

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I' BENCH,
NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No. 519/DEL/2022 [A.Y. 2017-18]

Vessel Warehousing Private Limited
106, Durga Chambers 1335 DB
Gupta Road, Karol Bagh, New Delhi

Vs. The Dy. C.I.T
Central Circle - 25(1)
New Delhi

PAN: AADCV 9171 D

(Applicant)

(Respondent)

Assessee By : Shri G.C. Srivastava, Adv
Shri Kalrav Malhotra, Adv
Shri Mayank Patawari, AR

Department By : Shri Rajesh Kumar, CIT-DR

Date of Hearing : 20.11.2023
Date of Pronouncement : 22.11.2023

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against order dated 27.01.2022 framed u/s 143(3) r.w.s 144C (13) r.w.s 144B of the Income-tax Act, 1961 [the Act, for short] pertaining to Assessment Year 2017-18.

2. Grievances of the assessee read as under:

"1. Ground No. 1 - General ground

1.1 That on the facts and circumstances of the case, the Ld. A.O. has erred in ignoring the specific directions of the Hon'ble DRP as well as the relevant provisions of the Act.

1.2 That on the facts and circumstance of the case, the Learned Transfer Pricing Officer ("Ld. TPO")Ld. AO and Hon'ble DRP have erred in making a TP adjustment of INR 2,16,29,690 to the returned total income of the Appellant in respect of the international transaction pertaining to payment of interest on Fully Compulsorily Convertible Debentures ("FCCDs") and Non-Convertible Cumulative Debentures ("NCCDs") to its Associated Enterprises ("AEs").

2. Incorrect rejection of SBI PLR for benchmarking interest paid on FCCDs and NCCDs denominated in INR

2.1 That on the facts and circumstances of the case and in law, the Ld. TPO/Ld. AO and the Hon'ble DRP have erred in incorrectly rejecting SBI PLR for benchmarking interest paid on FCCDs and NCCDs and thereby disregarding the position laid down by the Hon'ble DRP in the case of M/s Noida Towers Private Limited for A.Y. 2013-14, dated June 28, 2017.

3. Incorrect rejection of separate benchmarking analysis conduct by the Appellant for AY 2017- 18 using CUP method

3.1 That, without prejudice to Ground 2, the Ld. TPO/Ld. A.O. and the Hon'ble DRP have erred in rejecting a separate benchmarking analysis conducted by the Appellant for A.Y. 2017-18 by using the CUP method.

4. Adoption of incorrect comparable by the Ld. TPO

4.1 That on the facts and circumstances of the case, the Ld. TPO/Ld. AO have erred in not following the directions of the Hon'ble DRP in choosing the comparables, in its final order.

4.2 That on the facts and circumstances of the case and in law, the Ld, TPO/ Ld. AO have erred in choosing comparables which were not comparable to the profile of the Appellant.

4.3 That on the facts and circumstances of the case, the Ld. TPO/Ld. A.O. have erred in law and on facts in not appreciating the nature of these instruments.

5. Not allowing the set off of brought forward business loss of earlier years

5.1 That on the facts and circumstances of the case, the Ld. A.O. has erred in not allowing the set off of brought forward

losses of earlier years, arrived at by the Ld. A.O. in the assessment proceedings of such earlier years.

Without prejudice to the above Grounds

6. Incorrect computation of total income in computation sheet enclosed with the impugned assessment order

6.1 That on the facts and circumstance of the case, the Ld. AO has erred in incorrectly computing the total income of the Appellant as INR 3,48,95,357 in the computation sheet annexed with the impugned assessment order as against the correct total income of INR 3,42,62,860 assessed in the impugned assessment order and confirmed under the Direct Tax Vivad Sa Vishwas Act, 2020 ("VS Act").

7. Initiation of Penalty Proceedings

7.1 That on the facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings u/s 270A of the Act.

The Appellant submits that each of the above grounds of appeal are independent of and without prejudice to one another. The Appellant craves leave to add, alter, vary, omit, amend or delete one or more of the above grounds of appeal at any time before, or at the time of hearing of the appeal, so as to enable your Honour to decide this appeal according to law."

3. Substantive grievance relates to the incorrect rejection of SBI PLR for benchmarking interest paid on Fully Compulsorily Convertible Debentures [FCCDs] and Non-convertible Cumulative Debentures [NCCDs] NCCDs denominated in Indian Rupee.

4. Briefly stated, the facts of the case are that the assessee is a company incorporated on 27.01.2012 with the objective to carry on business of warehousing of goods of any nature at any place or indulge in any other such form of activity in pursuance of such business to provide and maintain services to all the operators who set up their plants inside any special economic zone and to develop infrastructure and warehousing activities inside special economic zone for ultimate usage of developers and operators.

5. The return of income for the year under consideration was filed on 30.11. 2017 declaring an income of INR 1,26,33,170/-. Return was selected for scrutiny assessment and, accordingly, reference for computation of Arm's Length Price (ALP) was made to the Transfer Pricing Officer (TPO).

6. The order travelled to the Dispute Resolution Panel (DRP) and pursuant to the directions of the DRP, final assessment was framed on 27.01.2022, in which the Assessing Officer made an upward adjustment of Rs. 2,16,29,690/-.

7. The international transaction under consideration in the present appeal relates to the payment of interest by the assessee on FCCDs and NCCDs to its Associated Enterprises [AEs]. The assessee had raised funds by issuing Rupee denominated, unsecured FCCDs to Ammon Holding | Pte Ltd, an AE of the assessee during F.Ys. 2013-14 and 2014-15, for the purpose of acquisition, construction and maintenance of warehouses.

8. As per the terms of the Debenture Agreement, these FCCDs carried an interest @ of SBI PLR plus 1% or 13.5% whichever is higher. During the year under consideration, the assessee had paid interest of Rs. 5,17,59,240/- @ 15.04% being SBI PLR 14.04% + 1%.

9. As mentioned elsewhere, since the FCCDs were issued in F.Y., 2013-14 and 2014-15, the assessee has been consistently benchmarking using Comparable Uncontrolled Price [CUP] method since

inception. In A.Ys 2014-15 and 2015-16, since the return was never selected for scrutiny assessment, benchmarking by the assessee was never tested by the Assessing Officer /TPO, but in A.Y 2016-17, return was selected for scrutiny assessment and Transfer Pricing [TP] Study of the assessee for the impugned transaction was accepted.

10. However, for the year under consideration, the TPO was of the opinion that the date of allotment filter adopted by the assessee in its TP study does not coincide with the actual date of allotment of the FCCDs, hence rejected the methodology and proceeded to recompute the ALP by adopting other method of benchmarking.

11. Objections were raised before the DRP and the DRP disposed off the objections by observing as under:

"4.7 Accordingly, the TPO's action of widening the search criteria to include infrastructure financing comparables under Other Method due to lack of sufficient comparables in the real estate sector is upheld. However, the Panel is of the view that FCCDs being hybrid instruments carrying a higher risk are not strictly comparable with bond instruments accordingly, as done by the assessee in its CUP analysis for FCCDs, the TPO is directed to apply the search filter of Instrument Type to Debentures and to exclude instruments other

than CCDs / convertible debentures to determine the arm's length interest rate on the said FCCDs in the final order. Such exclusion of instruments which are not convertible Debentures will ensure that the search maintains the quasi-equity nature of the comparable the nearest extent possible. The other search criteria / filters used by the TPO are not interfered with. On similar lines, in respect of NCCDs, the TPO is directed to apply the search filter of Instrument Type to Debentures and to exclude instruments other than NCCDs while determining the arm's length interest rate on the said NCCDs in the final order. Grounds 3 and 4 are disposed of as above."

12. Pursuant to the directions of the DRP, the Assessing Officer, vide order dated 20.01.2022 giving effect to the directions of the DRP, fresh search was made in FCCDs for F.Y. 2013-14 and following was the result:

The screenshot displays a search interface for Fixed Income securities. At the top, there are tabs for 'Actions', 'Settings', and 'Fixed Income Search'. Below these are sub-tabs for 'Build/Edit Search', 'My Searches', and 'Example Searches'. The main search criteria are listed as follows:

- 1) Asset Classes: Corporates, Governments (2,978,161 securities)
- 2) Sources: All Securities

The search criteria table is as follows:

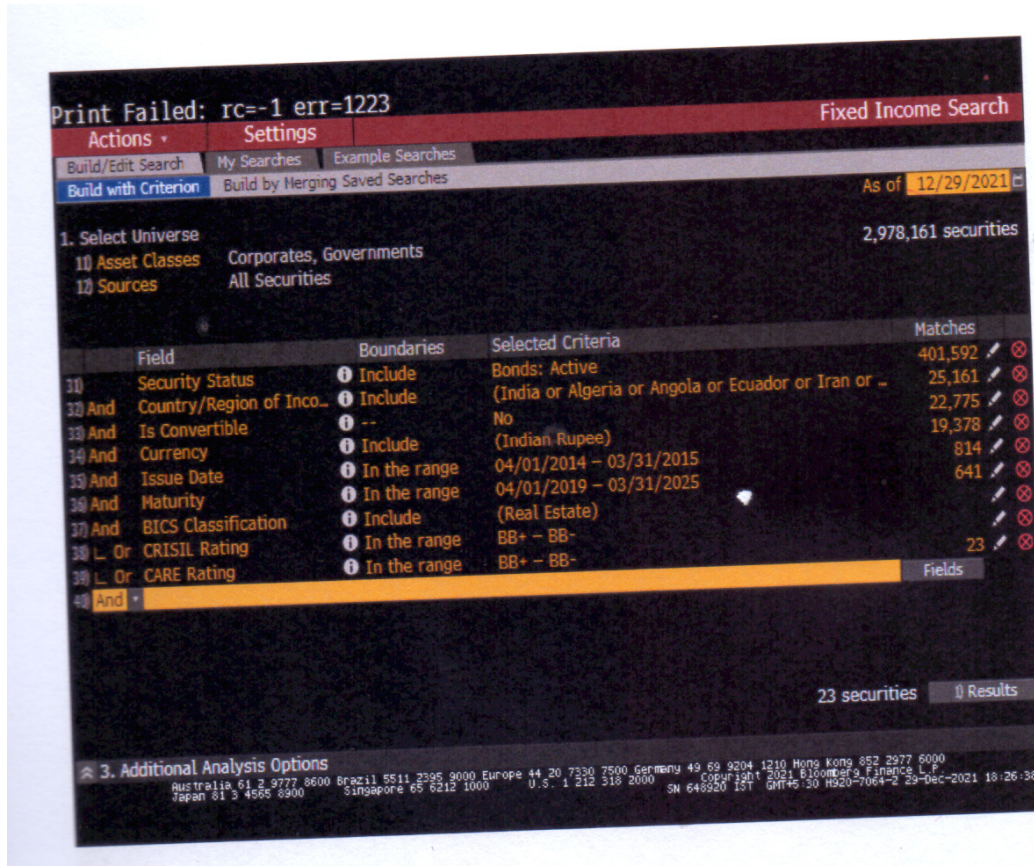
	Field	Boundaries	Selected Criteria	Matches
31	Security Status	Include	Bonds: Active	401,592
32	And Country/Region of Inco...	Include	(India or Algeria or Angola or Ecuador or Iran or ...	25,161
33	And Is Convertible	--	Yes	2,386
34	And Currency	Include	(Indian Rupee)	2
35	And Issue Date	In the range	04/01/2013 - 03/31/2015	0
36	And Maturity	In the range	04/01/2019 - 03/31/2025	0
37	And BICS Classification	Include	(Real Estate)	0
38	L Or CRISIL Rating	In the range	BB+ - BB-	0
39	L Or CARE Rating	In the range	BB+ - BB-	0
40	And			

At the bottom of the search results, it shows '0 securities' and 'Results'. Below the search results, there is a section for '3. Additional Analysis Options' with a list of countries and their corresponding codes:

Australia 61 2 9777 8600 Brazil 5511 2395 9000 Europe 44 20 7330 7500 Germany 49 69 9204 4210 Hong Kong 852 2977 6000
Japan 81 3 4685 8900 Singapore 65 6212 1000 U.S. 1 212 318 2000

3.1 No change in adjustment for FCCDs as no comparables available for F.Y. 2013-14. Therefore search for FCCDs being used as a proxy to determine the arms length price as also in the original order. Further, Rs. 1,81,64,690 is retained as adjustment for interest on FCCDs issued during F.Y. 2013-14.

4. Similarly, the fresh search was made in NCCDs for F.Y. 2014-15, and the results are as under:



13. As nothing new was gained as per the TPO, he made the same addition as earlier.

14. Before us, the ld. counsel for the assessee vehemently stated that the search process is defective. Therefore, no comparable could be found. It is the say of the ld. counsel for the assessee that in spite of the specific directions of the DRP, the TPO proceeded by searching for “bonds” whereas the directions of the DRP were very specific to apply search filter of instrument type to debentures.

15. The ld. DR fairly conceded to the erroneous search process adopted by the TPO.

16. We have given thoughtful consideration to the orders of the authorities below. The undisputed fact is that in the initial search, the TPO used “bonds” to determine the benchmarking for FCCDs and NCCDs. It is equally true that the DRP rejected this approach and directed the TPO to use specific search filter of instrument type of debenture.

17. Surprisingly, the TPO again used the bonds, which search gave no comparables. Therefore, in the interest of justice and fair play, we deem it fit to restore the quarrel to the file of the Assessing Officer/TPO. The Assessing Officer/TPO is directed to use correct search filter for the specific instruments under consideration.

18. The assessee is also directed to provide necessary comparables for fresh determination of ALP in respect of interest payments on FCCDs and NCCDs.

19. The TPO shall give reasonable and adequate opportunity of being heard to the assessee and the assessee shall assist the Assessing Officer/TPO in finding suitable comparables. This ground is allowed for statistical purposes.

20. The other substantive grievances relate to the non-allowing of set off of brought forward loss of earlier years.

21. The Assessing Officer is directed to allow set off of brought forward business loss of earlier years as per the provisions of law and after affording reasonable opportunity of being heard to the assessee.

22. In the result, the appeals of the assessee in ITA No. 519/DEL/2022 is allowed for statistical purposes.

The order is pronounced in the open court on 22.11.2023 in the presence of both the rival representatives.

Sd/-

**[ANUBHAV SHARMA]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 22nd NOVEMBER, 2023.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	