

आयकर अपीलीय अधिकरण "सी" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, PUNE

BEFORE SHRI R.S.SYAL, VP AND  
SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA No. 276/PUN/2021  
निर्धारण वर्ष / Assessment Year : 2016-17

City Corporation Limited  
(Before Merger Amanora Future Towers Pvt.Ltd.)  
917/9A, City Chambers, F.C. Road,  
Shivajinagar, Pune-411 004  
PAN : AAKCA3074H

.....अपीलार्थी / Appellant

बनाम / V/s.

The Deputy Commissioner of Income Tax,  
Circle-1(1), Pune.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Suhas Bora

Revenue by : Shri Mahadevan A.M Krishnan

सुनवाई की तारीख / Date of Hearing : 06.09.2021

घोषणा की तारीख / Date of Pronouncement : 06.09.2021

**आदेश / ORDER**

**PER PARTHA SARATHI CHAUDHURY, JM:**

This appeal preferred by the assessee emanates from the order of the Ld. CIT(Appeal), Pune-13 dated 25.05.2021 passed u/s.250 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for the assessment year 2016-17 as per the following grounds of appeal on record :

*"1. On the facts and circumstances of the case, the learned CIT(A), Pune has erred in giving direction to AO to refer the case to TPO to verify this claim. In case, the claim is found to be correct, there will be no transfer pricing adjustment on account of interest payments. Otherwise, the*

*transfer pricing adjustment is restricted to 1.13% of the amount borrowed as CCDs.*

*2. On the facts and circumstances of the case, the learned CIT(A), erred in confirming additions of Rs.2,75,41,987/- on basis of the order passed for AY 2013-14 without appreciating the facts of the case.*

*3. The assessee submits that 'Education Cess' and 'Secondary and Higher Education cess' amounting to Rs.42,46,460/- may kindly be allowed as a deduction while computing the total income of the assessee company.*

*4. The appellant prays for admission of Additional grounds/Additional evidence, if any required to support its case.*

*5. The appellant craves to leave or add, amend or alter any of the grounds for appeal. In view of all these and others grounds which may be produced during the hearing of appeal the appeal may be allowed and justice rendered."*

2. The brief facts in this case are that the assessee is a private limited company and engaged in the business activity of real estate projects. The assessee company is developing a township projects named as Future tower at Amanora, Pune. The assessee has filed its return of income for the year under consideration on 28.11.2016 declaring total income of Rs.42,12,75,820/-. The case was selected for scrutiny and accordingly, notices were issued to the assessee. The Assessing Officer concluded the assessment proceedings vide order dated 21.01.2020 u/s.143(3) r.w.s.144C(3) of the Act by making the additions of Rs.3,92,81,275/-, Rs.2,75,41,987/- and Rs.54,180/- on account of Transfer Pricing Adjustment, addition on reworking of WIP and disallowance u/s.43CA of the Act respectively. With the result, the assessee's total income was assessed at Rs.48,81,53,260/-.

3. With regard to first issue pertaining to TP adjustment in respect of interest payment on debentures, the TPO has discussed this issue from Para 6 onwards and has given his findings at Para 16 of his order. During transfer

pricing proceedings, the TPO while going through the assessee's Form 3CEB and transfer pricing report observed that it has not done the benchmarking of the payment of interest on debentures/compulsory Convertible debentures (CCDs) properly. The TPO observed that the assessee had issued Compulsory Convertible Debentures to its AEs in India and abroad against which it had claimed an interest payment of Rs.3,92,81,275/-. In respect of the same, the TPO held that the said transaction was, in fact, a shareholder activity and that the payment of interest was nothing but a self-inflicting loss. Accordingly, a show cause notice was issued to the assessee in this regard. The assessee made a detailed submission before the TPO. The same is not being reproduced for the sake of brevity. Further, the assessee's reply was duly considered but rebutted by the TPO. It was observed by the TPO that as per the assessee's agreement dated 22.03.2012 under which the funds had been brought, the AE's were referred to as investor and not as lender. Further, as per the terms of the agreement, the funds were to be used for the specific projects only. The assessee was also not allowed to raise any loan or debt for the project without the written consent of the lender. No such loan was appearing in the balance sheet of the assessee. Also, the agreement under which the funds has been brought from the AE, is self-inflicted agreement and under Income Tax Act, self-inflicted loss is not allowable. The TPO then held that by this agreement, the lenders (who are also shareholders) have been ensured that it does not have to pay the tax on the dividend which would be available for the distribution and would have been taxed in India. Therefore, it was clear that the interest payments were made to the shareholder/ultimate shareholder only.

4. The TPO went on to refer to the OECD report of 1979, OECD Guidelines, 2010, provisions of section 2(22)(e) of the Act and various other

case laws. In view of the above, the TPO took the Arm's Length Price of the payment of interest to AE at Rs. Nil and thus, made an unward adjustment of Rs.3,92,81,275/- and the same was confirmed by the Assessing Officer in his order.

5. Thereafter, the assessee filed detailed written submissions before the Ld. CIT(Appeal) which is on record. The Ld. CIT(Appeal) after considering the assessee's submission has given his findings at Para 2.3 of this order which reads as follows:

*"2.3 I have carefully considered the facts of the case and submission filed by the appellant. As rightly mentioned by the appellant, the transfer pricing adjustment towards interest on compulsory convertible debenture (CCDs) is squarely covered by my decisions in the appellant's own case for AY 2014-15 & AY 2015-16. Further, the appellant has also brought to my attention Honourable ITAT, Pune's decision dtd.18.12.2020 in ITA No. 772/PUN/2018 for AY 2013-14 in its own case. Accordingly, appeal is partly allowed as per directions in previous 2 assessments years."*

The Ld. CIT(Appeal) has relied on the decision of the Pune Bench of the Tribunal in assessee's own case dated 18.12.2020 in ITA No.772/PUN/2018 for the assessment year 2013-14 and provided partial relief to the assessee.

6. The Ld. DR placed strong reliance on the orders of the sub-ordinate Authorities and submitted that the view taken by the Ld. CIT(Appeal) should be upheld in view of the fact that he has given his findings based on the Tribunal's order in assessee's own case for the assessment year 2013-14 (supra.). The Ld. DR further submitted that the Tribunal in assessee's own case for the assessment year 2014-15 had referred to its own decision in respect of the assessee immediately preceding assessment year i.e. 2013-14.

7. We have gone through the findings of the Ld. CIT(Appeal) as well as the Tribunal's order in assessee's own case for the assessment year 2014-15 in

ITA No.618/PUN/2020 & ITA No.44/PUN/2021 wherein the Tribunal at Para 5 had referred to its own order for assessment year 2013-14 in ITA No.772/PUN/2018 and taken a decision upholding the findings of the Tribunal in assessee's own case for the assessment year 2013-14. The relevant findings of the Tribunal read as follows:

*"5. Having heard both the sides through Virtual Court and gone through the relevant material on record, it is seen that similar issue came up for consideration before the Tribunal in the assessee's own case for the immediately preceding assessment year 2013-14. In fact, the TPO also referred to his own decision taken for the assessment year 2013-14 for determining NIL ALP. The Tribunal, vide its order dated 18-12-2020 in ITA No.772/PUN/2018, has countenanced the assessee's stand by holding that the assessee rightly issued debentures and CCDs to its AEs and the AO was not justified in re-characterizing the transactions. As regards the ALP determination, the Tribunal restored the matter to the file of AO/TPO for a fresh determination. Since the facts and circumstances of the instant appeal are mutatis mutandis similar to those of the preceding year, respectfully following the precedent, we approve the view taken by the ld. CIT(A) and hold that the AO was not justified in re-characterising the transaction of issue of debentures/CCDs as that of equity shares. As regards the ALP determination, we again follow the view taken by the Tribunal for the immediately preceding year and direct the AO/TPO to recompute the ALP of the transactions of payment of interest on debentures/CCDs....."*

7.1 We find that the Ld. CIT(Appeal) has passed his order based on the decision of the Pune Bench of the Tribunal for the assessment year 2013-14 in assessee's own case (supra.). Therefore, we do not find any reason to interfere with the findings of the Ld. CIT(Appeal) and accordingly, the same is upheld. Thus, **Ground No.1 raised in appeal by the assessee is dismissed.**

8. **Ground No.2** pertains to the issue of addition on reworking of WIP. During the assessment proceeding, the Assessing Officer observed that the Ld. CIT(Appeal), Pune had passed an order for the assessment year 2013-14 dated 21.03.2018 wherein the Ld. CIT(Appeal) had upheld the action of the Assessing Officer for upward international transaction adjustment of Rs.16,88,23,507/-. However, the assessee made an alternate, without

prejudice argument before the Ld. CIT(Appeal) wherein it was stated that the interest accrued and paid on the CCDs had been capitalized to its WIP and had not been claimed as expenditure in the year under consideration. The Ld. CIT(Appeal) had accepted the alternative argument of the assessee and as the TP adjustment was confirmed, he directed the Assessing Officer to reduce the amount of WIP by the debenture interest.

9. In view of the Ld. CIT(Appeal)'s decision, the assessee was asked to submit the reworking of WIP for giving effect to the order of the Ld. CIT(Appeal), Pune for the assessment year 2013-14 and its effect in this year's profitability thereof. The assessee submitted that the cost of corresponding interest booked in view of the capitalized interest in the subsequent years. In view of the reworking of WIP submitted by the assessee, the cost of interest expenses on debenture booked in FY 2015-16 relevant to AY 2016-17 of Rs.2,75,41,987/- was added to the total income of the assessee by the Assessing Officer.

10. During the appellate proceedings, the assessee submitted detailed submissions which are not reproduced for the sake of brevity and found place on record. The Ld. CIT(Appeal) on this issue has given his findings at Para 4.3 of his order which read as follows:

*"4.3 I have carefully considered the facts of the case filed by the appellant. The issue is related to the giving effect to My predecessor's order dtd.21.03.2018 for AY 2013-14 in the subsequent year's WIP re-computation. Accordingly, this addition of Rs.2,75,41,987/- on reworking of WIP emanates from decision of my predecessor in AY 2013-14. Therefore, no interference is called on this issue. Accordingly, appeal on this ground is dismissed."*

11. The Ld. AR for the assessee submitted that this issue was also discussed in assessee's own case by Pune Bench of the Tribunal for the assessment year 2015-16 in ITA No.619/PUN/2020 & ITA No.45/PUN/2021

wherein the Tribunal at Para 20 & 21 of its order had followed its own order in assessee's own case for the assessment year 2013-14 (supra.) and held as follows:

*20. The next ground raised by the assessee is against the confirmation of addition of Rs.3,03,72,733/-. The factual panorama of this ground is that the assessee paid interest on debentures/CCDs to its AE for the assessment year 2013-14. The TPO determined Nil ALP. When the matter came up before the ld. CIT(A), the assessee contended that the interest cost of Rs.14.20 crore was taken to work-in-progress and not claimed as deduction. Albeit the ld. CIT(A) approved the ALP determination, but also accepted the assessee's alternative argument. He directed the AO that whenever the assessee claims deduction against this work-in-progress, the interest component for the assessment year 2013-14, whose ALP was determined at NIL, should be added back to the total income. Following the same, the AO added Rs.3.03 crore to the total income of the assessee for the year under consideration representing interest expenditure on debenture/CCDs booked for the assessment year 2013-14. The ld. CIT(A) approved the AO's action.*

*21. We have heard the rival contentions and perused the relevant material on record. It is seen that for the assessment year 2013-14 the Tribunal vide its order dated 18-12-2020 (ITA No.772/PUN/2018) has overturned the view of the ld. CIT(A) and held that the re-characterization of transaction of issue of debentures/CCDs to issue of equity capital was not correct and accordingly directed the AO/TPO to re-work out the ALP of the transaction of interest payment. In that view of the matter, the direction given by the ld. CIT(A) for the A.Y. 2013-14 stands substituted with that of the Tribunal for re-determining the ALP of the transaction of payment of interest on debentures/CCD. Since the assessee capitalized interest on debentures/CCDs in its WIP for the assessment 2013-14, it is but natural that when the work-in-progress is reversed in the subsequent years at the time of sale of flats/plots, the corresponding amount of excess interest on debentures/CCDs, over and above its ALP, needs to be reversed and added back to the income of that year. To exemplify, if the WIP stood at Rs.1000 as on 31.3.2013 which included interest of Rs.100 paid on debentures/CCDS and pursuant to the directions given by the Tribunal, the ALP of interest payment is re-determined at Rs.75/-. In that case, the differential amount of Rs.25/- (Rs.100 minus Rs.75) is required to be added back proportionately to the total income as and when the corresponding amount of the work-in progress is reversed on the sale of flats/plots etc. We, therefore, overturn the impugned order on this score and hold that the amount of capitalized interest on debentures/CCDs to the work in progress for the assessment year 2013-14, as is in excess of its ALP freshly determined by the AO/TPO, should be disallowed proportionately in the years in which the work-in-progress containing the amount of such interest standing as on 31-03-2013, is reversed on the sale of flats/plots."*

12. That the aforesaid order talks of the amount of capitalized interest on debentures/CCDs to the work in progress for the assessment year 2013-14 only as is in excess of its ALP freshly determined by the Assessing

Officer/TPO should be disallowed proportionately in the years in which the work in progress containing the amount of such interest standing as on 31.03.2013, i.e. FY 2013-14 relevant to AY 2014-15, is reversed on the sale of flats/plots. The same exercise has to be carried on for the assessment years 2014-15 and 2015-16 as well. Following the same parity of reasoning in assessee own case's decision of the Pune Bench of the Tribunal (supra.),

**Ground No.2 is allowed.**

13. **Ground No.3** pertains to 'Education cess' and 'Secondary and Higher Education Cess'.

14. That on this issue, both the parties herein accepted the fact that it is covered in favour of the assessee and same has been allowed in assessee's own case in ITA No.618/PUN/2020 & ITA No.44/PUN/2021 for the assessment year 2014-15 dated 17.08.2021. The Tribunal on this issue of 'Education cess' and 'Secondary and Higher Education Cess' held as follows:

*"6. The assessee has also raised an additional ground stating that Education Cess and Secondary and Higher Secondary Cess amounting to Rs.26,66,359/- may be allowed as a deduction while computing the total income of the assessee company.*

*7. The Hon'ble Supreme Court in National Thermal Power Company Ltd. Vs. CIT (1998) 229 ITR 383 (SC) has observed that "the purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item". Answering the question posed before it in affirmative, their Lordships held that on the facts found by the authorities below, if a question of law arises (though not raised before the authorities) which has bearing on the tax liability of the assessee, the Tribunal has jurisdiction to examine the same. Having gone through the subject matter of the additional ground taken by the assessee, it is discernible that it raises a pure question of law. We, therefore, admit the same.*

*8. On merits, the issue raised through the additional ground is no more res integra in view of the judgment of Hon'ble jurisdictional High Court in Sesa Goa Lt. Vs. JCIT (2020) 423 ITR 426 (Bom.) in which it has been held that Education Cess is not disallowable expenditure u/s.40(a)(ii) of*

*the Income tax Act. 1961 (hereinafter also called as `the Act'). Similar view was earlier taken by the Hon'ble Rajasthan High Court in Chambal Fertilisers and Chemicals Ltd. and Another Vs. JCIT (2018) 102 CCH 0202 (RajHC). We, therefore, direct the AO to ascertain the correct amount of education cess and then allow a deduction for it, after allowing opportunity of hearing to the assessee."*

15. That following the same parity of reasoning under same set of facts and circumstances, after hearing the parties, the matter is remanded to the file of the Assessing Officer to ascertain the exact amount of education cess and then allow a deduction for it, after allowing opportunity of hearing to the assessee. Thus, **Ground No.3 raised in appeal by the assessee is allowed for statistical purposes.**

16. **Grounds No. 4 and 5** are general in nature and hence, no adjudication is required.

17. In the result, **appeal of the assessee is partly allowed for statistical purposes.**

Order pronounced on 06<sup>th</sup> day of September, 2021.

Sd/-  
**R.S.SYAL**  
**VICE PRESIDENT**

Sd/-  
**PARTHA SARATHI CHAUDHURY**  
**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 06<sup>th</sup> September, 2021.

SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-13, Pune.
4. The Pr. CIT-5, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "सी" बेंच, पुणे / DR, ITAT, "C" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

**// True Copy //**

निजी सचिव / Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

|    |                                                    | Date       |          |
|----|----------------------------------------------------|------------|----------|
| 1  | Draft dictated on                                  | 06.09.2021 | Sr.PS/PS |
| 2  | Draft placed before author                         | 06.09.2021 | Sr.PS/PS |
| 3  | Draft proposed and placed before the second Member |            | JM/AM    |
| 4  | Draft discussed/approved by second Member          |            | AM/JM    |
| 5  | Approved draft comes to the Sr. PS/PS              |            | Sr.PS/PS |
| 6  | Kept for pronouncement on                          |            | Sr.PS/PS |
| 7  | Date of uploading of order                         |            | Sr.PS/PS |
| 8  | File sent to Bench Clerk                           |            | Sr.PS/PS |
| 9  | Date on which the file goes to the Head Clerk      |            |          |
| 10 | Date on which file goes to the A.R                 |            |          |
| 11 | Date of dispatch of order                          |            |          |