

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "A", HYDERABAD
BEFORE SMT P. MADHAVI DEVI, JUDICIAL MEMBER
AND SHRI SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**

ITA Nos.	A.Y	Appellant	Respondent
1098/Hyd/2017	2012-13	The Income Tax Officer, Ward – 2(1), Hyderabad.	KSK Wind Energy Halagali Benchi Pvt Ltd., Hyderabad. PAN- AAECK1965F
1099/Hyd/2017	2013-14	The Income Tax Officer, Ward – 2(1), Hyderabad.	KSK Wind Energy Halagali Benchi Pvt Ltd., Hyderabad. PAN- AAECK1965F
1100/Hyd/2017	2012-13	The Income Tax Officer, Ward – 2(1), Hyderabad.	KSK Wind Energy Power Aminabhavi Chikodi, Hyderabad. PAN-AAECK1888R
1101/Hyd/2017	2013-14	The Income Tax Officer, Ward – 2(1), Hyderabad.	KSK Wind Energy Power Aminabhavi Chikodi, Hyderabad. PAN-AAECK1888R
1102/Hyd/2017	2012-13	The Income Tax Officer, Ward – 2(1), Hyderabad.	KSK Wind Energy Mothalli Haveri Pvt. Ltd., Hyderabad. PAN-AAECK1987D
1103/Hyd/2017	2013-14	The Income Tax Officer, Ward – 2(1), Hyderabad.	KSK Wind Energy Mothalli Haveri Pvt. Ltd., Hyderabad. PAN-AAECK1987D
1104/Hyd/2017	2012-13	The Income Tax Officer, Ward – 2(1), Hyderabad.	KSK Wind Power Sankonahatti Athni Pvt., Ltd., Hyderabad. PAN-AAECK1990C
1105/Hyd/2017	2013-14	The Income Tax Officer, Ward – 2(1), Hyderabad.	KSK Wind Power Sankonahatti Athni Pvt., Ltd., Hyderabad. PAN-AAECK1990C

Revenue by : Smt. Praveena
Assessee by : None

Date of hearing : 20-11-2017
Date of pronouncement : 30-11-2017

ORDER

PER SMT. P. MADHAVI DEVI, JM:

All these appeals are filed by the Revenue for the A.Ys 2012-13 and 2013-14 respectively, with respect to each of the assesseees before us. In all of these Revenue's appeals, notices were sent by the Registry to the respective assesseees', vide registered post with acknowledgement due and have been duly served on them. In spite of such service of notice, none appeared for the assesseees. Therefore, the appeals of the Revenue are heard *ex-parte* qua assessee and are disposed of as under.

2. The grounds raised by the Revenue in all of these appeals are the same. For the sake of convenience, grounds of appeal raised by Revenue for the A.Y 2012-13 are reproduced hereunder:

“1. The Ld. CIT(A) erred in law and on facts in considering the interest income earned during the pre-commencement period, as a capital receipt.

2. The Ld. CIT(A) is not justified in law and on facts in treating the interest income as a capital receipt by relying upon the decision in the case of Bokaro Steels Ltd., and other case laws, when the facts of these cases are distinguishable from the facts of the present case?.

3. The Ld. CIT(A) erred in law and facts in treating the interest income as not taxable, ignoring the apex court decision in the case of Tutikorin Alkalie and Chemicals Fertilizers Ltd. (227 ITR 172) and Bangaigaon Refineries case and order of the Jurisdictional High Court in the case of CIt Vs. Raasi Cement Ltd., (232 ITR 554), and also jurisdictional ITAT decision of DRS Warehousing Vs ITO in ITA No. 1210/Hyd/2016.

4. Any other ground that may be urged at the time of hearing.

3. Brief facts of the case are that, the assessee companies were incorporated with the object of generation of electricity from non-conventional sources. The assessee companies were

contemplating installation of windmills in the state of Karnataka for generating the electricity. The assessee companies filed their returns of income originally, which were subsequently revised. During the assessment proceedings u/s 143(3) of the IT Act, the A.O observed that the assessee did not commence commercial operation of generating electricity and that during the relevant assessment years, the assessee has received interest income on the fixed deposits with the banks and the same has been claimed as capital receipt and adjusted against the expenditure pending allocation under the head capital work-in-progress. The A.O observed that the major expenditure involved in the work-in-progress was income tax and financial cost. He held that the claim of income tax as an expenditure is not allowable as per the IT Act either as capital or as revenue expenditure. As regards the financial cost incurred on account of borrowed funds, which has been set-off against the interest income from the fixed deposits, he held that the same is not allowable as the interest bearing funds are utilized for the purpose of setting up of business. While interest income is not derived from the business of the assessee nor can it be treated as capital work-in-progress, but is to be brought to tax under the head "income from other sources". Accordingly, a show cause notice was issued to the assessee. The assessee filed a letter stating that that the assessee's have been

incorporated on 03-01-2011 with the object of generation of electricity from non-conventional sources, the project of which is proposed in the state of Karnataka and for this purpose investments have been received in the form of equity capital of the assessee companies and equity shares were issued on 13-07-2011. It was submitted that the assessee's faced certain bottlenecks in implementing the envisaged power projects such as delays in wind resource assessment as well as evacuation and load flow studies, difficulties in contour survey in particular, wind power generation sites, inability to obtain necessary enhancement of sites capacities based on various studies of wind data. It was also submitted that these bottlenecks have stalled the project for the time being and consequently, the equity funds, which were procured for the project and were dishonest idle pending allocation and utilization for the project, had been placed in fixed deposits in the banks from which interest income was earned during the year of account and therefore, assessee companies treated such interest income as capital receipt which would reduce the cost of project. It was therefore, submitted that the interest income earned on deposits in bank during pre-production period be treated as capital receipt and be reduced from project cost. The A.O, however, was not convinced with the assessee's contentions and held the entire interest income has to be

assessed under the head “income from other sources”. Accordingly, he brought it to tax in respect of all the assessees.

4. Aggrieved, the assessee preferred appeals before the CIT(A) who, after considering the judgments of Hon’ble Supreme Court in the Case of (i) Tuticorin Alkali Chemicals & Fertilizers Ltd. Vs. CIT [1997] 227 ITR 172 (SC); (ii) CIT Vs Bokaro Steel Ltd (1999) 236 ITR 315 (SC); (iii) CIT Vs Karnal Co-operative Sugar Mills Ltd., (2000) 243 ITR 2 (SC) and other Hon’ble High Court decisions at length, has held that the interest income earned from the fixed deposits of the equity fund is to be treated as capital receipt which goes to reduce the project cost. Against the relief granted by the CIT(A) the Revenue is in appeal before us.

5. The Ld. DR, while supporting the order of A.O has placed reliance upon the decision of the jurisdictional High Court in the case of CIT Vs Raasi Cement Ltd., (1998) 232 ITR 554. In the said case, the assessee therein had deposited the funds in to banks during the installation of the company and therefore the Hon’ble High Court, following the decision of the Hon’ble Supreme Court in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra), has held that interest has to be separately treated as “income from other sources” and cannot be taken as part of the capital structure. In the case before us, we find that the assessee has

deposited the equity fund available with it with the banks as the project was stalled due to bottlenecks in implementation of the project and not to earn interest income and therefore the facts are distinguishable. Further, this decision of Hon'ble High Court has not considered the decision of the Apex Court in the case of Bokaro Steel Ltd., (supra). Therefore, in our opinion this decision is not exactly applicable to the facts of the case before us. The second decision relied upon by the Ld. DR is of the Hon'ble Supreme Court in the case of CIT Vs Auto Kast Ltd., 248 ITR 110, wherein following the decision of the Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra), it was held that the interest is chargeable to tax as "income from other sources". In the case of Bokaro Steel Ltd (supra) the Hon'ble Supreme Court has held that the principle laid down by the Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra) will not apply where the receipts are inextricably linked with the activity of setting up of the capital structure of the assessee company. This decision was followed by the Hon'ble Supreme Court in the case of Karnal Co-operative Sugar Mills Ltd., (supra) and also by a three Judges Bench in CIT Vs Karnataka Power Corporation (2001) 247 ITR 268. In the case of Bokaro Steel Ltd., (supra) the Hon'ble Supreme Court was considering various expenses incurred by the assessee before

setting up of the plant and the income earned by the assessee from letting out of quarters for the residence of staff and workers employed with the contractors who had been engaged by the assessee for carrying out for the work of construction and interest earned by the assessee against advances given by the assessee to its contractors which were adjusted against their dues of the contractors. The Hon'ble Supreme Court held that the income earned by the assessee from activities which are directly connected with or incidental to the work of construction of its plant is the capital receipt and goes to reduce the capital cost of the assessee. The Hon'ble Supreme Court also considered its earlier decision in the case of Challapalli Sugars Ltd., Vs CIT [1975] 98 ITR 167 (SC) to hold that in case money is borrowed by newly started company which is process of construction and erecting its plant, the interest cost on such borrowed money incurred before the commencement of production can be capitalized and added to the cost of the fixed assets created and as a result and by the same reason, if the assessee receives any amounts which are inextricably linked with the process of setting up of plant and machinery, such receipts will go to reduce the cost of its assets and cannot be taxed as income. The Ld. DR had also relied upon the decision of the SMC Bench of this Tribunal in the case of DRS Warehousing (South) Pvt., Ltd., in ITA No.

1210/Hyd/2016 dated 09-05-17, wherein the SMC Bench held that there is a clear line of demarcation on the taxation of the interest income and that if the receipts are inextricably connected to the project or construction, then the amounts are to be set off from capital expenditure incurred during preoperative stage. In the case before us, the funds deposited by the assessee with the banks are out of the equity capital of the assessee and not surplus funds and they were deposited in the bank because, the assessee was not in a position to proceed with the implementation of the project due to various bottlenecks beyond the control of the assessee. It is also to be noticed that the assessee was not paying any interest on such funds as it is its share capital which is meant were setting up of the project only. Such deposits are, in our opinion, inextricably linked with the project and are part of capital work-in-progress. The Hon'ble Delhi High Court in the case of Indian Oil Panipat Power Consortium Ltd., reported in (2009) 181 taxmann 249 (Del) and in the case of CIT Vs. Facor Power Ltd., reported in (2016) 66 Taxmann.com have reiterated the principle laid down in the case of Bokaro Steel Ltd., (supra) to hold that 'the interest' earned on funds primarily bought for infusion in the business could not be classified as "income from other sources". We find that CIT(A) has followed these decisions

for granting relief to the assessee. Therefore, we see no reason to interfere with the order of the CIT(A) on this issue.

6. In the result, all the appeals filed by the Revenue are dismissed.

Pronounced in the open court on 30th November, 2017.

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-
(P. MADHAVI DEVI)
JUDICIAL MEMBER

Hyderabad, Dated: 30th November, 2017.

KRK

- 1 KSK Wind Energy Halagali benchi pvt Ltd., 8-2-293/82/A/431/A, Road No. 22, Jubilee Hills, Hyd-33.
- 2 KSK Wind Energy Power Aminabhavi Chikodi Pvt Ltd., 8-2-293/82/A/431/A, Road No. 22, Jubilee Hills, Hyd-33.
- 3 KSK Wind Energy Mothalli Haveri pvt Ltd., 8-2-293/82/A/431/A, Road No. 22, Jubilee Hills, Hyd-33.
- 4 KSK Wind Power Sankonahatti Athni Pvt., Ltd., 8-2-293/82/A/431/A, Road No. 22, Jubilee Hills, Hyd-33
- 5 ITO, Ward-2(1), Hyderabad.
- 6 CIT(A)-2, Hyderabad.
- 7 Pr.CIT-2, Hyderabad.
- 9 The DR, ITAT, Hyderabad.
- 9 Guard file.