IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE S/SHRI N.S SAINI, ACCOUNTANT MEMBER
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No.155 & 122/CTK/2017
Assessment Years : 2010-11 & 2012-13

ACIT, Corporate Circle 1(2), Bhubaneswar	Vs.	M/s. POSCO India Pvt Ltd., 5th floor, Fortune Tower, Bhubaneswar.
PAN/GIR No.AADCP 8735 B		
(Appellant)	..	**(Respondent)**

C.O.No.07 & 08/CTK/2017
(arising out of **ITA No.155 & 122/CTK/2017)**
Assessment Years : 2010-11 & 2012-13

M/s. POSCO India Pvt Ltd., 5th floor, Fortune Tower, Bhubaneswar.	Vs.	ACIT, Corporate Circle 1(2), Bhubaneswar
PAN/GIR No.AADCP 8735 B		
(Appellant)	..	**(Respondent)**

Assessee by : Shri B.K.Mohapatra, AR
Revenue by : Shri Saad Kidwai, CIT DR

Date of Hearing : 14 /02/ 2018
Date of Pronouncement : 15 /02/ 2018

O R D E R

Per Pavan Kumar Gadale, JM

These are appeals filed by the revenue and cross objections of the assessee against the order of the CIT(A)- 1,Bhubaneswar dated 12.1.2017 for the assessment years 2010-2011 and 2012-13, respectively.

2. Since common issue is involved in both the appeals of the revenue and cross objections by the assessee, they are disposed of by this common order for the sake of convenience.

3. The only common issue taken by the revenue in both the appeas is that the CIT(A) erred in deleting addition of interest income of Rs.1,73,30,736/- for the assessment year 2010-2011 and Rs.13,64,57,044/- for the assessment year 2012-13 holding that such interest on FDs cannot be taxed in the hands of the assessee u/s.56 of the I.T.Act.

3. The brief facts of the case are that during the course of assessment proceedings, the Assessing Officer found that the assessee has earned interest of Rs.1,73,30,736/- for the assessment year 2010-2011 and Rs.13,64,57,044/- for the assessment year 2012-13 on fixed deposits utilising a part of the unutilised capital and the interest income was claimed to be exempt as capital receipts. The Assessing Officer referring to various judicial pronouncement observed that the inextricable link with the process of setting up the project with deposits in banks has not been explained by the assessee. The Assessing Officer observed that the facts of the assessee's case is similar to the decision of Hon'ble Supreme Court in the case of Tuticorin Alkali,227 ITR 172 (SC) and, therefore, following the same, he rejected the plea of the assessee and taxed the interest income u/s.56 of the Act.

4. On appeal, the CIT(A) following the decision of this Tribunal in assessee's own case for the assessment year 2008-09 in ITA No.462/CTK/2011 has held that the interest income on FDs cannot be taxed being capital receipts. The CIT(A) also observed that in the assessment year 2009-2010, the CIT(A)-II has also deleted the addition on account of interest on FDs following the order of the Tribunal. Therefore, he deleted the addition made by the Assessing Officer for both the assessment years under appeal.

5. Before us, ld D.R. supported the orders of the Assessing Officer.

6. Ld A.R. submitted that the assessee company has been following the system of offering interest on FDs on the amount received in the share capital and this amount was deposited with the bank and the nature of transaction is of commercial expediency whereas the Assessing Officer by applying the judicial decisions has treated that the income has to be taxed under income from other sources and, accordingly, made the addition. Ld A.R. also substantiated his arguments by filing the paper book disclosing financial statement and also submission before the appellate authority and further filed copy of ITAT order in assessee's own case for the assessment years 2006-07 to 2008-09 in ITA Nos.186,460 and 461/CTK/2011 order dated 14.2.2013, which has been relied by the CIT(A) in his orders.

7. We have heard the rival submissions, perused the orders of lower authorities and materials available on record. The only dispute agitated

by the revenue in these appeals is with respect to interest on fixed deposits on money received in respect of share capital. The contention of ld D.R. is that the interest income is a part of the share capital and it is in the nature of trade operative business activity and, therefore, the income has to be taxed under the head "income from other sources". However, ld D.R. on this disputed issue conceded that the issue is covered by the decision of the Tribunal in assessee's own case for the assessment years 2006-07 to 2008-09 (supra). We find that the co-ordinate of this Tribunal while considering this issue has held as under:

> "We have heard the rival parties and perused the material available on record. On our careful consideration of the facts and circumstances of case as brought on record by the authorities below, we are inclined to find the contention of the learned Counsel of the assessee appropriate to the extent that it was never a change of stance on the facts remaining the same beginning from Assessment Year 2006-07. It was a misconstruction of the facts for the purpose of finding applicability of the provisions of law enunciated by the Hon'ble Apex Court in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd v. CIT (supra). The law enunciated in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd v. CIT(supra) cannot alone be considered as favoring Revenue insofar as it also talks about capitalization of the interest and the circumstances, which circumstances have been dealt with by the Hon'ble Delhi High Court in the case of India Oil Panipat Power Consortium Ltd v. ITO (supra) and further more in the case of NTPC Sail Power Company Pvt. Ltd., v. CIT decided on 17.07.2012 in ITA No.1238/2011 (copy placed on record) which has also been relied on by the learned Counsel of the assessee. The learned Counsel of the assessee has submitted the financial statements duly audited under the provisions of the I.TAct as well as under the Companies Act which have been verified by the Assessing Officer requiring no reference to be made to the Transfer Pricing Officer under the provisions of Section 92CA. In other words, no business income has been generated by the assessee. The expenditure claimed therefore was only for the purpose of setting up the project envisaged and there is no method for balancing interest, if any, passed on to the share holders on account of dividend or business income by the assessee. 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 avail-able 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 "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. 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 Commissioner of Income-tax (Appeals) that the monies which were inducted into the joint venture by the Koreans 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, inasmuch as, the interest earned from the bank would have a huge 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. In the instant case, it was 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 he set off against pre-operative expenses. We are inclined to find a meaning to the insertion of the proviso to Section 36(l)(iii) that interest paid, in respect of capital borrowed for acquisition of an asset for extension of existing business or profession was being allowed as deduction u/.s.36(l)(iii) of the Act as revenue expenditure was amended w.e.f. 1.4.2004 when the amount of interest paid in respect of capital borrowed for acquisition of an asset for extension of existing business or profession whether capitalized in the books of account

or not for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction, holds true for the income insofar as once having identified that the income from interest is from the Banks where the share capital was parked was to not earn interest to be balanced interest on capital borrowed when the assessee's own funds were being utilised for the purpose of incurring the project cost which took undue delay due to Government and other interference. In the case of Tuticorin Alkali Chemicals & Fertilizers Ltd v. CIT (supra), Hon'ble Apex Court has held - *"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".* Subsequently Hon'ble Apex Court in the case of CIT v. Bokaro Steel Ltd (supra) held - *"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."* Merits for consideration as brought on record for the AYs in appeal before us are as under :

Rs. in Lakhs

Particulars.	As on 31.3.2006	As on 31.3.2007	As on 31.3.2008
1. Share Capital	22500.00	22500.00	22500.00
2.Land(CWIP)	307.00	664.74	1440.85
3. Bank Deposit.	19190.00	1289.00	-
4. Interest from Bank	637.44	1,04.17	432.67

5.Pre-operative Expenses.	629.76	3736.28	5280.69

The returns filed by the assessee for the AYs 2006-07 and 2007-08 clearly indicate that the assessee at no point of time was having income from other sources irrespective of the accounting of the income having been capitalized when the claim of expenditure of 10% was purely on estimation when apparently it was not the business of the assessee to earn income but parking of its funds when the interest income sought to be considered exempt for computing expenditure under the provisions of Section 14A for the purpose of I.T.Act. The learned Counsel of the assessee, therefore, has clarified that the assessee cannot be subjected to taxation in the impugned Assessment Year on the interest income capitalized and at the same time allow amortization thereof in the hope that project will see the light of the day in the years to come when the I.T. Department will allow less deduction than otherwise claimed will be multiplication of assessments for no fault of the assessee appellant. We are therefore inclined to hold that the learned Counsel of the assessee has submitted a bulk Paper Book which inter alia correlates to earning of interest on the amounts deposited in the Banks to be utilised for the purpose of business of the assessee as per the project envisaged and as per the project approved by the Government of Orissa but taken time due to reason beyond the assessee's control insofar as sanction and authorization have taken its toll when the fact finding is whether capitalization by reducing the expenses could be isolated for the purpose of taxation as income from other sources following the case laws annunciated by Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd v. CIT (supra) when again Hon'ble Apex Court have clarified the stand in the case of CIT v. Bokaro Steel Ltd (supra) was whether the business of the assessee was to claim the expenditure incurred for earning of such interest having been adjusted against the other expenses incurred rather leans in favour of the assessee to the extent that the interest was inextricably linked to the expenditures incurred which project cost did not require further approval but was taking time which time earned interest to the assessee when recording expenditure have been claimed from the interest earned for consideration of 10% thereof was not to be disturbed at all. In this view of the matter, we are of the considered view that for the Assessment Year 2008-09 the interest cannot be taxed as income from other sources in the hands of the assessee and therefore, the subsequent disallowance of expenses claimed at 10% to earn that income has been infused in the total project cost cannot be disallowed insofar as the whole of the income has been capitalized was rightly considered for revision by the assessee before the Assessing Officer filing NIL return. The

appeal for the Assessment Year 2008-09, therefore, is allowed on the basis of facts and figures brought on record by the Assessing Officer as well as the learned CIT(A) and as mentioned above. However in view of the principles laid out above, we are inclined to restore the issue to the file of the Assessing Officer for the Assessment 2006-07 and 2007-08 to consider the case of the assessee de novo on establishing the fact that the interest has been earned on the parking of share generated as was considered by the Hon'ble Apex Court insofar as the earning of interest has been capitalized by reducing the project cost to be amortized has to be considered as a nullity after verification. Needless to say, an opportunity of being heard to the assessee be granted to establish the fact as have been narrated before us in the light of Assessment Year 2008-09 when it is not a change of stance as contested by the learned DR but on the same set of facts the interest portion cannot be isolated for the purpose of taxation.

6. In the result, the appeal for the Assessment Year 2008-09 is allowed and the learned Assessing Officer is directed to accept the NIL revised return and the appeals for the AYs 2006-07 and 2007-08 are restored to the file of the Assessing Officer for consideration afresh in the light of our decision for the assessment year 2008-09 above. The same are considered to be allowed for statistical purposes."

8. We, considering the apparent facts on record and following the judicial precedent are of the opinion that the interest on fixed deposits are not taxable under income from other sources and, accordingly, we uphold the findings of the CIT(A) and dismiss the ground of appeal taken by the revenue for both the assessment years.

9. In the cross objections, the assessee has agitated the sustenance of reduction of expenses of Rs.7,12,500/- u/s.14A for both the assessment years under appeal.

10. Before us, ld A.R. of the assessee submitted that the assessee has not claimed any expenses in the return of income under the business income or under the head other sources and the Assessing Officer has

calculated the disallowance u/s.14A of the Act referred at page 7 applying Rule 8D and clause (iii) on the basis of investment. Ld A.R. contended that there is no claim of expenditure and, therefore, the provisions of section 14A are not applicable.

11. Ld D.R. supported the orders of the lower authorities and objected to the submission of the assessee.

12. We have heard the rival submissions, perused the orders of lower authorities and materials available on record. We find that Rule 8D of the Income tax Rules, 1962 is applicable only prospectively i.e. from A.Y. 2008-09 and the assessment years involved in the present case are 2010-11 and 2012-13 but the issue is in respect of non-claim of expenditure in the profit and loss account. Ld A.R. demonstrated before us by referring to the audited accounts and income tax returns at page 6 of the paper book explaining that the assessee has capitalised the expenditure under pre-operative expenses. Therefore, there is no claim and the Assessing Officer by applying the provisions of section 14A r.w.Rule 8D has made the addition. Looking to the facts of the case in its entirety, we are of the opinion that when the assessee has not claimed any expenditure in its return of income either under the head “business income” or “other sources”, the reduction of expenses has no base or legal scrutiny. Therefore, we are of the substantive view that the provisions of section 14A are not applicable in this case and, accordingly, we allow the cross

objections of the assessee and delete the addition in both the assessment years under consideration.

13. In the result, appeals filed by the revenue are dismissed and cross objections filed by the assessee are allowed.

Pronounced on 15 /02/2018.

Sd/- sd/-

(N.S Saini) (**Pavan Kumar Gadale)**
ACCOUNTANT MEMBER **JUDICIALMEMBER**

Cuttack; Dated 15 /02/2018
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : /Revenue ACIT, Circle 1(2), Bhubaneswar
2. The Respondent./Revenue: M/s. POSCO India Pvt Ltd., 5th floor, Fortune Tower, Bhubaneswar
3. The CIT(A)-1,Bhubaneswar
4. Pr.CIT-1, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.

//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY
ITAT, Cuttack