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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision: 30.11.2023*

+ **ITA 397/2019**

THE PR. COMMISSIONER OF INCOME TAX -5 Appellant

Through: Mr Shailendera Singh, Sr. Standing
Counsel.

versus

JAYPEE POWERGRID LTD. Respondent

Through: Mr Nischaya Kantoor, Advocate.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MR JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

1. This appeal concerns Assessment Year (AY) 2009-10.
2. *Via* the instant appeal, the appellant/revenue seeks to assail the order dated 24.07.2018, passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].
3. The issue which arose for consideration before the Tribunal was whether the interest earned by the respondent/assessee from the investment made in fixed deposits, out of the funds received for setting up a power transmission system in the state of Himachal Pradesh, would be amenable to tax under the head "income from other sources"?
4. The Assessing Officer (AO), *via* the assessment order dated



26.12.2011, concluded that interest amounting to Rs.3,40,52,432/- earned on funds invested in the fixed deposit amounting to Rs.55.16 crores was taxable under the head “income from other sources”.

5. In an appeal preferred by the respondent/assessee, the Commissioner of Income Tax (Appeal) [in short, “CIT(A)”] sustained the view of the AO and thus dismissed the appeal. Strangely, the CIT(A), while dismissing the appeal, made the following observations:

“I discussed the matter him and persuaded him to accept the Supreme Court decision in the case of Tuticorin Alkali chemicals and Fertilizers Ltd. [1997] 227 ITR 172 which is the latest case law of the apex court and this is the rule of law as on today. Therefore, I confirm the addition made by AO of Rs.3,40,52,432/- as interest income from FDRs under the head "income from other sources".”

6. The respondent/assessee had a different understanding of what had been contended on its behalf in the hearing held by the CIT(A) and therefore, went on to prefer an appeal before the Tribunal. The Tribunal, as noted hereinabove, ruled in favour of the respondent/assessee and while doing so, applied the ratio of the judgment rendered by a coordinate bench of this court in **Indian Oil Panipat Power Consortium Ltd. v. ITO**, (2009) 315 ITR 255 (Del).

7. The record shows that notice in the above-captioned appeal was issued by the coordinate bench on 16.09.2019, based on the appellant/revenue’s submission that the impugned order was contrary to the decision of the Supreme Court in **Tuticorin Alkali Chemicals & Fertilizers Ltd. v. CIT**, (1997) 6 SCC 117.

8. On 26.07.2023, counsel for the parties were heard at some length, whereupon, we came to a *prima facie* view, given the facts and



circumstances obtaining in the instant case, that it was covered by the decision rendered in **Indian Oil Panipat Power Consortium's** case. It is required to be noted that in the aforementioned judgment, the coordinate bench, after adverting to the decision rendered by the Supreme Court in **Tuticorin Alkali Chemicals & Fertilizers'** case and the subsequent judgment rendered in **CIT v. Bokaro Steel Ltd., (1999) 236 ITR 315**, distinguished the former judgment of the Supreme Court.

9. The broad facts which arise in the instant case and as noticed at the hearing held on 26.07.2023 are as follows:

"6.1 The respondent/assessee was incorporated on 05.10.2006. The respondent/assessee's incorporation was an outcome of a joint venture initiative undertaken by two companies i.e., Jaiprakash Power Ventures Ltd. and Power Grid Corporation of India Ltd. albeit, with the sole objective of setting up a power transmission system in Himachal Pradesh [hereafter referred to as, "the Power Plant"].

6.2 It appears that the construction of the Power Plant commenced in Financial Year (FY) 2007-08, which reached fruition in FY 2012-13.

6.3 The estimated cost for setting up the Power Plant was pegged at Rs.981 crores, which was financed through both equity and debt. Evidently, Rs.300 crores were brought in by way of equity, while Rs.700 crores was raised through borrowings. The borrowings were received by the respondent/assessee company from a consortium of bank under Trust and Retention Account Agreement [hereafter referred to as, "TRA Agreement"] and a loan agreement.

6.4 Having regard to the period over which the Project spanned, funds were received, it appears, in tranches. Thus, in the period under consideration, insofar as the funds from equity and debt were concerned, what was made available to the respondent/assessee was only Rs.295 crores. The respondent/assessee appears to have used Rs.250 crores out of the said amount, out of which short-term FDs were created amounting to Rs.55.16 crores.

6.5 Furthermore, on these FDs, the respondent/assessee earned interest during the relevant AY, amounting to Rs.3,40,52,432/-. The respondent/assessee had credited the interest on FDs amounting to Rs.3,40,52,432/- to an account titled as, "Incidental Expenditure During Construction Pending Allocation."

6.6 It was the respondent/assessee's stand before the Assessing Officer (AO) that the aforementioned amount received on FDs was capital



receipt.

6.7 The AO, however, viewed it otherwise and arrived at a conclusion that the interest earned on FDs was "income from other sources".

10. As noticed hereinabove, the CIT(A) upheld the order of the AO, which was then, on appeal, reversed by the Tribunal. It is against this backdrop counsel for the parties have addressed arguments in the matter.

11. The appellant/revenue is represented by Mr Shailendera Singh, learned senior standing counsel. Mr Singh has, broadly, submitted that the judgment rendered by the Supreme Court in ***Tuticorin Alkali Chemicals & Fertilizers***' case would apply to the facts that arise in the instant case.

11.1 According to Mr Singh, the respondent/assessee took a conscious decision to invest the surplus funds i.e., Rs.55.16 crores in a fixed deposit, only to earn interest. It is, thus, Mr Singh's contention that there was no linkage between the investment of funds in the fixed deposit and the setting up of the power transmission system.

11.2 In support of his plea, Mr Singh sought to place reliance on the two agreements under which the loan was made available to the respondent/assessee and its use was regulated by the creditors. The two agreements that Mr Singh adverted to were the Common Facility Agreement dated 17.06.2008 [in short, "Loan Agreement"], and the Trust and Retention Account Agreement dated 09.09.2008 [in short, "TRA Agreement"].

12. It is not disputed that Rs.700 crores, a figure that has been mentioned above, was received by the respondent/assessee from five creditors i.e., ICICI Bank Ltd., Punjab National Bank Ltd., Central Bank of India Ltd., United Bank of India Ltd. and Jammu and Kashmir Bank Ltd.

12.1 It is also not in dispute that Rs.700 crores were provided by the



aforementioned banks to the following extent:

Sl. No.	Bank	Amount
1	ICICI Bank Ltd.	Rs.180 crores
2	Punjab National Bank Ltd.	Rs.200 crores
3	Central Bank of India Ltd.	Rs.150 crores
4	United Bank of India Ltd.	Rs.70 crores
5	Jammu and Kashmir Bank Ltd.	Rs.100 crores

13. Furthermore, under the TRA Agreement, 13 sub-accounts were maintained and regulated by the creditor-banks. Given this backdrop, it was Mr Singh's submission that a conscious decision had been taken by the respondent/assessee to invest borrowed funds which were otherwise lying idle in a fixed deposit.

13.1 In other words, the argument was that the decision to invest surplus funds in a fixed deposit had no linkage with the setting up of the power transmission system.

14. However, this submission advanced by Mr Singh is also reflective of the fact that if there was, indeed, an inextricable linkage with the setting up of the power transmission system, then the interest earned could not have been treated as "income from other sources"- it had to be capitalized.

15. Mr Nischaya Kantoor, learned counsel, who appears on behalf of the respondent/assessee, while admitting the execution of the Loan Agreement and the TRA Agreement submitted that a scrutiny of the agreements would show that their purpose was to secure loan from the banks referred to above and to regulate their use to achieve the primary object of setting up of a



power transmission system.

16. It was also Mr Kantoor's submission that the temporary investment of funds was closely linked to the need to use the funds for the execution of the project i.e., setting up of the power transmission system.

16.1 In this regard, our attention was drawn, by both Mr Singh as well as Mr Kantoor, to Clause 15.1 of the TRA Agreement. Mr Kantoor, however, in addition to Clause 15.1, also drew our attention to sub-clauses (ii) and (iii) of Clause 15.2, Clauses 15.3 and 15.6.

17. We have heard learned counsel for the parties at some length. We are of the view that given the issue at hand, the test for deciding as to whether the interest earned on the fixed deposit should be treated as "capital receipt" or "income from other sources" is dependent on whether the invested funds were inextricably linked with setting up of the power transmission system.

18. The facts in this case, as noticed on 26.07.2023, disclosed that the project was funded *via* two sources, i.e., equity and loans. Through equity capital, the respondent/assessee gathered Rs.300 crores. Insofar as borrowing was concerned, the respondent/assessee secured Rs.700 crores from the lenders referred to hereinabove.

19. The record also shows, and something which was not disputed, that in the period in issue, Rs.295 crores was received by the respondent/assessee in the form of equity and debt, out of which it spent Rs.251 crores. The balance amount which was left i.e., Rs.55.16 crores was invested in a fixed deposit, which earned an interest amounting to Rs.3,40,52,432/- during the period in issue.

20. The argument advanced by Mr Singh that a conscious decision was taken on behalf of the respondent/assessee to invest the surplus funds in a



fixed deposit, without regard to any linkage with the setting up of the power transmission system, does not impress us. The reason why we have reached this conclusion is that a project such as the present one, which involved setting up a power transmission system, could only have been completed over a period of time and was dependent on funds which were concededly received in tranches.

21. As noted above, in the period in issue, the respondent/assessee had received Rs.295 crores out of which Rs.251 crores were spent, leaving a balance of Rs.55.16 crores. The record reveals that a short-term fixed deposit was created, which led to the accrual of interest. This amount was credited to an account titled, “Incidental Expenditure During Construction Pending Allocation.”

22. Likewise, the argument of Mr Singh based on Clause 15.1 is also untenable, as a closer examination of the said Clause would show that amounts which were standing to the credit of any of the TRA accounts i.e., the sub-accounts, could only be invested in “permitted investments”, which had to have a scheduled maturity date which could not go beyond the anticipated cash withdrawal or transfer date.

23. A plain reading of Clause 15.1 brings this to the fore:

*“15.1 So long as the Account Bank is not notified of an Event of Default or Potential Even of Default by the Facility Agent, **the Account Bank shall invest in Permitted Investments on the instructions of the Borrower,** as provided in this Agreement, from such part of the amounts standing to the credit of any of the Trust and Retention Accounts, **in each case with respect to those amounts next anticipated to be transferred or withdrawn, having a scheduled maturity no later than such next anticipated cash withdrawal or transfer from such Account in accordance with this Agreement.** Upon the occurrence and during the continuance of an Event of*



Default or Potential Event of Default, investment of such funds, such investments and reinvestment shall be made by the Facility Agent. Section 20 of the Indian Trusts Act, 1882 shall not apply to investments of amounts in the Trust and Retention Accounts.”

[Emphasis is ours]

24. The fact that permitted investments had a linkage with the amounts that were credited to the TRA sub-accounts, and provided a security for liquidation of the debt, is evident upon the perusal of sub-clauses (ii) and (iii) of Clause 15.2. For convenience, the same are extracted hereafter:

“(ii) All documents of title or other documentary evidence of ownership with respect to Permitted Investments made out of any Account will be held in the custody of the Account Bank under the name and for the account of the Borrower.

(iii) The Borrower shall at all times procure that there are maintained a spread of Permitted Investments (which, in the determination of the Facility Agent from time to time, are prudent) and shall match the maturities of the Permitted Investments with the payment or transfer obligations under this Agreement, having regard to the availability of Permitted Investments which are readily marketable.”

[Emphasis is ours]

25. Sub-clause (ii) of Clause 15.2 indicates that the title documents and other documentary evidence establishing ownership of the permitted investments made using the sub-accounts regulated by the TRA were to be held in custody for the benefit of the borrower/lender.

26. Similarly, sub-clause (iii) of Clause 15.2 broadly casts an obligation that the maturity value of the permitted investments is related to the payment or transfer obligations under the TRA. In this regard, what is underscored in the said sub-clause is that the permitted investments had to be readily marketable.

27. Clause 15.3 obliges the respondent/assessee to ensure that the money



which was realized through investments shall be immediately credited to the relevant account by the account bank or invested in another permitted investment, in accordance with the lender/borrower's instruction.

28. It is in the same vein that Clause 15.6 of the TRA provided that any interest or other income paid *qua* permitted investments would have to be paid to the relevant account as determined by the facility agent, which broadly meant that it would enure to the benefit of the borrowers/lenders.

29. A holistic reading of the aforementioned Clauses would show that there was indeed an inextricable link between the investment of the surplus funds and the setting up of the power transmission system. Therefore, clearly, the interest earned thereon could only be categorised as "capital receipt."

30. This very aspect was the subject matter of discussion in the ***Indian Oil Panipat Power Consortium***'s case. The relevant paragraphs therein are extracted hereafter:

"5.1 The test, therefore, to our mind is whether the activity which is taken up for setting up of the business and the funds which are garnered are inextricably connected to the setting up of the plant. The clue is perhaps available in Section 3 of the Act which states that for newly set up business the previous year shall be the period beginning with the date of setting up of the business. Therefore, as per the provision of Section 4 of the Act which is the charging Section income which arises to an assessee from the date of setting of the business but prior to commencement is chargeable to tax depending on whether it is of a revenue nature or capital receipt. The income of a newly set up business, post the date of its setting up can be taxed if it is of a revenue nature under any of the heads provided under Section 14 in Chapter IV of the Act. For an income to be classified as income under the head "profit and gains of business or profession" it would have to be an activity which is in some manner or form connected with business. The word "business" is of wide import which would also



include all such activities which coalesce into setting up of the business. See **Mazagaon Dock Ltd vs CIT & Excess Profits Tax**; (1958) 34 ITR 368 (SC), and **Narain Swadeshi Weaving Mills vs Commissioner of Excess Profits Tax**; (1954) 26 ITR 765 (SC). Once it is held that the assessee's income is an income connected with business, which would be so in the present case, in view of the finding of fact by the CIT(A) that the monies which were inducted into the joint venture company by the joint venture partners were primarily infused to purchase land and to develop infrastructure - then it cannot be held that the income derived by parking the funds temporarily with Tokyo Mitsubishi Bank, will result in the character of the funds being changed, in as much as, the interest earned from the bank would have a hue different than that of business and be brought to tax under the head „income from other sources". It is well-settled that an income received by the assessee can be taxed under the head "income from other sources" only if it does not fall under any other head of income as provided in Section 14 of the Act. The head "income from other sources" is a residuary head of income. See **S.G. Mercantile Corporation P. Ltd vs CIT, Calcutta**; (1972) 83 ITR 700 (SC) and **CIT vs Govinda Choudhury & Sons.**; (1993) 203 ITR 881 (SC).

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 source". 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."

31. The aforementioned principle has been followed in the following judgments: **Principal Commissioner of Income Tax-01 vs Brahma Centre**



Development Pvt. Ltd., [2021] 437 ITR 285; ITA No. 66/2015 titled *Commissioner of Income Tax-6 vs NTPC Tamil Nadu ER Company Ltd.*; *Principal Commissioner of Income-Tax v. Triumph Realty (P) Ltd.*, [2023] 450 ITR 271 (Delhi); *NTPC Sail Power Company Pvt. Ltd. vs Commissioner of Income Tax*, 2012 (10) TMI 524; *Principal Commissioner of Income Tax vs Facor Power Ltd.*, [2016] 380 ITR 474; *Commissioner of Income Tax v/s Sasan Power Ltd.*, 2012 (1) TMI 25, and *Principal Commissioner of Income Tax, Jaipur-II vs Road Infrastructure Development Corporation of India*, D.B. IT Appeal No. 144 of 2017.

32. We may note that Mr Singh has relied upon a more recent judgment of the Supreme Court, rendered in *The Commissioner of Income Tax-IV, Ahmedabad v. Shree Rama Multi Tech Ltd.*, (2018) 16 SCC 744. A careful perusal of the ratio of the judgment would show that it supports the view taken by us hereinabove. The issue that came up for consideration before the Supreme Court in the said matter was whether interest accrued on account of deposit of share application money in a fixed deposit would be taxable in the hands of the assessee. The Supreme Court applied the test of inextricable linkage and went on to rule that the respondent/assessee could set off the interest earned against the expenses incurred on public issue.

32.1 We may also note that the court cited in its judgment, *Bokaro Steel Ltd.*'s case and the decision in *Commissioner of Income Tax v. Karnal Co-operative Sugar Mills Ltd.*, (2000) 243 ITR 2 (SC).

32.2 The following observations made in *Shree Rama Multi Tech Ltd.*'s case would be apposite and are set forth hereafter:

“.....We are, therefore, of the opinion that interest earned was



inextricably linked with requirement of company to raise share capital and was thus adjustable towards the expenditures involved for the share issue.

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11. Further, the rationale of judgment of Bokaro Steel Ltd. (Supra) was followed in Commissioner of Income Tax v. Karnal Co-operative Sugar Mills Ltd. Manu/SC/1289/1999 : (2000) 243 ITR 2 (SC). In this case, the company had deposited certain amount with the bank to open letter of credit for purchase of machinery for setting up plant. On the money so deposited, it earned interest. In that background, this Court observed that this is not a case where any surplus shares capital money which was lying idle had been deposited in the bank for the purpose of earning interest. The deposit of money is directly linked with the purchase of plant and machinery.

12. The common rationale that is followed in all these judgment is that if there is any surplus money which is lying idle it has been deposited in the bank for the purpose of earning interest then it is liable to be taxed as income from other sources but if the income accrued is merely incidental and not the prime purpose of doing the act in question which resulted into accrual of some additional income then the income is not liable to be assessed and is eligible to be claimed as deduction. Putting the above rationale in terms of the present case, if the share application money that is received is deposited in the bank in light of the statutory mandatory requirement then the accrued interest is not liable to be taxed and is eligible for deduction against the public issue expenses. The issue of share relates to capital structure of the company and hence expenses incurred in connection with the issue of shares are to be capitalized because the purpose of such deposit is not to make some additional income but to comply with the statutory requirement, and interest accrued on such deposit is merely incidental. In the present case, the Respondent was statutorily required to keep the share application money in the bank till the allotment of shares was complete. In that sense, we are of the view that the High Court was right in holding that the interest accrued to such deposit of money in the bank is liable to be set-off against the public issue expenses that the company has incurred as the interest earned was inextricably linked with requirement of the company to raise share capital and was thus adjustable towards the expenditure involved for the share issue."

[Emphasis is ours]

33. Thus, having regard to the foregoing reasons, we are of the view that no interference is called for in the impugned order passed by the Tribunal.



Thus, according to us, no substantial question of law arises for our consideration.

34. The appeal is, accordingly, closed.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

NOVEMBER 30, 2023/tr