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

% Judgment reserved on: *20.12.2025*
Judgment delivered on: *10.04.2026*
Judgment uploaded on: *As per Digital Signature~*

\+ **ITA 795/2004**
\+ **ITA 796/2004**

VNG AUTOMOTIVE P. LTD .....Appellant

versus

ASSTT. COMMISSIONER OF INCOME TAX .....Respondent

Advocates who appeared in this case

For the Appellant : Mr. Satyen Sethi & Mr. Arta Trana Panda, Advocates.

For the Respondent : Mr Abhishek Maratha, SSC, Mr Apoorv Aggarwal, Mr Parth Samwal, JSCs, Ms Nupur Sharma, Mr Gaurav Singh, Mr Bhanukaran Singh Jodha, Ms Muskan Goel, Mr Himanshu Goel and Mr Nischay Purohit, Advocates

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO
HON'BLE MR. JUSTICE VINOD KUMAR

JUDGMENT

V. KAMESWAR RAO, J.

1. The challenge in these appeals is against the common order of the Income Tax Appellate Tribunal (“ITAT”) dated 23.06.2004 in ITA. 3792/Del/2002 and ITA. 3793/Del/2002 for the Assessment Years (“AY”) 1993-94 and 1994-95 respectively.

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2. The appellant company was incorporated on 24.03.1992 with the object of carrying on business of manufacture and export of ecological brake-shoes for two-wheelers, cars and trucks. For AYs 1993-94 and 1994-95, returns declaring "nil" income were filed on 29.12.1993 and 29.11.1994, respectively. In computing the income, interest earned during the respective previous years was adjusted against project expenses.

3. On 25.05.1992, the appellant entered into an agreement with CDB Holding Pte. Ltd, Singapore for acquiring technical know-how. In terms of the agreement, the appellant was to pay USD 2, 50,000/- out of which, USD 50,000/- (Rs.20,27,000/-) was paid during AY 1993-94. The balance USD 2,00,000 /- was to be paid in five equal yearly installments. The appellant in AY 1993-94 raised a loan of Rs.72,69,500/- from its Directors. The payment of technical fee and other expenses aggregating to Rs.23,17,618/- and Rs.20,27,157/- (inclusive of payment for land) were paid out of the said loan from the directors. The funds not immediately required were deposited in the bank, on which the appellant earned interest of Rs.1,23,151/- and Rs.2,37,770/- for the AYs 1993-94 & 1994-95.

4. The Assessing Officer (AO) re-opened the assessment under Section 148 A of the Income Tax Act, 1961, ('the Act') by referring to the ***Tuticorin Alkali Chemicals & Fertilizers Ltd. v. CIT, (1997) 227 ITR 172 (SC),*** and treated the amount deposited in the bank as surplus amount, and that the surplus fund/interest to be taxed as '*income from other sources*'. Aggrieved by the order of the AO, the appellant filed an appeal before the Commissioner of Income-tax (Appeals)-XIV, New Delhi, ["CIT (A)"], which was allowed. Aggrieved by the order of the CIT (A), the respondent

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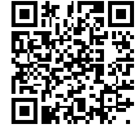

filed the appeal before the ITAT.

5. The ITAT, vide order dated 23.06.2004, set aside the order of CIT(A) and held that the decisions of ***CIT v. Bokaro Steel Ltd. 236 ITR 315 (SC)*** and ***CIT v. Karnal Cooperative Sugar Mills Ltd., 243 ITR 2(SC)***, as relied upon by CIT(A), were not applicable and as such, interest received was wrongly adjusted against project expenses. Accordingly, the interest income was liable to be taxed separately as "*income from other sources*".

6. Aggrieved by the common order of the ITAT, the appellant filed these appeals. On 21.04.2005, this Court framed the following substantial questions of law:

> *"(1) Whether on the facts and circumstances of the case, the Tribunal was right in law in upholding the reassessment, even though, the department had not raised any ground against the finding of CIT(A) that jurisdiction to re-assess the income was assumed on mere change of opinion?*
> *(2) Whether, on the facts and circumstances of the case and in law, the Tribunal had any material before it, which justified reversal of finding recorded by CIT(A) that it is not a case where surplus capital lying idle has been deposited in the bank for the purpose of earning interest?"*

CASE OF THE APPELLANT

7. It is the case of the appellant that in terms of the agreement with CDB Holding Pvt. Limited, Singapore for acquiring technical know-how for the manufacturing of Asbestos-free automobile brake-shoes, the appellant was required to pay USD 2,50,000/- out of which, USD 50,000/- (equivalent to Rs.20.27 lakhs) were paid during the previous year/AY 1993-94. The remaining amount was to be paid in five equal instalments. In fact, payment

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of technical fee and other expenses aggregating to Rs.23,17,618/- and Rs.20,27,157/- (inclusive of land) were paid out of the loan from the Directors. The funds not immediately required from the loan raised from the Directors were deposited in the bank, on which the appellant earned an interest of Rs.1,33,151/-and Rs.2,37,770/- for the AYs 1993-94 & 1994-95.

8. Having entered into technical know-how agreement, the appellant incurred following expenses towards the project :-

	Accounting Year ending 31.3.93	**Accounting Year ending 31.3.94**
Purchase of industrial land	**-**	**15,36,614/-**
Technical know-how fee (including withholding tax)	**20,72,028/-**	**-**
Raw material – import	**39,590/-**	**-**
Tools & dies	**-**	**15,543/-**
Advances for purchases of machinery		
Ashok Hydraulic	**2,51,000/-**	**2,00,000/-**
Hi-Tech Precision Engg.	**-**	**75,000/-**
Pyramids Precision Engg.	**-**	**50,000/-**
Pioneer Enggo. Co.	**-**	**50,000/-**
Fad-de-con Engg.	**-**	**1,00,000/-**
	23,17,618/-	**20,27,157/-**

9. It is the case of the appellant that the expenditure of Rs.43,44,775/- (Rs.23,17,618 + Rs.20,27,157) was incurred out of the funds arranged from the Directors, partly by way of share capital of Rs.25,00,000/- and partly as interest free loans of Rs.50,59,113/-. In order to facilitate the timely payment

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of committed obligations such as purchase of plant & machinery, construction of factory building etc., the appellant company deposited the remaining funds of approx. Rs.32,00,000/- in the bank. It was on this deposit that appellant, during the previous years relevant to AYs 1993-94 and 1994-95 earned interest of Rs.1,33,151/- and Rs.2,37,770/- respectively. The interest was adjusted against the project expenditure and the deficit was transferred to pre-operative expenses which were carried forward.

10. On 28.03.2001, a notice under Section 148 of the Act, re-opening the assessment for AY 1994-95 was issued to tax the interest income as *'income from other sources'*. In the notice, the AO by referring to ***Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra)*** treated the amount deposited in the bank as 'surplus funds' brought the interest to tax as '*income from other sources*'. The appellant's stand before the AO was that the ratio of the later judgment of Supreme Court in ***Karnal Co-operative Sugar Mills (supra)*** is applicable, which was rejected for the reason that there was no compulsion for the appellant to deposit funds in the bank as was the case of ***Karnal Co-operative Sugar Mills (supra)***. It was also held by the AO that since the business of the appellant has not commenced, the deposit in the bank was not directly linked to acquisition of technical know-how and hence the interest earned was income from other sources.

11. Aggrieved by the order of the AO, the appellant filed an appeal before the CIT(A). The CIT(A), vide order dated 25.02.2002, held as under :

> *"It is not a case wherein a surplus share capital money lying idle has been deposited in the bank for the purpose of earning interest and the deposit of money by the appellant, was directly linked to the committed obligations for the purchase of plant*

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and machinery, construction or factory premises and payment of technology fees. Thus any income earned on such deposit is incidental to the acquisition of assets for setting up for the plant & machinery and meeting other committed obligations."

12. It is the case of the appellant that in the appeal against the order of CIT (A), though the Revenue did not raise any ground on assumption of jurisdiction, the ITAT went on to hold that the assessment was validly assumed. On merits, the ITAT proceeded on the premise that the interest was earned on surplus funds and held as under :-

> *"We find that the facts of the case of the assessee are more or less identical to those in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra). The facts of the case in Bokaro Steels Ltd are different. Subsequent judgment in the case of Bokaro Steels does not purport to over-rule the earlier judgment of Apex Court in the case of M/s Tuticorin Alkali Chemicals & Fertilizers"*

13. Mr. Satyen Sethi, the learned counsel appearing for the appellant, submitted that the ITAT cannot go beyond the subject matter of appeal, which is governed by the grounds raised before it and the Revenue did not raise any such ground against the order of CIT(A) holding that jurisdiction under Section 148 of the Act was not validly assumed. He also submitted that the ITAT was not correct in going into the issue of reopening of assessment, which had attained finality. In support of this submission, he has relied on the judgment of this Court in ***CIT v. Divine Infracon (P) Ltd, (2015) 64 taxmann.com 472***.

14. He submitted that the judgment in the case of ***Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra)*** was rendered in its own facts and has

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no applicability to the case of the appellant, He contended that Tuticorin Alkali Chemicals & Fertilizers Ltd was incorporated on 03.12.1971 and had taken term loans from various banks and financial institutions. Since the funds borrowed were not immediately required, the same were invested in short term deposits with (i) banks, (ii) Tamil Nadu Electricity Board and (iii) utilised to disburse interest bearing loans to its employees to purchase vehicles. In the said case, up-to AY 1980-81, the interest earned was shown as "income" and was taxed accordingly. Only in AYs 1982-83 and 1983-84, the interest income was reduced from the pre-production expenses. It was a case where surplus funds were utilised to generate income. In fact, the stand before the Supreme Court was that deduction/set-off of interest income be allowed against interest payable on borrowed funds. It was not the case therein that interest on deposits was incidental to acquisition of assets and the same would go to reduce the cost of project.

15. Mr. Sethi submitted that the Supreme Court in ***CIT v. Bokaro Steel Ltd., (1999) 236 ITR 315 (SC)***, applying the ratio of ***Challapalli Sugar Mills Ltd. v. CIT, (1975) 98 ITR 167***, held that if an assessee receives any amounts, which are inextricably linked with the process of setting-up its plant & machinery, such receipts will go to reduce the cost of its assets, for such receipts are of a capital nature and cannot be taxed as ‘income’. In reaching the aforesaid conclusion, ***Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra)*** was also considered. He also submitted that, ***Bokaro Steel Ltd (supra)*** was rendered in the context of; (a) rent charged from the contractor for housing workers (b) hire charges for plant & machinery given to contractor for using in construction and (c) interest from advances to

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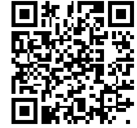

contractors to facilitate construction.

16. He submitted that, in ***Karnal Co-operative Sugar Mills (supra)***, the principle laid down in ***Bokaro Steel Ltd. (supra)*** was applied to interest on money deposited to open LC for purchase of machinery and in ***CIT v. Karnataka Power Corporation (2001) 247 ITR 268***, the same was applied to interest receipts.

17. He submitted that, from a conjoint reading of ***Bokaro Steel Ltd (supra)*** and ***Karnal Cooperative Sugar Mills Ltd (supra)***, it is evident that interest, which is directly linked with setting-up of a project and would reduce the cost of the project, will not be covered by ***Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra)***.

18. According to him, the reasoning is that since there was no compulsion for the appellant to deposit funds in the bank, the ratio of ***Karnal Co-operative Sugar Mills (supra)*** is not attracted is not correct, as the compulsion of deposit of funds is not the guiding factor. He has also relied on the judgments of this Court in ***Indian Oil Panipat Power Consortium Ltd. v. ITO, (2009) 315 ITR 255*** and ***Pr. CIT v. International Coal Ventures (P) Ltd, (2025) 472 ITR 307.***

19. Mr. Sethi submitted that the preliminary objection of the Revenue is that the CIT (A) has admitted additional evidence which is in violation of Rule 46A of the Income Tax Rules, 1962 ("Rules"). For the assessment order for AY 1999-00, deduction under Section 35D of the Act was allowed. The assessment orders for the subsequent years do not constitute 'additional evidence', since they are part of record of the Revenue and that clarificatory

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material is not additional evidence. He has placed reliance on the judgment in the case of ***Sri Shankar Khandasari Sugar Mills v. CIT, (1992) 193 ITR 669 (Kar)***, to contend that in the said case, the assessee produced sales tax assessment order for the first time before the CIT(A), which refused to look into the same on the pretext of additional evidence. The Karnataka High Court held the action of the CIT(A) to be unjustified. He has also relied on the judgment in the case of ***CIT v. Lakshmi Vilas Bank, (2010) 329 ITR 591 (Mad),*** to support his case.

20. He submitted that, in ***CIT v. Mahalakshmi Textile Mills Ltd., (1967) 66 ITR 710 (SC)***, the expenditure on *"Casablanca conversion bsystem"* involving replacement was held to be allowable, not as 'installation of new machinery' as claimed but as 'current repairs' to the existing machinery. The Supreme Court while dealing with powers of the Tribunal, held as under:

> *"If for reasons recorded by the departmental authorities in rejecting a contention raised by the assessee, grant of relief to him on another ground is justified, it would be open to the departmental authorities and the Tribunal and indeed they would be under a duty, to grant that relief."*

21. He submitted that, Section 254 of the Act, which deals with orders that the ITAT can pass on an appeal before it, is *pari-materia* to Section 33(4) of the Indian Income-Tax Act, 1922. The provision reads as under:-

> *"(1) The Appellate Tribunal may, after giving both parties to the appeal on opportunity of being heard, pass such order thereon as it thinks fit."*

22. The word "thereon" was considered by Supreme Court in

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Hukumchand Mills Ltd. v. CIT (1967) 63 ITR 232, wherein, it was observed that, "*The word 'thereon', of course, restricts the jurisdiction of the Tribunal to the subject-matter of the appeal.*"

23. Mr. Sethi contended that in ***CIT v. Divine Infracon (P) Ltd, (2015) 64 taxmann.com 472***, based on search and seizure operation, addition of Rs.20.25 crore on account of share application money was made under Section 68 of the Act. In appeal, the CIT (A) held that the addition was not based on any incriminating material. No appeal against the aforesaid finding was filed by the Revenue. However, in the appeal filed by the assessee, the Revenue sought to assail the finding of the CIT(A) on the ground that the addition was outside the scope of Section 153A of the Act, which though permitted, was not sustained on merits. In the appeal filed by the Revenue against the order of ITAT, this Court referring to ***Hindustan Coca Cola Beverage (P) Ltd v. Jt. CIT, (2007) 293 ITR 226 (SC),*** held that:

> *"7. We find considerable merit in the contention advanced on behalf of the Assessee. Concededly, the issue whether the additions made by the AO were beyond the scope of Section 153A had been decided by the CIT (A) in favour of the Assessee and the decision on the said issue had attained finality as the revenue had not preferred any appeal with regard to the CIT(A)'s order.*
> *8. It is also relevant to note that by virtue of Section 253(2) of the Act, the Principal Commissioner or Commissioner may, if he objects to an order passed by the CIT (A) under Section 250 of the Act, direct the AO to prefer an appeal to the Tribunal. It is not disputed that no such directions to file an appeal against the CIT (A)'s order dated 21st January, 2014 were issued by the concerned Income Tax Authority.*
> *9. In the circumstances, there could be no dispute that the CIT (A)'s order in so far as it relates to the issue regarding the*

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assessment being beyond the scope of Section 153A of the Act had attained finality, and thus, could not have been disturbed by the Tribunal."

He also submitted that, in ***Mahalakshmi Textile Mills Ltd. (supra)***, the Supreme Court has noted that there was no change in the subject matter of appeal.

24. Mr. Sethi submitted that the genesis of the finding of the CIT(A) as change of opinion is holistic and is not purely based on the judgment in ***Tuticorin Alkali Chemicals & Fertilizers Ltd. v. CIT (1997) 227 ITR 172 (SC)***. The CIT(A) referring to the fact that the AO has already allowed deduction under Section 35D of the Act for AY 1999-00, observed that:

"On the basis of material available on record, it is clear that there is neither any material information which has come to the possession of the Ld. Assessing Officer nor any fresh material already on record provide a nexus between the material / information and the formation of belief of escapement of income. The accrual of interest of bank deposit was duly declared in the profit & loss account quoted supra. The mere change of opinion to reopen the completed assessment, has not found favour…… "

25. According to him, ***Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra)*** was decided on 08.07.1997, ***Bokaro Steel Ltd. (supra)*** was rendered on 18.12.1998 and ***Karnal Co-operative Sugar Mills (supra)*** was decided on 23.04.1999, meaning thereby that all the judgments were available on 28.03.2001, when the assessments for AYs 1993-94 and 1994-95 were reopened.

26. He submitted that as per the scheme of the Act, in respect of business

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which is newly set up, the 'charge of income tax' under Section 4 of the Act is on the total income of the 'previous year', which term is defined by Section 3 of the Act, as the financial year immediately preceding the assessment year. However, in respect of business newly set up, the previous year begins with the date of setting up of business. In support his submission he has relied upon the following judgments:-

- ***Western India Vegetable Products Ltd. v. CIT [1954] 26 ITR 151 (Bom)***
- ***Carefour WC & C India (P) Ltd. v. Dy. CIT (2014) 368 ITR 692 (Del)***

27. Mr. Sethi submitted that though Revenue expenses are allowed from the date business is set up, capital expenditure incurred prior to commencement of business are amortised under Section 35D of the Act and are allowed 1/10th in ten successive year beginning with the previous year in which the business is commenced. He also submitted that there is a marked distinction between 'setting-up of business' and 'commencement of business'. In support of his submission, he has relied upon the judgment of this court in ***Carefour WC & C India (P) Ltd. (supra)***. Mr. Sethi has relied upon the decision of this Court in the case of ***Pr Commissioner of Income Tax-1, Delhi v. Brahma Center Development Pvt Limited, 2025:DHC:8487-DB*** to contend that the funds were received for the real estate project and while awaiting their deployment, they were invested in a fixed deposit which generated interest. This fits in with the dicta of the Supreme Court in ***Bokaro Steels Ltd. (supra)*** case and of this Court in ***Indian Oil Panipat Power (supra)*** and other similar judgments.

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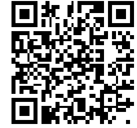

28. According to him, applying the ratio of judgments, the conclusion of the CIT (A) that the appellant company was in '*post project setting up stage*' was correct because the appellant had already paid USD 50,000 to CDB Holding Pte. Ltd, to acquire technical know–how and had imported chemicals as raw materials and had made advance payments to the manufacturer for supply of machinery as also the land for construction of building. He also submitted that the ITAT in reversing the order of CIT(A) has merely observed that; *"the facts of the case of the assessee are more or less identical to those in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra). The facts of the case in Bokaro Steels Ltd are different…"*. The reasons do not throw any light, in the finding of CIT(A) that the appellant was in 'post project setting up stage', was incorrect.

29. He submitted that admittedly, the appellant was to start manufacturing operations, which takes time. Having adjusted interest on bank deposits against deduction under Section 35D of the Act, the AO cannot turn around and assess the very same interest as income from other sources, as it would amount to double taxation.

30. He submitted that, the ratio of judgments of this Court in ***Indian Oil Panipat Power Consortium Ltd. (supra) and Pr. CIT v. International Coal Ventures (P) Ltd (2025), 472 ITR 307;*** are applicable to the facts of the present case because in the present case, the interest on bank deposit was inextricably linked to setting up of manufacturing unit. It was not on surplus funds, as was in ***Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra)***. Therefore, the finding of the ITAT is erroneous.

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31. He seeks prayers as made in these appeals.

SUBMISSIONS ON BEHALF OF THE RESPONDENT.

32. Mr. Abhishek Maratha, learned Senior Standing Counsel for the respondent/Revenue, submitted that the reassessment proceedings in the present case were not initiated on a change of opinion, as erroneously alleged by the appellant/assessee. At the time of original assessment, the AO had not formed any opinion on the specific issue, which subsequently formed the basis of reassessment, as there was no order passed under Section 143(3) of the Act, rather only intimation under Section 143(1) of the Act was issued by the Revenue.

33. He submitted that, besides the agreement with CDB Holding Pte. Ltd, the appellant had imported certain raw materials (chemicals) and made advances to manufacturers towards purchase of machinery and land for construction of building.

34. He submitted that the CIT (A) has erred in law and on facts while granting relief to the appellant by placing reliance upon additional facts and evidence which were never before the AO. The assessment order was passed after granting sufficient opportunities to the appellant. Despite such opportunities, the appellant failed to furnish the material which subsequently formed the basis of the relief granted by the CIT (A). He submitted that the CIT (A), while exercising appellate jurisdiction, has accepted and relied upon fresh material without adhering to the mandatory procedure prescribed under Rule 46A of the Rules. No reasons have been recorded to demonstrate that the case of the appellant fell within any of the exceptions enumerated

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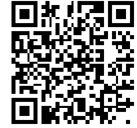

under Rule 46A (1) of the Rules. He also submitted that, Rule 46A of the Rules prevents taxpayers from intentionally withholding evidence during assessment and then introducing it at the stage of appeal to get a fresh review.

35. He submitted that the AO was not afforded any meaningful or effective opportunity to examine, verify, or rebut such additional evidence, as required under Rule 46A(3). Thus, the statutory safeguard intended to protect the interests of the Revenue has been completely bypassed.

36. Mr. Maratha submitted that it is a settled position of law that though the powers of the CIT (A) are wide, such powers cannot be exercised in contravention of statutory provisions. Any order passed in violation of Rule 46A is vitiated and liable to be set aside.

37. He submitted that the counsel for the appellant contended that the ITAT had granted certain reliefs which were allegedly not prayed for by the Revenue, is misconceived and untenable in law. In this regard, he has relied upon the judgment of the Supreme Court in ***Mahalakshmi Textile Mills Ltd. (supra)***, to contend that, whether in law or of fact, which relate to the assessment of the assessee, may be raised before the ITAT, and that the ITAT is not confined to the grounds set forth in the memorandum of appeal. He also submitted that the ITAT has rightly applied the settled distinction between “setting up” and “commencement” of business and has correctly upheld the finding that the appellant’s business had not commenced during the relevant AY.

38. He submitted that, upon examination, the AO has categorically held

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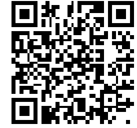

that the appellant/assessee had neither carried out any actual business activity during the relevant period, nor had it earned any income from its stated business activities. The ITAT, after independently examining the factual matrix, concurred with the AO that the assessee was still in the pre-operative stage. The ITAT has also found that the appellant has not crossed the threshold of actual business operations and has applied legal principles to the facts of the case

39. He submitted that the ability of expenditure and tax consequences are dependent upon actual commencement of business. The expenditure incurred prior thereto remains pre-operative in nature. He also submitted the ITAT has merely applied the principal of law in the present case and that, Section 35D of the Act is a specific and restrictive provision which permits amortisation of certain preliminary expenses only when the statutory conditions are strictly fulfilled, and the onus lies on the assessee to demonstrate such compliance.

40. He seeks dismissal of these appeals.

ANALYSIS

41. Having heard the learned counsel for the parties and perused the record, we note that in the present appeals, two common substantial questions of law have been framed on 21.04.2005, which we have already reproduced in paragraph 6 above. These appeals pertain to AYs 1993-94 and 1994-95. In view of the common questions of law framed, the first and foremost issue, which needs to be decided is whether in the facts and circumstances of the case, the ITAT was right in upholding the re-

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assessment even though the department has not raised any ground of objection against the finding of the CIT (A) that jurisdiction to reassess the income was assumed on a mere change on opinion.

42. In this regard, we may note that the transaction with regard to the interest on the bank deposit was duly disclosed by the assessee in the profit and loss account accompanied with the return of income filed under Section 139(1) of the Act and the assessment thereof was completed under Section 143(1)(a) of the Act. It was only thereafter in the year 2001 that reassessment proceedings were initiated by issuing a notice under Section 148 of the Act, in view of the decision of the Supreme Court in the case of ***Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra)***. The AO primarily held that the aforesaid judgment of the Supreme Court covers the case in favour of the Revenue and against the assessee. The jurisdictional issue as to whether the reassessment could have been carried out was raised by the assessee before the CIT (A). The conclusion drawn by the CIT (A) is that the assessment could not have been opened on mere change of opinion that too of a completed assessment.

43. The CIT (A) was also of the view that any post dated judgment cannot be applied retrospectively especially when assessments were not pending, but stood completed on the basis of laws enforced at the time of filing of the returns as has been held in the case of ***CIT v. Gujarat Power Corporation 254 ITR 217 Guj.***

44. We may state here that the CIT (A) while stating that the ratio of the judgment of the Supreme Court in ***Tuticorin Alkali Chemicals & Fertilizers***

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Ltd. (supra) is not applicable to the facts of this case, relied upon the judgments in ***Karnal Cooperative Sugar Mills Ltd. (supra)*** and ***Bokaro Steel Ltd. (supra)***. In any case, we may state here that the Revenue did not challenge the findings of the CIT (A) on the jurisdictional aspect. Rather the ITAT took upon itself the jurisdictonal issue and decided the same by holding that under the new provisions of Section 147 of the Act (w.e.f. 01.04.1989) if the earlier assessment was not made under Section 143(3), all the talk about fresh facts coming into existence or omission or failure on the part of the assessee to disclose fully and truly, all the material facts necessary for the assessment would be irrelevant. It held that only requirement is escapement of income chargeable to tax, which has been fully satisfied in the instant case.

45. We are in agreement with the conclusion of the ITAT that the CIT(A) erred in holding that the notice under Section 148 of the Act was based on a change of opinion in as much as the assessment which stood completed was reopened pursuant to the judgment of the Supreme Court in ***Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra).*** The initiation of assessment under Section 143(1) of the Act cannot be treated to be an 'assessment order' where the AO has formed an opinion and passed an order. In view of the conceptual difference between Section 143(1) and Section 143(3) of the Act, when no order under the latter provision has been passed, the AO is not precluded from re-opening the assessment, provided he has reasons to believe income has escaped assessment. Thus, the ITAT has rightly reached this conclusion. The position of law in this regard can be found in the judgment of the Supreme Court in ***Assistant Commissioner of Incometax v.***

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Rajesh Jhaveri Stock Brokers Pvt Limited, 2008 (14) SCC 208.

46. An objection has been raised by Mr.Sethi that since the Revenue has not challenged the finding of the CIT(A) with regard to the jurisdictional aspect, the ITAT could not have taken upon itself to decide the same. We do not see any merit in this objection for the reason that the ITAT possesses ample power to decide any issue that goes to the root of the subject matter before it, as it thinks fit. This position has been clarified by the Karnataka High Court in ***Fidelity Business Services India P Limited v. ACIT & Another, 2018 SCC OnLine Kar 756*** on which much reliance has been placed by Mr. Maratha. Relevant part of the judgment reads as under:-

> *"62. The powers under section 254 of the Act with the Tribunal to pass such orders "as it thinks fit" cannot be lesser than the powers conferred upon the lower and first appellate authority, viz., the Commissioner of Income- tax (Appeals) who under section 251(1)(a) of the Act has power to dispose of an appeal against the order of assessment and he may confirm or reduce or enhance or annul the assessment. The higher and final appellate authority under the Act cannot be intended by Parliament to have lesser power than the first appellate authority as is well settled that the powers of the appellate authorities are always co-extensive with that of the assessing authority and therefore what the assessing authority or the first appellate authority could do in the matter of assessment, the Tribunal cannot be said to have any lesser power to do so.*
>
> *63. Section 254 of the Act, in our opinion, does not have any narrower scope to put fetters on the powers of the Tribunal as is sought to be canvassed before us that the Tribunal could not have exceeded the grounds raised before it by the appellant-assessee. The appellant may be either the assessee or Revenue before the Tribunal and the Tribunal has also powers to allow fresh ground of appeal or allow*

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the other party to the appeal to file its cross objections and even suo motu pass appropriate orders "thereon" and therefore the words "as it thinks fit" in our opinion, confer wide powers upon the Income-tax Appellate Tribunal to pass such orders on the subject matter of appeal "as it thinks fit" whether the issue is raised by either party to the appeal or not. The Tribunal is not bound to decide the appeal in a particular or narrower manner or limited to the grounds raised in the appeal before it. The confines or boundary limit is only "subject matter" of the appeal.

64. The powers of the Tribunal are not limited or circumscribed by the grounds raised before it and any order on the subject matter of appeal can be passed if it is found to be necessary, expedient and relevant by the learned Tribunal."

47. Further, the Supreme Court in ***Mahalakshmi Textile Mills Ltd. (supra)*** in paragraph no.5 has also held as under:-

"5. By the first question the jurisdiction of the Tribunal to allow a plea inconsistent with the plea raised before the departmental authorities is canvassed. Under sub-section (4) of Section 33 of the Indian Income Tax Act, 1922, the Appellate Tribunal is competent to pass such orders on the appeal "as it thinks fit". There is nothing in the Income Tax Act which restricts the Tribunal to the determination of questions raised before the departmental authorities. All questions whether of law or of fact which relate to the assessment of the assessee may be raised before the Tribunal. If for reasons recorded by the departmental authorities in rejecting a contention raised by the assessee, grant of relief to him on another ground is justified, it would be open to the departmental authorities and the Tribunal, and indeed they would be under a duty to grant that relief. The right of the assessee to relief is not restricted to the plea raised by him."

48. Having said that, now the issue is whether in the facts and

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circumstances of the case the Tribunal had any material before it to justify the reversal of the finding recorded by the CIT (A). As stated above, the present appeals are relatable to AYs 1993-94 and 1994-95 and the reassessment is sought to be done *vide* notice dated 28.03.2001. The appellant company was incorporated on 24.03.1992 and the agreement with the Singapore based company was entered on 25.05.1992 for acquiring technical knowhow. The consideration of USD 50,000 along with TDS of Rs. 5,25,562/- was paid by the appellant as per terms thereof. The unsecured loan raised by the appellant company of Rs. 72,69,500/- from its Directors have been utilized and partially invested into fixed deposits from which interest of Rs. 1,33,151/- and Rs. 2,37,770/- have accrued during AYs 1993-94 and 1994-95. We may also state for clarification that after meeting the requisite payment for technical knowhow and purchase of land and also for advances for purchase of machinery and raw material, the remaining amount was deposited in the bank yielding interest as the funds were not immediately required.

49. In view of the fact that the business of the company had not commenced during these years, it had adjusted the income against pre-operative expenses. The AO was of the view that there was no compulsion on the appellant to deposit the money in the bank and therefore, it cannot be said that the deposit of money on which interest income was received was directly linked with the purchase of technical knowhow. On the above basis, the interest income has not been allowed to be set off against the pre-operative expenses.

50. At this juncture, it is necessary to reproduce the profit and loss

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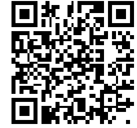

accounts for the years ending 31.03.1993 and 31.03.1994, on which much reliance has been placed by the CIT (A):-

<u>ASSESSMENT YEAR 1993-94</u>
Return filed at NIL income-accompanied with the following:
PROFIT & LOSS ACCOUNT FOR THE YEAR ENDING 31ST MARCH 1993

PARTICULARS	AMOUNT	PARTICULARS	AMOUNT
To raw materials	39,590	By Intt. on Bank Deposit	1,33,151
To Technical Know-how fee	20,27,028	By Closing Stock (Valued at cost)	39,590
To Fees & Taxes	1,000		
To Travelling & Conveyance (including Rs. 166438 for foreign travelling)	1,69,800	By Amount trfd. to Pre-operative expenses	20,67,878
To Bank Charges	682		
To Audit Fee	2,500		
To Printing & Stationery	19		
	22,40,619		22,40,619

<u>ASSESSMENT YEAR 1994-95</u>
Return filed at NIL income – accompanied with the following:
PROFIT & LOSS ACCOUNT FOR THE YEAR ENDING 31ST MARCH 1994

PARTICULARS	AMOUNT	PARTICULARS	AMOUNT
To Opening Stock	39,590	By Intt. on Bank Deposit	2,37,770
"Salary	30,565	By Closing Stock (valued at cost)	39,590
"Postage, Telegram & Telepohone	4,234	By Amount trfd. to Pre-operative expenses	655
To Printing & Stationery	6,543		
To Travelling & Conveyance (including Rs. 1,66,238/- for foreign traveling)	1,74,128		
To Staff Welfare	2,285		
To AGM expenses (including Meeting fee)	3,155		

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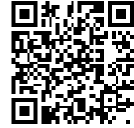

To fees & Taxes	*3,940*		
To Bank Charges	*502*		
To Audit Fees	*10,000*		
To Misc. Expenses	*3,073*		
Total	*2,78,015/-*		*2,78,015/-*

51. The aforesaid would reveal that the appellant had paid for the purchase of industrial land, technical knowhow, raw material import and tools. But at the same time, for certain purchases of machinery etc., advances were paid to different parties. The case of the appellant/assessee is that the balance of the amount payable for purchase of machinery has to be met through the deposits made in the bank on which interest has accrued, which is sought to be taxed by the Revenue. It is also contended the timely payment of the committed liability towards the know-how fee of USD 40,000 (out of total of UDS 2,00,000) annually was also to be made out of the said amounts.

52. If that be so, surely the said funds, on which interest of Rs. 1,33,151/- and Rs. 2,37,770/- respectively had accrued, could not have been treated as income from other sources and the benefit under Section 35D would enure to the benefit of the appellant as the same was inextricably linked with the setting up of the business. The reasoning given by the CIT (A) for holding that the ***Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra)*** is not applicable to the facts of this case is the following:-

> *"8. ... ...*
> *The assessments have been reopened to tax the interest income on the strength of the decision of the Hon'ble Supreme Court. The decision of the Hom'ble Supreme Court relied upon by the Ld AO is not applicable to the facts and circumstances of the case. The decision of the*

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Hon'ble Supreme Court in the case of Bokaro Steel Limited Dated 18.12.1998 is fully applicable in the available facts and circumstances of the case. In the case of Bokaro Steel Limited, the Hon'ble Supreme Court held "that the assessee company was in process of steel constructing and erecting its Plant and had not started any business during the relevant assessment years It received certain amounts through (i) rent charged by assessee from its contactors for housing workers and staff employed by contractor for construction work of assessee (ii) hire charges for plant and machinery given to contractors for use in construction work of assessee, (iii) interest from advances made to contractors for purpose of facilitating work of construction, and (iv) royalty for excavation and use of stones lying on assessee's land for construction work-First three receipts had been adjusted against charges payable to contractors and, thus, had gone to reduce cost of construction Whether first three receipts being intrinsically connected with construction of assessee's plant, would be capital receipt and not Income of assessee from any independent source - Held, yes, Whether similarly royalty received for stone excavated from assessee's land would go to reduce cost of plant and could not be taxed as Income - Held, yes."

53. Whereas the ITAT has differed with the CIT (A) by holding as under:-

"5. We shall now address ourselves as to whether the fact that at the time of return of income filed the judgment in the case of Tuticorin Alkali Chemicals and Fertilisers was not reported would make any difference. In our opinion the judgment of the Hon'ble Supreme Court lays down the legal position as it always existed. Unless the Hon'ble Supreme Court over-rules an earlier judgment it cannot be said that

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any change in the legal position was brought about by the particular judgment of the Hon'ble Supreme Court. We, therefore, do not see any force in the contentions of the assessee that the judgment in the case of Tuticorin Alkali Chemicals and Fertilisers Ltd. was not available when the returns of income were filed by the assessee. Reliance placed by the assessee in this respect on the judgment of the Hon'ble Gujarat High Court in the case of Gujarat Power Corpn. Ltd., 254 ITR 217(Guj.) is misplaced. In that case there was levy of additional tax u/s 143(1A) on the ground that the original return of income had not been correctly filed. There is no such additional tax levied in the case of the assessee. We, therefore, do not see any assistance to the case of the assessee from the judgment in the case of Gujarat power Corpn. Ltd. (supra). As to the reopening of the asstt. u/s 147 it is important to bear in mind that the original asst. was completed u/s 143(1). Under the new provisions of Sec. 147 w.e.f. 1.4.1989 if the earlier asstt. was not made u/s 143(3) all the talk about fresh material facts coming in to existence or omission or failure on the part of the assessee to disclose fully and truly all the material facts necessary for the assessment is irrelevant. The only requirement is escapement of income chargeable to tax which is fully satisfied in the instant case. We also do not see much force in the contention of the assessee that deduction u/s 35-D has not allowed for the asstt. year 1999-2000 on the basis as claimed by the assessee. It is settled legal position that under the Income Tax Law each asstt. year is a self contained unit and is not effected by other asstt. years."

54. Suffice to state that this Court had also considered a similar issue in ***Pr. Commissioner of Income Tax, Delhi v. Brahma Center Development Pvt. Ltd., 2021 437 ITR 285 Delhi*** wherein the ratio of the judgments in ***Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra)*** and also ***Bokaro***

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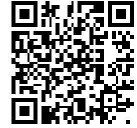
Steel Ltd. (supra) were examined. The said judgment was referred to by this Court again in ***ITA 475/2025*** titled ***Pr. Commissioner of Income Tax, Delhi v. Brahma Center Development Pvt. Ltd.*** Relevant part of the judgment reads as under:

> *"12. According to us, the AO, having received a response to his query about the adjustment of interest, in the concerned AYs, against inventory, concluded that, there was a nexus between the receipt of funds from investors located abroad and the real estate project, which upon being invested generated interest. Thus, it cannot be said that the conclusion arrived by the AO, that such adjustment was permissible in law, was erroneous.*
>
> *12.1. The reliance placed on behalf of the revenue on the judgement of Supreme Court in Tuticorin Alkali Chemicals & Fertilizers Limited v. CIT, (1997) 227 ITR 172 (SC) was not apposite, given the finding of fact returned by the Tribunal that there was a nexus between the investment of funds received from investors located abroad and the real estate project. The Tribunal, in paragraph 15 of the impugned order, has distinguished (and, in our view, correctly) the judgement of the Supreme Court in Tuticorin Alkali Chemicals Case and applied the later judgement of the same Court in CIT v. Bokaro Steels Limited, (1999) 236 ITR 315 (SC).*
>
> *12.2. Furthermore, these judgements were also considered by a Division Bench of this Court in Indian Oil Panipat Power Consortium Ltd. vs. Income-tax Officer, [2009] 181 Taxman 249 (Delhi)/[2009] 315 ITR 255 (Delhi) wherein after appreciating the ratio of the aforementioned judgements of the Supreme Court, the following was observed as follows.*
>
>> *"5. In our opinion the Tribunal has misconstrued the ratio of the judgment of the Supreme Court in the case of Tuticorin Alkali Chemicals &*



Fertilizers Ltd.'s case (supra) and that of Bokaro Steel Ltd. (supra). The test which permeates through the judgment of the Supreme Court in Tuticorin Alkali Chemicals & Fertilizers Ltd.'s case (supra) is that if funds have been borrowed for setting up of a plant and if the funds are 'surplus' and then by virtue of that circumstance they are invested in fixed deposits the income earned in the form of interest will be taxable under the head 'income from other sources'. On the other hand the ratio of the Supreme Court judgment in Bokaro Steel Ltd.'s case (supra) to our mind is that if income is earned, whether by way of interest or in any other manner on funds which are otherwise 'inextricably linked' to the setting up of the plant, such income is required to be capitalized to be set off against pre-operative expenses.

xxx xxx xxx

5.2 It is clear upon a perusal of the facts as found by the authorities below that the funds in the form of share capital were infused for a specific purpose of acquiring land and the development of infrastructure. Therefore, the interest earned on funds primarily brought for infusion in the business could not have been classified as income from other sources. Since the income was earned in a period prior to commencement of business it was in the nature of capital receipt and hence was required to be set off against preoperative expenses. In the case of Tuticorin Alkali Chemicals & Fertilisers Ltd. (supra) it was found by the authorities that the funds available with the assessee in that case were 'surplus' and, therefore, the Supreme Court held that the interest earned on surplus funds would have to be treated as 'income from other sources' . On the other hand in Bokaro Steel Ltd.'s case (supra) where the

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> *assessee had earned interest on advance paid to contractors during pre-commencement period was found to be 'inextricably linked' to the setting up of the plant of the assessee and hence was held to be a capital receipt which was permitted to be set off against pre-operative expenses."*

12.3. Indian Oil Panipat Power Case has also been cited with approval NTPC Sail Power Company (P.) Ltd. vs. Commissioner of Incometax, [2012] 25 taxmann.com 401 (Delhi); the relevant observations are extracted hereafter.

> *"9. This Court, in Indian Oil Panipat Power Consortium Ltd. v. ITO [2009] 315 ITR 255/181 Taxman 249 (Delhi) held that where interest on money received as share capital is temporarily placed in fixed deposit awaiting acquisition of land, a claim that such interest is a capital receipt entitled to be set off against pre-operative expenses, is admissible, as the funds received by the assessee company by the joint venture partners are "inextricably linked" with the setting up of the plant and such interest earned cannot be treated as income from other sources. The reasoning in Indian Oil is in line with Bokaro Steel Ltd. Similarly, the Supreme Court in CIT v. Karnataka Power Corpn. [2001] 247 ITR 268/[2000] 112 Taxman 629 (SC) and Bongaigaon v Refinery & Petrochemicals Co. Ltd. v. CIT [2001] 251 ITR 329/119 Taxman 488 (SC) held that such receipts are not income.*
>
> *10. It is no doubt correct that the proviso to section 36(1)(iii) of the Income Tax Act enacts that any amount of the interest paid towards ("in respect of") capital borrowed for acquisition of an asset or for extension of existing business regardless of its capitalization in the books or otherwise, "for any period beginning from the date on which the capital was borrowed for*

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acquisition of the asset till the date on which such asset was first put to use" would not qualify as deduction. However, in all these cases, when the interest was received by the assessee towards interest paid for fixed deposits when the borrowed funds could not be immediately put to use for the purpose for which they were taken, this Court, and indeed the Supreme Court held that if the receipt is "inextricably linked" to the setting up of the project, it would be capital receipt not liable to tax but ultimately be used to reduce the cost of the project. By the same logic, in this case too, the funds invested by the assessee company and the interest earned were inextricably linked with the setting up of the power plant. It may be added that the Tribunal has not found that the deposits made as margin monies were not limited to the construction activity connected to the expansion of the business by way of setting up of a new power generation plant."

xxx xxx xxx

13. Having regard to the aforesaid, we are of the opinion that, since the Tribunal has returned a finding of fact that there was indeed an enquiry carried out by the AO as to the nexus between the funds invested in fixed deposits (on which interest was earned) and the real estate project undertaken by the assessee, no interference is called for by the Court.

xxx xxx xxx

14.5. In the instant cases, it was not as if the funds were surplus and therefore invested in a fixed deposit. The funds were received for the real estate project and while awaiting their deployment, they were invested in a fixed deposit which generated interest. This fits in with the dicta of the Supreme Court in Bokaro Steels Case and of this Court in Indian Oil Panipat Power Case, NTPC Sail Power Case, and Jaypee DSC Ventures Case."

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55. A perusal of paragraph 14.5 of the above judgment reveals that in that case, funds which were received for a real estate project were invested in fixed deposits while awaiting their deployment. The interest generated therefrom was held to enure in favour of the assessee and was not be treated as income from other sources to be taxed. The Court after considering the judgment in ***Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra)*** held that in such a factual circumstances, the judgment in ***Bokaro Steel Limited (supra)*** would be applicable.

56. We find that the funds in the present case were not lying as surplus but the same were earmarked to facilitate the balance payment for plant and machinery etc. for which advances were made by the assessee. The funds are inextricably linked to the setting up of the business of the assessee, and as such, would be covered by the judgment of the Supreme Court in ***Bokaro Steel Ltd (supra),*** and not ***Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra)***.

57. In view of the above discussion, question of law (1) is answered in favour of the Revenue and against the appellant. Question of law (2) is answered in favour of the appellant and against the Revenue. The judgment of the ITAT is set aside.

58. The appeals are disposed of as allowed.

V. KAMESWAR RAO, J

VINOD KUMAR, J

APRIL 10, 2026
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