

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, MUMBAI
BEFORE SHRI D. MANMOHAN, VICE PRESIDENT AND
SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER

ITA no. 5452/Mum./2009
(Assessment Year : 2005-2006)

ITA no. 4835, 4836, 4837, 4838 & 7269/Mum./2010
(A.Ys : 1999-2000, 2000-2001, 2001-02, 2002-03 & 2007-08)
Date of Hearing: 13.6.2011

M/s. Bina Power Supply Co. Ltd.
106, Maker Chamber-VI
Nariman Point, Mumbai 400 028
PAN – AAACB8397C

..... Appellant

v/s

Dy. Commissioner of Income Tax
Circle-3(1), Mumbai

..... Respondent

Assessee by : Mr. S.E. Dastur a/w
Mr. Niraj Sheth

Revenue by : Mr. Subachan Ram

ORDER

PER J. SUDHAKAR REDDY, A.M.

All the appeals are filed by the assessee.

2. Appeal in ITA no.4835 to 4838/Mum./2010, are directed against the impugned common order dated 31st March 2010, passed by the

Commissioner (Appeals)-VII, Mumbai, for assessment years 1999-2000, 2000-01, 2001-02 and 2002-03 respectively.

3. Appeal in ITA no.5452/Mum./2009, is directed against the impugned order dated 26th December 2008, passed by Commissioner (Appeals)-XXVII, Mumbai, for assessment year 2005-06; and

4. Appeal in ITA no.7269/Mum./2010, is directed against the impugned order dated 26th May 2010, passed by the Commissioner (Appeals)-VII, Mumbai, for assessment year 2007-08.

5. As the issues arising from all the above appeals are common, for the sake of convenience, they are heard together and are being disposed off by way of this consolidated order.

6. Brief facts of the case are that, the assessee is a company, set-up with an object to carry business of generation and distribution of power. The Assessing Officer had passed order under section 143(3) r/w 254 of the Income Tax Act, 1961 (for short "*the Act*") consequent to the Tribunal restoring the matter to the file of Assessing Officer by its order dated 6th March 2006, as nothing turns on these proceedings, we directly refer to the facts of the issue before us.

7. The sole issue in this appeal is the taxability of interest on security deposit. This Bench has to adjudicate as to whether there was accrual of income by way of interest on security deposit placed by the assessee company with Madhya Pradesh Electricity Board (for short "*MPEB*").

8. The promoters of the assessee company entered into a Memorandum of Undertaking with the Madhya Pradesh State Govt. in the year 1994, under which the M.P. State Govt. agreed to enter into a Power Purchase Agreement (for short "*PPA*") with the separate company, to be promoted by the said promoters. Subsequently, the promoters formed and registered the assessee

company in the year 1995; (ii) in the year 1996, PPA was entered into between the assessee and MPEB. The agreement provided, inter-alia, the method of tariff calculation, the payment of security, the modes of payment and other obligation of the parties; (iii) in the year 1998, prioritization of Independent Power Projects was done. The producers who would bid for the least tariff, would be prioritized. The assessee qualified. MPEB, vide letter dated 24th July 1998, demand a security deposit of 2% of the project cost towards the assessee's commitment to achieve financial closure. The financial closure was to be achieved within a period of two months from the date of escrow agreement. The escrow agreement would provide a charge on recoverable of MPEB to the power producers.

9. The financial closures were to be achieved within two months of MPEB providing a bankable escrow agreement. On achieving financial closure within two months of providing a bankable escrow agreement by MPEB, the security deposit was to be returned with interest. In case, financial closure was not achieved within two months despite providing of bankable escrow agreement by MPEB, security deposit was to be forfeited.

10. The assessee furnished a security deposit of ₹ 52,24,00,000, being 2% of the project cost to MPEB on 14th August 1998. The draft escrow agreement provided by MPEB was not acceptable to the financial institutions. Therefore, the bankable escrow agreement was never entered into by MPEB. As the financial closure was to be completed by the assessee within two months of entering into bankable escrow agreement, the same was not possible.

11. The assessee requested MPEB to refund the deposit with interest as MPEB failed to provide the bankable escrow agreement. It was the case of the assessee company that financial closure of the project could not be reached as the arrangement of escrow was not satisfactorily resolved. The MPEB, vide letter dated 17th January 2002, took a stand that there is no such

condition to execute an escrow agreement, prior to financial closure. It stated that escrow will be provided at the time of commercial operations. It further gave notice that the security deposit will be forfeited, if financial closure is not be achieved by the assessee company, within two months of providing bankable escrow agreement form.

12. MPEB, on 13th July 2002, passed an order forfeiting the security deposit of ₹ 52,24,00,000.

13. The assessee filed writ petition before the Hon'ble High Court of M.P., Jabalpur Bench, and the Hon'ble High Court decided the issue in favour of the assessee on 13th May 2003. The Hon'ble High Court quashed the order passed by MPEB forfeiting the security deposit and directed the MPEB to provide bankable escrow agreement to the assessee company in its true spirit as envisaged in its letters dated 24th July, 4th September 1998 and that the same should be done within two months from the date of the order of the Court. The Hon'ble High Court further ordered that, in case, the arrangement does not materialize, MPEB should refund the amount of security deposit along with accrued interest. Later, the period was extended up to 31st March 2004, by an order dated 20th February 2004 passed by the Hon'ble High Court. Thereafter, MPEB carried the matter in appeal before the Division Bench of the Hon'ble M.P. High Court and the Division Bench passed an interim order directing the MPEB to deposit ₹ 25,00,00,000 with the Court @ ₹ 5,00,00,000 per month commencing from 1st September 2004 and gave the assessee company liberty to withdraw the amount deposited by furnishing unconditional bank guarantee of a national bank. MPEB was also directed to furnish an unconditional bank guarantee of nationalized bank for ₹ 50,00,00,000. The assessee company was allowed to withdraw the above amount without prejudice and subject to final order of the Hon'ble Court in Letters Patent Appeal.

14. On 24th October 2005, the Division Bench of the Hon'ble High Court dismissed the appeal of the MPEB on the ground that the appeal is not maintainable. It further ordered that the interim order passed by the Court on 5th August 2004, and the arrangements made pursuant thereto, will continue to be in force subject to any order that may be passed by the Hon'ble Supreme Court in the proposed Special Leave Petition. The MPEB filed an appeal before the Hon'ble Supreme Court and the Court, vide order dated 10th February 2006, directed that the interim order passed by the High Court would continue until further orders. Meanwhile, there was a change in the management of the assessee company. The company was taken over by M/s. Jaiprakash Powers Ventures Ltd. on 15th May 2008. The new management of the assessee company accepted the forfeiture of the security deposit, vide minutes of the meeting dated 17th June 2008 held with MPEB. In other words, the assessee company agreed to forgo the deposit of ₹ 52,24,00,000 with MPEB and interest thereon for various business and commercial reasons. Consequently, joint petitions were filed before the Hon'ble Supreme Court and withdrawn all the cases from M.P. High Court.

15. On these facts and circumstances, the issue to be adjudicated by us is, whether interest has accrued to the assessee on the security deposit of ₹ 52,24,00,000 placed with the MPEB. The Assessing Officer was of the view that the income has accrued to the assessee for the reason that MPEB has not recovered any amount from the assessee company and it is the assessee company which voluntarily returned back the deposit in question. He held that before the SLP was withdrawn, the decision of High Court directing the MPEB to refund security deposit along with accrued interest remained in force. He held that the decision to forgo the claim of security deposit of ₹ 52,25,00,000 by the assessee in favour of MPEB was a commercial decision and this does not dilute the assessee's right to retain the amount. He held that interest income on security deposit was accruing to the assessee company on a yearly basis as the assessee company was following mercantile system of accounting. He held that the agreement between MPEB

and the assessee company, as mentioned in the minutes of the meeting dated 17th June 2008, has nothing to do with the rights of the assessee company to receive not only the security deposit but also the interest thereon and that the forgoing of the deposit and the return of the money was entirely for different commercial considerations. He held that the interest is accrued @ 9% on the security deposit. He rejected the alternative contentions of the assessee that the interest income should be adjusted against the cost of the project by relying on the observations made in the order of the Tribunal in the first round of litigation. It would be relevant to mention that the Assessing Officer had accepted this alternative contention of the assessee in assessment year 2006-07.

16. Aggrieved, the assessee carried the matter in appeal, wherein the first appellate authority, in its common order for assessment years 1999-2000 to 2002-03, held that the only event that has taken place between the years 1999-2000 to 2002-03, is prioritization of IPP for escrow account and subsequent payment of deposit of ₹ 52,24,00,000 by the assessee to MPEB. He held that in terms of agreement, interest would be accruing on the deposit. He pointed out that the deposit was forfeited on 13th July 2002, which falls in assessment year 2003-04 and that the assessment year 1999-2000 to 2002-2003, deposit had not been forfeited. He rejected the contentions of the assessee and upheld the order of the Assessing Officer.

17. On the alternative contention that the interest income should be set-off against cost of consideration, the Commissioner (Appeals) relied on the decision of the Hon'ble Supreme Court in Bongaigaon Refinery & Petrochemicals Ltd. v/s CIT, (2001), 251 ITR 329 (SC), and held that there is no direct link between the interest income and the expenditure on construction and, hence, the set-off cannot be allowed. He also pointed out that the security deposit has been given much before the awarding of the project. For the assessment year 2005-06, the first appellate authority simply followed the order of the learned CIT(A) for the earlier assessment

years. Similarly, for the assessment year 2007-08, the order of the Tribunal for earlier years was followed. Aggrieved, the assessee is in appeal before the Tribunal raising following grounds:-

"Ground no.I: Addition on account of notional interest on security deposit placed with MPEB;

Ground no.II: Without prejudice to above, even if interest had accrued to the appellant, the same ought to have been reduced from preoperative expenditure.

Ground no.III: Without prejudice to above, on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in confirming the action of the ITO in presuming interest rate of 9% on the security deposit."

18. Before us, Mr. S.E. Dastur, Sr. Advocate, appearing on behalf of the assessee along with Mr. Neeraj Sheth, took us through the facts of the case. They had filed three paper books and our attention was drawn to the MoU dated 29th October 1994, PPA dated 12th February 1996, various minutes of meeting with MPEB, correspondence by Govt. of M.P., letters from the financial institutions, etc. Learned Sr. Counsel submits that the security deposit was to be returned to the assessee with interest only on completion of financial closure within two months from MPEB furnishing a Bankable Escrow Agreement, and otherwise the security deposit would be forfeited. He submits that the assessee would have right to receive the fixed deposit as well as the interest thereon, only on the happening of an event i.e., on achieving financial closure. He pointed out that, in this case, financial closure was never achieved for the reason that MPEB failed to provide a bankable escrow agreement, even after specific directions of the M.P. High Court. Under these circumstances, the learned Sr. Counsel submits that the question of accrual on income does not arise. Even otherwise, he submits that the stand of MPEB is that the assessee has failed to achieve financial closure as stipulated in the agreement and, hence, it forfeited the security deposit and even in such circumstances, there is no accrual of income. He relied on the real income theory and argued that there is no income at all.

He vehemently contended that the Revenue authorities have not pointed out, the time at which the assessee has got a right to receive interest on security deposit. He pointed out to various correspondences, agreements and Court orders and submits that the entire issue is in dispute and it was the case of MPEB that no interest accrued on security deposit and, in fact, that the security deposit itself has to be forfeited, due to failure on the part of the assessee company. He referred to the order dated 13th May 2003 passed by the Hon'ble High Court and submits that even in terms of the High Court order, the assessee's right, if any, would accrue only after 31st March 2004, as the High Court has held that if MPEB failed to provide a bankable escrow agreement before 31st March 2004, then only the assessee should be repaid the deposit with interest. This order also was modified in appeal and was subjudice. He submits that, at least, upto that point of time, there is no accrual of income. He further points out that later for whatever the reasons, the decision of MPEB to forfeit the security deposit was accepted by the assessee company and in those circumstances also, there is no accrual of income. He submits that under the real income theory or on facts, the assessee had never the right to receive the income till date of forfeiture and, hence, no income accrued to the assessee. On the interim order passed by the Division Bench of the Hon'ble High Court directing the MPEB to deposit ₹ 25,00,00,000 and allowing the assessee to withdraw ₹ 25,00,00,000 on furnishing a bank guarantee, the learned Sr. Counsel submits that, firstly, ₹ 25,00,00,000 pertains to the principal amount of the fixed deposit and not to the interest part and secondly it is an interim order and is not taxable in view of the decision of the Hon'ble Supreme Court in CIT v/s Hindustan Housing & Land Development Trust Ltd. (1986) 161 ITR 524 (SC).

19. For the proposition that no income has accrued, the learned Sr. Counsel relied on the following case laws:-

- "i) *E.D. Sassoon & Company Ltd. v/s CIT, (1954) 26 ITR 27 (SC);*
- ii) *Godhra Electricity Co. Ltd. v/s CIT, (1997) 225 ITR 746 (SC); and*

iii) FGP Limited v/s CIT, (2010) 326 ITR 444 (Bom.);

20. Alternatively, learned Sr. Counsel submits that if the argument that interest income has not accrued is not accepted, then, without prejudice, he submits that the interest goes to set-off and to reduce to the cost of plant. He relied on the following case laws:-

- i) CIT v/s Bokaro Steel Ltd., (1999) 102 Taxman 94 (SC);*
- ii) CIT v/s Karnal Co-op. Sugar Mills Ltd. (2001) 118 Taxman 489 (SC);*
- iii) ITO v/s M/s. Vemagiri Generation Ltd., ITA no.6352/Mum./2005, order dated 26th May 2008;*

21. Learned Departmental Representative, Mr. Subachan Ram, on the other hand, opposed the contention of the learned Sr. Counsel and submits that there are two distinct set of facts in this case and the learned Sr. Counsel has inter-mixed these facts and that he would like to place the facts in their perspective. He submits that there is no dispute on the receivability of the interest. He contends that the M.P. Government and MPEB had granted full guarantee to the assessee company and its financial institution and it is wrong on the part of the learned Sr. Counsel to state that there was no security in this case. He submits that it was the assessee who had disputed the wording in the bankable escrow agreement and it has nothing to do with the accrual of interest on security deposit. He drew the attention of the Bench to Page-235 of the assessee's paper book which is the letter written by MPEB to the assessee company on 26th April 1999, wherein it is stated that the matured amount has been reinvested for a further period of six months and that the interest earned is @ 9%. He submits that this letter clearly proves that the assessee has received interest income and that interest income has accrued to the assessee. According to the learned Departmental Representative, this letter is proof enough to dismiss the claim of the assessee that there is no accrual of income. Further, he referred to Page-222 of the assessee's paper book which is a letter dated 24th September 1998, written by the assessee to the Chairman, MPEB, to point

out that it was the assessee who disputed the terms and conditions of the escrow agreement. He further relied on Page-226 of the assessee's paper book which is the letter dated 24th October 1998, written by the assessee to MPEB again to demonstrate that the dispute on escrow account was because of the assessee. Learned Departmental Representative referred to the order of the Assessing Officer and submits that the decision of the High Court were in favour of the assessee and this was not vacated and that by virtue of these judgments, interest has accrued to the assessee. He argued that forgoing of the deposit by the assessee company was only a commercial decision and giving up deposit at a later date, in no way effects the earlier accrual of income. He relied on the following case laws:-

- "i) *CIT v/s Toshoku Ltd. (1980) 125 ITR 525 (SC);*
- ii) *CIT v/s Govind Prasad Prabhunath, (1988) 171 ITR 417 (All.);*
- iii) *CIT v/s Annapurani Veerappan, (1994) 193 ITR 426 (Mad.)*
- iv) *CIT v/s Confinance Ltd., (1973) 89 ITR 292 (Bom.); and*
- v) *Babulal Narottamdas & Ors. v/s CIT, (1991) 187 ITR 473 (SC)*

22. Learned Departmental Representative, on the alternative contentions made by the learned Sr. Counsel, submits that there is no nexus between the interest income earned and the expenditure incurred for the cost of construction. He relied on the order of the Commissioner (Appeals) and points out that the security deposit was placed much before the commencement of construction and under these circumstances, no set-off as claimed can be given.

23. In reply, the learned Sr. Counsel, submits that the letter dated 26th April 1999, simply stands that the fixed deposit amount of MPEB has been reinvested on maturity and that nothing turns on this issue. Similarly, he submits that letters dated 24th September and 24th October 1998, do not help the case of the Revenue, as they relate to negotiation on certain

conditions in the escrow agreement. He distinguished the case laws cited by the learned Departmental Representative.

24. Rival contentions were heard. On a careful consideration of the facts and circumstances of the case and on perusal of the papers on record, as well as the case laws cited before us, we hold as follows:-

i) The sole issue that arises for our adjudication is, whether or not the assessee had a right to receive interest under the facts and circumstances of the case. If the assessee has no right to receive interest, then, it cannot be held that the interest has accrued. This principle is well settled by a number of judgments, some of which are given below:-

"1. CIT vs. A. Gajapathy Naidu, 58 ITR 114 (SC) (Page-1 of 'D') - In this case the assessee supplied bread to a Government Hospital during the period 1st April, 1948 to 31st March, 1949. After the close of the year the assessee represented to Government that he had incurred loss. The Government paid compensation for the loss which was received during accounting year 1950-51 relevant to asst. yr. 1951-52. It was held that the said profit is to be included in asst. yr. 1951-52 and could not be related back to earlier year during which the assessee actually supplied the bread. It was also held that if the assessee followed mercantile system of accounting it is to be seen as to when the right to receive, accrued. The income is assessable in the year in which the right to receive accrued.

2. CIT vs. Ashokbhai Chimanbhai, 56 ITR 42 (SC) (Page-10 of 'D') It was held that the words "accrue" and "arise" are used to contra-distinguish the word "receive". Income is said to be received when it reaches the assessee; when right to receive the income becomes vested in the assessee, it is said to accrue or arise. Income becomes taxable on accrual only after the right of the assessee to the income accrues or arises and in the case of an agreement which makes profits receivable at or on the happening of a contingency, the income would accrue only after the event of the contingency takes place.

3. Seth Pushalal Mansinghka (P) Ltd. vs. CIT, 66 ITR 159 (SC) - The words "accrue" and "arise" do not mean actual receipt of the profits. Both these words are used in contra-distinction to the word "receive" and indicate a "right to receive". If the assessee acquires a right to receive the income, the income can be said to accrue to him, though it may be received later on its being ascertained."

ii) To come to the conclusion whether the assessee has a right to receive interest or not, we have to examine the facts, terms and the dispute between the assessee and MPEB.

iii) The MPEB in its letter bearing no.07-11/IPC/995, dated 24th July 1998, vide Para-3, stated as follows:-

"The IPPs will also be required to pay along with the above offer a security deposit equal to an amount of 2% of the project cost as approved in the TEC, which in the case of your project comes to ₹ 26,12,044 crores, through a demand draft drawn on any scheduled commercial bank in favour of Regional Accounts Officer (CAU), MPEB, Jabalpur. No bank guarantee shall be accepted. This amount shall be kept as a fixed deposit initially for a period of six months as a security towards achieving financial closure. This security deposit is being taken as a commitment from IPPs to achieve financial closure within two months of providing a bankable escrow agreement form to be executed by the IPPs, failing which the security deposit will be forfeited. On achieving financial closure, within the above mentioned period, the security deposit will be released to the IPPs along with interest accrued. The interest rate shall be computed as per rate given by SBI for fixed deposits for the concerned maturity period." [emphasis own]

iv) To make things more clear, at Page-191 of the assessee's paper book, MPEB, vide its letter no.07-11/IPC-Gen./Escrow-1215 dated 4th September 1998, states as follows:-

- (1) *Financial Closure has to be achieved by you within two (2) months from the date of providing a Bankable Draft Escrow Agreement.*
- (2) *In case of financial closure is not achieved by you within the specified period of 2 months, then the security amount deposited by you along with your offer under reference will be forfeited and the allotment of Escrow protection will stand cancelled.*

v) From the above, it is clear that the assessee would have a right to receive the deposit along with interest only on achieving financial closure. In other words, if financial closure is not achieved, the assessee has no right to receive back the security deposit, let alone the interest thereon.

vi) We have to also see the manner in which the MPEB understood their commitment to return the deposit along with the interest. At Page-237 of the paper book, MPEB, vide letter dated 22nd September 1999, has informed the assessee company that it is not possible to return the security deposit. At Page-243 of the paper book, vide letter dated 8th April 2000, MPEB states that escrow agreement for the project will be executed only after achieving financial closure by the assessee. The assessee also filed copy of letters from its bankers to demonstrate that they were demanding bankable escrow agreement. At Page-252 of the paper book, is a legal notice issued by the Advocates of the assessee company M/s. Amarchand Mangaldas, on 29th October 2001, calling upon MPEB to immediately return the security deposit along with interest for the reason that MPEB has failed to execute the bankable escrow agreement despite repeated requests and efforts of the assessee. In response to the notice issued by the assessee company's Advocates, MPEB, vide letter dated 17th January 2002, replied as follows:-

"..... You will appreciate that in our letter dated 2.4.98, there was no such condition to execute Escrow Agreement prior to financial closure. It is evident from the above that it was a failure on the part of your client that even after selection for escrow and providing escrow agreement form they could not achieve financial closure till date.

As may be seen from the above MPEB has extended all possible help to M/s. BPSCL for achieving financial closure. However, even after fulfilling the requirement of letter dated 24.7.98, your client failed to achieve financial closure till date. This has caused an acute shortage of power in the State. The security deposit of ₹ 52.24 crores was obtained by way of firm commitment to achieve financial closure by M/s. BPSCL within 2 months of providing Bankable Escrow Agreement form. The conditions of letter dated 24.7.98 have already been fulfilled by MPEB and it is failure on the part of your client to achieve financial closure till date. Thus, the claim of M/s. BPSCL for refund of security deposit at this stage is not in order. When your project has already got priority for Escrow comfort as per PPA hence asking for refund of SD at this stage may defeat purpose of grant of priority to your project. It is, therefore, requested to advise your client to achieve financial closure as per letter dated 24.7.98 immediately within 30 days from the date of this letter otherwise 2% security deposit will be forfeited. Public is suffering badly due to non-addition of power generating capacity in the State for which your client is equally responsible."

v) MPEB, vide their letter dated 13th July 2002, forfeited the security deposits. It concluded as follows:-

"MPEB offered various workable alternatives to Bina Power to resolve the issue so that the work on power project may start but there was no positive response of Bina Power on any of the alternatives. It appears that Bina Power are not interested in execution of project and are only interested in refund of their S.D. which is not as per contract hence there is no option left with MPEB except to pass this order to forfeit S.D. of M/s. Bina Power."

Thus, MPEB was of the opinion that the assessee has no right to receive either the security deposit or the interest thereon.

vi) The assessee challenged the forfeiture in a Writ Petition filed before the M.P. High Court, wherein the Court, vide order dated 13th May 2003, held as follows:-

"19. In the result, this petition is allowed. The order of the respondent M.P. Electricity Board (or the M.P. State Electricity Board) dated 13th July 2002, forfeiting the security deposit of ₹ 52.24 crores of the petitioner is quashed. The Board is directed to provide "Bankable Escrow Agreement" to the petitioner company in its true spirit as envisaged in its letters dated 24th July 1998 and 4th September 1998. This will be done within two months of the date of this order. The Board will get this agreement approved by the State Bank of India. The Board will make all possible efforts with the assistance of the State Government to obtain the clearances of the State Bank of India, for this project. On furnishing of the "Bankable Escrow Agreement", by the Board with the clearance of the State Bank of India, within two months of the date of this order to the petitioner company, the petitioner company will obtain the financial closure from its banker or financial institution within the next two months. It is further directed that if for any reason this arrangement does not materialise the respondents no.2 and 3 will refund the amount of security deposit of ₹ 52.24 crores to the petitioner company with accrued interest. The respondents no.4 and 5 have been impleaded but no relief has been claimed against them and they have no liability in the present case and, therefore, they are discharged."

vii) Thereafter, on 20th February 2004, the time mentioned in Para-19 above, was extended up to 31st March 2004 by the Hon'ble High Court. Thus,

up to 31st March 2004, the assessee had no right to receive back the security deposit or the interest thereon as it was the decision of MPEB that the assessee is not entitled to the same for the reason that, it has not achieved financial closure. Thereafter, the Writ Appeal was filed which was ultimately dismissed on the issue of jurisdiction and the matter was finally pending before the Hon'ble Supreme Court. The Division Bench of the Hon'ble High Court had given the following interim directions in its order dated 5th August 2004, when the matter was pending before it.

"In the background of the facts of this case and rival contentions and to safeguard the interest of both the parties, we consider this a fit case for staying the final order of the learned Single Judge, but subject to following terms:

- a) *The appellant shall deposit in all a sum of ₹ 25 crores (Rupees Twenty Five crores) with the Registrar (Judicial) of this Court at the rate of ₹ 5.00 crores (Rupees Five Crores) per month commencing from 1.9.2004. This deposit should be made under the notice of the First Respondent.*
- b) *The first respondent will be at liberty to withdraw the amount deposited by the appellant as per clause (a) above as and when deposited by the appellant, by furnishing an unconditional bank guarantee of the nationalised bank in favour of the Court (represented by Registrar General) of this Court) for repayment in the event of appellant's success in the appeal.*
- c) *In addition to the deposit of ₹ 25 crores, as aforesaid, the appellant Board shall furnish an unconditional bank guarantee of a nationalised bank for ₹ 50 crores (Rupees Fifty crores) in favour of the Court (represented by Registrar General) within a period of two months from today.*
- d) *The deposit by the appellant and withdrawal thereof by the first respondent and compliance with the other terms of this order, will be without prejudice and subject to final orders of this Court in the Letters Patent Appeal.*

List the matter on 17.8.2004, at request." [emphasis own]

viii) These interim directions were directed to be in force subject to any order that may be passed by the Hon'ble Supreme Court in the proposed Special Leave Petition as the Hon'ble High Court had dismissed the Writ

Appeal on the ground that it is not maintainable. The Hon'ble Supreme Court held that the interim order granted by the High Court, as extracted above, would continue up till further order, vide its judgment dated 10th February 2006. Thereafter, due to change in the Management of the assessee company, there were fresh negotiations and in the minutes of the first meeting held on 17th June 2008, between the Govt. of Madhya Pradesh, MPEB, and the assessee company, it was decided as follows:-

"iii) Company agreed to settle all the pending court disputes between Beena Power Supply Company and Madhya Pradesh State Electricity Board, by arriving at an out-of-court settlement and for this purpose a sum of ₹ 52.24 crores which was lying deposited in the State Electricity Board as security amount, shall be forfeited by the State Electricity Board and thereafter there will be no liability of any type on the State Electricity Board. It was further agreed that a sum of ₹ 25 crores which was withdrawn by Beena Power Supply Company in compliance to the order of the Hon'ble High Court of Madhya Pradesh at Jabalpur, will now be refunded to the State Electricity Board. It was further agreed that a sum of ₹ 50 crores which has been deposited by State Electricity Board, in the Hon'ble High Court of Madhya Pradesh at Jabalpur, as Bank guarantee, will now be withdrawn in favour of the Board." [emphasis own]

After all the amounts mentioned herein above are refunded by Beena Power Supply Company to the MPEB, necessary proceedings will be initiated by the parties to withdraw all the cases pending in the Courts and recommendations will also be made by the State Govt. to allot coal to the company.

ix) From the above, it is very clear that though the company had made claims for refund of security deposit with interest, MPEB has not agreed with the view and the matter was before the Court. The judgment of the Hon'ble M.P. High Court in the Writ Petition was stayed by the Hon'ble Supreme Court. Partial withdrawal allowed by the Court against furnishing of bank guarantee is an interim relief and income cannot be said to have accrued. The assessee had no right to receive the interest. There is no real income. In our considered opinion, the issue in this case is clearly covered in favour of the assessee and against the Revenue by the decision of Hon'ble Supreme Court in the case of Godhra Electricity Co. Ltd. (supra). In this case, the

assessee company which had a license to generate and supply electricity, enhanced the charges for electricity. This enhancement was challenged in the Courts and ultimately, the Hon'ble Supreme Court upheld the enhancement. The assessee had passed entries in its books of account treating the increased charges as its income. Shortly thereafter, the Under Secretary to the Govt. of Gujarat wrote a letter to the company advising it to maintain status quo for the rates to the consumers. While doing so, the consumers also filed a representative Suit wherein an interim injunction was granted and, thereafter, finally, decreed in favour of the consumers by the lower Court. On these facts, the Hon'ble Supreme Court held that since the assessee was not able to collect enhanced charges, necessary entries made in its books of account represented only hypothetical income and it could not be brought to tax as it did not represent income which had really accrued even though the assessee was following mercantile system of accounting. At Para-12, the Hon'ble Supreme Court noted that the letters addressed to the Under Secretary to the Govt. of Gujarat, had no legal binding effect. It held that one has to look at things from practical point of view and the directions of the State Govt. which is couched in the form of an advice cannot be ignored. At Para-14, the Court held as follows:-

"9. The question whether there was real accrual of income to the assessee-company in respect of the enhanced charges for supply of electricity has to be considered by taking the probability or improbability of realisation in a realistic manner. If the matter is considered in this light, it is not possible to hold that there was real accrual of income to the assessee-company in respect of the enhanced charges for supply of electricity which were added by the ITO while passing the assessment orders in respect of the assessment years under consideration. The AAC was right in deleting the said addition made by the ITO and the Tribunal had rightly held that the claim at the increased rates as made by the assessee-company on the basis of which necessary entries were made represented only hypothetical income and the impugned amounts as brought to tax by the ITO did not represent the income which had really accrued to the assessee-company during the relevant previous years. The High Court, in our opinion was in error in upsetting the said view of the Tribunal."

x) Applying the principles to the case on hand, MPEB and M.P. State Govt. were firmly of the view that the assessee was not entitled to refund of the security deposit. While so, to hold that real income has accrued to the assessee by way of interest on the security deposit, would not be correct.

xi) Hon'ble Supreme Court E.D. Sassoon & Company Ltd. (supra), had laid down that income would accrue or arise only if the assessee acquired the right to receive income. The Hon'ble Jurisdictional High Court in FGP Limited (supra), was considering the case where certain amounts were payable to the assessee under a royalty agreement. No amount was received by the assessee till date, pursuant to royalty agreement as there was a dispute between the parties and arbitration proceedings are being proceeded with. Under these circumstances, the Hon'ble Jurisdictional High Court applied the decision of Hon'ble Supreme Court in Godhra Electricity Co. Ltd. (supra) and held that in the instance case, there is no real accrual of income as there is a dispute between the parties in the relevant assessment year and that the income received by the assessee will be liable to be assessed only when the arbitral proceedings come to an end.

xii) Applying these principles to the facts of the case, we have to hold that as there was a dispute between the parties, and as the matter was in the Supreme Court, no real income accrued to the assessee. Finally also, as the deposit has been forfeited for whatever reason, there was no accrual of income. The fact remains that, at no point of time, MPEB or M.P. State Govt. have agreed with the demand of the assessee for return of the deposit with interest. The cases were withdrawn from the Supreme Court only because the forfeiture was accepted by the assessee. The view of the Assessing Officer that the forfeiture was accepted on different commercial consideration and hence, there is an accrual of income prior to such acceptance, in our view, is incorrect as the dispute was pending in the Courts. The order of the Single Judge of the Hon'ble M.P. High Court was

stayed, hence, there was no enforceable right to the assessee for all these years.

xiii) Hon'ble Supreme Court in Hindustan Housing & Land Development Trust Ltd. (supra), was considering the case where certain land belonging to the assessee company was acquired by the Govt. and compensation awarded. The quantum of compensation was under dispute. The High Court directed the Govt. to deposit certain amounts during the pendency of the dispute and the assessee was allowed to withdraw the same by furnishing security. The Hon'ble Supreme Court held that since the amount was in dispute, the amount of enhanced compensation cannot be brought to tax. At Para-6 of the order, it held as follows:-

"6. The legal position was explained in further detail by the Gujarat High Court in Topandas Kundanmal vs. CIT 1976 CTR (Guj) 507 : (1978) 114 ITR 237 (Guj). The High Court was called upon to decide whether the right to receive the enhanced compensation under the Land Acquisition Act accrued or arose to the assessee when he sought a reference under s. 18 of the Act or when the award was made by the Civil Judge although an appeal was pending against that award. The learned judges referred to the nature of an award made by the Collector, and advertent to the opinion of this Court in Raja Harish Chandra Raj Singh vs. Deputy Land Acquisition Officer (1962) 1 SCR 676 : AIR 1961 SC 1500, that the award made by the Collector was merely an offer or tender of the compensation determined by the Collector to the owner of the property on the acquisition, the High Court observed :

".....the legal position which emerges is that there is no liability in praesenti to pay an enhanced compensation till it is judicially determined by the final Court since the entire question, namely, whether the offer made by the Land Acquisition Officer is inadequate and the claimant is entitled to an additional compensation and if yes, at what rate is in flux till the question is set at rest finally, we do not think that any enforceable right to a particular amount of compensation arises. The offer made by the Land Acquisition Officer, by his award, if not accepted by a claimant would not result automatically in a liability to pay additional compensation as claimed by a party aggrieved. There is no doubt a liability to pay a compensation as offered by the Land Acquisition Officer. But that is far from saying that that liability is a liability to pay additional compensation or enhanced compensation as claimed by a party aggrieved. If there is an existing liability, the mere fact that the payment is postponed to the future would not detract that liability

from becoming a debt but the liability to pay unliquidated damages or additional compensation which are inchoate or contingent would not create a debt."

xiv) This judgment also applies on all fours to the facts of the case. For all the assessment years in question, the issue was before the Hon'ble Supreme Court and was subjudice. Under these circumstances, it cannot be said that there was a final determination of the rights. In such a situation, the disputed income cannot be brought to tax on the ground that there is accrual of income.

xv) Now, we consider the case laws relied upon by the learned Departmental Representative.

xvi) The Hon'ble Supreme Court in Toshoku Ltd. (supra), was considering the case where the dealers in tobacco in India exported to Japan and France through a nonresident sales agent. The exclusive sales agent was entitled to a commission of 3% of invoice amount. The invoice amount was remitted to India and the Indian dealer debited his commission account and credited the amount of commission payable to Japanese Company which is the sales agent. in his account book and later remitted the amount to the Japanese Company. The question was, whether the commission earned by the nonresident sales agent can be brought to tax. The Court held as follows:-

"Held: (i) that it could not be said that the making of the entries in the books of B amounted to receipt, actual or constructive, by the non-resident sales agents as the amounts so credited in their favour were not at their disposal or control; they could not, therefore, be charged to tax on the basis of receipt of income, actual or constructive, in the taxable territories."

In our view, this case is, in fact, in favour of the assessee for the reason that the assessee did not have the security deposit or interest thereon, at its disposal and as MPEB has rejected the claims of the assessee.

xvii) Hon'ble Allahabad High Court in Govind Prasad Prabhunath (supra) held that income may accrue to the assessee without the actual receipt of the sale. It further held that the income can be received later, provided the assessee got the right to receive the said income. In the case in hand, we have already held that the right of the assessee to receive income is in dispute and, hence, this case does not help the Revenue.

xviii) Hon'ble Madras High Court in Annapurani Veerappan (supra), was considering the case where interest on mortgage loans become legally payable though not actually received. In the case on hand, we have clearly brought out that the interest was not legally payable to the assessee unless it achieves financial closures. Thus, this decision does not apply.

xix) Hon'ble Bombay High Court in Confinance Ltd. (supra), observed as follows:-

"..... They are assessable if they have arisen or accrued or are under the Act deemed to have arisen or accrued to the assessee in the accounting year just as much as if they had been received or were deemed to have been received in that year.

This principle would be attracted even in cases where an assessee follows the mercantile system of accounting. However, in examining any transaction or situation, the Court would have more regard to the reality of the situation rather than the purely theoretical aspect of it and greater emphasis will be laid on the business aspect of the matter viewed as a whole when that can be done without disregarding the statutory language."

This judgment, in fact, helps the case of the assessee for the reason that the reality of the situation is that the assessee was not in a position to realise the security deposit or interest thereon.

xx) Coming to the judgment of Hon'ble Supreme Court in Babulal Narottamdas & Ors (supra), the Hon'ble Supreme Court was considering the case where income was actually earned by the assessee by virtue of a resolution passed by the company. The Court held that the right to receive

additional remuneration arose only on the basis of resolution and payment was deferred on account of litigation. Under these circumstances, it held that income accrued. In the case on hand, the assessee does not have right to receive either the security deposit or the interest thereon.

xxi) Coming to the letter dated 26th April 1999, at Page-235 of assessee's paper book, relied on by the learned Departmental Representative, it is not of much help, as the fixed deposit in question was made by MPEB in its own name with State Bank of India and interest was earned by MPEB and not the assessee. The assessee was kept informed of this. This does not give a right to the assessee to receive interest.

xxii) Similarly, the letters dated 27th September and 24th October 1998, are of no consequence as the Court had to finally adjudicate the issue.

25. In view of the above discussions and the legal position as applied to the facts of the case, we hold that no income by way of interest on security deposit with MPEB, as accrued to the assessee in all the assessment years under consideration. Ground no.1 is, thus, allowed.

26. As we have allowed ground no.1, it is not necessary to adjudicate the alternative ground i.e., ground no.2, as it would be an academic exercise.

27. In the result, all the appeals are allowed.

Order pronounced in the open Court on 24th June 2011

Sd/-
D. MANMOHAN
VICE PRESIDENT

Sd/-
J. SUDHAKAR REDDY
ACCOUNTANT MEMBER

MUMBAI, DATED: 24th June 2011

Copy to:

- (1) The Assessee;
- (2) The Respondent;
- (3) The CIT(A), Mumbai, concerned;
- (4) The CIT, Mumbai City concerned;
- (5) The DR, "B" Bench, ITAT, Mumbai.

**TRUE COPY
BY ORDER**

Pradeep J. Chowdhury
Sr. Private Secretary

**ASSISTANT REGISTRAR
ITAT, MUMBAI BENCHES, MUMBAI**