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

\+ ITA 10/2012

% **Date of Decision** : 6th January, 2012.

CIT ..... Appellant
Through Mr. Sanjeev Rajpal, sr. standing counsel

versus

SASAN POWER LTD ..... Respondent
Through

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

SANJIV KHANNA,J: (ORAL)

The Revenue by present appeal under Section 260A of the Income Tax Act (Act, for short) impugns the order dated 29.4.2011 passed by the Income Tax Appellate Tribunal (tribunal, for short) in ITA No.2819/2010.

The appeal relates to assessment year 2007-08.

2. The respondent-assessee had filed its return of income on 30.10.2007 declaring nil income. By assessment order dated 30.10.2009, the Assessing Officer assessed income of Rs.2,71,92,899/- by disallowing interest expenses of Rs.1,36,11,665/- and Rs.1,35,81,234/- being document development expenses.

3. The respondent-assessee succeeded in the first appeal and the tribunal has affirmed the said decision and upheld the deletions made by the Commissioner of Income (Appeals).

4. Revenue has filed the present appeal in respect of disallowance of interest expense of Rs.1,36,11,665/-.

5. The respondent-assessee was a wholly owned subsidiary of Power Finance Corporation (PFC) and was incorporated/created as a special purpose vehicle (SPV) for inviting bids for construction and building of an ultra mega power project at Sasan in Madhya Pradesh. The respondent-assessee as a SPV was subsequently transferred to the successful bidder. This was the sole purpose behind the activities which were undertaken in the year in question. It is obvious that with these

objects and purpose the attempt and desire was to have a neutral or a nil balance sheet. It may be noted here that PFC is a public sector corporation.

6. The respondent-assessee entered into an agreement with the PFC that the entire expenditure for the bidding process was to be incurred by PFC. As noted above, the expenditure of Rs.1,35,81,234/- paid by the respondent-assessee to PFC as document development expenses is not in debate and in appeal before us.

7. To get better and favourable bids i.e. to enable the bidders to quote lower tariff, it was decided that land for the power project and coal mines were required to be acquired. This would minimize the risk associated. In the meeting held on 11.10.2009 by a Secretary (Power) with Member Secretaries of various States, it was decided that the States concerned would provide funds to the SPV as Commitment Advance. This would enable the SPV to leverage these funds to borrow and pay for land acquisition etc.

8. The respondent-assessee received Commitment Advance from Power Procurement Utilities of the States concerned. These advances

were transferred to PFC and PFC had paid interest of Rs.1,36,11,665/- on the unutilized Commitment Advance as per the agreement between PFC and the respondent-assessee. The said interest was credited to "capital work in progress". The respondent-assessee was also liable to pay interest to the Power Procurement Utilities on the Commitment Advance paid. The interest expenditure for the assessment year 2007-08 was Rs.2,07,58,287/-. This was shown as a reduction from interest income received from PFC credited to the capital work in progress.

9. In the income tax return, the assessee, however, had shown the interest received from PFC under Section 57 as "income from other sources". It may be noted that the respondent-assessee had not commenced business operation. The Assessing Officer himself had recorded that the entire interest earned and to be paid was shown as "capital work in progress".

10. The Assessing Officer took a very narrow view and held that interest paid was on capital account but the interest received was taxable under Section 57 of the Act. Interest paid, accordingly, cannot be set off and allowed as a deduction under Section 57(iii) of the Act.

11. The Commissioner of Income Tax (Appeals) after examining the factual position allowed the respondent-assessee to raise an additional ground after referring to the decisions of the Supreme Court in ***Jute Corporation of India Ltd. Vs. Commissioner of Income Tax*** (1991) 187 ITR 688 (SC), ***National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax*** (1998) 229 ITR 383 (SC). Reference was also made to judgment of the Delhi High Court in ***CIT Vs. Jai Parabolic Springs Ltd.*** (2008) 306 ITR 42 (Delhi). The respondent-assessee was allowed to raise the contention that the interest received by the respondent-assessee from PFC was capital in nature and not Revenue in nature. The Commissioner of Income Tax (Appeals) examined the nature and character of the interest received from PFC and after referring to decision of this Court in ***Indian Oil Panipat Power Consortium, New Delhi Vs. ITO*** (2009) 315 ITR 255 (Del.) held that the interest income was capital in nature and not revenue and therefore, not taxable under Section 57 of the Act.

12. The ITAT has, referring to the facts of the present case, held as under :

"8. Concerning the merits of the case, it has been asserted that the facts in the present case are in no way different from those in the case of 'Indian Oil Panipat Power Consortium' (supra). Reliance has been placed on "CIT vs. Bokaro Steel Ltd., 236 I.T.R. 315(SC), wherein it has been held that if money is borrowed by a newly started company which is in the process of constructing and erecting its plant and machinery, the interest incurred before the commencement of production on such borrowed money can be capitalized and added to the cost of the fixed asset created as result of such expenditure; that likewise, if the assessee receives any amount inextricably linked with the process of setting up of its plant and machinery, such receipts will go to reduce the cost of its assets and these are receipts of a capital nature, not capable of being taxed as income. 'Bokaro Steel Ltd.' (supra) has been followed in 'CIT' vs. Karnal Cooperative Sugar Mills Ltd., 243 I.T.R. 2 (SC). Reliance has also been placed on 'Add. CIT vs. Indian Drugs & Pharmaceuticals Ltd.', 144 I.T.R. 134 (Del.) confirming the decision of the Tribunal that the receipts were from sources which were not independent, but which were inextricably linked with the process of setting up of the business; that since the business had not been fully set up, the receipts were capital in nature, and therefore, the receipts did not constitute income liable to tax.

9. Further, attention has been drawn to Schedule VII of the Balance Sheet of the assessee, a copy whereof has been placed on record. Para. 5 of the said Schedule VIII, i.e., Notes on Account states as follows:

> "Pursuant to an agreement between PFC and Sasan Power Ltd., the entire expenditure on Development Project shall be incurred by PFC from its own funds until receipt of the Commitment Advance from the Power Utility Commitment Advance received from utility has been given to the holding Company for incurring expenditure for the Project on behalf of the company and for investment of

Unutilized Portion of Advance on the Unutilized Portion of the Commitment Advance placed on the PFC as inter-corporate loan, interest if receivable from PFC at monthly average short term deposit rate of PFC as determined from time to time"

Further, it has been contended that as per the agreement with PFC, the entire expenditure was to be reimbursed by the assessee."

13. Thereafter, the tribunal has observed following :

10. We have heard both the parties and have perused the material on record. It is seen that as per the Minutes of the Meeting between the Secretary, Power with the Member Secretaries of various States, it was agreed that the States would provide funds@ Rs.1crore per 100 MG for state-wise allocation regarding acquisition of land for Power projects and coalmines. These funds were to be provided to the SPV in the form of Commitment Advance. Also, an agreement had been entered into between PFC and the assessee. As per this agreement, the entire expenditure on development of the Project was to be incurred by PFC out of its own funds, till it received the Commitment Advance from the power utilities, as provided for in Schedule VIII to the Balance Sheet of the assessee. The Commitment Advance received had been given to the holding company for the incurring expenditure for the Project on behalf of the company, for investment of the unutilized portion of the advance. This unutilized portion of the advance, was placed with PFC as in Inter-corporate Loan, for which, the interest was receivable from PFC at the monthly average short term deposit rate of PFC. The assessee was to pay interest to PFC on the expenditure incurred by it, out of its own funds, when the expenditure was incurred out of the Commitment Advance. The AO treated both, the receipt, as well as the expenditure, as capital in nature. The Interest income

had been inadvertently shown by the assessee as income from other sources and deduction was claimed u/s 57 of the Act concerning the interest payment.

11. In 'Indian Oil Panipat Power Consortium Ltd.' (supra), it has been held that where interest is on money received as share capital, which is temporarily placed in fixed deposit awaiting acquisition of land, the Claim that the interest is in the nature of a capital receipt liable to be set off against pre-operative expenses, is acceptable, since the funds infused in the assessee company by the joint venture partners are inextricably linked with the setting up of the plant and the interest earned cannot be treated as income from other sources. 'Indian Oil Panipat Power Consortium Ltd.'(supra) is squarely applicable to the present case, as discussed. This is in consonance with 'Bokaro Steel Ltd. (supra), 'Karnal Cooperative Sugar Mill' (supra), "CIT vs. Karnataka Power Corporation", 247 I.T.R. 268(SC) and "Bongaigaon Refinery and Petro Chemical Co. Ltd. vs. CIT', 251 I.T.R. 329(SC), wherein also, it has been laid down that any receipt inextricably linked to the setting up of the project is capital receipt not liable to tax and going to reduce the cost of the project. In the present case too, the funds infused by the assessee company were inextricably linked with the setting up of the power plant. Likewise, the interest payment was also capital expenditure, which fact was confirmed by the AO, while observing the entire income of the entire expenditure was capital in nature.

12. All these facts have been duly taken into consideration by the CIT(A) while passing the order under appeal. Therefore, there is no merit in the grievance raised by the department by way of ground nos. 1 & 2. Accordingly, ground nos. 1 & 2 are rejected.

14. It is clear from the facts stated above that Commissioner of Income

Tax (Appeals) and tribunal have specifically held that the interest income was on capital account. We have gone through the grounds of appeal and do not find any reason or justification to upset the said finding. The factual findings recorded by the CIT(Appeals) and tribunal are not under challenge. The CIT(Appeals) and the tribunal have held that in view of the factual position quoted above the decision of the Supreme Court in ***CIT Vs. Bokaro Steel Ltd.***, (1999) 236 ITR 315 (SC) was applicable as the Commitment Advance, which had been paid to PFC. This is not a case of surplus funds, which were available and investment were made in fixed deposits to earn interest. The interest paid to the power procurement utilities on commitment advances was capitalized. Interest paid and interest received were inextricably linked and have a commonality about their nature and character. The appellant cannot treat them differently. Commitment Advances and interest paid and received had reference to bidding process and linked to the project/purpose for which the respondent was set up. In view of the factual matrix, interest received on unutilized commitment advances cannot be taxed as revenue income and interest paid on commitment advance treated as a capital expense. This

will be contradictory. The entire expenditure for inviting bids etc. and even documentation was paid to PFC. The amounts received from the prospective bidders on account of sale of tender documents was also transferred to PFC. As noticed above, Revenue has not challenged and has accepted the order of the tribunal deleting addition of Rs.1,35,81,234/- paid by the respondent-assessee to PFC for preparation of tender documents. In view of the factual matrix, the tribunal has rightly followed the ratio in **Indian Oil Power Consortium** (supra).

15. In view of the aforesaid position we do not find that substantial question of law arises from the order of the tribunal. The appeal is dismissed. No order as to costs.

SANJIV KHANNA,J

R.V.EASWAR, J

JANUARY 06, 2012
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