

**आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, F, मुंबई ।**

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "F", MUMBAI**

**श्री अमित शुक्ला, न्यायिक सदस्य एवं  
श्री अश्वनी तनेजा, लेखा सदस्य, के समक्ष**

**Before Shri Amit Shukla, Judicial Member, and  
Shri Ashwani Taneja, Accountant Member**

**ITA No.8688/Mum/2011  
Assessment Year: 1998-99**

Welspun Syntex Ltd. Trade World, B. Wing, 9th Floor, Kamala Mills Coumpound, Senapati Bapat Marg, Lower Parel, Mumbai-400013	<b>बनाम/ Vs.</b>	ACIT Cen. Cir-22 R.No.403, Aayakar Bhavan, Mumbai-400020
(Assessee)		(Revenue)
P.A. No.AAACW0489L		

**ITA No.8689/Mum/2011  
Assessment Year: 1999-2000**

Welspun Syntex Ltd. Trade World, B. Wing, 9th Floor, Kamala Mills Coumpound, Senapati Bapat Marg, Lower Parel, Mumbai-400013	<b>बनाम/ Vs.</b>	ITO, WD 4(3)(2) Addl. CIT 1(1) R.No.403, Aayakar Bhavan, Mumbai-400020
(Assessee)		(Revenue)
P.A. No. AAACW0489L		

**ITA No.6284/Mum/2005  
Assessment Year: 2000-01**

Welspun Syntex Ltd. Trade World, B. Wing, 9th Floor, Kamala Mills Coumpound, Senapati Bapat Marg, Lower Parel, Mumbai-400013	<b>बनाम/ Vs.</b>	ITO, WD 4(3)(2) Addl. CIT 1(1) R.No.403, Aayakar Bhavan, Mumbai-400020
(Assessee)		(Revenue)
P.A. No. AAACW0489L		

**ITA No.6653/Mum/2005  
Assessment Year: 2000-01**

ITO, WD 4(3)(2) Addl. CIT 1(1) R.No.403, Aayakar Bhavan, Mumbai-400020	<b>बनाम/ Vs.</b>	Welspun Syntex Ltd. Trade World, B. Wing, 9th Floor, Kamala Mills Coumpound, Senapati Bapat Marg, Lower Parel, Mumbai-400013
(Revenue)		(Revenue)
P.A. No. AAACW0489L		

Appellant by	Shri F.V. Irani (AR)
Respondent by	Shri Rajesh Ojha (DR)

सुनवाई की तारीख/ <b>Date of Hearing:</b>	<b>21/07/2016</b>
आदेश की तारीख / <b>Date of Order:</b>	<b>11/08/2016</b>

**आदेश / O R D E R**

**Per Ashwani Taneja (Accountant Member):**

These appeals pertains to the same assessee involving identical issues and therefore these were heard together and being disposed by this common order.

**2.** During the course of hearing, arguments were made by Shri F.V. Irani, (AR) on behalf of the Assessee and by Shri

Rajesh Ojha, Departmental Representative (Ld. DR) on behalf of the Revenue.

**First we shall take up Appeal filed by the assessee in ITA No.6284/Mum/2005 for A.Y. 2000-01:**

**The assessee has filed following grounds of appeal:**

*1.a) The Hon. CIT (A) has erred in Law and Facts in confirming the disallowance of depreciation of Rs. 35,09,559/- of foreign exchange difference capitalised on realignment of foreign currency loan directly & fully utilized for fixed assets. The reasons given by him are wrong and contrary to the provisions of law.*

*The Hon. CIT (A) failed to appreciate that increase of loan liability due to fluctuation in exchange rate is directly related to acquisition of fixed assets. He ought to have allowed depreciation of Rs. 35,09,559/- on such foreign exchange loss.*

*2.a) The Hon. CIT (A) erred in law and facts in disallowing alternative claim for allowance of Rs. 59,82,332/-, being difference oil of foreign currency loan (oil day of the year) utilized for assets already put to use, u/s 37 of the Act being expense incurred for the business of the appellant.*

*The Hon. CIT (A) erred in law and facts in holding that exchange difference oil of foreign exchange loan is on capital account. He failed appreciate that it is business loss allowable deduction u/s 37 of the Act.*

*The Hon. CIT (A) failed to appreciate that Rs. 59,82,332/- being difference oil of foreign currency loan used for assets put to use hence he treated as incurred wholly and exclusively for the purpose of the business and allowable u/s 37 of the I.T. Act, 1961.*

*2. a) The Hon. CIT (A) has erred in law and facts in confirming the addition of Rs.4.00 Crores u/s 68 of the Act as unexplained credit on account of forfeiture of preference shares. The reasons given by A.O. and confirmed by Hon. CIT (A) is wrong and contrary to the provisions of law and facts of the case.*

*b) The addition of Rs. 4 Crore to income as unexplained credit confirmed by the Hon. CIT (A) is factually and legally contrary to the provisions of law-*

*(i) as the amount of Rs. 4 Crores were received and credited during the earlier asst. year (para 4.4 of CIT (A)'s order) hence if at all addition to be made it should have been made in the asst. year 1999-00.*

*(ii) The credit to share capital on issue of shares is once accepted by him as explained and forfeiture of those very shares cannot be held as unexplained.*

*C) The Hon. CIT (A) failed to appreciate that the amount on forfeiture of Preference shares is on capital account and not taxable. It is a capital receipt hence addition is wrong and contrary to the provisions of law. The Ld. CIT (A) has confirmed the addition without giving any reasons for doing so.*

*3.a)The Hon. CIT (A) has erred in law and facts in confirming the disallowance of claim of Rs. 16,70,226/- being provisions for earned leave. The reasons of actuarial certificate, given by him is wrong and against law.*

*(b) The Hon. CIT (A) failed to appreciate that provisions for earned leave liability is allowable deduction as held in the case of Bharat Earth Movers and not covered u/s 43B of the Act. This is included u/s 43B by Finance Act 2001 w.e.f. 01.04.2002 (A.Y. 2002-03)].*

**3. Ground No. 1(a):** In this ground the assessee has challenged the action of Ld. CIT(A) in confirming the disallowance of depreciation of Rs.35,09,559/- on the foreign exchange difference capitalized on realignment of foreign currency loan claimed to be utilized, directly & fully, for acquiring fixed assets.

**3.1.** The brief facts are that during the year under consideration, the assessee company was engaged in the business of manufacturing and processing yarns viz Texturising, Twisting, Dyeing, Polyester yarn at Palghar and

Rakholi. The assessee filed its return of income on 30.11.2000 showing loss of Rs. 41,47,38,061/-. The assessee had purchased certain machineries utilizing foreign currency loan taken by it. As per its accounting policy, it realigned its fixed loan liability at the year end and difference was debited to cost of fixed assets purchased out of that loan and claimed depreciation thereon. The assessee claimed depreciation of Rs. 35,09,559/- on exchange difference capitalised within Plant & Machineries, in respect of loan of Rs. 10.00 crores taken for purchase of machineries. The assessee alternatively claimed deduction of Rs.59,82,332/- as revenue expenses being exchange difference of loan during the year, which is used for machineries already put to use for the purpose of business. The Ld A.O. disallowed the depreciation of Rs. 35,09,559/- on the ground that the exchange difference cannot be capitalised u/s 43A as the loan is not used for imported machineries hence not eligible for depreciation and also rejected alternative claim for deduction of Rs.59,82,332/- as revenue expenses / business loss. Ld. CIT (A) upheld the disallowance.

**3.2.** Being aggrieved, the assessee filed an appeal before the Tribunal.

**3.3.** During the course of hearing Ld. Counsel submitted that fairly speaking section 43A does not apply on the facts of this case since the assessee did not purchase plant and machinery from outside India and therefore assessee cannot take benefit of depreciation taking shelter of section 43A, but, the assessee

is entitled for depreciation on additional liability arising on account of fluctuation in foreign exchange under general principles. In support of his arguments, he relied upon judgments of Hon'ble Supreme Court in the case of CIT v. Arvind Mills Ltd. 193 ITR 255 for this proposition and argued that this issue is covered with the said judgment of Hon'ble Supreme Court.

**3.4.** Per contra, Ld. DR submitted that section 43A is clear in its expression and does not provide benefit where the machine is purchased within India. He further submitted that under the general principles also assessee cannot be given benefit of depreciation on account of fluctuation in foreign exchange. He drew our attention on page no.4 of order passed by Ld. CIT(A) wherein this issue has been discussed.

**3.5.** We have gone through the orders of lower authorities and considered submissions made by both the sides as well as the judgments relied upon before us. Admittedly, in this case, the machine has not been purchased from outside India and therefore, assessee is clearly not eligible to claim the benefit of depreciation u/s 43A of the Act. The next issue that arises for our consideration is whether the assessee would be entitled for the depreciation on the additional amount of liability of the loan arising on account of foreign exchange fluctuations. In this regard, it was shown to us that this issue has already been decided by Hon'ble Supreme Court in the case of Arvind Mills Ltd. (supra). It is noted from the perusal of judgment of Hon'ble Supreme court that one of the questions considered by Hon'ble Supreme Court was that whether the assessee can

claim allowances like depreciation etc. under the Act on the additional liability arising to the assessee consequent to the devaluation of rupee viz-a-viz foreign exchange. Hon'ble Supreme Court considered entire gamut of law available and also considered the statement issued by the Institute of Chartered Accountant of India wherein it was advised that fixed assets which are purchased prior to devaluation but paid for subsequently should be recorded at the enhanced cost of conversion at the new rates of exchange and depreciation must be provided on the additional cost according to the method of depreciation normally employed by the company. Their lordships observed as under:

*“We may now turn to the second question posed earlier and consider the position on general principles. So far as depreciation allowance is concerned, the position is perhaps a little simpler because it is a recurrent claim. Under the definitions contained in Section 32 read with Section 43(1) and (6) of the Income-tax Act, the depreciation is to be allowed on the actual cost of the asset less all depreciation actually allowed in respect thereof in earlier years. **Thus where the cost of the asset subsequently goes up because of devaluation, whatever might have been the position in the earlier year, it is always open to the assessee to insist, and for the Income-tax Officer to agree, that the written down value in the year in which the increased liability has arisen should be taken on the basis of the increased cost minus depreciation earlier allowed on the basis of the old cost.** Thus in the illustration given earlier, if the asset is one that earns depreciation at 10%, the assessee would have got a depreciation allowance of Rs. 10,000 for assessment year 1966-67 and that will stand. But, for the assessment year 1967-68 the depreciation allowance will be calculated on an actual cost of Rs. 1,20,000 minus the depreciation, earlier allowed, of Rs. 10,000 i.e. on Rs. 1,10,000. The*

*written down value and allowances for subsequent years will be calculated on this footings. **In other words, though the depreciation granted earlier will not be disturbed, the assessee will be able to get a higher amount of depreciation in subsequent years on the basis of the revised cost and there will be no problem.***

**3.6.** Thus, perusal of the judgment of Hon'ble Supreme Court reveals that if an assessee incurs an additional liability on account of fluctuation in foreign exchange for the loan which was taken for acquiring a fixed assets, then on general principles also it shall be adjusted to the cost of the assets and assessee would be eligible to claim benefit of depreciation on the adjusted cost. The facts in this regard are undisputed; it is an admitted fact that loan was taken for acquiring fixed assets. Ld. Counsel placed before us at page 62 a work sheet showing the effect of increase in liability on account of devaluation of INR viz-a-viz US\$ and consequent adjustment to the cost of the assets and entitlement of the assessee with respect to depreciation on the additional liabilities adjusted to the cost of the assets. Thus, respectfully following the judgment of Hon'ble Supreme Court, we direct the AO to verify the facts as have been brought before us vide Paper Book page no. 62 and after verifying requisite details and documentary details in this regard, the AO should allow this depreciation on the adjusted cost of assets in relation to increase in the liability arising on account of fluctuation in foreign exchange. The assessee is free to raise all legal and factual issues in this regard for which the AO shall grant adequate opportunity of hearing. This ground may be treated as allowed.

**4. Ground No.1(b):** In this ground, the assessee had made alternative claim of allowing the amount of Rs.59,82,332/- being difference on realignment of foreign currency loan u/s 37 of the Act, as part of business expenses.

**4.1.** Since, we have principally allowed primary claim of the assessee with respect to capitalizing the additional liability and allowing depreciation on the same, therefore, we find that Ground No. 1(b) has become infructuous and same is dismissed as such.

**5. Ground No. 2(a):** In this ground, the assessee has challenged the action of Ld. CIT(A) in confirming the addition of Rs.4.00 crores u/s 68 of the Act as unexplained credit on account of forfeiture of preference shares.

**5.1.** The brief facts in this regard are that the assessee received Rs. 4.00 Crores on 05.03.1999 by way of a loan from M/s Churuwala Investment & Finance Pvt. Ltd, a company assessed to tax, and subsequently converted the said loan into share application money for 80,00,000 Preference Shares of Rs. 10/- each ( for aggregate face value of Rs 8 Crores ) and allotment was made on 30.04.99 and the shareholder was asked to make payment of balance amount of Rs. 4.00 Crore. However, the company failed to make the payment of balance call money of Rs. 4.00 Crore inspite of forfeiture notice issued from time to time by the assessee company. Eventually, the assessee company forfeited the aforesaid amount and credited it to Capital Reserve A/c during the year. The AO did not accept it and made addition of Rs. 4.00 Crores on this account as unexplained credit.

Ld. CIT(A) confirmed the addition, and therefore appeal has been filed before us.

**5.2.** During the course of hearing before us, it was submitted that the impugned amount was received by the assessee in the preceding year and therefore, no addition could have been made u/s 68. It was further submitted that requisite evidences were submitted to show that there was forfeiture of shares due to non-payment of pending amount by the shareholder. It was also submitted that there arises no profit on account of forfeiture of share and secondly the shares though preference in nature forms part of the capital of the company and therefore, any forfeiture on account of this amounts to be capital receipts and thus the forfeiture of share is an act of a company in respect of its capital structure. Under these circumstances, no addition could have been made in the year under concern much less u/s 68. Our attention was drawn upon various evidences filed in this regard.

**5.3.** Per contra, Ld. DR submitted that since there were contradictions in the evidences submitted by the assessee and evidences collected by the AO directly from the said party, therefore, addition was rightly made by the AO.

**5.4.** We have gone through the orders of the lower authorities and considered submissions made by both the sides before us. It is noted by us from the perusal of the assessment order that at para 5.5, the AO has clearly mentioned that the cheque was deposited and got cleared in the bank account of the assessee on 09.03.1999. Thus, the impugned funds saw light of the day for the first time in financial year 1998-99 (corresponding to

A.Y. 1999-00). Under these circumstances, we find that as per section 68 'addition', if at all it was possible, could have been made in A.Y. 1999-00 only. Section 68 does not permit for making of addition for an amount which has not been received during the year under concern. Under these circumstances, we find that impugned addition could not have made at all in A.Y. 2000-01 i.e. the year under consideration. Thus, on this ground itself this addition is liable to be deleted. It is further noted by us that this amount has been duly confirmed by the said company and was also shown in its balance sheet as advance share application money as on 31.03.1999. In financial year 1999-00, the said company has written off this amount in its balance sheet and debited it in its profit and loss account as loss on account of forfeiture. It is further noted that in its computation sheet, this loss has been added back as a part of items disallowed. The assessing officer of the said company has accepted the same and neither any addition nor disallowance was made nor any adverse observation was given in this regard. Thus, we find that, viewed from any angle, the addition made by the AO is contrary to law and facts and the same is hereby deleted.

**6. Ground No. 3:** In this ground, the assessee has challenged the action of Ld. CIT(A) in confirming the disallowance of claim of Rs.16,70,226/-being the amount of provisions made for Earned Leave, on the ground that proper certificate was not given by the assessee.

**6.1.** The brief facts in this regard are that the assessee claimed deduction for Rs. 16,70,226/- being provision for leave

encashment, in view of Supreme Court's decision in the case of Bharat Earth Movers Vs. CIT (112 Taxman 61). The AO disallowed the same on the ground that report of actuarial valuation was not submitted. Ld. CIT (A) confirmed the disallowance on the ground that it is not paid before the due date of submission of return of income by the assessee.

**6.2.** During the course of hearing before us, Ld. Counsel of the assessee submitted that proper details were submitted wherein nothing wrong has been found by the AO and still disallowance has been made and wrongly confirmed by the Ld. CIT(A).

**6.3.** We have gone through the details submitted by the assessee in this regard and find that the assessee has submitted proper employee wise and date wise details with respect to employees. These details are quite exhaustive. Nothing wrong has been pointed out by the AO with regard to these details. The only requirement of law is that the calculation should be done on scientific basic. There is no such requirement that a certificate from the actuarial is mandatory. Thus, we send this issue back to the file of the AO with the direction to verify these exhaustively prepared details submitted by the assessee before us. The assessee may also furnish further details and evidences in support of its claim as may be considered appropriate as per law. The AO shall consider these details and evidences on objective basis and unless anything wrong is found in details or documentary evidences, the claim of the assessee should be allowed in view of judgment of Hon'ble Supreme Court in the case of Bharat

Earth Movers vs CIT 245 ITR 428. Thus, this ground may be treated as allowed for statistical purposes.

**6.3.** As a result, appeal of the assessee is partly allowed.

**Now, we shall take up revenue's appeal in ITA No.6653/Mum/2005 for A.Y. 2000-01.**

**7.** It was brought to our notice that in this appeal tax effect is less than 10,00,000/- and therefore, appeal of the revenue is not maintainable in view of circular of CBDT. Keeping in view, these submissions and facts of this case, appeal of revenue is dismissed. Our order shall have no bearing on the merits of this case.

**7.1.** As a result, appeal of the revenue is dismissed.

**Now, we shall take up appeal filed by the assessee in ITA No.8688/Mum/2011 for A.Y.1998-99:**

**8. Ground Nos. 1, 2 & 3:** These grounds are identical to the ground no. 1(a) for A.Y. 2000-01 and therefore, these are allowed in terms for our direction as given in A.Y. 2000-01.

**9. Ground No.4:** This ground is identical to ground no. 1(b) for A.Y. 2000-01 and therefore it is dismissed as infructuous.

**Now we shall take up assessee's appeal for A.Y. 1999-00 in ITA No.8689/Mum/2011:**

**10.** Ground Nos. 1(a)(b) & (c) are identical to ground no.1(a) of A.Y.2000-01 and therefore, these are allowed in terms of our

directions as given in A.Y. 2000-01. The AO is directed to follow our directions as given for A.Y. 2000-01.

**11. Ground No. 1(d).** This ground is identical to ground no. 1(b) for A.Y. 2000-01 and therefore, dismissed as infructuous.

**12.** Ground No. 2 is not pressed and therefore, dismissed.

**13.** Ground No.3 is general and does not need any specific adjudication.

**14.** In the result, appeal filed by the revenue is dismissed and appeals filed by the assessee are partly allowed.

Order pronounced in the open court on 11<sup>th</sup> August, 2016.

Sd/-

(Amit Shukla )

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(Ashwani Taneja)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 11/08/2016

*Patel, P.S./नि.स.*

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**