Dy. Commissioner Of Income Tax vs Capital Cars Pvt. Ltd. on 31 January, 2007

Equivalent citations: (2008)113TTJ(DELHI)1120

ORDER

K.G. Bansal, Accountant Member

1. This appeal of the revenue arises out of the order of CIT(Appeals)-VI, New Delhi, passed on 17.02.2003. The corresponding order of assessment was passed by the Deputy Commissioner of Income-tax, Circle 3(1), New Delhi (hereinafter called the Assessing Officer), on 28.03.2002 under the provisions of Section 143(3) of the Income-tax Act, 1961. The revenue has taken up two grounds of appeal to the effect that on the facts and in the circumstances of the case, the learned CIT(Appeals) erred in -(i) allowing deduction of depreciation amounting to Rs. 21,24,315/-. on cost of land component of the building, and (ii) deleting addition of Rs. 1,92,878/- made on account of interest earned during pre-operative period.

2. In regard to ground No. 1, it is mentioned in the assessment order that the assessee acquired a part of commercial complex along with undivided interest in land in the relevant previous year. However, in the schedule of fixed assets, the whole of the cost was shown under the head "building". Therefore, the assessee was required to furnish a valuation report with a view to find out the component of land cost and state why depreciation on the value of land claimed in the return may not be disallowed. The case of the assessee was that he acquired interest in building only and not in land. On this plea, valuation of land and building in separate terms was not furnished. It was claimed that the assessee was entitled to deduct depreciation on the whole of the cost in view of decision of Hon'ble Supreme Court in the case of CIT v. Hindustan Times Ltd. . However, the Assessing Officer did not accept the arguments of the assessee. He was of the view that the case was squarely covered within the ratio of the decision of Hon'ble Supreme Court in the case of CIT v. Alps Theatre , and the assessee was not entitled to deduction of depreciation on the component of the value of land contained in the purchase consideration. Since the assessee had not furnished valuation report to segregate the value of land, he estimated such value at 1/3rd of the total purchase consideration, which amounted to Rs. 2,12,43,157/-. He disallowed depreciation amounting to Rs. 21,24,315/- on this estimated value of the land. Aggrieved by this order, the assessee moved appeal before the learned CIT(Appeals)-VI, New Delhi. He disposed off this matter in favour of the assessee. It was held by him that having considered the rival submissions, this ground is decided in favour of the assessee in view of the fact that the decision of Hon'ble Supreme Court relied upon by him in the case of Hindustan Times Ltd. (supra), as discussed and distinguished the decision in the case of Alps Theatre (supra), relied upon by the Assessing Officer.

3. Before us, the learned DR referred to the discussion made by the Assessing Officer on pages 4, 5 and 6 of his order under the head "land". It was inter-alia pointed out on the basis of purchase deed that the purchaser was desirous of purchasing and seller was willing to sell all the interest, rights

and title whatsoever comprised in and to the superstructure of the basement and ground floor of the complex as constructed as of Effective Date, including the undivided interest in the common areas, service areas and facilities appurtenant thereto, admeasuring in aggregate approximately 84,972.63 sq. ft. and more particularly described in Schedule 2 annexed hereto and the undivided interest in the ownership of the land on which the complex is situated, for the purpose of setting up a dealership of cars, on the terms and conditions hereinafter appearing. The case of the learned D.R. was that the aforesaid recital in the deed clearly shows that the assessee purchased not only the building but also undivided interest in the ownership of the land on which the building was constructed. It was in this connection that the Assessing Officer asked the assessee to furnish valuation of land and building so that the value of land and building could be segregated. That was not done by the assessee. Therefore, the Assessing Officer had no option but to estimate the value of the land. It was his case that the estimate made by the Assessing Officer was fair and reasonable and the matter was discussed by him on page 6 of the order. It was mentioned therein that it was a common knowledge that construction cost is normally between 100% to 200% of the cost of land. Therefore, it would not be wrong to estimate 1/3rd of the purchase consideration to be the cost of the land.

3.1 Coming to the legal issue, the learned DR read out extensively from the decision in the case of Alps Theatre. In that case, the Tribunal while accepting the case of the assessee had observed that you cannot conceive of a building without land beneath it. It was not possible to conceive building without a bottom. What Section 10(2)(vi) of the 1922 Act says is that depreciation will be allowed on building. The word "building" itself connotes land on which something has been constructed. It was, therefore, wrong on the part of the authorities below to exclude the value of land upon which some construction was made. The true meaning of the word "building" itself connotes the land upon which some thing has been constructed. It was, therefore, wrong on the part of the authorities below to exclude the value of land upon which some construction was made. The true meaning of the word "building" means the land upon which some construction had been made. The two must necessarily go together. The High Court also answered the question referred to it against the revenue and it was observed that under the Act, a building is placed on par with machinery and furniture and is treated as a unit. Therefore, for this purpose, a building cannot be split up into the building and land. It was further observed that depreciation is allowed on the capital, which is a unit of building in this case. If the same is sold and it fetches more than its written down value, then, the surplus is liable to be taxed. The Hon'ble Supreme Court referred to the schedule of depreciation as it existed for the relevant period. It was pointed out that the rate of depreciation is fixed on the nature of the structure. A first class building will depreciate slower than a second class building. Temporary structures would depreciate even faster. However, the contention of the assessee was that same rate of depreciation should be allowed in respect of land under temporary structure and land under first class building. It would be difficult to appreciate why land under temporary structure would depreciate faster than the land under a first class building. The Hon'ble Court referred to another important consideration, namely, the computation of income after allowing expenditure and deduction. The deduction of depreciation is allowable on general principles of accountancy as well as under the Income-tax Act. The reason for the same is that the true picture of real income of business has to be arrived at. However, the land does not depreciate at all and if depreciation is allowed, it would give a wrong picture of the true income. Thus! the question was decided against

the assessee and in favour of the revenue. The case of the learned D.R. was that the facts of the instant case are squarely covered by the decision of Hon'ble Supreme Court in the aforesaid case of Alps Theatre.

3.2 He also referred to the decision of Hon'ble Supreme Court in the case of Hindustan Times Ltd. In that case the assessee had purchased an existing building in the residential area. Subsequently it wanted to convert its user from residential to commercial. A formal agreement was entered into between it and the Land Development Officer (LDO), under which a sum of Rs. 3,65,875/- was paid to the LDO. Higher rent was also fixed for the land. The assessee demolished the existing structure on the land and constructed a multi-storeyed building thereon, which was several times the original area of the said land. After completion of the construction, the assessee applied to LDO for using the building for commercial purposes and paid a further sum of Rs. 36,06,516/- for such user. The Assessing Officer disallowed the deduction of depreciation on this payment by holding that the impugned amount was paid for conversion of the land user and, therefore, it should be added to the cost of the land. The matter was decided in favour of the revenue by the CIT(Appeals) and the Tribunal. The High Court gave a finding that the conversion of the user had already taken place when the assessee paid a sum of Rs. 3,65,875/- to the LDO in an earlier year and, therefore, there was no question of any further commercialization of the land. The amount paid after construction of the building, which had been constructed by the assessee, formed part of the cost of the building for the purpose of construction of additional office space. Therefore, it formed the cost of the building. The Hon'ble Supreme Court distinguished the facts of the case of Alps Theatre in this case for the reason that the findings of the Hon'ble High Court was that the sum of Rs. 36,96,516/- was paid after construction of the building in relation to construction of extra space. Therefore, the decision of the Hon'ble High Court was upheld. The case of the learned DR was that the facts of the instant case are distinguishable from the facts of Hindustan Times Ltd. The assessee had not paid any extra money for creating extra office space after the construction of the building. It had purchased land and building which, inter-alia, consisted of certain built-up area and proportionate ownership right in the land on which the building was constructed. Therefore, the facts of the case were squarely covered by the decision of Alps Theatre and distinguishable from the facts of the case of Hindustan Times Ltd. Accordingly, it was urged that the order of the learned CIT(Appeals) may be reversed on this issue and that of the Assessing Officer may be upheld.

4. As against the aforesaid, the learned Counsel for the assessee pointed out that the question to be decided in this case is whether any cost was paid for the land? If answer is in the affirmative, the decision in the case of Alps Theatre will apply. Otherwise, the whole consideration will have to be allocated to the cost of building. It was his case that the entire money paid under the agreement was for the purpose of securing the super structure and for this purpose, the document has to be read as a whole. In this connection, he referred to the decision of Hon'ble Supreme Court in the case of Union of India v. Gosalia Shipping P. Ltd. . The question in that case was whether the amount, which the company was required to pay to the owners of the ship, was payable on account of carriage of goods of the owners of the ship within the meaning of Section 172(2) of the Act or not? The company paid hire charges to the owners of the ship, but it loaded the ship with company's own goods. It was held that the company received nothing on account of carriage of the goods and, therefore, provisions of Section 172(2) were not applicable. The Hon'ble Court pointed out that it

was true that excessive reliance could not be placed on the form which the parties gave to their agreement, or on the label which they attached to the payment due from others. One must have regard to the substance of the matter and, if necessary, the veil may be lifted in order to see the true character of the payment. In this very connection, he also relied on the decision of Hon'ble Supreme Court in the case of Controller of Estate Duty v. Aloke Mitra . The decision of the Hon'ble Court was that Section 5(1) of that Act alone was capable of imposing a charge of duty. By no rule of construction, the operation of this section can be curtailed by operation of Section 6, as the latter section is in addition to the provisions of this section. The object of Section 6 is to catch properties in the net of Section 5, which do not really passed on the death of a person, such as recoverable gifts etc. Thus, where the deceased was the real owner of certain shares held by him as benami in the names of the wife and sons, the shares passed on the death of the real owner. He also relied on the decision of Hon'ble Calcutta High Court in the case of CIT v. Stantaon & Stavely (Overseas) Ltd. , in which it was held that the terms which have not been defined in the taxing statute should be interpreted in accordance with commercial principles. It was also held that nomenclatures used in the documents were not conclusive of the matter in interpretation of the document.

4.1 Coming to the facts of the case, it was pointed out that the original owner had acquired the land from the Ghaziabad Development Authority (GDA), which permitted them to develop and construct a multi-storeyed shopping-cum-office complex and sell various constructed units to the prospective purchasers, as evidenced from page 33 of the paper book. Thus, while the assessee was authorized to sell only the units, the Assessing Officer relied on the recital (j) on page 4 of the agreement to sell, which included within the ambit of sale not only the units but also undivided interest in the ownership of the land. It was his case that undivided interest in land has not been defined in the agreement, which may undergo change as and when the FAR utilization permitted by the GDA is changed. Therefore, his case was that on combined reading of pages 4 and 33 of the paper book lead to the conclusion that what the seller could sell was only the units and not the land. Relying on the cases discussed above, it was argued that the substance of the transaction should be taken into account and not the form as mentioned in the recital. We, however, find that the mention of land is there not only in recital but also in paragraph 1.1, forming the main portion of the agreement and the undivided proportionate ownership of the land, on which the building is situated, also forms part of the contract as per this paragraph. It is no doubt true that the agreement has to be read as a whole. However, it is not proved that the mention of land is there only in the recitals.

4.2 The learned Counsel pointed out that the land will be of no use to the buyer if he received right of possession and occupation of superstructure only and, therefore, the issue should be decided on the basis of ground realities. In this connection, he relied on the decision of Hon'ble Supreme Court in the case of CIT v. Poddar Cement Pvt. Ltd. and Ors. (1997) 226 ITR, where the Hon'ble Court was occupied with the interpretation of the term "owner", occurring in Section 22 for the purpose of bringing to tax income from house property. The Hon'ble Court pointed out that construction of the statute should be so made as to take into account the changes occurring after enactment of the statute. On that basis, it was held that the owner must be that person who can exercise the rights of ownership in his own right and not on behal of the owner. Thus, it was held that registration of sale deed was no sine-qua- non for coming to the conclusion whether a person was owner of a house property or not.

4.3 Thereafter, the learned Counsel took us through paragraph 2.2 of the agreement, which fixes the consideration at Rs. 6,73,29,473/- @ Rs. 750/- per sq. ft., consisting of price of the land and the superstructure. His case was that the consideration was fixed with reference to the constructed portion. It was also mentioned that physical possession of ground floor and vacant physical possession of one quarter of basement of the property will be effected by a possession letter to that effect. He also referred to paragraph 4.1.3(d) regarding representations and warranty and it was undertaken by the seller that the execution, delivery or purpose of the agreement of the consummation of the transaction will not conflict with, violate or result in a breach of any provision of the terms of conveyance deed between the seller and the GDA. Thus, while this clause gave a warranty to the buyer that he had right to purchase the building as well as of proportionate right in land, the case of the learned Counsel was that this was in conflict with the authority giver by the GDA to sell only constructed units. He also referred to paragraphs 4.8.1, 4.8.2 and 4.8.3 making representations about various defects etc. Paragraphs 6.8 and 6.9 contain the undertakings of the seller regarding completion of common areas, service areas, which was to continue even after execution of the sale deed. A reference was made to paragraph 7.2 which undertook to hand over possession of the entire property purchased by 30th Sept., 1998 free from all lien, charges, encumbrances etc. He also referred to the sale deed placed in the paper book from pages 32 to 48 and pointed out that the clauses therein are the same as in the agreement to sell.

4.4 Coming to the legal issue, he referred to the decision of the Apex Court in the case of Hindustan Times Ltd. (supra), in which it was held that payment made after construction of the complex was payment in respect of the extra space constructed because land remained to be the land and its user had been converted from residential to commercial at an earlier date. He also referred to the decision of Hon'ble Madras High Court in the case of CIT v. Southern Petro Chemical Industries Corporation Ltd. (No. 1) , in which it was inter-alia held that for the purpose of depreciation roads laid within the factory premises are necessary adjuncts to the factory building and are to be treated as building for the purpose of depreciation.

4.5 It was also claimed that the depreciation on land, for the purpose of disallowance, was calculated as if the land and building were used in the business for more than 180 days. However, the fact is that it was used for less than 180 days and, therefore the disallowance was excessive. It was also claimed that apportionment to the cost towards the land at 1/3rd of the overall consideration was excessive and the matter may be restored to the file of the Assessing Officer for this purpose.

5. In the rejoinder, the learned DR referred to a number of clauses in the main agreement which speak about proportionate ownership of the land passing to the assessee under the agreement. It was pointed out that in spite of requisition of valuation report by the Assessing Officer, it was not filed by the assessee and, therefore, his estimate may be upheld. It was also pointed out that the assessee had not taken any ground about excessive disallowance of depreciation on land. It was clarified that the stipulation of the sale of units in the agreement with GDA was made to ensure that the assessee constructed commercial building and did not sell land to the prospective buyers. It was agitated that the issue has to be decided on the basis of facts as they existed in the relevant previous year and in this connection the argument of increase in FAR etc. was totally extraneous to the consideration of the matter.

6. We have considered the facts of the case and rival submissions. The first issue in this case is regarding the interpretation of documents. The case of the learned Counsel was that the documents should be read as a whole to find out its true and intent and purpose. For this purpose, he relied on the decision in the case of Gosalia Shipping, Aloke Mitra etc. On the basis of these decisions, we tend to agree with the learned Counsel that the documents should be read as a whole to find out what was the subject matter of agreement and whether the consideration paid was only for the purpose of purchase of building or purchase building and proportionate land.

6.1 When we read the documents executed by the seller with the GDA and the documents executed by the assessee with the seller, it becomes clear that the subject matter of sale was building, proportionate share in the land etc. This is so not only under the recitals but also under Article 1 regarding subject matter of sale and Article 2 regarding fixation of consideration. The GDA had permitted the seller to develop land and sell the units. That does not mean that there was any exclusion on the part of the seller to pass title in the proportionate land to the prospective buyers. As rightly pointed out by the learned DR, the aforesaid stipulation was incorporated in that agreement so that the seller could be obliged to develop land, construct building thereon and thereafter sell the units rather than sell the land itself, which would have fuelled speculation in land transactions. Therefore, that agreement does not coming the way of the finding that the assessee had purchased not only the building but also right of ownership in proportionate land. The learned Counsel had also relied on the consideration clause which fixed the rate at Rs. 750/- per sq. ft. of the constructed area to canvass the proposition that what was sold was only the building. We are unable to persuade ourselves to agree with such an interpretation of the consideration clause contained in Article 2 of the agreement. The reason being that paragraph 2.1 clearly mentions that the consideration was for purchase of property comprising of land price and building super structure cost @ Rs. 750/- per sq.ft. It was further mentioned that the said total consideration shall include the consideration for common areas, service areas and facilities described in Schedule 2 of the agreement. Thus, it is clear that the subject matter for which the consideration was fixed was land, building, common areas, service areas and facilities. The fixation of rate was merely a methodology to work out the total consideration for the aforesaid land, building, common areas, service areas and facilities. It could have been fixed with reference to proportionate area of land or constructed space as the two are linked with each other by a multiplication factor of FAR. The Article nowhere curtailed the right of the assessee to ownership of undivided proportionate share in land. It was also argued by the learned Counsel that the land was of no use to the assessee. There is nothing on record to suggest the same. In fact, common areas, service areas are necessary to get ingress into the building for its effective utilization. The building cannot stand without the land beneath it. Therefore, for effective use of the building, the ownership of land and interest in common areas and service areas was of equal importance. In any case, if an assessee purchases an useless asset for a consideration, its cost will not become nil. Thus, we are of the view that the subject matter of the agreement was land and building for which the consideration was paid.

6.2 Coming to the second issue, which is legal in nature, the case of the learned Counsel was that the facts of the case are distinguishable from the facts of Alps Theatre and come nearer to the facts of Hindustan Times Ltd. We are afraid that that is no so. The issue in the case of Hindustan Times Ltd. was whether the amount of about Rs. 36.96 lakh was for conversion of land from residential user to

commercial user. The decision of the Hon'ble Court was that the aforesaid amount was paid after the construction of the building in relation to extra space constructed and, therefore, the payment was for the purpose of extra space. The land conversion charges had already been paid, which formed cost of the land and the assessee was also paying higher rental after such conversion. Such is not the case here. The assessee has entered into an agreement which can be said to be a composite agreement for purchase of building, proportionate ownership right in the undivided land, common areas and service areas. Thus, the subject matter of agreement was land and building. No further amount was paid after purchase of land & building for construction of any further area. Thus, the facts of the case are identical to the facts in the lease of Alps Theatre, in which it was held that land is not a depreciable asset. The facts are quite distinguishable from the facts of the case of Hindustan Times Ltd. Therefore, we are of the view that the learned CIT(Appeals) grievously erred in summarily holding that the consideration was paid only for the building and the facts of the case were distinguishable from the facts of Alps Theatre, in view of the decision in the case of Hindustan Times Ltd. It may be added here that the ratio of the case of Poddar Cement goes against the assessee for the reason that the assessee exercises the right of an owner in the proportionate area of the land by way of user and legal right therein. The position of roads is quite different from that of land, which falls within the ratio of the decision in Alps Theatre's case and, therefore, the decision in the case of Southern Petro Chemical Industries does not come in aid of the assessee's case.

6.3 The assessee had also taken a plea that the land and building were used in the business for less than 180 days and, therefore, disallowance of depreciation relatable to land @ 10% was excessive, which should be reduced to 5%. His case was that as a respondent, he could support the findings of the learned CIT(Appeals) by any other argument or on any other ground. We find that this view is supported by the decision of Hon'ble Bombay High Court in the case of B.R. Banasi v. CIT . The Hon'ble Court pointed out that the position of an appeal Under Section 33 of the Income-tax Act (1922 Act) and an appeal under the Code of Civil Procedure is identical. In the case of Venkatarao v. Satyanarayanmurthy I.L.R. 1994 Mad. 147, it was held that it was open to a respondent in an appeal, who had not filed cross objection with regard to the portion of the decree which had gone against him, to urge in opposition to the appeal of the appellant a contention which if accepted by the trial court would have necessitated the total dismissal of suit, but the decree in so far as it was against him would stand. In view of this judgment, it was pointed out that if the ground of the respondent succeeds in the income-tax proceedings, the only result would be that the appeal will fail. The ground will serve as a weapon of defence against the appeal and not a weapon of offence. In view of this judgment, we tend to agree with the learned Counsel that he could have taken any plea, not taken before the learned CIT(Appeals) which would go to support the order of the ld. CIT(A) and if it succeeds, the appeal of the revenue will fail. It was his further contention that if he could wholly support the order of the learned CIT(Appeals), he could also partly support it by any other argument. To our mind, such a conclusion follows naturally from the decision in the case of B.R. Bamasi (supra). However, the judgment is to the effect that the assessee could have taken any other ground to support the order of the learned CIT(Appeals). It will not be open for him to canvass new facts before us to come to a decision which will be contrary to the position of the revenue taken in its appeal. The case of the learned Counsel is not based upon any legal argument or ground. It is based upon finding of fact whether the land and building were used for 180 days or more; or less than 180 days. The assessee had not taken up any ground in this regard before the learned CIT(Appeals) and

has also not pointed out anything in this matter before the Assessing Officer. Therefore, the issue requires finding of fresh facts, which cannot be done in the guise of raising another ground to support the order of the learned CIT(Appeals), wholly or partly. Thus, this plea also fails. In any case, if there is a factual error apparent from record in the order of the AO, the assessee can very well approach him and seek rectification of the order Under Section 154 of the Act.

6.4 It was also argued by the learned Counsel that the rate of the land fixed by the Assessing Officer at 1/3rd of the consideration was excessive and the same may be reduced suitably. We find that the Assessing Officer had directed the assessee to file his own valuation report so that the value of the land could be fixed properly. The same was not done. The report was also not filed before the learned CIT(Appeals). In view of these facts, it will not lie in the mouth of the learned Counsel now to say that the rate fixed by the Assessing Officer was excessive for reasons that -(i) there is no evidence on record to support the case of the assessee, and (ii) the Assessing Officer had adopted a very reasonable method of allocating cost in absence of any evidence filed before him.

6.5 In nutshell, it is held that on complete reading of the documents, it is found that the subject matter of agreement was land and building and fixation of rate on the basis of built-up area and the clause in the agreement between seller and the GDA do not detract us from the aforesaid conclusion in any manner. The land was very much useful for enjoyment of the built-up area and in any case that issue is irrelevant in determining that the proportionate land had any cost or not. The issue is regarding the subject matter of the agreement and the consideration paid, which is against the assessee. The determination of the value of land and depreciation claimed thereon involve finding of new facts, which is beyond the ambit of this appeal even after taking into consideration the decision in the case of B.R. Bamasi (supra).

7. The result of aforesaid discussion is that ground No. 1 of the appeal of the revenue is allowed.

8. Ground No. 2 is against the finding of the learned CIT(Appeals) in which he deleted the taxation of an amount of Rs. 1,92,878/- as interest earned by the assessee during pre-operative period.

8.1 In this connection, it is mentioned in the assessment order that the case of the assessee was that such an interest would go to reduce the cost of capital investment, as held by Hon'ble Supreme Court in Bongaigaon Refinery & Petrochemicals Ltd. (supra). However, the Assessing Officer did not accept this position. He was of the view that the ratio of the aforesaid case was against the assessee, in which it was categorically held that if interest income is earned from investment of surplus funds which have no nexus with the capital expenditure incurred, then, the same would be taxed as "income from other sources". The learned CIT(Appeals) was of the view that the Assessing Officer appeared to have mis-interpreted the ratio of the judgment of the aforesaid case of Bongaigaon. The true ratio of the case is that the amount directly connected with or incidental to capital expenditure can be adjusted against the capital cost. Thus, the appeal was decided in favour of the assessee.

8.2 Before us, the learned DR relied on the decision in the aforesaid case of Bongaigaon. The question before the Hon'ble Court was whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the items of income derived by the assessee during the

formation period for the main business, were not taxable but were to be adjusted against the project cost for the oil refinery and petrochemicals, the main business for which the company was set up? In this connection, the Hon'ble Court referred to the decision in the case of Tuticorin Alkali Chemical & Fertilizers Ltd. v. CIT and it was pointed out that that was a case in which the question related to interest earned by the company during the formative period by investments, which was held to be taxable as "income from other sources". The Court had held in CIT v. Bokaro Steel Ltd. that it is so confined and did not apply where the receipts were directly connected with or were incidental to work of construction of the assessee's plant. The decision in the case of Bokaro Steel Ltd. had been followed in the case of CIT v. Karnal Cooperative Sugar Mills Ltd. and CIT v. Karnataka Power Corporation (2001) 247 ITR 268. It was also pointed out that in the latter case, it was not disputed by the revenue that the question related to hire charges paid by contractors had to be answered in the light of judgment in the case of Bokaro Steel Ltd. Therefore, it was not now possible to take any different view than the view taken in Bokaro Steel case.

9. As against the aforesaid, the learned Counsel relied on the decision of the learned CIT(A). He also mentioned that the Tribunal has subsequently distinguished the decision in the case of Tuticorin Alkali Chemical & Fertilizers Ltd. (supra) in a case.

10. We have considered the facts of the case and rival submissions. In the case of Tuticorin Alkali Chemicals & Fertilizers Ltd., the Hon'ble Supreme Court had pointed tout that the charge to tax is attracted at the point when the income is earned. The taxability of income does not depend upon its utilization. Therefore, what has to be seen are-(i) the point of accrual of income and, (ii) it is of revenue nature or not. If the income has accrued at a particular point of time and it is of revenue nature, the amount will have to be taxed. It was further pointed out that interest income is always of revenue nature, unless it is received by way of compensation or damages. Thus, if money is borrowed for the purpose of business but utilized for earning interest, howsoever temporarily, the interest income will be taxable Under Section 4 of the Act. After the generation of income, the assessee may utilize it in whatever manner he likes. It was also pointed out that under the Income-tax Act, under Section 14, the income has to be classified under one or the other head. If a company has not commenced business, there cannot be any question of assessment of its profits and gains of business. However, that does not lead to a conclusion that it cannot have income under other heads before the commencement of business. The company may keep surplus fund in short-term deposit in order to earn interest. Such an income will be chargeable to tax Under Section 56 of the Act. In coming to this conclusion, the fact that the money was raised by issue of shares, debentures or borrowings will not make any difference. It is true that the company may have to pay interest on borrowed money, but that cannot be a ground for non-taxation of interest income and it only mean that expenditure incurred for earning the income may be set off under the provisions of Section 57 of the Act. We may also examine the facts of the case of Bongaigaon Refinery & Petro Chemicals Ltd. (supra) relied upon by the learned Counsel and the learned CIT(Appeals). In that case contractors were working at the premises of the assessee for installing plant and machinery. The contractor was occupying certain portions of the building owned by the assessee for executing project, for which rental charges were received and set off against the payment to be made to the contractor. The finding of the Hon'ble Court was that such receipts can be set off against the expenditure for finding out the cost of installation of plant & machinery. The learned Counsel had

also spoken about some case of the Tribunal, which distinguished the case of the aforesaid Tuticorin. That case was, however, not cited before us. We are of the view that Tribunal can legitimately distinguish facts of the case at hand from the facts of the case decided by any Court and thereafter may come to an appropriate conclusion in the matter. However, the expression used by the learned Counsel 'distinguished the case of Tuticorin' is vague and he has not distinguished the facts of the instant case from the case of the aforesaid Tuticorin. Having considered the decisions in the cases of Tuticorin and Bangaigaon, it is clear that the facts of the instant case are identical to the facts of the case of Tuticorin. It is not a case where certain recoveries were made from the contractors by the assessee, who were executing the capital projects, which reduced the outgoings to be paid to the contractors. It is a case of utilization of surplus funds for earning interest income, which has been held to be taxable by Hon'ble Supreme Court under the residuary head. Respectfully following the ratio of decision in the case of Tuticorin, it is held that the learned CIT(Appeals) erred in holding that interest income was not taxable Under Section 56 of the Act.

11. The result of aforesaid discussion is that ground No. 2 of the appeal of the revenue is allowed.

12. In the result, the appeal of the revenue is allowed.

The order was pronounced in the open court on 31st January, 2007.