs.5,32,82,402 and was debited to the profit and loss account for the year under consideration. In this factual matrix of the matter, we hold that the finding of the Assessing Officer that an amount of Rs.3,85,49,961 was the interest relatable to the inter-corporate deposit appears to be factually erroneous.

5.5.4 As against the interest expenditure of Rs.5,32,82,402 related to inter corporate deposits @ 12.25% per annum payable monthly, interest earned from inter corporate deposits @ 13% per annum amounted to Rs.4,09,10,613. The interest expenditure was more than the interest earned even though the rate of interest on the inter-corporate deposit was higher than the loan of Rs.81.30 Crores taken by the assessee. This was because the interest payable to the Bank was computed on monthly balance whereas the interest receivable was calculated on day to day balance. Further, as per the material on record and the Auditor's Report, the currency swap arrangement, in respect of the entire loan, was entered into with a view to reduce the interest cost and for hedging the interest rate risk. The learned Departmental Representative did not demonstrate as to how the currency swap arrangement was only in respect of the unutilised funds as concluded by the Assessing Officer. In this view of the matter, we hold that the finding of the Assessing Officer that the currency swap arrangement was only in respect of unutilised funds is factually erroneous. We, therefore, hold that the currency swap arrangement and the resultant income therefrom amounting to Rs.1,75,28,315 was in respect of the entire loan and the same was linked to the loan borrowed for the purpose of reduction of interest cost.

5.5.5. As per section 57(iii) of the Act, any expenditure laid out or expended wholly and exclusively for the purpose of making or earning the income is allowable as deduction. Under section 37 of the Act, revenue expenditure laid out wholly and exclusively for the purpose of carrying on business is allowed as a deduction. In the case on hand, the interest amounting to Rs.5,32,82,402 debited to the profit and loss account was the interest cost of the loan finds temporarily placed as a inter-corporate deposit. The currency swap arrangement and

the income there from amounting to Rs.1,75,28,315 was also in respect of the entire loan and was linked to the loan borrowed for the purpose of reduction of interest cost. Thus, the interest debited to the profit and loss account amounting to Rs.5,32,82,402 was incurred for earning income from the inter-corporate deposit and the currency swap arrangement and in the regular course of business carried on by the assessee and we, therefore, hold that the interest so debited to the profit and loss account is admissible as a deduction under section 57(iii) of the Act or alternatively under section 37(1) of the Act.

5.5.6. Further, the interest from inter-corporate deposit and the currency swap arrangement totally amounting to Rs.5,84,38,928 (Rs.4,09,10,613 plus Rs.175,28,315) was higher than the interest paid amounting to Rs.5,32,82,402 debited to the profit and loss account and has also admittedly been brought to tax. In view of the facts and circumstances of the case as discussed above, the action of the Assessing Officer in disallowing interest paid amounting to Rs.1,47,32,441 is therefore factually incorrect and is accordingly deleted. ”

Following the order of this Tribunal in the case of Prestige Garden Construction P.Ltd. (supra), we allow the claim of the assessee in respect of interest of Rs.9.72 crore as deduction u/s 57(iiii) of the Act.”

Following the earlier order of this Tribunal, we allow the claim of the assessee in respect of the interest claimed as deduction under Section 57(3) of the Act.

4. Ground No.3 is an alternate plea regarding treating the interest income as business income if the interest expenditure is considered as business expenditure.

4.1 In view of our finding on the issue of treating of interest expenditure and consequential claim of deduction under Section 57(3) of the Act, the additional plea raised in Ground No.3 becomes infructuous and accordingly dismissed.

5. Ground No.4 is regarding rate of surcharge on dividend distribution tax. The assessee has declared dividend for the financial year 2009-10 on 13.8.2010. The Assessing Officer proposed to levy the dividend distribution tax along with surcharge as applicable for the F.Y. 2009-10. The assessee contended that the dividend was declared on 13.8.2010 and therefore the effective rate of dividend distribution tax applicable from 1.4.2010 has to be applied in the case of the assessee. Since there is a difference between surcharge in respect of FY 2009-10 and 2010-11 therefore, there was a dispute regarding levy of surcharge on the dividend distributed by the assessee as declared on 13.8.2010. The Assessing Officer was of the view that the dividend relates to FY 2009-10, therefore, the surcharge in this case is applicable for the FY from 1.4.2009 to 31.3.2010 @ 7.5% would be leviable in this case. The assessee challenged the action of the Assessing Officer before the CIT (Appeals) but could not succeed.

5.1 Before us, the learned Authorised Representative of the assessee has submitted that as per the provisions of section 115 O of the Act, the dividend distribution tax in addition to the income tax chargeable in

respect of the total income for any amount declared, distributed or paid by a domestic company by way of dividend on or after 1<sup>st</sup> day of April, 2003 shall be charged to additional income tax. Thus the learned Authorised Representative has submitted that the additional tax is chargeable on dividend only when the dividend is declared, distributed or paid and therefore prior to the declaration, distribution or payment whichever is earlier, no dividend distribution tax can be levied. Hence the rate of dividend distribution tax as well as surcharge is leviable as applicable for the FY in which such dividend is declared, distributed or paid whichever is earlier. The learned Authorised Representative has referred to the rate of dividend distribution tax as per the schedule of rate of dividend tax as well as surcharge and submitted that for the FY 1.4.2010 to 31.3.2011, rate of surcharge leviable on dividend distribution tax is @ 7.5% and therefore the same is applicable in the case of the assessee.

5.2 On the other hand, the learned Departmental Representative has relied upon the orders of the authorities below and submitted that there is no dispute that the dividend pertains to the FY 2009-10 and therefore

the Assessing Officer is justified in applying the rate applicable for the FY 2009-10.

5.3 We have considered the rival submissions as well as provisions of the Act. Section 115 O of the Act stipulates the chargeability of additional income tax in respect of any amount declared, distributed or paid by a domestic company by way of dividend on or after 1.4.2003. For ready reference, we quote section 115 O as under :

“ Section 115-O.

(1) Notwithstanding anything contained in any other provision of this Act and subject to the provisions of this section, in addition to the income-tax chargeable in respect of the total income of a domestic company for any assessment year, any amount declared, distributed or paid by such company by way of dividends (whether interim or otherwise) on or after the 1st day of April, 2003, whether out of current or accumulated profits shall be charged to additional income-tax (hereafter referred to as tax on distributed profits) at the rate of 91[fifteen] per cent.]

[(1A) The amount referred to in sub-section (1) shall be reduced by

- (i) the amount of dividend, if any, received by the domestic company during the financial year, if such dividend is received from its subsidiary and ;
  - (a) where such subsidiary is a domestic company, the subsidiary has paid the tax which is payable under this section on such dividend; or
  - (b) where such subsidiary is a foreign company, the tax is payable by the domestic company under Section 115BBD on such dividend;

Provided that the same amount of dividend shall not be taken into account for reduction more than once.

- (ii) The amount of dividend, if any, paid to any person for, or on behalf of, the New Pension System Trust referred to in clause (44) of section 10.

Explanation.—For the purposes of this sub-section, a company shall be a subsidiary of another company, if such other company holds more than half in nominal value of the equity share capital of the company.]

(1B) .....

(2).....

(3) .....

(4) .....

(5) .....

(6) .....

**Provided** that the provisions of this sub-section shall cease to have effect from the 1st day of June, 2011.”

Thus it is clear that the dividend distribution tax being an additional income tax which is levied only on the amount declared, distributed or paid by way of dividend on or after 1.4.2003. Section 115 O contemplates the instance of chargeability to tax on the amount of dividend only when it is declared, distributed or paid. Hence the instance of charge / levy of tax under Section 115 O is the declaration, distribution or payment of dividend and not relate back to the year for which the dividend is declared, distributed or paid. Sub-section (1A) further clarifies that the amount of dividend so declared, distributed or paid shall be reduced by the amount of dividend if any received by the domestic company from its subsidiary during the FY which means that the relevant FY as referred in sub-section (1)A is the same in which the dividend is declared, distributed or paid as well as any amount of dividend is received by such company from its subsidiary. We may gainfully refer Section 8 of the Act in this respect which reads as under :

- “ **Section 8.** For the purposes of inclusion in the total income of an assessee,ô
- (a) any dividend declared by a company or distributed or paid by it within the meaning of sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) or sub-clause (e) of clause (22) of **section 2** shall be deemed to be the income of the previous year in which it is so declared, distributed or paid, as the case may be ;
  - (b) any interim dividend shall be deemed to be the income of the previous year in which the amount of such dividend is unconditionally made available by the company to the member who is entitled to it.ö

Section 8 envisages the inclusion of dividend income in the total income of the previous year in which it is so declared, distributed or paid. Therefore, it is manifest from the relevant provisions of the Act i.e. Section 115 O as well as Section 8 of the Act that the dividend distribution tax is chargeable only when it is declared, distributed or paid whichever is earlier and not prior to that. Section 8 further corroborate this analogy by treating the dividend income as part of the total income of the previous year in which the dividend declared, distributed or paid as the case may be. Accordingly, we set aside the order of the authorities below qua this issue and direct the Assessing Officer to charge the distribution tax as well as surcharge prevailing for the FY 2010-11 in which the dividend in question has been declared by the assessee.

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

Order pronounced in the open court on the 13th day of May, 2016.

Sd/-  
**(INTURI RAMA RAO)**  
Accountant Member

Sd/-  
**(VIJAY PAL RAO)**  
Judicial Member

\*Reddy gp

Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard File.

(True copy)

By Order

Asst. Registrar, ITAT, Bangalore