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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on : 27.04.2015

ITA 153/2014

COMMISSIONER OF INCOME TAX-I.....Appellant

Through: Sh. M.S. Syali, Sr. Advocate with Sh. Abhimanyu Lamba, Sh. Mayank Nagi, Sh. Tarandeep Singh and Sh. Tarun Singh, Advocates.

Versus

ACCESSION BUILDWELL (P) LTD.Respondent

Through: Sh. Kamal Sawhney, Sr. Standing Counsel with Sh. Shikhar Garg and Sh. Mukul Mathur, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. Two questions of law are sought to be urged by the Revenue, in its appeal under Section 260-A of the Income Tax Act, 1961 ("the Act") directed against the decision of the Income Tax Appellate Tribunal (ITAT) for assessment year (AY) 2008-09 (i.e. ITA No. 2001/Del/2012, decided on 09.09.2013):

(i) Whether the ITAT was justified in the eyes of the law in treating the interest income of ₹77,25,153/- on the FDR's as part of its business income?

(ii) Whether the ITAT was in error in allowing the business expenditure of ₹1,40,575/- as revenue expenditure?

2. The assessee company engages in business as builders and the developer. During the relevant period in the assessment year, it earned interest to the extent of ₹77,25,153/- on FDRs which was not offered for taxation; instead it was set-off with projects in progress. Holding that interest income was unrelated to the business activity of the assessee the A.O. treated this income to be income from other sources. The A.O. further disallowed the setting-off of this income from the interest paid as he held that the interest paid is a business expense and such payment of interest has also been treated as part of the 'project in progress' by the assessee itself. On appeal, the CIT (A) accepted the contention that the interest paid was an obligation arising out of the debenture debt incurred by it; the said debenture amount had to be kept in a designated amount, which earned interest. The debentures were issued by the assessee for raising finances for the purpose of its business. The amounts were utilized mainly for the purpose of land. The investment in bank FDRs was made as per the terms of the Debenture Trust Deed with a view to maintain the Minimum Interest Reserve Account for the purpose of servicing the interest burden on debentures. In view of these facts, the CIT (A) held that

“I find that the interest accrued on the bank FDRs forms part of the business income of the appellant and is not an independent activity which can be classified as income from other sources. The case laws relied upon by the AD including that of Tuticorin Alkali Chemicals & Fertilizers Ltd. Vs. CIT (1997) 227 ITR 172 (SC) are not relevant to the instant case, as in the above case of Tuticorin Alkali interest was earned by the assessee before the commencement of business on short term deposits made in the bank out of surplus funds from the

term loans received from financial institutions. As against the above, in the instant case, interest has accrued to the appellant on the bank FDRs after the commencement of the appellant's business. The said investment in bank FDRs was not out of surplus funds but for creating a Minimum Interest Reserve Account to service the interest burden on the above debenture as per the terms of the above Debenture Trust Deed. In view of the above, the facts in the instant case are clearly distinguishable. Considering the same, I find that the action of the AP in treating the impugned amount of Rs. 77,25,153/- as income from other sources is not sustainable on facts or in law."

The ITAT upheld the CIT(A)'s decision. On this issue, the Revenue urged that both the lower authorities fell into error in not upholding its contentions, reflected in the AO's order, because the test indicated in *Tuticorin* (supra) applied squarely to the facts of the case. The decision not to allow the adjustment, and treat the interest income as a separate source should not, in the circumstances, have been interfered with.

3. In *Tuticorin Alkali Chemicals and Fertilizers Ltd.* (supra) the Supreme Court held as follows:

"if the company, even before it commences business, invests the surplus funds in its hands for purchase of land or house property and later sells it at profit, the gain made by the company will be assessable under the head 'capital gains'. Similarly, if a company purchases a rented house and gets rent, such rent will be assessable to tax under section 22 as income from house property. Likewise, a company may have income from other sources..... The company may also, as in that case, keep the surplus funds in short-term deposits in order to earn interest. Such interest will be chargeable under section 56 of the Income-tax Act".

The Supreme Court, subsequently, in *Commissioner of Income Tax v. Bokaro Steel* 236 ITR 315, held that:

“However, while interest earned by investing borrowed capital in short-term deposits is an independent source of income not connected with the construction activities or business activities of the assessee, the same cannot be said in the present case where the utilisation of various assets of the company and the payments received for such utilisation are directly linked with the activity of setting up the steel plant of the assessee. These receipts are inextricably linked with the setting up of the capital structure of the assessee-company. They must, therefore, be viewed as capital receipts going to reduce the cost of construction.”

4. This Court, in *Indian Oil Panipat Power Consortium Ltd v. ITO* (2009) 315 ITR 255 (Del) held that where interest on money is received as share capital, and is temporarily placed in fixed deposit awaiting acquisition of land, a claim that such interest is in a capital receipt entitled to be set off against pre-operative expenses, is admissible, as the funds received by the assessee company by the joint venture partners are “inextricably linked” with the setting up of the plant and such interest earned cannot be treated as income from other sources. The reasoning in *Indian Oil (supra)* is in line with *Bokaro Steel Ltd. (supra)*. Similarly, the Supreme Court held that such receipts are not income in *CIT v. Karnataka Power Corporation*, 247 I.T.R. 268 (SC) and *Bongaigaon v. Refinery and Petro Chemical Co. Ltd. v. Commissioner Income Tax* 251 I.T.R. 329 (SC). This Court is consequently of the opinion that the Revenue’s contentions have to perforce, fail. Furthermore, the mandate of Section 117C of the Companies Act also supports this view, because a debenture debtor such as the assessee in this case, is compelled to a certain margin separately, to secure the interest of the debenture holders.

5. So far as the second question goes, the facts are that ₹8,89,275/- was directed to be capitalized by the AO on the ground that the assessee had not

set up its business. The CIT (A) reversed that finding but noticed that of that amount ₹7,48,700/- could not have been allowed as revenue expenditure because the above expenditure on Registrar of Companies' fee for increase in authorized share capital could not be allowed and was also not amortizable under Section 35D (2)(c)(iii) of the Act, not being fee for initial registration of the company. The CIT's view was supported by the Supreme Court judgments in *Brook Bond India Ltd. v. Commissioner of Income Tax* 225 ITR 798 and *Punjab State Industrial Development Corporation Ltd. v Commissioner of Income Tax* 225 ITR 798. The ITAT upheld this view. This Court finds no infirmity in its approach or decision.

6. As a result of the above discussion, no question of law requiring consideration of this Court arises in this appeal; it is, therefore, dismissed.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

APRIL27, 2015