

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

BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER
AND SHRI T.S. KAPOOR, ACCOUNTANT MEMBER

I.T.A. No. 4300/Del/2012

Assessment year : 2009-10

ITO, Ward 11(2),
New Delhi

Vs.

M/s. Facor Power Ltd.,
401, Corporate One,
Plot NO.5, Jasola,
New Delhi-110 044

GIR / PAN: AABCF0054B

(Appellant)

(Respondent)

Appellant by : Smt. Parwinder Kaur, Sr. DR

Respondent by : Shri K Sampath, Adv.

Date of hearing : 01.0-6.2015

Date of pronouncement : 10.06.2015

ORDER

PER T.S. KAPOOR, AM:

This is an appeal filed by Revenue against the order of Ld. CIT(A) dated 14.05.2012. The grounds of appeal raised by Revenue are reproduced below:

“1. The Learned CIT (A) has erred on the facts and circumstances of the case and in law in treating the interest income of Rs.70,75,843/- received on account of bank deposit as capital receipt instead of treating it as income under head other sources and there by overlooking the ratio laid down in the case of Tuticorin Alkali Chemicals and Fertilizers Ltd.

2. The Learned CIT(A) has erred on facts and circumstances of the case and in law in allowing to adjust interest income against preoperative expenses, however assessee had no compulsion for

making fixed deposit with the bank rather it was surplus money kept with the bank to earn interest.”

3. The brief facts as noted in the assessment order are that the assessee company was incorporated on 24.08.2005 to carry on in India or elsewhere the business to generate, receive, produce, improve, buy, sell, etc. in electric power by establishing thermal power plant, active power plants etc. During the year under consideration, no business activities were carried out by the assessee as the project was under implementation. The case of the assessee was selected for scrutiny. During assessment proceedings, the A.O. observed that he assessee had received an amount of Rs.70,75,843/- from State Bank of Mysore as interest on fixed deposits but the same was not declared in the return of income as income from other sources. On further perusal of details, the A.O. observed that the assessee had reduced such interest from capital w.i.p., therefore, the assessee was asked to provide an explanation as to why interest income of RS.70,75,813/- be not treated as income from other sources. In response, the assessee company submitted that the assessee had earned interest income from FDRs which were placed with bank as margin money for procurement of various capital goods required for setting up of the project. The assessee relied upon the case law of Bokaro Steel Plant decided by Hon'ble Supreme Court. The A.O. however held that the case law of Bokaro Steel Plant was distinguishable as in that case, the company had earned interest income on completion of project on time. The A.O. also distinguished another case law of LG Electronics Pvt. Ltd. holding that in L G Electronics Pvt. Ltd., the fixed deposits were temporarily kept with the bank as margin money against letter of credit issued for credits for import of capital goods and bank guarantee.

The A.O. held that in the present case, no such compulsion was there. As regards the argument of assessee that the funds were kept for procurement of various capital goods, the A.O. held that contention of assessee far away from the fact and he rejected this contention by holding as under:

“The assessee has claimed that the FDs with banks were kept as Margin for procurement of various capital goods for setting up the project. The claim of the assessee is far away from the facts of the case. As per the Schedule of Fixed Assets, the major portion of Fixed Assets was Land which comprised 82% of the Total Assets. Thus, out of total assets of Rs. 1.48 Crores, land cost is Rs. 1.21 Crores. Rest of the assets are office equipments, furniture, vehicle and computers. By no stretch of imagination, it can be said that the assessee has kept FDs worth Rs. 1389 Lakhs to acquire meager capital goods of just about Rs. 20 Lakhs. Similarly, in the list of Capital-Work-In-Progress, there is no such capital asset as has been acquired by the assessee during the year. On the other hand, it is seen that the assessee has given an advance of Rs. 11.29 Crores against Capital Contracts. The case of the assessee is not such that the assessee had no funds in its hands but it was necessary for it to procure capital goods by keeping its FDs as Margin against procurement of such capital goods, Here in this case, the assessee has not received any such capital goods and yet has given advance of Rs. 11.29 Crores as Capital Contract. There arise no question of keeping the FDs as margin money for procurement of capital goods in absence of any such capital goods acquired by the assessee during the year under consideration. Thus, the contention raised by the assessee is far away from the facts of the case.”

4. Therefore, the A.O. after relying upon the case law of Tuticorin Alkali Chemicals and Fertilizers Ltd. Vs CIT 227 ITR 172, made the addition of R.70,75,843/- as income from other sources. Aggrieved, the assessee filed appeal before Ld. CIT(A) and made various submissions. The assessee before Ld. CIT(A) also tried to distinguish the facts of the case of Tuticorin with that of itself and these submissions are noted in Ld. CIT(A)'s order at

para 7.2. It was also submitted that the expenditure including capital advances were used from share application money which were temporarily put in Fixed Deposits awaiting for the payments to be made for awarding new contracts and for further payments of existing contract and therefore, it was submitted that funds placed in FD were inextricably linked with the project and in this respect, case law decided by Hon'ble Delhi High Court in the case of Indian Oil Panipat Power Consortium Ltd. Vs ITO 315 ITR 255 was also relied upon. Ld. CIT(A) allowed relief to the assessee by distinguishing the facts of Tuticorin Alkali Chemicals and Fertilizers Ltd. by holding as under:

“I have considered the submission of the appellant and observation of the ASSESSING OFFICER. It is seen that appellant company was in the process of setting up a power project in Orissa. For that appellant had acquired land in F.Y. 2007-08 and spent Rs. 68.62 lacs on purchase of land etc. During the F.Y. 2008- 09, appellant company has taken money from share holders as additional share capital in October 2008 for the purpose of acquiring capital assets for setting of the power plant. The money so received was put in FDRs for a temporary period of 3 months till the orders for machinery were placed. In the month of December, appellant awarded contract to M/s Thyssan Krupp Industries Pvt. Ltd for purchase of boiler for Rs. 7500 lacs. The appellant gave advance of Rs. 50,00,000/- to said company. In the month of January the appellant gave order for STG Set for Rs. 3510 lacs and paid advance of Rs. 130 lacs to M/s BHEL. In the month of May 2009, appellant further gave contract to M/s Paharpur Cooling Towers for Rs. 1017 lacs and paid advance of Rs. 10 lacs. These facts established that amount raised as additional share capital from share holders and put in the FDRs was inextricably linked with acquisition of plant and machinery by the appellant company. The additional share capital raised was for purpose of acquiring capital assets which was temporarily put in the Fixed Deposits. The appellant had spent substantial money in acquisition of land in F.Y. 2007-08 and for that purpose it has spent Rs. 68.62 lacs. This shows that the funds raised by the appellant from share holders were not idle but the

same were meant for acquisition of capital assets. In view of the above it is held that funds raised by the appellant company were inextricably linked with acquisition of the capital assets. The interest received from such funds which were put in FDRs for temporary period was in the nature of capital receipts and such receipts was required to be set off against the preoperative expenses. In this regard reliance is placed on the decision of Hon'ble Delhi High Court in the case of Indian Oil Panipat Power Consortium Ltd. vs ITO [2009/315 ITR 0255 (DEL)INCOME OR CAPITAL--INTEREST--INTEREST EARNED PRIOR TO COMMENCEMENT OF BUSINESS ON FUNDS BROUGHT IN BY WAY OF SHARE CAPITAL FOR SPECIFIC PURPOSE--IS CAPITAL RECEIPT--LIABLE TO BE SET OFF AGAINST PRE-OPERATIVE EXPENSES--INCOME-TAX ACT, 1961.

The assessee-company was incorporated in pursuance of a joint venture entered into between Indian Oil Corporation and M of Japan to set up a power project. In order to effectuate the purpose for which the joint venture was conceived, share capital was contributed by these two corporations which included Rs. 20 crores by way of additional share capital. The Assessing Officer treated the interest earned on monies received as share capital by the assessee temporarily placed in a fixed deposit awaiting acquisition of land which had run into legal entanglements on account of title as "Income from other sources". The Commissioner (Appeals) accepted the stand of the assessee that the interest was in the nature of a capital receipt which was liable to be set off against pre-operative expenses. The Tribunal reversed this order. On appeal :

Held, allowing the appeals that the funds in the form of share capital were infused for the 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 be 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 a capital receipt and was required to be set off against pre-operative expenses.

Tuticorin Alkali Chemicals and Fertilizers Ltd. v. CIT [1997/ 227 ITR 172 (SC) distinguished.

The facts of the case laws relied upon by the ASSESSING OFFICER were different, therefore, the same are not applicable to the case of the appellant. The additional share capital raised by the appellant was linked with acquisition of capital assets, therefore, interest received from such capital is capital receipt and same can be adjusted against preoperative expenses. Therefore, the addition made by the ASSESSING OFFICER of Rs.70,75,843/- treating the interest income as "income from other sources" is deleted."

5. Aggrieved, the Revenue is in appeal before us.
6. At the outset, Ld. D.R. invited our attention to grounds of appeal and submitted that the case law of Tuticorin as relied upon by A.O. was applicable to the facts of the present case and further argued that the assessee had no compulsion for making fixed deposits with the bank as these were not made as margin money or against letter of credit and, therefore, she heavily relied upon the order of A.O.
7. Ld. A.R. on the other hand invited our attention to Ld. CIT(A)'s order at page 8 and submitted that Ld. CIT(A) has noted down the difference between the facts in assessee's case and that of the facts in Tuticorin and argued that in the case of Tuticorin, the assessee had borrowed funds whereas in the case of assessee, the assessee had raised funds by way of share capital. Moreover, he argued that funds were not surplus funds as the cost of project was more than Rs.500 crores and during the year only Rs.24 crores were received and these were placed temporarily in the form of bank deposits. Ld. A.R. heavily relied upon the order of Ld. CIT(A) and case law relied upon by him. In her rejoinder, Ld. D.R. submitted that in the present case, there was no compulsion to the assessee to place funds in the form of bank deposits.

8. We have heard rival parties and have gone through the material placed on record. We find that that in the case of Tuticorin Alkali Chemicals and Fertilizes Ltd., the funds which were placed in the form of FD were raised by way of loan whereas in the present case, the assessee had raised funds through share capital and in that case, the question decided was as to whether the investment of borrowed funds prior to commencement of business result in earning of interest by the assessee and Hon'ble Supreme Court in that as case has held that if a person borrows money for business purposes but utilizes the money to earn interest, the interest so generated will be his income from other sources. In the present case, the funds placed in bank deposits were not raised by borrowing funds and rather they were raised through share capital as noted by Ld. CIT(A) at page 8 of his order. Moreover in the case law of Tuticorin Alkalies, the funds were surplus funds whereas in the present case, the funds were not surplus funds as the fixed deposits which were made from October onwards were redeemed till April 2009 and funds were utilized for contract payments for the project. During proceedings before Ld. CIT(A), the assessee had filed copy of contract awarded during July 2008 to June 2009 and it had demonstrated that funds which were kept temporarily in the form of fixed deposits were linked with the setting up of project and cannot be categorized as surplus funds. In the case of M/s. Indian Oil Panipat Power Consortium Ltd., Hon'ble Delhi High Court after considering Hon'ble Supreme Court decision in the case of Tuticorin has held as under:

“In our opinion, the Tribunal misdirected itself in applying the decision of the Supreme Court in Tuticorin Alkali Chemicals (supra) in the facts of the present case. In our opinion on account of the finding of fact returned by the CIT(A) that the funds infused in the assessee by the joint venture partner were inextricably linked with the

setting up of the plant, the interest earned by the assessee could not be treated as income from other sources.

9. We find that the facts in the present case are also similar to the facts in the case of Indian Oil Panipat Power Consortium Ltd. (supra). In the present case also, amount was invested by joint venture partner by raising share capital and funds were directly linked with setting up of project. Ld. CIT(A) has made a clear finding with respect to linkage of funds as noted at page 10 of his order. Therefore, in view of above, we do not find any infirmity in the order of Ld. CIT(A) and the same is upheld.
10. In view of above, appeal filed by revenue is dismissed.
11. Order pronounced in the open court on 10th June, 2015.

Sd./-
(DIVA SINGH)
JUDICIAL MEMBER
Date: 10.06.2015

Sd/-
(T.S. KAPOOR)
ACCOUNTANT MEMBER

Sp

Copy forwarded to:-

1. The appellant
2. The respondent
3. The CIT
4. The CIT (A)-, New Delhi.
5. The DR, ITAT, Loknayak Bhawan, Khan Market, New Delhi.

True copy.

By Order

(ITAT, New Delhi).

S.No.	Details	Date	Initials	Designation
1	Draft dictated on	2/6		Sr. PS/PS
2	Draft placed before author	3/6		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS	10/6/15		Sr. PS/PS
6	Kept for pronouncement	10/6		Sr. PS/PS
7	File sent to Bench Clerk	10/6		Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			