

THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD "A" BENCH

**Before: Ms. Annapurna Gupta, Accountant Member  
And Shri Siddhartha Nautiyal, Judicial Member**

**ITA No. 1938/Ahd/2016  
Assessment Year 2013-14**

The DCIT, Cir-3(1)(2), Ahmedabad (Appellant)	Vs	M/s. Rohtak Panipat Tollway Pvt. Ltd. Sadbhav House, Opp. Law Garden Police Chowky, Ellisbridge, Ahmedabad- PAN: AAECR672P (Respondent)
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**Assessee by: None**  
**Revenue by: Shri S.S. Shukla, Sr. D.R.**

Date of hearing : 19-04-2022  
Date of pronouncement : 08-06-2022

**आदेश/ORDER**

**PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-**

This is an appeal filed by the Revenue against the order of the Id. Commissioner of Income Tax (Appeals)-11, Ahmedabad in Appeal no. CIT(A)-11/315/CC-1(1)/2015-16 vide order dated 12/04/2016 passed for the assessment year 2013-14.

2. The Revenue has taken the following grounds of appeal:-

“1. The Id. CIT(A) has erred in law and on facts in deleting the addition of Rs.3,44,84,982/- made on account of interest on FD and gain of sale of mutual funds invested out of unutilized borrowed fund.

2. On the facts and circumstances of the case, the Ld. Commissioner of Income tax (A) ought to have upheld the order of the Assessing Officer.

3. It is, therefore, prayed that the order of the Ld. Commissioner of Income tax (A) may be set-aside and that of the Assessing Officer be restored.”

3. Facts, in brief, are that the company was incorporated on 01.01.2010 under the Companies 1956 with its main object of Development and Operation of Highway. The assessee was incorporated as a Special Purpose Vehicle (SPV) for four laning of Rohtak-Panipal section in the state of Haryana on Design, Build, Finance, Operate and Transfer (DBFOT) Toll basis. The assessee earned interest on fixed deposits of the funds temporarily invested in the bank during its pre-construction period and also made gains on sale of mutual funds amounting to Rs. 3,49,29,368/- during the year under consideration. The AO treated the above receipts as income from other sources. The Ld. Assessing Officer held that income from interest was earned during the pre-construction period of the project and therefore, the ratio of the judgement of Tuticorin Alkali Chemicals and Fertilizers Ltd 227 ITR 172 would be applicable. Accordingly, he taxed the receipts u/s. 56 of the Act. The Ld. Assessing Officer while passing the order observed as under:

4.9 In view of the facts stated above and relying on the decision of Hon'ble Supreme Court in case of Tuticorin Alkali Chemicals &

*Fertilizers Ltd. (Supra), I am not inclined to accept the above contention of the assessee that interest income from Fixed Deposit and gain on sale of units of mutual funds should not be capitalized to the cost of project, but it is to be taxed under the head "Income from Other Sources" and "Short term Capital Gains". Accordingly, the same is hereby disallowed and added to the total income of the Assessee. The penalty proceedings under section 271(l)(c) of I.T. Act are also separately initiated for furnishing inaccurate particulars of income.*

4. Before Ld. CIT(A). the assessee submitted that the AO did not dispute the fact that the project was under construction and only the part of the borrowed funds which were not immediately utilized for construction activity were deposited with the bank. The receipts by way of interest on FDs were set off against capital expenditure of the project, therefore, these receipts were not in the nature of income. The appellant relied on following decisions in support of his contention that that when the income was received by the assessee from temporary investments for the reason that the funds could not be immediately put to use for the purpose for which they were taken and if the receipt was inextricably linked to be setting up of a project, then it would be capital receipt not liable to tax but ultimately be used to reduce the cost of project:

- (i) Karnataka Power Corporation 247 ITR 268 (SC)
- (ii) Indian Oil Panipat Power Consortium Ltd. (2009) 315 ITR 255 (Del.)

- (iii) NTPC Sail Power Company Pvt. Ltd. ITA 1238/2011 (Del. HC)
- (iv) Bokaro Steel Limited - 236 ITR 315 (SC)
- (v) Bongaigaon Refinery and Petrochemical Co. Ltd. 251 ITR 329 (SC)

However, Ld. CIT(A) dismissed the assessee's appeal with the following observations:

*In the present case of the appellant company, as discussed in the foregoing paras, the construction of the project was in progress and there was no commencement of any business activities during the relevant period. The funds were invested in the pre-construction period and income earned therefrom was inextricably linked with the setting up of the capital structure of the assessee- company. Thus, there was direct nexus of the funds and income from interest and mutual funds out of temporary investments.*

*After having regard to the facts of the case and position of law on the issue, in my considered opinion, the action of the AO was not in order. Accordingly, this ground of appeal is allowed.*

5. The issue for consideration before us is whether in the instant set of facts, the interest earned by the assessee company from temporary fixed deposits and gains on sale of mutual funds amounting to ₹ 3,49,29,368/- during the pre-construction period could be treated as 'Income from Other Sources' or whether the same would qualify as 'Capital Receipts' and hence

not in the nature of income. In our considered view, the company is a Special Purpose Vehicle (SPV) incorporated for the purpose of four laning of Rohtak Panipat Highway and therefore funds of the assessee company could only be utilized for this specific purpose for which it was incorporated. It was only during the period when the funds could not be utilized for the aforesaid purpose, that they were temporarily parked with banks/mutual funds for earning income. In the case of **Adani Power Ltd. [2015] 61 taxmann.com 355 (Ahmedabad - Trib.)**, the brief facts of the case were that the assessee company was engaged in business of developing, operating, maintenance of power projects and sale of power. During year under consideration, assessee-company's projects were under implementation and if had not started any commercial activities. The assessee earned certain interest income on surplus funds deposited in Government securities. The Ahmedabad ITAT after taking into consideration the decisions of Bokaro Steel and Tuticorin Alkali held that since interest received related to period prior to commencement of business, it was in nature of capital receipt and was required to be set off against pre-operative expenses. The ITAT observed as below:

*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 the pre-operative expenses.*

*That, the ratio of the above finding of the Hon'ble Delhi High Court would be squarely applicable to the facts of the assessee's case,*

*because admittedly in the case under appeal before us the share capital as well as loans were raised for the specific purpose of setting up of the power generation plants. The business of the assessee has not been commenced and therefore, as per above decision, the interest received in the period prior to commencement of business was in the nature of capital receipt and hence was required to be set off against the pre-operative expenses. The assessee has already set off the interest income against the pre-operative expenses which is titled as "project development expenditure". In view of above, we are of the opinion hat the interest income of Rs.1,35,87,158/- as well as Rs.7,91,51,306/- was a capital receipt not chargeable to tax during the year under consideration.*

5.1 Again, the Kolkata Tribunal in the case of **Kolkata Metro Rail Corpn. Ltd. [2019] 102 taxmann.com 419 (Kolkata - Trib.)**, held that where money given by Government to assessee-joint venture company of Central and State Government for implementation of construction work of metro railway was kept in fixed deposit with a bank before utilisation, interest income earned could not be taxed as income from other sources in hands of assessee. While passing the ruling, the Tribunal made the following observations:

*We note that the ratio of the judgment of the Supreme Court in the case of Tuticorin Alkali Chemicals [1997] 227 ITR 172 and that of Bokaro Steel Ltd. [1999] 236 ITR 315. The test which permeates through the judgment of the Supreme Court in Tuticorin Alkali*

*Chemicals & Fertilizers Ltd. v. CIT [1997] 227 ITR 172/93 Taxman 502, is that if funds have been borrowed for setting up of a plant and if the funds are 'surplus' and then by virtue of that circumstance they are invested in fixed deposits the income earned in the form of interest will be taxable under the head "Income from other sources'. On the other hand the ratio of the Supreme Court judgment in Bokaro Steel Ltd. (supra), is that if income is earned, whether by way of interest or in any other manner on funds which are otherwise 'inextricably linked' to the setting up of the plant, such income is required to be capitalized to be set off against pre-operative expenses. The test, therefore, 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 cue 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 of the Act, in Chapter IV of the Act. For an income to be classified as income under the head "Profits 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. We take support of these propositions from the judgments of Hon`ble Supreme Court in the case of Mazagaon Dock Ltd. v. Commissioner of Income tax and Excess Profit tax [1958] 34 ITR 368 and Narain Swadeshi Wev. Mills v. CEPT [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 Bank, will result in the character of the funds being changed, in as much as the interest earned from the bank would have a huge difference 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. 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 & Fertilizers Ltd. (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.'s case (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.*

**The very purpose of constitution of the Assessee was to act as a Special Purpose Vehicle (SPV)** created by the Govt of India and Govt. of West Bengal in the form of Joint Venture with equal equity participation for implementation of rapid transport infrastructure in Kolkata. Both the Central and the State Governments are to provide requisite finances for implementation of the said project. The funds from the Central and State Governments flow directly to the Assessee company as equity and Subordinate Debt/Loans. The objective is to create and maintain a fund for the development of infrastructural assets on a continuing basis and, therefore, the Assessee is a SPV formed by the Government of India and Government of West Bengal as per the guidelines; there is no profit motive as the entire fund entrusted and the interest accrued therefrom on deposits in bank though in the name of the Assessee has to be applied only for the purpose of welfare of the State as provided in the guidelines.

5.2 In the case of **Bangalore Metro Rail Corpn. Ltd. [2022] 135 taxmann.com 268 (Karnataka)**, the Karnataka High Court held that where out of funds granted by State Government to assessee-Government company for implementation of a rail-based Mass rapid Transit System, unutilized

funds of project were invested by assessee in **fixed deposits and mutual funds** as per directions of Government, **since interest accrued therefrom had to be utilized only for purpose of scheme, it could not be counted as income of assessee and could not be considered as revenue receipts.**

5.3 The Hon'ble Delhi High Court in the case of **Indian Oil Panipat Power Consortium Ltd. v. ITO [2009] 181 Taxman 249/315 ITR 255 (Delhi)** wherein the Hon'ble Delhi High Court have held as under:

*"5. In our opinion the Tribunal has misconstrued the ratio of the judgment of the Supreme Court in the case of Tuticorin Alkali Chemicals (supra) and that of Bokaro Steel Ltd. (supra). The test which permeates through the judgment of the Supreme Court in Tuticorin Alkali Chemicals (supra) is that if funds have been borrowed for setting up of a plant and if the funds are surplus and then by virtue of that circumstance they are invested in fixed deposits the income earned in the form of interest will be taxable under the head "income from other sources. On the other hand the ratio of the Supreme Court judgment in Bokaro Steel Ltd. (supra) to our mind is that if income is earned, whether by way of interest or in any other manner on funds which are otherwise inextricably linked to the setting up of the plant, such income is required to be capitalized to be set off against pre-operative expenses.*

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.*

5.4 In view of the above discussion, in our view, the assessee company which was formed primarily for the purpose of four laning of the Rohtak Panipat highway and the funds available with the assessee were to be utilised primarily for the above purposes for which the assessee company was set up. Consequentially, the interest / gains earned on fixed deposits/sale of mutual funds was also be to be utilised for the aforesaid purpose. Therefore, in our view, interest/gains earned by the assessee company during the pre-commencement was inextricably linked with the setting up of the capital structure of the assessee company and there was a direct nexus of the funds and income from interest and mutual funds out of the temporary investments and accordingly, the Id. CIT(A) has not erred in law in holding that receipts in question could not be taxed as “income from other sources” and “short term capital gains”.

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

Order pronounced in the open court on 08-06-2022

**Sd/-**  
**(ANNAPURNA GUPTA)**  
**ACCOUNTANT MEMBER**  
**Ahmedabad : Dated 08/06/2022**

**Sd/-**  
**(SIDDHARTHA NAUTIYAL)**  
**JUDICIAL MEMBER**

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण,  
अहमदाबाद

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