



ITA Nos.5583-84/Mum/2016
Asian infraprojects Private Limited
Assessment Years-2009-10 & 2011-12

आयकर अपीलीय अधिकरण “ए” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, MUMBAI

माननीय श्री शक्तिजीत दे, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE SHRI SAKTIJIT DEY, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आयकरअपील सं./ I.T.A. No.5584/Mum/2016

(निर्धारण वर्ष / Assessment Year:2009-10)

&

आयकरअपील सं./ I.T.A. No.5583/Mum/2016

(निर्धारण वर्ष / Assessment Year:2011-12)

DCIT-9(1)(2) Room No.260-A, 2 nd floor Aaykar Bhavan, M.K. Road Mumbai-400 020	बनाम/ Vs.	M/s. Asian Infra Projects Private Limited A-501, Kotia Nirman Opp. Laxmi Industrial Estate New Andheri Link Road Andheri (W), Mumbai-400 053.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AABCL-1351-P		
(□ पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

□ पीलार्थी की ओर से/ Appellant by	:	Shri S. Michael Jerald-Ld. DR
प्रत्यर्थीकीओरसे/ Respondent by	:	S/Shri Paras Nath & Jitendra Trivedi-Ld. ARs

Date of Hearing	:	14/10/2019
Date of Pronouncement	:	03/01/2020

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member): -

1. Aforesaid appeals by revenue for Assessment Years [in short referred to as AY] 2009-10 & 2011-12 contest separate orders of learned first



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Appellate Authority. Since the findings in AY 2011-12 forms the basis for reopening of assessment in AY 2009-10, we take up appeal for AY 2011-12, ITA No. 5583/Mum/2016 as the lead year and proceed to adjudicate the same.

Condonation of Delay

2.1 The registry has noted a delay of 251 days in filing of the appeal, the condonation of which has been sought by the revenue vide condonation petition dated 14/09/2016. It has been submitted that the appellate order for this year formed the basis to provide relief in AYs 2009-10 & 2012-13. While processing the appellate orders for AYs 2009-10 & 2012-13, it was observed that the decision not to file the appeal for AY 2011-12 was taken based on categorical report of lower authorities that there was nexus between funds borrowed and the funds advanced. However, there could not have been a complete nexus which was evident from quantum of interest earned and interest expended, which fact was not brought to the notice and the same resulted into delay in filing of appeal. Another plea raised is the fact that Ld. CIT(A) failed to appreciate that neither the business had commenced nor it was carried out during the year under consideration. In the above background, the Ld. DR pleaded for condonation of delay. The Ld. Authorized Representative for Assessee (AR), on the other hand, opposed the condonation for want of sufficient cause for delay in filing of appeal. As per Ld. AR, limitation could not be condoned on the ground of compassion or equitable considerations or where the party seeking condonation appears to be callous or negligent. Reliance has been placed,



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inter-alia, on the decision of Hon'ble Supreme Court rendered in **Office of the Chief Post Master General & or V/s Living Media India Ltd. & Anr. (348 ITR 7)** for the plea that condonation of delay is an exception and should not be used as an anticipated benefit for Government Departments. Reliance has also been placed on the decision of Hon'ble Supreme Court rendered in **P.K.Ramachandran V/s State of Kerala & Anr. (7 SCC 556)**. The Ld. AR also drew attention to the fact that during appellate proceedings, the assessee had submitted that there was direct nexus between interest income and interest expenditure as the assessee had given interest yielding loans out of interest-bearing funds. The learned first appellate authority, allowed the same to be assessable under the head business income after categorical findings / observations and relying upon various judicial decisions.

2.2 We have carefully considered the rival arguments on condonation of delay. It is quite evident that the subject matter of dispute under appeal spread over multiple years and therefore, no useful purpose would be served by dismissing the appeal merely for want of condonation of delay. No doubt, the parties are expected to be vigilant in the matter of appellate proceedings, however, as per settled legal position, a liberal approach may be adopted by appellate authorities in the interest of justice. We are guided by the principles laid down by Hon'ble Supreme Court in the case of **167 ITR 471 (SC) Collector, Land Acquisition Vs. Katiji** as under: -

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is



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condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common-sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Keeping in mind the aforesaid principles, the bench formed an opinion that the delay was to be condoned and the appeal was to be proceeded with as per the merits of the case.

Decision on Merits

3. The grounds raised by the revenue read as under: -

i) Whether in the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that there was a nexus between interest bearing borrowings and interest yielding advances ignoring that, at best, there was only partial nexus and not complete nexus as evidenced by the fact that interest earned was Rs.1,44,41,920/- whereas interest paid on borrowings made for making the interest yielding advances was Rs.2,38,56,459/-?

ii) Whether in the facts and circumstances of the case and in law, the Ld. CIT(A) failed to appreciate that notwithstanding a partial nexus between interest paid on borrowings utilized for interest yielding advances, the entire interest attributable to borrowings not utilized for making interest yielding advances could not have been allowed as business loss in view of the fact that neither the business had commenced nor was it carried on during the year?"

The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the DCIT 9(1)(2) be restored."

4. We have carefully heard the rival submissions including written submissions and documents placed on record. We have also deliberated on



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judicial pronouncements as cited before us including decision rendered by Tribunal in assessee's own case for AY 2012-13 in an appeal filed by the revenue vide ITA No.5582/Mum/2016 order dated 06/02/2017.

5.1 Facts on record would reveal that the assessee being resident corporate assessee stated to be engaged in the business of real estate, was assessed for year under consideration on 14/03/2014, wherein the income of the assessee was determined at Rs.146.65 Lacs after certain additions / adjustments as against returned loss of Rs.95.60 Lacs e-filed by the assessee on 27/09/2011.

5.2 During assessment proceedings, the perusal of Profit & Loss Account for the year under consideration as well as for the preceding year revealed that the assessee did not carry out any business activity of real estate. However, the assessee reflected interest income of Rs.144.41 Lacs which mainly consisted-off of interest on loans for Rs.136.57 Lacs and interest on Income Tax Refund for Rs.7.77 Lacs. The said income was offered as business income despite the fact that the business activity of the assessee was that of real estate and not money lending. Against interest income, the assessee claimed administrative and other expenses of Rs.1.64 Lacs as well as interest expenditure of Rs.238.56 Lacs.

5.3 As per the observations of Ld. AO, the loans obtained by the assessee appeared to have been diverted to directors / sister concerns. The assessee paid interest of 12% to couple of lenders and interest of 16% to one lender whereas it was receiving interest of 12% on its own lending which was evident from the fact that interest income was Rs.136.57 Lacs



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against income expenditure of Rs.238.58 Lacs. It was noted that the assessee was not a financing company and it had no license of money lending and therefore, the interest income was assessable under the head *income from other sources* as against *business income* offered by the assessee. The failure of the assessee to defend the same during the course of assessment proceedings led Ld. AO to treat the interest income as *income from other sources*. Consequently, interest expenditure was not allowed as deduction since the assessee failed to substantiate the nexus of interest expenditure with the interest income earned by the assessee.

5.4 The interest expenditure was also not allowed by invoking explanation to Section 37(1) since the assessee, in the opinion of Ld.AO, could not carry out the business of money lending and such activity was in violation of provisions of the Bombay Money Lenders Act. In the alternative, Ld. AO held that the excess interest of 4% amounting to Rs.40.96 Lacs being paid to one of the lender entities was to be disallowed u/s 36(1)(iii) / 57 of the Act.

5.5 Finally, the interest income was assessed under the head *Income from other sources* and total income was determined at Rs.146.65 Lacs. The interest expenditure of Rs.238.56 Lacs was not allowed as deduction either u/s 36(1)(iii) or u/s 57 of the Act.

6.1 Before learned CIT(A), the assessee, *inter-alia*, submitted that the assessee had borrowed funds for the purpose of its business. However, due to slowdown in the market, the projects could not be commenced whereas the assessee's liability to pay interest on borrowed funds had



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started. Therefore, the loans were advanced by the assessee so as to reduce the overall interest cost. It was also submitted that under normal circumstances when the assessee did not earn any income during the year, still the expenses would be allowable which would ultimately result into losses to the assessee. To avoid huge financial losses and to reduce overall financial burden towards interest liability, the assessee advanced money out of the borrowed funds to its associated entities. If such loans were not given, the resultant accumulated losses would even lead to bankruptcy or liquidation of the assessee. In the aforesaid background, the assessee pleaded that the interest was assessable under the head business income and interest expenditure would be an allowable deduction.

6.2 Regarding nexus between borrowed funds vis-à-vis lending made by the assessee, the attention was drawn to the fact that requisite details were filed by the assessee during the course of assessment proceedings vide letter dated 05/03/2014 which were not considered by Ld. AO while framing the assessment order. It was submitted that the funds were borrowed for business purposes and the lending were made to reduce overall interest cost as the project could not be started. Therefore, the interest expenditure having direct nexus with interest income was an allowable deduction.

6.3 Without prejudice, it was submitted that even if interest income was to be assessed as *Income from Other Sources*, the corresponding interest expenses having direct nexus with such income ought to have been allowed to be reduced / set-off therefrom since the prime intent of the assessee was to reduce the interest cost so as to avoid default in timely



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servicing of loans by way of repayment of principal and interest on funds borrowed. The attention was drawn to the financial statements to support the fact that there was direct nexus between borrowings and lending.

6.4 Finally, the assessee also assailed the proportionate disallowance of Rs.40.96 lacs as proposed by Ld.AO, in the alternative, by submitting that interest expenses were incurred for the existence of business.

7.1 After due consideration of factual matrix, it was observed by learned first appellate authority that the assessee had already started real estate business and given and received advances for this purpose in earlier years also. In fact, the assessee earned profit from real estate business in AY 2008-09. To support the same, the details of income earned by the assessee during AYs 2008-09 to 2010-11 has already been tabulated in para 5.1.1 of the impugned order.

7.2 Upon perusal of various clauses of Memorandum of Association (MOA), it was seen that although the primary business of the assessee was to acquire / develop properties but the assessee could invest and deal with the money of the company not immediately required. The assessee could receive deposits as well as advance money and therefore, it could not be said that the said activity violated the objectives of the assessee. Reliance was placed, *inter-alia*, on the decision of Hon'ble Bombay High Court rendered in **CIT V/s Lok Holdings (308 ITR 356)** wherein it was held that interest received by the assessee property developer, on temporary deposits of surplus money out of advances received by from intending purchases was business income and not income from other sources. In the



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above background, it was also noted that interest income as well as interest expenditure was accepted by the department in earlier years to be the business income of the assessee. Therefore, Ld. AO was directed to treat the interest income as business income and allow interest expenditure against the same. Alternatively, if the interest income was to be treated as Income from other sources, then interest expenditure would still be allowable u/s 57 of the Act. At the same time, Ld. CIT(A) confirmed the stand of Ld. AO in making proportionate disallowance of Rs.40.96 Lacs, being interest paid at excess rates since the borrowed capital was diverted at lower rates of interest.

7.3 The perusal of order giving effect dated 27/11/2015 passed by Ld. AO would reveal that ultimately, the income of the assessee was determined at a loss of Rs.53.85 Lacs, *inter-alia*, after disallowance of interest expenditure of Rs.40.96 Lacs. The interest income was assessed under the head *business income*.

Aggrieved by aforesaid adjudication, the revenue is under further appeal before us.

8. Upon due consideration of factual matrix as enumerated in preceding paragraphs, we find that Ld. CIT(A) has clinched the issue in the right perspective. It is quite evident that the business of the assessee was already set-up since the assessee had already reflected income from real estate business during AY 2008-09. The perusal of assessee's financial statements for year under consideration would show that the assessee has obtained unsecured loans of Rs.583.56 Lacs which has substantially been



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advanced to directors & others (to the extent of Rs.185.45 Lacs) and to make-up for the accumulated losses of Rs.317.31 Lacs incurred by the assessee over the years. The assessee do not have any other source of fund except Share capital of Rs.1 Lac. Therefore, there was complete nexus between the borrowings and lending made by the assessee. This being the case, the interest expenditure having direct nexus with interest income was clearly allowable to the assessee.

9. So far as the question of applicability of head of income is concerned, rule of consistency favor's assessee's stand which is evident from the fact that the assessee was following consistent method of offering such income as business income. The Ld. AR has placed on record status of assessment for AYs 2008-09 to 2015-16, the perusal of which would reveal that similar interest income has been accepted by revenue as business income in scrutiny assessment proceedings u/s 143(3) for AYs 2013-14 to 2014-15. In AYs 2008-09, 2010-11 & 2015-16, there was no scrutiny assessment and assessee's claim was accepted in self-assessment. Further, relying upon AY 2011-12, similar view was taken by Ld. CIT(A) in AY 2012-13, against which revenue preferred further appeal before this Tribunal vide ITA No. 5582/Mum/2016 order dated 06/02/2017 wherein the appeal of the revenue was dismissed.

10. Finally, the undisputed findings are that the assessee, in terms of its Memorandum of Association, could receive deposits as well as advance money and therefore, it could not be said that the said activity violated the objectives of the assessee. The ratio of decision of Hon'ble Bombay High



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Court rendered in **CIT V/s Lok Holdings (308 ITR 356)** was clearly applicable wherein it was held that interest received by the assessee property developer, on temporary deposits of surplus money out of advances received by from intending purchases was business income and not income from other sources. Therefore, no fault could be found in the impugned order, in this regard.

11. Keeping in view the entirety of facts and circumstances, we find that Ld. CIT(A) was correct in directing Ld.AO to assess the interest income as business income and allow interest expenditure against the same to the extent as specified in the impugned order. The ground stand dismissed to that extent.

12. Having said so, we find that factual matrix would require our indulgence only to the extent of interest on tax refund of Rs.7.77 Lacs earned by the assessee which is a part of overall interest income of Rs.144.41 Lacs. The said interest income, undisputedly, could not be held to be business income for the assessee rather it was assessable as *Income from Other Sources*. Therefore, we direct Ld.AO to modify order giving effect dated 27/11/2015 accordingly. The ground stand partly allowed to that extent.

Resultantly, the appeal stands partly allowed in terms of our above order.

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13. Facts are pari-materia the same in this year. The assessment was framed u/s 144 r.w.s.147 on 21/03/2015. The assessment framed in AY 2011-12 formed the basis to trigger reassessment proceedings in this AY.



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The assessment was framed on *best judgment basis* since the assessee failed to respond to hearing notices. Consequently, the assessment was framed on similar lines wherein the interest income was brought to tax as *Income from other sources* and interest expenditure was disallowed. The learned CIT(A), relying upon the order of its predecessor for AY 2011-12, took similar view. It was also noted that no appeal was filed by revenue against appellate order for AY 2011-12. The proportionate disallowance of Rs.75.39 Lacs was confirmed u/s 36(1)(iii). Aggrieved, the revenue is under further appeal before us.

14. The issue as well as factual matrix being identical as in AY 2011-12 and since we have decided the issue on merits in AY 2011-12, taking the same, we confirm the stand of Ld. CIT(A) in directing Ld.AO to accept interest income as business income. The interest on tax refund, if any, would be assessable as *Income from other sources*. No indulgence would be required against proportionate disallowance of Rs.75.39 Lacs u/s 36(1)(iii) as confirmed by Ld. CIT(A).

15. The appeal stands partly allowed in the same manner.

Conclusion

16. Both the appeals stand partly allowed in terms of our above order.

Order pronounced in the open court on 03rd January, 2020.

Sd/-

(Saktijit Dey)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 03/01/2020

Sr.PS:-Jaisy Varghese



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आदेश की प्रतिलिपि ढ ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

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**उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**