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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 5th March, 2014

+ ITA 572/2013

THE COMMISSIONER OF INCOME TAX-IV Appellant

Through: Mr. Sanjeev Sabharwal, Sr.
Standing Counsel with Mr. Ruchir
Bhatia, Jr. Standing Counsel.

versus

INDIAN VACCINES CORPORATION LTD. Respondent

Through: Mr. Prakash Kumar with Mr. Sheel
Vardhan, Advocates.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J. (OPEN COURT)

Admit.

Following question of law arises for consideration: -

“Did the Tribunal fall into error in concluding that the interest to the tune of Rs.90,37,029/- invested through the Portfolio Management Scheme by the assessee, into which the amounts were invested, were not taxable as ‘income from other sources’?”



2. In the return filed for the assessment year 1992-93, the assessee adjusted the interest income of Rs.90,37,029/- against the pre-operative expenses relating to a project. While completing the assessment, assessing officer rejected the claim for adjustment and held that the interest was separately assessable under the head “income from other sources”. He placed reliance on the judgment of the Supreme Court in the case of *Tuticorin Alkali Chemicals and Fertilizers Ltd. vs. CIT*, (1997) 227 ITR 172. The matter reached the Income Tax Appellate Tribunal (hereinafter referred as “Tribunal”) which by order dated 21.03.2006 restored the same to the file of the assessing officer for an opportunity of being heard on the question of applicability of the judgment. In the fresh assessment made on 15.11.2006, the assessing officer repeated his stand. The assessee’s appeal to the CIT (Appeals) was unsuccessful. In the further appeal before the Tribunal, the Tribunal held in its impugned order that the case of the assessee is covered by the ruling of the Supreme Court in the case of *CIT vs. Bokaro Steel Ltd.*, (1999) 236 ITR 315 (SC) and, therefore, the interest cannot be separately brought to tax, but has to be adjusted against the pre-operative expenses relating to the project.

3. Aggrieved by the aforesaid order of the Tribunal passed on 01.03.2013, the revenue is in appeal under Section 260A of the Income Tax Act, 1961.



4. We are of the view that the revenue has to succeed. The assessee was incorporated as a company on 27.03.1989 with the object of manufacturing human vaccines based on the technology developed by Pasteur Merieux Serums et Vaccines (PMSV), Lyon France. Under an agreement dated 02.12.1988 entered into between France and India, the assessee received substantial financial grant. The grant was to be utilised for payments to PMSV from whom the technology was to be obtained as also for obtaining equipment, technical services and training of the personnel. Company by the name Indian Petrochemicals Corporation Ltd. assumed the responsibility for project implementation and another company by the name Engineers India Ltd., a government of India undertaking, provided the consultancy services for speedy engineering package, construction, supervision and commission of all utilities. Funds were also brought in by the promoters to the tune of Rs.17,88,31,000/- as share capital; Indian Petrochemicals Corporation Ltd. one of the promoters also granted a loan of Rs.50 lakhs. All these funds were invested with banks under the “portfolio management scheme” under which the banks gave an assured earning guarantee. The banks in turn invested the monies in shares and securities. Any amounts over and above the assured guarantee earned from the shares and securities were to be retained by the banks, which were also to suffer the loss in case the



returns fall below the assured guarantee. On these facts the Tribunal took the view that the funds which were invested by the assessee were not borrowed funds but they were funds provided by the promoters. On this footing, it was held that the promoter's funds were inextricably linked with the instillation of the project and thus the case attracted the ratio of *Bokaro (supra)*. It was further held that the interest cannot be separately assessed under the residual head, but was to be adjusted against the capital work in progress.

5. We are afraid that the Tribunal fell into error in holding that the facts of the case attracted the principle laid down in *Bokaro (supra)* merely because the funds invested were not borrowed funds but were provided by the promoters. The source of the funds is not in our opinion relevant. This was recognized in *Tuticorin (supra)* itself and we quote the relevant observation: -

“In other words, if the capital of a company is fruitfully utilised instead of keeping it idle, the income thus generated will be of revenue nature and not an accretion to capital. Whether the company raised the capital by issue of shares or debentures or by borrowing, will not make any difference to this principle. If borrowed capital is used for the purpose of earning income, that income will have to be taxed in accordance with law. Income is something which flows from the property. Something received in place of the property will be capital receipt. The amount of interest received by the company flows from its investments and is its



income and is clearly taxable even though the interest amount is earned by utilising borrowed capital.”

6. *Tuticorin (supra)* also recognized that even during construction of the project and when the actual business was not commenced, a company can earn income from sources other than the business. In that case the funds were invested during the construction of the project, on which interest was earned and the Supreme Court held that such interest has to be brought to tax under the head “income from other sources”. *Bokaro (supra)* was dealing with an entirely different set of facts. There, during the construction period the assessee received income under 5 different heads, all of them inextricably linked to the construction of the project. For instance, advances were given to the contractors to enable them to purchase plant and machinery which were to be used in the project. Interest was received on those advances. Some buildings belonging to the assessee were let out to the contractors for rent so that the labourers employed by the contractors can be housed there. The income under the 5 heads were found by the Court to be inextricably linked to the project under construction. On these facts it was held in *Bokaro (supra)* that the interest income cannot be separately assessed under the residual head, but should be treated as capital receipt, to be reduced from the construction cost or the capital work in progress.



7. The facts of the present case are not on all fours with those in *Bokaro (supra)*. Herein the investment of the funds has nothing to do and was not inextricably linked with the construction of the project. It was an investment under the “portfolio management scheme” operated by banks under which an assured return was guaranteed by the banks. It was a conscious act of investment of funds by the assessee and if such investment results in income, the same must be brought to tax under the residual head, even if the company has not commenced its business, on the basis of *Tuticorin (supra)*. The Tribunal erred in placing reliance upon the fact that the present case is not one where borrowed funds were used for parking them to earn interest and that the funds were those of the promoters. In the light of the observation of the Supreme Court in *Tuticorin (supra)* quoted above, whether the funds were borrowed or were those of the assessee itself would make no difference to the principle. In *Bokaro (supra)*, the earlier judgment in *Tuticorin (supra)* was referred to and it was observed that interest earned by investing in short term deposits is an independent source of income, which is not connected with the construction activities; it is only when the investment is inextricably linked with the process of setting-up the plant and machinery that the interest will go to reduce the cost of the assets without being taxed as income. In the present case there is no such finding by any



of the authorities below, including the Tribunal. As already pointed out, the Tribunal placed undue emphasis on the source of the funds instead of focussing its attention to the utilisation of the fund – whether they were invested in activities which are inextricably linked with the construction of the project. In fact, the assessee in the present case had invested the funds under the PMSV operated by the banks for an assured return. That has nothing to do with the project and there is no inextricably link between the investment and the project. The interest income cannot, therefore, be permitted to be adjusted against the capital work in progress or the pre-operative expenses. Both the assessing officer and the CIT (Appeals) were right in bringing the interest to tax under the head “income from other sources”.

8. In view of the above discussion, the Court is of the opinion that the question of law has to be answered in favour of the revenue and against the assessee. The appeal is accordingly allowed.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

MARCH 5, 2014
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