

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद /

**IN THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD - BENCH 'A'**

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER  
AND  
SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

**आयकर अपील सं./ ITA No.2484 and 2485/Ahd/2014  
निर्धारण वर्ष/Asstt. Year: 2000-2001**

Welspun Projects Ltd. (Formerly known as MSK Projects 707-708, Sterling Centre R.C.Dutta Road, Baroda 390 005. PAN : AABCM 4107 C	Vs.	ACIT, Cir.4 Baroda.
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**ITA No.2518, 2519 and 2520/Ahd/2014  
Asstt.Year : 2004-2005**

ACIT, Cir.4 Baroda.	Vs.	Welspun Projects Ltd. (Formerly known as MSK Projects 707-708, Sterling Centre R.C.Dutta Road, Baroda 390 005.
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अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
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Assessee by :	Shri Vartik Chokshi, AR
Revenue by :	Smt.Aparna M. Agrawal, CIT-DR

सुनवाई की तारीख/Date of Hearing : 14/08/2018  
घोषणा की तारीख/Date of Pronouncement: /08/2018

**आदेश/ORDER**

**PER RAJPAL YADAV, JUDICIAL MEMBER:**

These are two sets of appeal; first two appeals are directed at the instance of the assessee against orders of the Id.CIT(A)-III, Baroda dated 9.6.2014 and 16.6.2014 and other three appeals are by the Revenue against orders of the Id.CIT(A) dated 9.6.2014, 17.6.2014 and 11.6.2014 for the respective assessment years. All these appeals are disposed of by this common order for the sake of convenience.

2. First we take up Revenue's appeals.
3. In ITA No.2518/Ahd/2014 Revenue has challenged deletion of interest expenses of Rs.42,77,609/- attributable to BOT projects by the Id.CIT(A). ITA No.2519/Ahd/2014 is quantum appeal challenging allowance of deduction under section 80IA of Rs.32,83,582/- by the Id.CIT(A) which was denied by the AO, while ITA No.2520/Ahd/2014 is filed to challenge deletion of penalty imposed by the AO under section 271(1)(c) of the Income Tax Act, 1961.
4. Before taking up the above appeals of the Revenue, the Id.counsel for the assessee vehemently contested maintainability of the above three appeals filed by the Revenue before the Tribunal in view of recent CBDT circular no.3 of 2018 whereby the Board has instructed the Revenue not to file appeal before the Tribunal where tax effect is below Rs.20 lakhs. Though the Id.DR did not dispute this preliminary objection of the Id.counsel for the assessee, left issue to the Bench decide these appeals in accordance with law.
5. After hearing both the sides on preliminary issue and on perusal of the record, we find that on 8.7.2018 the CBDT has issued Instructions bearing No. 3 of 2018 under file No.F.No.279/Misc.142/2007-ITJ(Pt) prohibiting its subordinate authorities from filing of appeal to the Tribunal against order of the CIT(A) where the tax effect by virtue of the relief given by CIT(A) is less than Rs.20 lakhs. The instructions have been made applicable with retrospective effect, meaning thereby, these instructions are applicable on pending appeals also. In the present case, if we consider each addition contested by the Revenue, then it would show that tax effect on each appeal would fall below Rs.20 lakhs. The "tax effect" as per CBDT Circular is tax on the total income assessed minus the tax that would have been chargeable had such total income been reduced by the

amount of income in respect of the issue against which appeal is filed, would be less than Rs.20 lakhs. Therefore, the present appeals of the Revenue are hit by the CBDT Circular and hence not maintainable. Besides that Id.DR has not pointed out whether the case of the Revenue fall within the ambit of exceptions provided in the Circular or not. Thus, keeping in view the above CBDT circular and provisions of section 268A of the Income Tax Act, we are of the view that the present appeals of the Revenue deserve to be dismissed. They are accordingly dismissed.

However, it is observed that in case on re-verification at the end of the AO it comes to the notice that the tax effect is more or Revenue's case falls within the ambit of exceptions provided in the Circular, then the Department will be at liberty to approach the Tribunal for recall of this order. Such application should be filed within the time period prescribed in the Act. In view of the above, the appeals of the Revenue are dismissed due to low tax effect.

6. Now we take appeal of the assessee in the assessment year 2000-01 i.e. ITA No.2484/Ahd/2014. This appeal is directed by the assessee against order of the Id.CIT(A) dated 9.6.2014 passed in the Asstt.Year 2000-01.

7. It emerges out from the record that earlier one round of litigation travelled upto the Tribunal and the Tribunal has decided the issue vide order dated 30.9.2011 in ITA No.1385/Ahd/2006. In pursuance of the Tribunal's order fresh assessment order has been passed on 4.1.2013. Dissatisfied with the various additions made, the assessee went in appeal before the Id.CIT(A) who has partly confirmed by the impugned order.

8. In the first ground of appeal, the assessee has pleaded that the Id.CIT(A) has erred in confirming the disallowance of interest expenditure of Rs.21,94,475/- out of total expenses attributable to

eligible undertaking at Rs.42,77,609/-. The Id.counsel for the assessee did not press this ground of appeal, hence, it is rejected.

9. Ground no.4: In this ground of appeal, grievance of the assessee is that the Id.CIT(A) has erred in calculating the interest expenses at Rs.8,44,577/-. The Id.counsel for the assessee at the very outset submitted that a disallowance of Rs.26,83,618/- was made on the ground that the assessee has used interest bearing fund for earning tax free income. On appeal, the assessee submitted calculation before the Id.CIT(A), which has been accepted by the CIT(A). But while quantifying the amount, the Id.CIT(A) has confirmed disallowance of Rs.8,44,577/-. In fact this disallowance should be Rs.84,577/-.

10. With the assistance of the Id.representatives, we have gone through the record. There is no dispute with regard to the fact that interest expenditure incurred for earning of tax free income deserves to be disallowed. The assessee has submitted the details and quantified the interest expenditure which has been reproduced by the Id.CIT(A) at page no.24 of the impugned order. Such details read as under:

*"This investment is made from the internal accruals, which consists of interest free funds. Therefore, no disallowance shall be made on the said investment. The alleged disallowance made by the Ld. AO is wrong and needs to be deleted.*

Particulars	Date of Transfer	Amount	Remarks		Available balance as on date	No.ofdays upto 31.03,2000	Interest 16.25 %
Borrowing	01.04.1999	46000	Corp. Bank 5/97	Opening Balance OD		365	7475
Income	16.08.1999	982500	Corp. Bank 5/97	Trf. From BOTAC 1799	3067102		
Income	24.11.1999	7500000	Corp. Bank 5/97	Trf. From BOTAC 1799	7500000		

Borrowing	24.11.1999	1342500		Trf. from IDBI bank	1342500	129	77102
		9871000	Total				84577

*The above chart clearly shows that out of the total investments of Rs.98,71,000/- made during the year under consideration, investment to the tune of Rs.84,82,500/- (9,82,500 + 75,00,000) was brought out of the business income of the appellant as transfer from BOT Account. Further, the remaining investment of Rs. 13,88,500/-(46,000 + 13,42,500) is made from the borrowings.*

*Applying the rate of 16.25% on the amount utilized from the borrowed funds, irrespective of the fact that the appellant have abundant interest free funds, a interest come at Rs. 84,577/-. Thus the disallowance of interest may be restricted to Rs. 84,577/-."*

11. The Id.CIT(A), in principle, concurred with the assessee and confirmed the disallowance computed by it and made disallowance of Rs.8,44,577/- instead of Rs.84,577/- worked out by the assessee. The finding of the Id.CIT(A) on this issue reads as under:

*"4.4 So far as ground no. 5 81 6 is concerned, again the appellant vide submission dated 09/11/2012 had filed before the AO the complete details of the investment made for the purposes of earning of exempt income. Again the AO has not examined the details and has made the disallowance as was made in the original order. The appellant has also stated that due to the disallowance made by the AO on account of interest paid on capital diverted into infrastructure division and u/s 14A, the total disallowance exceeds the total in the debited by the appellant in the P/L account. Hence, the disallowance made by the AO in summary manner cannot be held to be correct. The appellant has provided full details of investment made during the year for the purposes of earning of tax free exempt income and has also computed the interest attributable to this. Such interest is Rs.8,44,577/-only. The appellant had provided full details of funds used for investment and its sources to the AO during the course of assessment proceedings. Hence, the AO is directed to restrict the disallowance u/s.14A to Rs.8,44,577/-"*

12. Considering the above finding of the Id.CIT(A), we are of the view that there is no justification or supporting evidence in favour of the calculation of Rs.8,44,577/-. From the submission of the assessee it

reveals that it was a sum of Rs.84,577/- which has been in principle accepted by the CIT(A). Therefore, we allow this ground of appeal partly and confirm addition to the extent of Rs.84,577/-. Appeal of the assessee is accordingly partly allowed.

13. Now we take up the ITA No.2485/Ahd/2014.

14. This appeal is directed at the instance of the assessee against the order of the Id.CIT(A) dated 16.6.2014 passed for the Asstt.Year 2000-01. Grievance of the assessee is that the Id.CIT(A) has erred in confirming the penalty of Rs.26,81,000/- under section 271(1)(c) of the Act.

15. Brief facts of the case are that the assessee has filed its return of income on 20.11.2000 declaring total income at Rs.36,70,730/-. The assessment was reopened by issuance of notice under section 143(2) and ultimately an assessment order was framed under section 147 r.w. section 143(3) on 28.3.2005 whereby income of the assessee was determined at Rs.1,11,33,930/-. The Id.AO has made addition/disallowance on seven counts. He initiated penalty proceedings by issuance of notice under section 274 on 28.3.2005 with regard to two additions viz. interest expenses attributable to BOT projects claimed in regular business of Rs.42,77,609/- and interest expenditure relating to tax free income amounting to Rs.26,83,618/-. *Qua* these two additions penalty proceedings initiated and ultimately penalty of Rs.24,14,500/- was imposed upon the assessee vide order dated 28.3.2007. This order of the AO has been upheld by the CIT(A) vide order dated 23.2.2009. According to the Id.counsel for the assessee no further appeal was filed.

16. In the quantum proceedings, the appeal was filed by the assessee and assessment was set aside. He again initiated penalty proceedings and imposed penalty under section 271(1)(c) of the Act vide order

dated 24.7.2013. This time he has imposed penalty at Rs.26,81,000/- on addition of Rs.69,61,227/- i.e. Rs.42,77,609/- plus Rs.26,83,680/-.

17. With the assistance of the Id.representatives, we have gone through the record carefully. A perusal of penalty order dated 24.7.2013 impugned in the present appeal would reveal that the AO was aware about the imposition of penalty amounting to Rs.24,14,500/- vide order dated 28.3.2007. He took cognizance of this aspect on page no.5 of the impugned order. The AO thereafter rejected contentions of the assessee that since the amounts which have been added to the income of the assessee have already been considered for visiting the assessee with penalty, and therefore, again no penalty should be imposed. The relevant part of the penalty order reads as under:

*"All the additions were upheld by CIT(A). The assessee carried the issues before ITAT.*

*In the mean time, the penalty u/s 271(1) (c) was imposed at Rs. 24,14,500 vide an order dated 28.03.2007 by the DOT, Cen. Cir. 1(2), Ahemdabad after seeking approval from Addl. CIT.*

### *III.*

*1.1. The Hon. ITAT vide their order ITA No, 1385/Ahd/2006 dated 30,09.2011 set aside issues back to the file of the Assessing Officer for fresh adjudication by giving opportunity of the assessee. Accordingly, the ACIT, Cir.4, Baroda issued the notice u/s 142(1) on 31.08,2012 and on 03,10,2012 for going ahead in the issues set aside by ITAT. After given an opportunity of being heard, the assessment u/s 143(3) r.w.s. 254 of the Act was decided on 04.01.2013, The assessing officer in the re assessment order observed that the assesses could not justify its claim again on the second round. The assessing officer made the similar additions on both the above issues and initiated penalty proceedings u/s 271(1)(c). Notice u/s 274 r.w.s. 271(i)(c) of the Act was issued on 04.01.2013 & was served upon the assessee. Again on 16.07.2013 a notice u/s 271(1) (c) was issued upon the assessee by my predecessor. On 19.07.20 J.3, the undersigned issued notice u/s 271(l)(c) r.w.s 129 of the Act. Opportunity of being heard was offered. In response, the assessee furnished the*

*submission on 22.07.2013 signed by authorized signatory which scanned & pasted as under:*

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*1.2. From the above submission it can be gleaned that no contention has been put forward by the assesses in respect of the levy of penalty. It has been argued that the penalty was imposed earlier and the same cannot be imposed again. The contention has no force as the two predominant issues discussed above and few other issues of expenses like expenses on Staff Welfare, Conveyance, Telephone, Depreciation, Puja and Diwali etc were restored back to the file of assessing officer. Therefore, the present proceeding of penalty is relevant.*

*From the above, it is crystal clear that the' asscsscc has concealed income by way of furnishing inaccurate particulars of income. In fact the assesses new that huge interest bearing Funds in the infrastructure division is not allowable even then, it claimed the same just lo avoid the tax liability and therefore, penalty u/s 271(l)(c) is liable on a wrong claim of interest bearing funds of infrastructure division in the normal division of T 42,77,609.*

*The balance-sheet shows clear investment in long term shares of Rs.1.65 crores. Thus, it is very clear that finance charge & interest expenses on the borrowed funds of Rs.1.65 crores invested in shares arc not allowable from the business head. Accordingly, interest @ 16.25% which is average borrowing rate of the assessee, Rs.26,83,618 is disallowed u/s 36(1 )(iii). As the assesses has wrongly claimed the taxable income as exempt income by way of furnishing inaccurate particulars of income / concealment, the penalty u/s 271(l)(c) of the Act-is leviable in the case of the assessee.*

*1.3. Therefore, in view of the above discussion and legal position, I am satisfied that the assessee furnished inaccurate particulars of its income leading to concealing the particulars of income and hence, it is liable for the penalty u/s 271(1) (c) of the Act. The penalty is thus imposable on the addition of Rs.42,77,609 out of Interest cost capitalisation and out of interest, relating to earning of exempt income on Rs.26,83,618.*

*It is added that with the deletion of the word 'deliberate' from the provisions of section 271(i)(c) of the Act and the introduction of explanation thereto and also having regard to the principle laid*

*down by the Apex Court in the case of Dharmendra Textile Processors & Ors [2008 306 JTR 277 (SC)] the penalty proceedings are no longer quasi criminal proceedings and hence, the presence of mens rea is not required to be established.*

*Prom the facts of the case and the submission made by the assessee, it is very clear that the assessee has deliberately concealed the particulars of unaccounted income and is guilty of the contumacious conduct The assessee has failed to give any justification or acceptable explanation for charging of concealment*

*In the circumstance, I hereby levy penalty of Rs.26,81,000 [being 100% of the tai: sought to be evaded on the amount of Rs.69,61,227 (Rs.42,77,609 + Rs.26,83,618/-)as minimum penalty as against the maximum Rs.80,43,000 for furnishing inaccurate particulars of its income leading to concealing the particulars of income.*

*1.4. This order is passed with the prior approval of the Addl. C.J.T, Range -4 Baroda as required by the provisions of section 274 (2)(b) of the Act under his approval dated 24.07.2013 conveyed under his No. BRD / AddLCIT / R.4 / Penalty Approval/2013-14."*

18. It is pertinent to observe that in this year, the Id.AO considered two amounts for calculating penalty under sub-clause (iii) of section 271(1)(c). These amounts are disallowance of interest amounting to Rs.42,77,609/- out of capitalization and disallowance of interest relating to earning of exempt income at Rs.26,83,618/-. In earlier part of this order, we have considered quantum appeal of the assessee, wherein we have upheld interest expenses of Rs.21,94,475/- out of Rs.42,77,609/- and Rs.84,577/- out of Rs.26,83,618. It will suggest that quantum on which it could be alleged that taxes evaded has been reduced substantially. If we go by the logic of the AO in the impugned order, then penalty would reduce substantially whereas the assessee has already accepted penalty amount of Rs.24,14,500/- by not challenging the order of the Id.CIT(A) in penalty appeal levied in the first round. Considering the stand of the assessee that it has accepted penalty imposed under section 271(1)(c) of the Act, we are of the view that

there should not be any second penalty on the same addition. We allow this appeal of the assessee and delete penalty of Rs.26,81,000/- computed by the AO in the impugned order.

19. In the result, appeals of Revenue are dismissed, whereas quantum appeal of the assessee in ITA No.2484/Ahd/2014 is partly allowed and penalty appeal of the assessee in ITA No.2485/Ahd/2014 is allowed.

Order pronounced in the Court on 28<sup>th</sup> August, 2018 at Ahmedabad.

Sd/-  
(WASEEM AHMED)  
ACCOUNTANT MEMBER

Sd/-  
(RAJPAL YADAV)  
JUDICIAL MEMBER