

आयकरअपीलीयअधिकरण, विशाखापटणमपीठ, विशाखापटणम

IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्रीदुव्वुखारएलरेड्डी, न्यायिकसदस्यएवंश्रीएसबालाकृष्णन, लेखासदस्यकेसमक्ष

BEFORE SHRI DUVVURU RL REDDY, HON'BLE JUDICIAL MEMBER &
SHRI S BALAKRISHNAN, HON'BLE ACCOUNTANT MEMBER
(Through Hybrid Hearing)

आयकरअपीलसं./ I.T.A. No.92/Viz/2022

(निर्धारणवर्ष/ Assessment Year : 2017-18)

Arkha Solar Power Private
Limited,
Elakolanu Village,
Rangampeta, Rajahmundry,
Andhra Pradesh – 533294.
PAN: AALCA 4293K

(अपीलार्थी/ Appellant)

अपीलार्थीकीओरसे/ Assessee by

प्रत्यार्थीकीओरसे/ Revenue by

सुनवाईकीतारीख/ Date of Hearing

घोषणाकीतारीख/Date of

Pronouncement

Vs.

Deputy Commissioner of
Income Tax-1,
4th Floor, Sri Deepthi Towers,
Main Road, Kakinada,
Andhra Pradesh-533001.

(प्रत्यर्थी/ Respondent)

Ms. Karishma R. Phatarphekar

Dr. Satyasai Rath, CIT-DR

04/12/2023

22/12/2023

ORDER

PER S. BALAKRISHNAN, Accountant Member :

This appeal is filed by the assessee against the final assessment order passed U/s. 143(3) r.w.s 144C(13) r.w.s 144B of the Income Tax Act, 1961 [the Act] vide DIN No.

ITBA/AST/S/143(3)/2021-22/1040122408(1), dated 25/02/2022 for the AY 2017-18.

2. Brief facts of the case are that the assessee is engaged in the business of Solar Power generation filed its return of income on 30/11/2017 declaring NIL income and by claiming brought forward loss of Rs. 7,64,78,335/-. The return was summarily processed U/s. 143(1) of the Act. Subsequently, the case was selected for complete scrutiny and notice U/s. 143(2) dated 28/08/2018 was duly served to the assessee through email. Subsequently, notice U/s. 142(1) was issued from time to time and served on the assessee. In response, the assessee submitted details through ITBA portal. Considering the international transaction entered into by the assessee, the Ld. AO made a reference to the Ld. Transfer Pricing Officer [TPO] by ACIT, Circle-1, Kakinada vide letter dated 16/09/2019 after obtaining approval of the Ld. Pr. CIT-2, Visakhapatnam. The Ld. TPO observed that the assessee entered into the following transactions with the Associated Enterprises [AEs] as per the 3CEB filed by the assessee:

International transactions	Amount Received / Receivable (Amount in INR)	Amount paid / payable (Amount in INR)
INR Denominated Non-convertible Debentures	27,00,00,000	-
Interest payable on INR Denominated Non-convertible Debentures	-	69,23,836

The Ld. TPO observed that the assessee has issued Non-convertible Debentures (NCDs) amounting to Rs. 27 Crores to the AEs and has been benchmarked following the other method. The Ld. TPO also observed that with respect to the payment of interest on the issue of NCDs and was benchmarked following the CUP method. The assessee in order to identify similar uncontrolled transactions made search in the following Websites viz., BSE, NSDL, CDSL. After applying the relevant filters, the assessee arrived 20 comparable uncontrolled transactions wherein the coupon rate for NCDs ranging from 8% to 14.30%. Since the number of comparables is more than six, the Arm's Length Price [ALP] range as per the Indian TP Regulations is the beginning from the 35th percentile of the data set and ending on the 65th percentile of the data set. The assessee based on the data set found that the instruments at 35th percentile and 65th percentile of the data set are carrying interest rates of 10.68%

and 14.25%. The assessee considered the interest rate of 13% paid by the assessee is within the arm's length range which is below the 65th percentile. It was also observed by the Ld. TPO that as per the debenture subscription agreement the NCDs unlisted, unrated, unsecured, redeemable, taxable. As per the agreement the interest rate was fixed @ 13% per annum. The assessee received the subscription on 18/01/2017 and hence paid interest for the period of 72 days commencing from 18/1/2017 to 31/3/2017 @ 13% amounting to Rs. 69,23,836/- and deducted the TDS of Rs. 10,67,625/-. On examination of the TP documents for benchmarking the transaction, the Ld. TPO concurred with the CUP method as the most appropriate method under the given facts of the case. The Ld. TPO also observed that the assessee's selection of final comparables is inappropriate and arbitrary. The Ld. TPO rejected the ALP determined by the assessee and then proceeded to determine the ALP in accordance with section 92C(1) and 92C(2) of the Act. The Ld. TPO selected the comparables based on the following criteria:

Step	Description	No. of companies
1	List of privately placed debt instruments	10194
2	Debt instruments pertaining to PPNCD category	7456

3	Instruments that were issued in the period FY 2016-17	1557
4	Instruments having valid coupon rate (after excluding zero coupon rate)	961
5	Instruments pertaining to energy sector	64
6	Debt instruments as comparables after FAR analysis and excluding Govt / PSU issued instruments	8

The Ld. TPO then aggregated the list of comparables from BSE, NSDL and CDSL as follows:

S.No	Company	ISIN Number	Coupon Rate	Source
1.	Cleantech Solar Energy (India) Private Limited	INE850S08116	8%	NSDL
2.	Cleantech Solar Energy (India) Private Limited	INE850S08108	8%	NSDL
3.	Cleantech Solar Energy (India) Private Limited	INE850S08124	8%	NSDL
4.	Welspun Renewables Energy Private Limited	INE296N08022	8%	NSDL
5.	Omc Power Private Limited	INE240W08013	8%	NSDL
6.	Nabha Power Ltd		8.3%	CDSL
7.	Jsw Energy Limited	INE121E07320	8.65%	BSE
8.	Jhajjar Power Limited	INE165K07050	8.7%	BSE
9.	Jhajjar Power Limited	INE165K07068	8.7%	BSE
10.	Jhajjar Power Limited	INE165K07035	9.91%	BSE
11.	Jhajjar Power Limited	INE165K07043	9.91%	BSE
12.	Marikal Solar Parks Private Limited	INE469T08022	10%	NSDL
13.	Marikal Solar Parks Private Limited	INE469T08030	10%	NSDL
14.	Reliance Power Limited		10.2%	CDSL
15.	Reliance Power Limited	INE614G08061	10.2%	BSE
16.	Reliance Power Limited	INE614G07022	10.6%	BSE
17.	Reliance Power Limited	INE614G07030	10.6%	BSE
18.	KnBijapura Solar Energy Private Limited	INE137W08011	10.75%	NSDL
19.	Kn Indi Vijayapura Solar Energy Private Limited	INE138W08019	10.75%	NSDL
20.	KnMuddebihal Solar Energy Private Limited	INE139W08017	10.75%	NSDL

21	KnSindagi Solar Energy Private Limited	INE147W08010	10.75%	NSDL
22	Sei Sun Power Private Limited	INE596W08018	13.25%	NSDL
23	Amplus Power Solutions Private Limited	INE596W08040	13.25%	NSDL
24	Amplus Power Solutions Private Limited	INE154W08032	13.25%	NSDL
25	Vena Energy Solar India Power Resources Private Limited	INE018V08072	14.30%	NSDL

35 th percentile	8.7%
65 th percentile	10.6%
Median	10%

The Ld. TPO thereafter arrived at the 65th percentile or 10.60% and since the assessee was paying interest @ 13%, issued a show cause notice dated 4/3/2020 requesting the assessee to show cause as to why the interest rate of 10.60% should not be considered as ALP for calculating the interest payable on NCDs. The assessee in its reply to show cause notice raised objection for the two comparables and the Ld. TPO considering the objections of the assessee, conducted a fresh search and concluded with the following 25 comparables:

S.No	ISIN Number	Company Name	Interest Rate
1.	INE203U07025	Essel Green Energy Private Limited	6.00
2	INE774O07010	Atria Brindavan Power Limited	6.00
3.	INE240W08013	OMC Power Private Limited	8.00
4.	INE296N08022	Walwhan Renewable Energy Limited	8.00

5.	INE850S08108	Cleantech Solar Energy (India) Private Limited	8.00
6.	INE850S08116	Cleantech Solar Energy (India) Private Limited	8.00
7	INE850S08124	Cleantech Solar Energy (India) Private Limited	8.00
8	INE607M07024	Tata Power Renewable Energy Limited	8.30
9	INE607M08022	Tata Power Renewable Energy Limited	8.30
10.	INE211W08204	Amplus Solar Power Private Limited	8.50
11	INE813H07085	Torrent Power Limited	8.95
12	INE813H07093	Torrent Power Limited	8.95
13	INE813H07101	Torrent Power Limited	8.95
14	INE473U07024	SEI Venus Private Limited	9.50
15	INE474U07030	SEI Diamond Private Limited	9.50
16	INE614G08061	Reliance Power Limited	10.20
17	INE003S07155	Renew Power Private Limited	10.30
18	INE139S07017	Renew Solar Power Private Limited	11.35
19	INE154W08040	Amplus Power Solutions Private Limited	14.25
20	INE420T08207	Amplus Power Solutions Private Limited	14.25
21	INE018V08072	Vena Energy Solar India Power Resources Private Limited	14.30
22	INE154W08032	Amplus Power Solutions Private Limited	14.30
23	INE154W08057	Amplus Power Solutions Private Limited	14.30
24	INE154W08107	Amplus Power Solutions Private Limited	14.30
25	INE420T08181	Amplus Power Solutions Private Limited	14.30

	Value	Value
Number of comparables	25	25
35 th Percentile	9 th Entry	8.30%
Median	13th Entry	8.95%
65 th Percentile	17 th Entry	10.30%

The Ld. TPO thereafter arrived at a Median of 8.95% and issued a show cause notice dated 4.3.2020 requesting the assessee to show cause as to why the interest rate of 8.95% should not be considered as ALP for calculating interest payable on NCD. Accordingly, the Ld. TPO proposed an adjustment by computing the difference between the interest adopted by the assessee @13% and the median computed @ 8.95%, thereby arriving at an addition of Rs. 21,67,041/- [Rs. 69,23,836 – Rs. 47,66,795]. The assessee did not respond to the show cause notice and therefore another notice was issued to the assessee on 16/12/2020 by providing an opportunity to file any objection on or before 22/12/2020. Since there was no response from the assessee, the Ld. TPO made an adjustment of Rs. 21,57,041/- u/s. 92CA(3) of the Act. Based on the order of the Ld. TPO, the Ld. Assessing Officer passed the draft assessment order vide DIN and Order No. ITBA/AST/F/144C/2021-22/1032686293(1), dated 26/04/2021. Aggrieved by the Draft Assessment Order, the assessee raised its objections before the Ld. Dispute Resolution Panel [DRP]. The Ld. DRP considering the objections raised by the assessee observed that the NCDs are issued to the controlling entity of the assessee-company and hence whether it is unguaranteed or unsecured it will not make any difference and thereby dismissed

the objections raised by the assessee in this regard. Aggrieved by the order of the Ld. DRP, the assessee is in appeal before us with the following grounds of appeal:

"Payment to interest on NCDs

1. *On the facts and circumstances and in law, the Ld. AO and the Ld. TPO under the directions of the Hon'ble DRP, erred in rejecting the appellant's benchmarking analysis which demonstrated that payment of interest on NCDs was at arm's length and conducting a fresh benchmarking exercise.*
2. *Without prejudice to the above, on the facts and circumstances of the case and in law, the Ld. AO and the Ld. TPO, under the directions of the Hon'ble DRP, erred in selecting comparable instances for determining arm's length price for the payment of interest on NCDs, which were in-fact not comparable to the appellant. Once the incorrect comparable instances are rejected from the fresh benchmarking exercise conducted by the Ld. TPO, the appellant's transaction is at arm's length.*

Mistake in computing total income and tax thereon

3. *On the facts and circumstances of the case and in law, the Ld. AO erred in computing the appellant's total taxable income and tax thereon.*

Interest under 234B and 234D

4. *On the facts and circumstances of the case and in law, the Ld. AO erred in computing the interest under section 234B and section 234D of the Act while calculating the appellant's payable demand.*

Initiation of penalty under section 270A

5. *On the facts and circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings U/s. 270A of the Act.*

The above grounds are independent and without prejudice to one another. The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of appeal, so as to enable the Hon'ble Income Tax Appellate Tribunal to decide this appeal according to law."

3. The only issue arising out of the above grounds is with respect to benchmarking of the interest rate on NCDs, whereas the other issues are consequential. In this regard, the Ld. AR argued that the Non-Convertible Debentures were unsecured and hence higher rate of interest of 13% is applied considering the risk factors involved. The Ld. AR vehemently objected to the filters selected by the Ld. TPO and submitted that the Ld. TPO failed to apply filter, i.e all secured / unsecured while determining the list of comparables. The Ld. AR further submitted that the Ld. TPO failed to distinguish between the rate of interest applicable for secured and unsecured debt instruments. The Ld. AR further submitted that these objections were raised before the Ld. DRP and the Ld. DRP has failed to consider the same. Further, the Ld. AR also submitted that the Ld. TPO also erred in considering the comparable companies in

the Wind Sector whereas the assessee operates in Solar Power Sector. The Ld. AR placed reliance on the ratio laid down in the decision of the Coordinate Bench of ITAT, Bangalore in the case of Vena Energy KM Wind Power (P.) Ltd vs. DCIT reported in [2022] 141 taxmann.com 557 (Bangalore - Trib.) [07-07-2022] wherein it was held that *"one of the key criteria for determining the interest rate is the risk involved. When the loan is unsecured, the risk is higher and there would be a higher rate of interest charged for the loan."* The Ld. AR also relied on the decision of ITO vs. VR Surat Pvt Ltd by coordinate Bench of Surat reported in 152 taxmann.com 679 (Surat Trib.). The Ld. AR therefore pleaded that benchmarking done by the assessee shall be accepted as its ALP.

Per contra, the Ld. DR submitted that the NCDs were issued to 100% holding companies and hence whether it is a secured or unsecured will not make any difference. The Ld. DR also further submitted that it shall be considered as secured NCDs only and therefore the Ld. TPO has rightly considered the same. Countering the arguments of the Ld. DR, the Ld. AR submitted that the AEs should be considered as a third party and it is illogical to consider the relationship of the holding and

subsidiary companies for the purpose of secured and unsecured transactions.

4. We have heard the rival contentions and perused the material available on record, including the written submissions by the assessee. It is an admitted fact that there is no dispute between the Revenue and the assessee with respect to adoption of CUP Method as the most appropriate method. The dispute is only with respect to selection of comparables wherein the assessee's contention was that the Ld. TPO has selected the comparable companies having secured debentures and / or not in the Solar Power Sector. It is also not disputed by the Revenue that the assessee has issued NCDs as unsecured and had agreed the rate of interest of 13%. The key criteria for determining the interest rate is the risk involved. When the loan given is unsecured, the risk is higher and there would be a higher rate of interest. In our considered view, the relationship of a holding / subsidiary is not the criteria for determining the interest with respect to secured / unsecured debt instruments. We find from the submissions of the Ld. AR that when the filters of secured or guaranteed are applied in the list of comparables, the rate of interest and the 65th percentile worked out to 14.25% which is over above the

interest rate paid by the assessee. Further, when the companies in the Wind / Thermal Power Sectors are excluded, the 65th percentile worked to 14.25% which is over and above the interest rate paid by the assessee company. The Coordinate Bench of Surat in the case of **ITO vs. V R Surat (P.) Ltd reported in [2023] 152 taxmann.com 679 (Surat. Trib.)** held as follows:

"Where the assessee issued FCCDs which were unsecured in nature, company which issued debenture which was secured in nature could not be included in the list of comparables of the assessee company."

Further, the Bangalore Tribunal in the case of **Vena Energy KN Wind Power (P.) Ltd (supra)** has held as follows:

"12.....One of the key criteria for determining the interest rate is the risk involved. When the loan is unsecured the risk is higher and there would be a higher rate of interest charged for the loan. Applying this logic the assessee has justified the interest charged at 14.70% with that of the third party borrowings where the interest is charged between 11.05% to 12.50%. This contention of the assessee has merits as the assessee has taken loan in the form of non-convertible unsecured debentures which has a higher risk factor as it is unsecured. Even applying the contention of the of the TPO that debenture has repayment on maturity and loan has periodical repayment justifies higher rate of interest charged for debenture in the commercial sense."

5. The Revenue has not brought any material / case / any contrary decision before us. Therefore, respectfully following the above decisions, we are of the considered view that the rate of interest charged by the assessee company is at Arm's Length

basis and therefore **the ground No. 1 & 2 raised by the assessee are allowed.** The additional evidence filed by the assessee which was not pressed by the Ld. AR and therefore not considered while adjudicating the issues involved in the appeal. **Grounds No. 3, 4 & 5 are consequential and therefore they need no separate adjudication.**

6. In the result, appeal of the assessee is allowed.

Pronounced in the open Court on 22nd December, 2023.

Sd/-

(दुव्वूरु.एलरेड्डी)

(DUVVURU RL REDDY)

न्यायिकसदस्य/JUDICIAL MEMBER

Sd/-

(एसबालाकृष्णन)

(S.BALAKRISHNAN)

लेखासदस्य/ACCOUNTANT MEMBER

Dated :22.12.2023

OKK - SPS

आदेशकीप्रतिलिपिअग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee–Arkha solar Power Private Limited, Elakolanu Village, Rangampeta, Rajahmundry, Andhra Pradesh - 533294.
2. राजस्व/The Revenue –Deputy Commissioner of Income Tax-1, 4th Floor, Sri Deepthi Towers, Main Road, Kakinada, Andhra Pradesh- 533001.
3. The Principal Commissioner of Income Tax,
4. आयकरआयुक्त (अपील)/ The Commissioner of Income Tax

5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, विशाखापटणम/ DR,ITAT,
Visakhapatnam
6. गार्डफ़ाईल / Guard file

आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, Visakhapatnam