THE INCOME TAX APPELLATE TRIBUNAL
"D" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Ramlal Negi (JM)

I.T.A. No. 6423/Mum/2017 (Assessment Year 2007-08)
I.T.A. No. 6424/Mum/2017 (Assessment Year 2009-10)
I.T.A. No. 6439/Mum/2017 (Assessment Year 2010-11)
I.T.A. No. 6431/Mum/2017 (Assessment Year 2010-11)

DCIT 1(2)(2) Room No. 535 5th Floor Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	M/s. Maharashtra Tourism Development Corporation Ltd. CDO, Hutments, Opp LIC Bldg Madam Cama Road Mumbai-400 020. PAN : AAACM0712G
(Appellant)		(Respondent)

Assessee by	Shri Anil Sathe
Department by	Shri Surendra Kumar
Date of Hearing	10.03.2021
Date of Pronouncement	01.06.2021

O R D E R

Per Shamim Yahya (AM) :-

These are appeals by the Revenue against respective orders of learned CIT(A). Some issues are common and connected these are being consolidated and disposed of by this common order.

ITA Nos. 6423, 6324 & 6439/Mum/2017

2. In these appeals common grounds are raised. For the sake of reference we are referring to ground of appeal for A.Y. 2007-08 as under :

1. On the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in deleting of Rs. 13,76,73,805/- on account of interest earning from fixed deposits made from grant in aid by holding that the same cannot held as income.

2. On the facts and in the circumstances of the case and in law, the Ld C1T(A) erred in deleting of Rs. 8,91,87,037/- of unutilized revenue grant in aid by holding that the same cannot be considered as income.

3. The Ld CIT(A) erred in law and facts by entertaining an altogether an

> allegation new additional ground by treating the same as revised ground without granting any opportunity to Revenue & without admitting the same as such.

3. Apropos Ground No. 1

Brief facts the assessee is a government company in which 100% share capital is held by the Maharashtra State Government. The assessee is engaged in the development of Tourism & allied activities in the state of Maharashtra on behalf of the State Government. For this, the appellant company receives grant from the Government which are to be utilized only for the purposes specified by the Government. Any unutilized grants are parked by the assessee company in form of the FDs with the banks. The appellant company earns interest income on such FDs made out of the unutilized grants. Up to AY 2006-07, the appellant company had offered such interest earned for tax under the head 'Business Income.' However, the Department had taxed the same under the head 'Income from Other Sources'. This has been upheld by Hon'ble ITAT Mumbai till AY 2006-07 and the assessee is in appeal before Hon'ble High Court on this issue. However, during the year under consideration, Office Memorandum dated 06/12/2006 was issued by the Central Government according to which such interest on FDs made out of unutilised grants-in-aid was to be utilized only for the purpose for which the grants were given.

4. However the Assessing Officer was not convinced. He referred to earlier ITAT order in assessee's own case and made the disallowance.

5. Upon assessee's appeal learned CIT(A) took into account the new government direction and deleted the addition. He noted the assessee's submission as under :

> "However, during the year under consideration, Office Memorandum dated 06/12/2006 was issued by the Central Government according to which such interest on FDs made out of unutilised grants-in-aid was to be utilized only for the purpose for which the grants were given. Further, it was clarified that,

in case the interest could not be so utilized, the same was liable to be returned to the Government. The appellant contends that due to this changed direction from the Government, interest earned on the FDs acquired essentially the character of the Grant itself. Accordingly, for AY 2007-08, such interest was credited by the appellant company to the Grants-in-aid account instead of crediting the same to Profit & Loss account. In September 2011, a similar Office Memorandum was issued by the State Government as well, requiring a strict compliance thereof. Further, in January 2014, another Office Memorandum was issued by the State Government clarifying that such interest should be treated as part of the principal Grant itself and should be characterized as such for all purposes. It is noteworthy that the said OM, in conclusion, stated, "This direction is to be applied for all grants sanctioned/spurts by the State Government whether disbursed before or after the issue of this direction. There shall not be any deviation from the aforesaid direction". Copies of the above Office Memorandum have been placed on record and being public document, they are not in dispute. It is also not in dispute that the appellant company is 100% public sector undertaking.

Finally, it is also undisputed that entire Grant-in-aid received by the appellant company has to be utilised exclusively for the execution on completion of projects relating to development of tourism in Maharashtra as per the mandate given by the State Government.

The Assessing Officer rejected the contention of the appellant primarily relying on assessment orders of earlier years and appellate decisions thereon including decision of Hon'ble ITAT Mumbai on this issue to assessment year 2006-07. In my opinion, the Assessing Officer has not dealt with the change in government policy effective from FY 2006-07, relevant to the instant assessment year 2007-08. Further, despite acknowledging that Hon'ble ITAT Mumbai had set aside this issue for re-adjudication on account of above mentioned OM dated 04/01/2014, the Assessing Officer has not discussed the import the said OM.

6. Learned CIT(A) held as under :-

“5.1.6 As is evident from the concluding lines of the OM quoted above, any interest earned by the appellant company on FDs made out of an utilised grants even disbursed before the said OM has to be mandatorily considered as part of the Grant-in-aid. Very clearly, in my opinion, this direction of the State Government is clarificatory in nature and applies to all grants including those disbursed in the past. Being a state PSU, this clarification is binding upon the appellant company. The said OM leaves no doubt that such interest on an utilised grant has to be treated as grant itself. Further, a harmonious reading of all the OMs discussed above on this issue lead to the conclusion that the appellant company does not have any claim on such interest and that State Government has overriding title on such interest. As stipulated, such interest has to be used in the same manner as the Grant and if it is not possible to be utilised then the same has to be returned to the

State Government. The appellant company can under no circumstance stake a claim or retain or use for any other purpose any interest earned from FD made out of unutilised Grant.

5.1.7 By categorising the interest as part of the grant itself, the State Govt. has assumed overriding title on the amount. The impugned FDs are made out of unutilised grants hence the principal amount in the FDs are part of the grant itself. By virtue of the above mentioned OM, even the interest earned on FDs are subsumed in the principal amount and hence become part of the grant. These facts were not before Hon'ble ITAT Mumbai in earlier years because the clarification regarding strict directions on utilisation of interest on FD was first issued by the State Govt. only in FY 2006-07 relevant to instant AY 2007-08. The question whether income stood diverted by overriding title was not considered in any earlier year.

5.1.8 The concept of 'diversion of income' as against 'application of income' has been subject to judicial debate. It is settled law that income when diverted before reaching/accruing to the assessee is called as diversion of income, whereas when the income is applied after it accrues/reaches the assessee, either due to contractual obligation or exercise of discretion, it is called as application of income. The essential aspects of the concept of diversion of income can be understood from decision of Hon'ble Supreme Court in CIT v. Sitaldas Tirathdas (1961) 41 ITR 367 (SC). The Apex Court laid out the tests for determining when an income can be said to have been diverted at source as a result of a charge or overriding title. The following is the observation of the Apex Court in Sitaldas Tirathdas's case:

> *"The true test is whether the amounts sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where, by obligation, income is diverted before it reaches the assessee, it is deducted; but where the income is required to be applied to discharge the obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second kind of payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable".*

5.1.9 In the facts and circumstances of the case, the interest arising out of the FD stands diverted to form part of the grant-in-aid before it reaches the hands of the appellant. The appellant is not free to apply the amount in any manner to ' further its business but is restricted to use it as if the amount was part of the grant. In case the sum is not utilised, the same has to be

returned to the State Government. Thus, in no way can the appellant claim it as its own income. Applying the ratio of the decision of Hon'ble Supreme Court, the interest earned on FDs made out of unutilised grants cannot be considered as income of the appellant.

5.1.10 In the case of CIT v/s. Shoorji Vallabhadas & Co., 46 ITR 144, the Hon'ble Supreme Court, after referring to the Judgements given by the Supreme Court in other matters, has held as follows -

> *"Income tax is a levy on income. No doubt, the Income tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipts; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a hypothetical income, which does not materialize."*

5.1.11 In the instant case, the appellant cannot be said to be recipient of income in form of interest on FD, in as much as it stands diverted at source to form part of government grant. Therefore, in view of the above decision, the impugned amount cannot be taxed as income of the appellant. Before the above mentioned directions of the State Government, the appellant was itself offering the interest as income. The dispute was only limited to whether it should be treated as business income or income from other sources. However, in the instant assessment year, the factual matrix of the issue has completely changed in view of directions of the government and the question that now needs to be decided is whether such interest can be considered income of the appellant at all or whether the sum stood diverted at source and has to be spent in future in accordance with government mandate.

5.1.12 After considering all facts and guiding decisions of courts, I am of the considered view that the impugned amount cannot be held as income in the hands of the appellant. Rather, it can be said that taxing the amount would be tantamount to taxing future expenditure on designated projects of tourism development in Maharashtra. Accordingly, these grounds of appeal are allowed and addition of Rs. 13,76,73,805/- is deleted.

7. Against the above order Revenue is in appeal before us. Learned Departmental Representative relied upon the order of Assessing Officer.

8. Per contra, learned Counsel of the assessee stated that learned CIT(A) has taken a correct view of the matter. He has submitted a detailed paper book alongwith following submissions :-

> "At the outset, ratio of decision of Hon'ble ITAT in assessee's own case for AY 2006-07 is not applicable to present appeals since in the said year, the limited question for consideration before Hon'ble ITAT was whether the

interest would be taxable under the head 'Business Income' or 'Other Sources'. In AY 2006-07 it was never contested by the assessee that the interest is not taxable. It was only in AY 2007-08 that the stand in regard to taxability of the interest was first time changed by the assessee, in view of the Office Memorandum dated 06/12/2006.

> There are a number of decisions of various appellate authorities, upholding the stand taken by the assessee that interest earned on un-utilized grants will be in the nature of grant itself and therefore not chargeable to tax. The said decisions have been included in the legal paper-book handed over during the hearing on 17/06/2019. (Please refer page no. 7 to 72 of the legal paper-book)

> The un-utilized grants are kept by the assessee in form of FDs and in no circumstances are utilized for any purpose other than the one for which the same are granted. A statement of grants received during FY 2006-07 and FDs kept against the same is included in the factual paper-book filed on 04/04/2019. (Please refer page no. 33 to 38 of the factual paper-book.)

> Accounting Standard (AS)-12 which deals with accounting for government grants, does not specify a particular method to be followed for recognition/accounting of interest accrued on the un-utilized grants. However, it is the contention of the assessee that once it is accepted that the interest partakes the same character of the principal grant, the interest should also be recognized in the same manner as the principal grant. A copy of AS - 12 is annexed herewith for reference.

> Similarly, ICDS - VII relating to government grants also does not prescribe any particular method for recognition of interest on unutilized grants. A copy of ICDS VII is already included in the factual paper-book. (Please refer page no. 114 to 116 of the factual paper-book)".

9. He has further relied upon following case laws :-

Over-riding title of the Government

- CIT VS Sitaldas Tirathdas (41 ITR 367)

Interest being characterized in the nature of grant

- CIT vs. SAR Infracon (P) Ltd. (Guj) 42 taxmann.com 405
- CIT vs. Karnataka State Agricultural Produce Processing & Export Corporation Ltd. (Kar) 57 taxmann.com 349
- CIT & Anr. Vs. Karnataka Urban Infrastructure Development & Finance Corporation (Kar) 203 CTR 422
- Gujarat Municipal Finance Board vs. Dy. CIT (Guj) 221 ITR 317
- ITO v. Harijan Evam Nirbal Varg Avas Nigam Ltd. (Allahabad) 29 TTJ 57
- Gujarat Power Corporation Ltd. vs. ITO (Guj) 25 taxmann.com 14

- Gujarat Narmada Valley Fertiliser Co. Ltd. vs. ITO (And) 2 ITD51
- Gujarat State Police vs. Asst. CIT (Ahd) 40 CCH 523
- Tamil Nadu Urban Finance & Infrastructure Development Corporation Ltd vs. Asst. CIT (Chennai) 33 CCH 680
- ITO VS Kolkata Metro Rail Corporation Ltd. (175 ITD 347)
- Vizhinjam International Seaport ltd. VS Income-tax Officer 76 taxmann.com 380

In the alternative, and without prejudice to above, Interest to be reduced from the cost of the asset

- CIT VS Bokaro Steel Ltd. 236 ITR 315

Principle of Consistency

- CIT VS Excel Industries Ltd. 358 ITR 295
- Radhasoami Satsang vs. CIT (193 ITR 321)

10. Upon careful consideration, we find that learned CIT(A) has taken a correct view of the matter. The Government directive which has been relied upon by him is duly applicable for the current assessment year. As per the said direction the interest on unutilised grant has to be treated a part of the grant itself. Hence, it cannot be subject to tax by the Revenue. In this view of the matter, there is change in circumstances and the ITAT order relied upon by the Assessing Officer is not at all applicable. As at that time there was no direction for such treatment. Further submission and case laws referred by the learned Counsel of the assessee is duly applicable on the facts and circumstances of the case. Nothing was brought before us referring the cogent finding of learned CIT(A). Hence, we uphold the order of learned CIT(A).

Apropos ground No. 2

11. Brief facts during the year under consideration, the appellant had received a Revenue grant of Rs. 15 crores towards Publicity and an amount of Rs. 6.08 crore was spent therefrom, during the year under consideration. The balance grant of Rs. 8.91 crore was unutilized and, therefore, the same was shown under the head Current Liabilities in the Balance Sheet. The assessing

officer treated the entire Revenue grant received as the income of the appellant in the year of receipt and accordingly, made an addition of Rs. 8.91 crores.

12. The learned CIT(A) deleted the disallowance holding as under :

> 5.2.2 It is not in dispute that the appellant receives both Capital and Revenue grants from the Government which are to be utilized as per the terms of the grant. As per the accounting policy followed by the appellant company, the Revenue grants are credited to Current Liabilities when received and subsequently, are credited to Profit & Loss account to the extent of corresponding expenditure met out of the said grant. This accounting policy is followed by the appellant company consistently for a number of years and the same has been accepted by the department in the past.
>
> 5.2.3 Although principles of res judicata do not apply to Income Tax assessments, it is settled law that to differ from stand taken/accepted in earlier years, the Assessing Officer must have some substantial material and there should be substantial difference in facts. In the case of Radhasoami Satsang Vs C.I.T, 193 I.T.R; p.321(SC) it was held that in the absence of any material change justifying the Department to take a different view from that taken in earlier proceedings, it is not permissible to take different and contradictory stand in a subsequent year with regard to the exemption earlier granted. In the instant case, there are no differences in facts w.r. to this issue from earlier years.
>
> 5.2.4 There is no dispute that the grant is in nature of revenue grant. The appellant has consistently accounted for it on matching concept in accordance with AS 12 and ICDS-VII. Relevant extracts of the same are given under contentions and hence not repeated here. This method has also passed the approval of CAG and accepted by the Department in the past. These revenue grants are in nature of reimbursement for publicity costs for promoting tourism incurred and the unspent amount will have to be incurred on publicity expenses in future in capacity of a Nodal Agency acting on behalf of Government of Maharashtra/Government of India. Therefore, the appellant is not free to retain the amount or spend it for any other purpose than publicity. The unspent amount cannot be considered as income in the hands of the appellant. Accordingly, this ground of appeal is allowed.

13. Against this order the Revenue is in appeal before us.

14. We have heard both the parties and perused the records. We find that policy of accounting for grant on receipt in current liability has been accepted by the Revenue in the earlier year. The utilisation of the same is duly accounted for. The unutilised grant is accepted in liability. Having

accepted the above policy earlier the Assessing Officer is taking a different view in the current year. We agree with learned CIT(A) that on the principle of consistency the Assessing Officer's action is not justified without pointing out why contrary view from earlier year is being taken. Hence, we uphold the order of learned CIT(A).

ITA No. 6431/Mum/2017

15. This appeal by the Revenue against the order of learned CIT(A) dated 7.8.2017 for A.Y. 2010-11 wherein he has deleted the penalty levied under section 271(1)(c) of the I.T. Act for the addition made in A.Y. 2010-11 as above.

16. Since we have already upheld the deletion of addition made in A.Y. 2010-11 as above, the penalty levied under section 271(1)(c) of the Act with reference to the same does not survive. Hence, we uphold the order of learned CIT(A).

17. In the result, this appeal stands dismissed.

Pronounced in the open court on 1.6.2021.

Sd/-	Sd/-
(RAMLAL NEGI)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 24/05/2021

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)

PS ITAT, Mumbai