



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

+ **ITA No.290 of 2011**

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**ITA No.292 of 2011**

% DECISION DELIVERED ON:17<sup>th</sup> February, 2011.

+ **ITA No.290 of 2011**

COMMISSIONER OF INCOME TAX . . . Appellant

through : Mr. M.P. Sharma, Sr. Standing Counsel.

VERSUS

PETRONET LNG LTD. . . .Respondent

through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Prakash Kumar, Advocate.

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**CORAM :-**

**HON'BLE MR. JUSTICE A.K. SIKRI**  
**HON'BLE MR. JUSTICE M.L. MEHTA**

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

**A.K. SIKRI, J.** (ORAL)

1. **CM Nos. 2744/2011, 2747/2011 (Exemption)**

Exemption is allowed subject to just exception.

These applications stand disposed of



2. **ITA Nos.292/2011 & 292/2011**

The respondent/assessee is a company which was incorporated in the financial year 1998-99 with specific purpose to set up Regasification Terminal. Four Public Sector Undertaking namely M/s Indian Oil Corporation Ltd., M/s Bharat Petroleum Corporation Ltd., M/s Oil and Natural Gas Corporation Ltd. and M/s Gas Authorities of India Ltd. are the promoter companies of the assessee which hold 50% equity shares in the assessee company. These companies had contributed a sum of Rs. 70 crores in the assessment year 2000-01 and Rs. 40 crores in the assessment 2001-02 as share capital money. The shares were yet to be allowed. Since the business was in the process of being set up in these assessment years, in respect of which appeals are filed are A.Y. 2001-02, 2002-03 and 2003-04. These funds are lying with the bank on which the interest was received. The assessee had also pledged ₹ 25 lacs with the Indian Overseas Bank against bank guarantee issued FDR and some interest on these FDRs were received. Another sum was kept as short term deposit for maintaining the liquidity. The question which arose for consideration before the Assessing Officer in these years is as to whether the interest income generated from the aforesaid amount is to be taxed under the head "income from other sources".

3. The Assessing Officer treated the same to be the income under the aforesaid head. This order was confirmed by the CIT (A). However, the ITAT has reversed these orders of the Assessing Officer and CIT (A) by a common decision dated 31<sup>st</sup> March, 2010 passed in respect of all these three assessment years holding that



shall be treated as capital receipt not exigible to tax under the head "income from other sources". As pointed out above, the assessee had not started its business and was in the process of setting up of the business in these years. Thus, there was no income otherwise which could be treated as business income in these years. In addition, we find following facts from the record which the ITAT has commented as undisputed facts:-

- (1) The assessee was required to furnish performance guarantee for taking up of the Regasification Terminus and against the bank guarantee parked with the Bank, FDRs were pledged.
- (2) The money was contributed by the four promoter companies in the form of share application money for which shares were to be allowed and the said money was to be utilized for the purpose of purchasing requisite plant and machinery. This application money was thus to be utilized for the purchase of capital assets.

This fact is specially taken note and discussed in para 9 of the impugned order, inter alia observing as under:-

"the learned counsel for the assessee has then drawn attention to page 91 (back) of the APB, i.e., the assessee's Annual Report for assessment Year 2000-01. Item © at this page is "EPC Contract". It states that the company had awarded a Lumpsum Turnkey Contract for Engineering, Procurement, Construction and Commissioning in December 2000 by following a transparent and competitive process to the Consortium led by Ms/ Ishikawajima Harima Heavy Industries Company Ltd. (IH()), Japan; that the other members of the Consortium are M/s Ballast Nedam International BV-Netherlands, M/s Toyo engineering India Limited, M/s Ithochu Corporation, M/s Mitsui Company Limited, Japan and M/s Toyo Engineering Corporation. Ms/ IHI is one of the most reputed construction companies in the field of LNG regasification terminals: that the project implementation



Basic Engineering Package had already been completed; that the site offices for IHI Consortium and Tank Civil Contractor had already been completed; that the site grading for the wro tanks had also been completed; that the piling work for the LNG tanks was in progress; that the site grading for balance facilities was in progress; that the construction of roads and boundary wwll was also in progress; that the over all progress of approx. 10% had been achieved till August 2001; that the first shipment from Qatar would arrive in December, 2003; and that the Terminal would be commissioned for commercial operation by February, 2004.”

- (3) Pending purchase of the said plant and machinery money was primarily parked with the bank and in the processed it generated the interest income.
4. On the aforesaid facts, the Tribunal arrived at a finding that the interest earned on the aforesaid amount was not inextricably linked for the setting up of the project. On these facts being established, the Tribunal applied the ratio of the judgment of this Court in the case of **Indian Oil Panipat Power Consortium Ltd. Vs. ITO**, 315 ITR 254 as well as the Commissioner of **Income Tax Vs. Panem Coal Mines Ltd.** ( ITA No. 639/2008 decided on 17<sup>th</sup> September, 2009).
5. In the aforesaid two judgments of this Court after discussing the legal principle in detail, the Court has held that if the interest earned on the fund which are to be utilized for purchase of capital asset/ setting up of the business and that is inextricably linked with the setting up of the business, said interest will not be treated as income under the head “income from other sources”.



6. While coming to this conclusion the Court has specifically referred to the judgment of Supreme Court in the case of **Bokaro Steel Ltd.**, 236 ITR 315 wherein the Court laid down the aforesaid test in the following manner:-

“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 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 in Chapter IV of the Act. For an income to be classified as income under the head "profit 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. See Mazagaon Dock Ltd. v. CIT & Excess Profits Tax 34 ITR 368(SC) , and Narain Swadeshi Weaving Mills v. Commissioner of Excess Profits Tax 26 ITR765. 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 Tokyo Mitsubishi Bank, will result in the character of the funds being changed, in as much as, the interest earned from the bank would have a hue 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 income derived from the bank is not



Corporation P. Ltd. v.83 ITR 700(SC) and CIT v.  
Govinda Choudhury & Sons 203 ITR881(SC).”

7. We are, therefore, of the opinion that no question of law arises.  
These appeals are accordingly dismissed.

**(A.K. SIKRI)**  
**JUDGE**

**(M.L. MEHTA)**  
**JUDGE**

**FEBRUARY 17, 2011**

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