

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE – VIRTUAL COURT

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

ITA No.2111/PUN/2017

निर्धारण वर्ष / Assessment Year : 2013-14

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| DCIT, Circle-1(1), Pune | Vs. | M/s. Kolte Patil Developers Ltd. (erstwhile Bellflower Properties Pvt. Ltd. merged with Kolte Patil Developers Ltd.,) Second Floor, City Point, Dhole Patil Road, Pune – 411 001 PAN : AADCB1007A |
| Appellant | | Respondent |

ITA No.1980/PUN/2017

निर्धारण वर्ष / Assessment Year : 2013-14

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| M/s. Kolte Patil Developers Ltd. (erstwhile Bellflower Properties Pvt. Ltd. merged with Kolte Patil Developers Ltd.,) Second Floor, City Point, Dhole Patil Road, Pune – 411 001 PAN : AADCB1007A | Vs. | DCIT, Circle-1(1), Pune |
| Appellant | | Respondent |

Assessee by
Revenue by

Shri Nikhil S. Pathak
Shri Rajarshi Dwivedy

Date of hearing

04 -12-2020

Date of pronouncement

08 -12-2020

आदेश / ORDER

PER R.S.SYAL, VP :

These two cross appeals – one by the Assessee and the other by the Revenue – emanate from the order dated 21-6-2017 passed by the CIT(A)-13, Pune in relation to the assessment year 2013-14. Because of certain overlapping issues

in the appeals, we have clubbed them for disposal through this common order.

2. First issue raised by the Revenue in its appeal through certain grounds is against overturning by the Id. CIT(A) of the action of the Assessing Officer (AO)/Transfer Pricing Officer (TPO) in treating Optionally and Compulsory Convertible Debentures issued by the assessee-company as Equity Share Capital.

3. Succinctly, the factual matrix of the case is that the assessee, a domestic company, is engaged in the business of development of Real estate. A return was filed declaring total income of Rs.20.08 crore. Certain international transactions and Specified Domestic transactions were reported by the assessee in the requisite form. The AO made a reference to the TPO for determining their Arm's Length Price (ALP). Dispute in the instant appeals is on the international transaction of payment of Interest on debentures to Lobrenco Ltd., Cyprus, amounting to Rs.2,83,75,007/- and the specified domestic transaction of payment of Interest on debentures to Kolte Patil Developers Ltd. amounting to Rs.3,48,93,588/-. The assessee applied the Comparable Uncontrolled Price (CUP) method for

demonstrating that payment of interest under these transactions was at ALP. The TPO observed that the assessee issued Compulsory Convertible Debentures (CCDs) and Optionally Convertible Debentures (OCDs) to its AEs in India and Abroad. Total interest payment of Rs.6,32,68,595/- was claimed as deduction. The assessee was show-caused as to why the transaction of funding by the assessee through the issue of debentures be not considered as issue of shares inasmuch as it was in the nature of 'Shareholder activity'. To support his view point, the TPO relied on definition of the term "Shareholder activity" in the OECD guidelines. The assessee submitted that its shareholders were Kolte Patil Developers Ltd. (KPDL) and Portman Holdings (Hyderabad) Ltd. holding 50.01% and 49.99% shares respectively. It was further explained that it had undertaken development and construction of the project "Margosa" in Pune which was a big project comprising of total saleable area of 10.00 lakh sq.ft. Such project started in the year 2007-08 and required further developments including acquisition of land for which funds were required. Out of various options available, the assessee decided to issue debentures to its joint venture partners. The assessee tried to

controvert the notion of the TPO about the 'Shareholder activity'. The TPO defended his view point of the transaction of funding as a 'Shareholder activity' by finding that the availing of funds by the assessee from its AEs was through hybrid instruments as these were convertible into shares. He further noticed that the assessee's paid up capital was Rs.99.99 lakh with Reserves & Surplus at Rs.18.40 crore and long term borrowings at Rs.23.32 crore. Considering the assessee's ratio of capital to borrowings at 1:23 and RBI Master Circular No.07/2009-10 dated 01-07-2009 stipulating Debt Equity ratio of 4:1 on External Commercial Borrowings (ECB), the TPO came to hold that no independent third party would have invested in the convertible debentures issued by the assessee except by way of participation in equity. He also took note of the Thin capitalization principle of having higher proportion of debt *vis-à-vis* equity and General Anti-Avoidance Rules (GAAR) resulting into tax avoidance. This convinced him to hold that the amount raised by the assessee in the form of debentures had a substance of equity on which no interest was payable. In reaching this conclusion, he took note of certain Tribunal orders and also the judgment of the Hon'ble Delhi

High Court in *CIT Vs. EKL Appliances Ltd. (2012) 349 ITR 241 (Delhi)* holding that re-characterization of transactions was permissible in two circumstances, *inter alia*, where the economic substance of a transaction differed from its form. The TPO, therefore, recharacterized the transactions of issue of debentures into shares and determined Nil ALP of international/specified domestic transactions of payment of Interest on debentures at Nil leading to proposing transfer pricing adjustment of Rs.6,32,68,595/-.

4. The Id. CIT(A) reversed the finding of the TPO incorporated in the assessment order re-characterizing the transaction of issuance of OCDs/CCDs to its Associated Enterprises (AEs) into Equity Capital. In reaching this conclusion, he also relied on certain judgments/orders and found the reliance of the TPO on other Tribunal orders misconceived. He further did not agree with the TPO in determining the ALP of the transactions of payment of Interest on debentures at Nil. As against 15% interest paid by the assessee, the Id. CIT(A), applying internal CUP method and taking support from his decision taken in the case of the assessee for the assessment year 2011-12, determined ALP of

the transaction at 13.75%, thereby restricting the transfer pricing adjustment to the amount equivalent to 1.25% of the value of transactions. Both the Revenue as well as the assessee have come up in appeal before the Tribunal on their respective stands.

5. We have heard the rival submissions through the Virtual Court and scanned through the relevant material on record. The issue espoused by the Revenue currently under consideration is against the reversal by the Id. CIT(A) of the view of the AO/TPO in treating the transactions of issue of OCDs and CCDs into Equity capital. Central facts leading to the dispute are that the assessee was in need of funds because of certain on-going projects on a large scale basis. It issued OCDs to KPDL and CCDs to Lobrenco Ltd. in 2009 and continued to pay interest @15% thereon. KPDL holds 50.01% shares in the assessee company and Lobrenco Ltd. is a subsidiary of Portman holdings (Hyderabad) Ltd., which, in turn, holds remaining 49.99% of the assessee's equity. CCDs issued to Lobrenco Ltd. were purchased by KPDL in January, 2013 and thereafter the same were converted into Non-convertible debentures and ultimately redeemed. The OCDs issued to KPDL were not

converted into equity shares and were redeemed by the assessee in January, 2013. Thus, the debentures issued by the assessee to both the related parties were never converted into equity and stood redeemed as such. The case of the TPO is that OCDs/CCDs issued by the assessee to its AEs were in true nature of equity shares. Their depiction as debentures and not as shares, in the opinion of the TPO/AO, was aimed at screwing the tax bill by claiming deduction of interest on debentures. On page 9 of his order, the TPO relied on the Thin capitalization and the GAAR rules to support his point of view.

6. At this juncture, it is pertinent to note that both the borrowing and raising of equity share capital are well recognized modes of funding business requirements. Every businessman has to take several circumstances into consideration before deciding as to whether he needs to borrow or issue capital. There is no legal bar in accepting loans from shareholders/related concerns in the same way in which it is open to issue fresh shares to its existing lenders who are non-shareholders. Thin capitalization is a state of financial position of a company in which proportion between its capital and borrowings is unevenly poised towards debts. Thin

capitalization can also be loosely called as thick borrowings. There are advantages and disadvantages of both the streams of funding, namely, capital and debts. However, in tax regime, their consequences are varying. *Por una parte*, a debt entails its service by interest, which is deductible in the computation of total income of payer, *por otra parte* an equity requires its service by payment of dividend, which is not only an application of income and hence not deductible but also requires the payer company to pay dividend distribution tax. The BEPS Action plan 4 notified the device of thin capitalization as a measure adopted by some related companies to erode taxation base from the concerned countries by unnecessarily opting for borrowings rather than capital so as to reduce its burden of taxation. Giving effect to the BEPS Action plan 4 and with an aim to reduce the needless claim of deduction of interest, India has introduced thin capitalization rule for the first time by means of a direct provision in the shape of section 94B by the Finance Act, 2017. This section provides a limit of deductible interest at 30% of earnings before interest, taxes, and depreciation where payment of interest exceeds Rs.1.00 crore. In the pre-insertion era, there was no direct statutory provision for making any transfer pricing

adjustment on this score. Side by side, Chapter X-A of the Act containing GAAR has also been made applicable from the 1st day of April, 2018. Starting with a non-obstante clause, section 95(1) provides that an arrangement entered into by an assessee may be declared an impermissible avoidance arrangement and the consequence in relation to tax arising therefrom may be determined subject to the provisions of this Chapter. An Impermissible Avoidance Arrangement (IAA) has been defined in section 96(1) of the Act to mean an arrangement, the main purpose of which is to obtain a tax benefit in certain situations subject to certain conditions. One of the requisites of an IAA is an arrangement lacking commercial substance, which has further been explained in section 97. Clause (a) of section 97(1) states that an arrangement shall be deemed to lack commercial substance, if 'the substance or effect of the arrangement as a whole, is inconsistent with, or differs significantly from, the form of its individual steps or a part'. In other words, where the form of an arrangement differs from its substance, it can be declared as IAA. Similarly clause (d) states that an arrangement shall be deemed to lack commercial substance, if 'it does not have a significant effect upon the

business risks or net cash flows of any party to the arrangement apart from any effect attributable to the tax benefit that would be obtained (but for the provisions of this Chapter).’ On declaring an arrangement as IAA, the consequences, as set out in section 98 follow, as per which the transaction can be, *inter alia*, recharacterized. It is apposite to note that the AO cannot simply at his sweet will declare a transaction as an IAA. There is a strict procedure enshrined in section 144BA, which needs to be followed for taking recourse to the GAAR. Thus it is overt that the legislation has been provided with teeth to tackle the excess payment of interest in case of transactions of borrowing and lending between two associated enterprises specifically with section 94B and generally with the GAAR. However, it is pertinent to note that both these provisions have been brought in the statute prospectively w.e.f.1.4.2018. The TPO, for treating the assessee’s debt as equity, drew support from the assessee’s debt equity ratio in the light of the RBI’s debt equity ratio for ECBs. However, section 94B, even after insertion at a later point of time, does not prescribe any debt equity ratio as a thin capitalization rule, thereby rendering the action of the TPO meritless. Whatever is not prohibited under the Act - generally

or specifically - is impliedly permissible. In the absence of any existing provision under the Act at the relevant point of time, the TPO could not have ventured to recharacterize the transaction of debt into equity.

7. At this stage, it is befitting to note that there are different thin capitalization rules adopted by various countries depending upon host of factors, including their financial requirements. Whereas, some countries like Austria provide for a specific debt equity ratio (4:1) only as a thin capitalization rule, others like Norway and Poland only limit the amount of interest on debts not exceeding a particular percentage of earnings before interest, taxes and depreciation etc. if deduction on account of interest exceeds a particular amount. While still some others countries like Denmark have a combination of both the debt-equity ratio as well as a cap on the deductibility of interest subject to maximum of certain percentage of a defined base, such as, profit before interest and depreciation etc. India has enshrined thin capitalization rule u/s 94B by providing a limit on the amount of deductible interest at 30% of earnings before interest, taxes, depreciation, where payment of interest exceeds

Rs.1.00 crore. India has chosen not to statutorily provide any debt equity ratio as a thin capitalization rule.

8. The TPO in the extant case made a transfer pricing adjustment by disallowing the interest paid to the related concerns. Here it is pertinent to mention that Chapter-X of the Act having, *inter alia*, transfer pricing provisions is a special anti-avoidance tax measure. It mandates computing income of an assessee from the transactions with related parties at arm's length. Section 92 of the Chapter, which is the first section begins with sub-section (1) providing that: ' Any income arising from an international transaction shall be computed having regard to the arm's length price.' Computation of arm's length price has been set out in section 92C. Sub-section (1) of this section states that: ' The arm's length price in relation to an international transaction or specified domestic transaction shall be determined by any of the following methods.....'. Throughout the Chapter there is a focus on determining the arm's length price of the international transaction, as has been entered. In other words, if transaction X has been entered at price A, then the emphasis is on ascertaining if the price A is at arm's length by finding suitable comparables. There is no

mandate for changing the colour of transaction from X to Y. This Chapter does not call for redetermining the nature of transaction in a way different from what has been actually entered into between two related enterprises. It simply requires redetermining the price of the transaction actually entered into. Thus, save and except a case falls within the purview of specific or general tax avoidance provision, the authorities cannot dub a genuine transaction as sham or anti-avoidance and proceed to disregard or recharacterize the same.

9. Reverting to the facts of the case it is seen that the assessee issued debentures to its AEs, which were eventually redeemed. The TPO/AO changed the complexion of the transaction from borrowing to equity by resorting to the Thin capitalization rule and the GAAR. We have noticed *supra* that section 94B containing specific thin capitalization rules and GAAR came into force w.e.f. 1.4.2018. The assessment year under consideration is 2013-14. Obviously, these provisions are not applicable and resultantly the TPO could not have altered the form of the transaction. Our view is fortified by the judgment dated 30.08.2012 of the Hon'ble jurisdictional High Court in DIT(IT) vs. M/s Besix Kier Dabhol SA (ITA No. 776

of 2011), copy placed at page 1 of the paper book laying down that the Tribunal was right in holding that in the absence of any specific thin capitalization rules in India, the AO could not disallow the interest payment on debt capital after having observed the abnormal thin capitalization.

10. The TPO has also harped on the concept of 'Shareholder activity' and dubbed the financing by the AEs as a shareholder activity. For this proposition, he relied on definition of the term 'Shareholder activity' given in the OECD Guidelines, 2010 that has been reproduced at page 8 of his order. The definition refers to an activity that a group member (usually Parent Company or Regional Holding Company) performs solely because of its ownership interest in one or more group members, i.e. in its capacity as shareholders. Thereafter, para 7.10 of the OECD guidelines 2010 gives certain examples constituting shareholding activity, some of which have been quoted by the TPO as under :

- “(a) Costs of activities relating to the juridical structure of the parent company itself, such as meetings of shareholders of the parent, issuing of shares in the parent company and costs of the supervisory board;
- (b) Costs relating to reporting requirements of the parent company including the consolidation of reports;
- (c) Costs of raising funds for the acquisition of its participations.”

11. On going through the ambit of “Shareholder activity” as given in the OECD guidelines on a general perspective, it becomes imminent that these activities are in the nature of certain acts performed by a parent company SOLELY because of its shareholding in other group companies, which is obviously not the case here. Then the TPO has listed 3 examples of the activities constituting shareholder activities albeit the OECD guidelines outline 5. We will limit ourselves in examining the shareholding activity from the TPO’s point of view only with the help of 3 examples that he has quoted.

12. The first activity relates to juridical structure of the parent company such as conducting shareholders’ meetings and cost of supervisory board. Second example is anent to reporting requirements of the parent company including the consolidation of reports. These two activities are obviously not relevant in the present context. The third activity talks of costs of raising funds for the acquisition of its participations. This applies where a parent company borrows money for introducing equity in another group concern. This example also is far away from the situation under consideration because here the AEs of the assessee have not borrowed any money for investing in the

shares of the assessee company but the assessee company has borrowed money from its related enterprises through debentures. *Ex consequenti*, it is simple and plain that the transaction of subscribing by the related companies to the debentures issued by the assessee does not fit into the description of a “Shareholder activity”. Thus, the view point canvassed by the TPO in this regard cannot be countenanced.

13. In the like manner, the ld. DR has referred to Securities Subscription Agreement dated 16-10-2009 to accentuate the point that Lobrenco Ltd. has been referred to in this Agreement as “Investor”. In his opinion, the nomenclature used for describing Lobrenco Ltd. in the Agreement depicts the intention of the parties to consider Lobrenco Ltd. as Investor in shares. This argument is *sans merits*. Primarily, the term “Investor” from the stand point of the person investing does not confine itself to investment in shares only but equally to debentures also. Secondly, hardly any authority is needed to emphasize that nomenclature given in any agreement cannot be decisive of the true nature of the transaction.

14. It is interesting to note that both the authorities as well as the rival counsel have heavily relied on the judgment of

Hon'ble Delhi High Court in the case of *EKL Appliances Ltd.* (*supra*) for buttressing their respective points of view, viz., the TPO/AO as well as the Id. DR for justifying the recharacterization of the transaction and the Id. CIT(A) and the Id. AR for otherwise. Let us examine that case in a little more detail. The assessee in that case made payment of Brand fee/Royalty to its Sweden Associate Enterprise. The TPO observed that the assessee was incurring huge losses year after year. Considering such perpetual losses, the payment of Royalty to the AE was held to be not justified more so because the Technical Knowhow/Brand fee did not accord any benefit to the assessee. The order of the AO was reversed by the Tribunal. When the Revenue brought the matter finally before the Hon'ble High Court for consideration, their Lordships accorded their imprimatur to the Tribunal order by observing that Rule 10B(1)(a) did not authorize disallowance of any expenditure on the ground that it was not necessary or was un-remunerative. That is how, the Hon'ble High Court set to naught the rule of 'necessity' resorted to by the authorities for making the disallowance. In the passing, it also dealt with the transfer pricing guidelines issued by the OECD providing for

recharacterization of transactions only in two exceptional circumstances. Insofar as the issue before the Hon'ble High Court on transfer pricing addition was concerned, that was not made by the AO/TPO on recharacterizing the transaction of payment of brand fee/royalty. Thus the *ratio decidendi* of the decision is that the AO/TPO cannot determine Nil ALP of a transaction of payment of an expenditure by holding that the assessee-company did not require the service etc. for which payment was made as expenditure. On the other hand, the discussion regarding OECD transfer pricing guidelines is *obiter dictum*.

15. Now we turn to the *obiter* in the case of *EKL Appliances (supra)* at a little length. The general rule is to recognize the actual transaction undertaken as such and not to rewrite it. The first exception is where the economic substance of a transaction differs from its form. An example of it, as given in the Guidelines is: 'an investment in an AE in the form of interest-bearing debt when, at arm's length, having regard to the economic circumstances of the borrowing company, the investment would not be expected to be structured in this way.' In such a case, the tax administration can recharacterize the

investment in accordance with its economic substance with the result that the loan may be treated as a subscription of capital. The focus of the Revenue in the instant case is on such first exception. It goes without saying that the *obiter* of a judgment of a higher forum also needs utmost respect. The first exception, which the Id. DR has vigorously accentuated, applies where the amount is, in fact, taken as equity but because of close relation between the assessee and its lender, the same has been reflected in the accounts as a borrowing or *vice-versa* so as to take home some tax advantage. It is in such circumstances that the apparent transaction of loan can be altered so as to bring on record the real or intended transaction of equity. It does not say that in all cases of borrowings made from related entities, it must be invariably taken as equity. If a certain sum of money was understood and accepted as a loan and also reflected in the same way, the case will not fall within the ambit of the first exception. On the facts of the extant case, we find that there is no difference in the form and substance of the transaction. The amount was raised through debentures, reflected in the same way in its accounts and then such debentures also got redeemed by the assessee company. The

position would have been different, if the assessee had taken the amount as equity but reflected it only as a debenture and also eventually converted into equity after some time. All the cases relied by the Department fall in such category where the amounts were, in fact, taken as equity but not declared as such and the intention behind the apparent transaction got unearthed due to surrounding circumstances. On the other hand, we are confronted with a situation in which the assessee was in need of funding for its ongoing projects. It took loan through debentures, which were eventually redeemed. So the instant case falls in the general provision of accepting the transaction as such and not in the exception requiring recharacterization of the transaction of debt into equity. *De hors* the provisions of section 94B and the GAAR in the period anterior to their applicability, the *obiter* in the case of *EKL Appliances (supra)* also supports the view canvassed by the Id. CIT(A) in not approving the recharacterization of the transaction of debt into equity. Thus, the first issue raised by the Revenue in its appeal is determined against it.

16. The next issue taken up by the Revenue in its appeal and the sole issue taken up by the assessee in its memorandum of

appeal is on the benchmarking of the International/Specified Domestic Transactions of interest payment to AES @15%.

17. We have noticed above that the assessee paid interest @ 15% to its AEs on CCDs and OCDs to KPDL and Lobrenco Ltd. The TPO/AO determined Nil ALP of the transactions. The Id. CIT(A), relying on his order for the assessment year 2011-12, worked out Arm's Length rate of interest at 13.75% on the basis of the interest paid by the assessee to its banker as a comparable uncontrolled transaction. Both the sides have come up in appeal on this issue.

18. The Hon'ble jurisdictional High Court in *CIT VS. Tata Autocomp Systems Ltd. (2015) 374 ITR 0516 (Bom)* has held that where loans are advanced to AEs, the ALP should be determined on the basis of rate of interest being charged in country where loan is received. Similar view has been reiterated in *Pr. CIT VS. India Debt Management P. Ltd. (2019) 417 ITR 103 (Bom)*. In the light of these judgments, the rate of interest to be taken into consideration for our purpose is the rate payable in India since the assessee is recipient of the loan in the form of debentures. In principle, the Id. CIT(A) is correct in

taking cognizance of the rate of interest payable on borrowings in India.

19. The assessee issued CCDs/OCDs in 2009 at interest rate of 15%. It was for the first time that the AO for the assessment year 2011-12 treated Arm's Length rate of interest at 8% on the basis of LIBOR plus certain basis points and made transfer pricing adjustment for the remaining interest equivalent to 7%. The Id. CIT(A), considering the interest paid by the assessee to IDBI Bank as Internal Comparable under the CUP method, determined the ALP of interest at 13.75%. Both the assessee as well as the Revenue preferred appeals against the order passed by the CIT(A) for the assessment year 2011-12. The Revenue did not dispute the determination of the arm's length rate of interest at 13.75% though it preferred appeal on disallowance u/s 14A of the Act. The assessee also preferred appeal against restricting the rate of interest at 13.75%, but, the Id. AR submitted that the assessee has filed application for settlement of the dispute under the Vivad Se Vishwas Scheme. It is thus vivid that the decision of the Id. CIT(A) for the assessment year 2011-12, considering internal comparable instance of interest payment by the assessee to IDBI as a benchmark, has attained

finality. On a pointed query as to what rate of interest was paid by the assessee during the year under consideration on the borrowings made from IDBI Bank, the ld. AR could not point out any such rate except referring to the Sanction letter dated 07-02-2011 issued by IDBI bank enhancing the assessee's credit facility to Rs.24.50 crore. However, on examination of the assessee's Balance sheet for the year under consideration, a copy placed at pages 152 onwards of the paper book, it emerges that the amount payable to IDBI bank stands at Nil. This shows that the interest rate paid by the assessee to IDBI Bank that was considered as an internal comparable under the CUP method for the earlier year, is no more relevant for the year under consideration. The exercise of ALP determination has to be undertaken each year separately by considering the facts and circumstances that are relevant and germane to the issue for that particular year. Given the fact that the basis for the determination of arm's length rate of interest for the preceding year 2011-12 does not survive and the ld. AR could not point out the rate of interest at which the assessee made borrowings from bank in the year under consideration, we are satisfied that it would be appropriate if the impugned order on this score is

set-aside and the matter is restored to the file of AO. We order accordingly and direct the AO/TPO to find out the rate at which interest was paid by the assessee to its bank in the year under consideration and then apply the same as arm's length rate for determining the ALP of the International/Specified Domestic transactions of payment of interest. Needless to say, the assessee will be allowed opportunity of hearing in such fresh determination. The cross grounds raised by both the sides on this issue are allowed for statistical purposes.

20. The assessee has raised an additional ground reading as under :

“The assessee submits that the education cess and secondary and higher education cess amounting to Rs.18,97,751/- may kindly be allowed as a deduction while computing the total income of the assessee.”

21. 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 the additional ground raises a pure question of law. We, therefore, admit the additional ground and espouse it for disposal on merits.

22. We find that 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 Act. Similar view has earlier been taken by the Hon'ble Rajasthan High Court in *Chambal Fertilisers and Chemicals Ltd. and Another Vs. JCIT (2018) 102 CCH 0202 (Raj-HC)*. As

correctness of the amount has not been disputed by the Id. DR,
we direct to allow deduction for such an amount.

23. In the result, the appeal of the assessee is partly allowed
and that of the Revenue is partly allowed for statistical
purposes.

Order pronounced in the Open Court on 08th December, 2020.

Sd/-
(S.S. VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 08th December, 2020
Satish

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-13, Pune
4. The Pr.CIT-5, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे
“सी” / DR ‘C’, ITAT, Pune
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

| | | Date | |
|-----|--|-------------|-------|
| 1. | Draft dictated on | 04-12-2020 | Sr.PS |
| 2. | Draft placed before author | 08 -12-2020 | Sr.PS |
| 3. | Draft proposed & placed before the second member | | JM |
| 4. | Draft discussed/approved by Second Member. | | JM |
| 5. | Approved Draft comes to the Sr.PS/PS | | Sr.PS |
| 6. | Kept for pronouncement on | | Sr.PS |
| 7. | Date of uploading order | | Sr.PS |
| 8. | File sent to the Bench Clerk | | Sr.PS |
| 9. | Date on which file goes to the Head Clerk | | |
| 10. | Date on which file goes to the A.R. | | |
| 11. | Date of dispatch of Order. | | |

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