

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH: BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SHRI KESHAV DUBEY, JUDICIAL MEMBER**

IT(TP)A No.312/Bang/2024
Assessment Year: 2009-10

Embassy One Developers Private Ltd. No.150, Embassy Point Infantry Road Bangalore 560 001 Karnataka PAN NO : AABCE8281F	Vs.	DCIT Circle-2(1)(1) Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Smt. Tanmayee Rajkumar, A.R.
Respondent by	:	Sri D.K. Mishra, D.R.

Date of Hearing	:	30.05.2024
Date of Pronouncement	:	04.06.2024

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal by assessee is directed against order of DCIT, Circle-2(1)(1), Bangalore passed u/s 143(3) r.w.s. 144C(13) r.w.s. 254 of the Income Tax Act, 1961 (in short “The Act”) for the assessment year 2009-10 dated 27.12.2023. The assessee has raised following grounds of appeal:

1. **“GENERAL GROUND**

1.1. The lower authorities have erred in finalizing an order of assessment which suffers from legal defects such as being contrary to the provisions of the Act, barred by limitation, devoid of merits and contrary to facts on record and applicable law and as such is liable to be set aside.

2. **JURISDICTIONAL GROUNDS**

2.1. The Ld. DRP has erred in issuing an invalid DRP directions without quoting a valid electronically generated Document Identification Number (“DIN”) on the body of the communication and consequently rendering the Impugned Order illegal, invalid and liable to be set aside.

2.2. The Draft Order dt. 05.03.2013 and the consequential final order dated 10.04.2013 passed by the Ld. AO in the original assessment proceeding, i.e., the first round prior to the remand, is illegal, without jurisdiction, contrary to the provisions of the Income Tax Act, 1961, barred by limitation and hence liable to be set aside.

2.3. Impugned Order dt. 27.12.2023 passed by the Ld. AO is illegal, without jurisdiction, barred by limitation, contrary to the provisions of the Income Tax Act, 1961, and hence liable to be set aside.

2.4- The Impugned Order passed by the Ld. AO manually, and without affixing a digital signature as mandated by the binding instructions and circulars Central Board of Direct Taxes ('CBDT') is invalid and hence is liable to be quashed.

3. **TRANSFER PRICING GROUNDS**

3.1 The lower authorities erred in determining the ALP of the international transaction of payment of interest on Compulsory Convertible Debentures ("CCDs") at 12.5%, and a TP adjustment of INR 4.38 crores on the basis of the said ALP.

3.2. The lower authorities erred in rejecting the Appellant's transfer pricing documentation including the benchmarking analysis, and in undertaking a fresh analysis, in the absence of demonstrating/ satisfying the conditions stipulated under section 92C(3) of the Act.

3.3. The benchmarking analysis undertaken by the Ld. TPO is erroneous insofar as it relates to, inter alia, selection of the database, the economic and functional comparability of the transactions, non-consideration of the applicable adjustments, non-provision of underlying agreements to establish comparability, amongst other aspects.

3.4 That the Dispute Resolution Panel ought to have directed the exclusion of Esplande Developers Pvt. Ltd., given that said company is not comparable to the Appellant.

3.5 That the TPO erred in not selecting, and the Dispute Resolution Panel erred in not directing the inclusion of Kinetic Motor Company Ltd. and Saurashtra Cement Ltd. as comparable, despite the transaction undertaken by the said companies being comparable to that of the Appellant's.

3.6. That the lower authorities erred in not granting an adjustment towards the differences in risk profile between the Appellant and the companies selected as comparable.

3.7. Without prejudice to the above, lower authorities have erred in not considering the risk adjusted SBI Prime Lending rate for the purpose of benchmarking the transaction of payment of interest on CCD."

2. Facts of the case are that the Assessee is a private limited company engaged in the business of real estate development and was established as a joint venture between WWD Pearl Ltd. ('WWD'), Century Real Estate Holding Pvt. Ltd. ('Century') and Green Banatelis Ltd. ('GBL'). During the financial year 2007-08, the Assessee had issued 13,50,00,000 CCDs having face value Rs. 10/- each to GBL, a non-resident company, carrying an interest rate of 15.75%. In its transfer pricing study, the Assessee benchmarked the payment of interest towards CCDs by using Comparable Uncontrolled Price ('CUP') method, to justify the arm's length nature of the transaction. The Assessee identified two comparables and arrived at an arithmetical mean of comparable interest rate at 11%. Further, the Assessee determined a risk adjustment of 4%, and on this benchmarking analysis, the payment of interest at 15.75% was concluded to be at arms' length. For the assessment year 2009-10, the Assessee filed its return of income declaring a loss of Rs. 1,00,31,508/- and the said return was picked up for scrutiny assessment. During the assessment proceedings, upon a reference to the TPO, the TPO passed an order dated 29.01.2013, recharacterizing the CCDs as equity and determined the ALP of the international transaction at 'NIL' and proceeded to make a TP adjustment of Rs. 21,26,25,004/-. The matter was carried in appeal by the Assessee to the ITAT, which came to be disposed off vide an order dated 26.11.2020, with a direction to the TPO to consider the CCDs as a debt instrument and to thereafter determine the ALP of the international transaction of payment of interest on the CCDs. Subsequently, the TPO passed an order dated 24.11.2022, rejecting the benchmarking analysis undertaken by the Assessee and determined the arm's length interest to be at 11.27%: Accordingly, the TPO determined the ALP of the interest paid on CCDs at 11.27% and made an adjustment of Rs. 6,04,80,001/- being the excess rate of interest paid by the Assessee. Initially, the Assessing Officer

passed a draft assessment order dated 27.03.2023, incorporating the aforesaid adjustment. Aggrieved, the Assessee filed its objections before the DRP which, vide its order dated vide its directions dated 08.12.2023, granted partial relief to the Assessee. Pursuant to the DRP directions, the Assessing Officer passed a final assessment order dated 27.12.2023, in which the aggregate TP adjustment was reworked to Rs. 4,38,75,001/-. Aggrieved by the final assessment order, the Assessee has preferred the present appeal before this Hon'ble Tribunal

3. Ground No.1 is general which do not require any adjudication. Ground Nos.2, 2.1 to 2.4, 3.1 to 3.3 & 3.5 to 3.7 are not pressed and hence, these grounds are dismissed as not pressed. The assessee has pressed only ground No.3.4.

4. With regard to ground No.3.4, facts of the case are as follows:

Details of the Assessee's International Transactions

Particulars	Amount	Outcome of TP Order dated 24.11.2022
Payment of interest on CCDs	Rs.21,26,25,004/-	Adjustment of Rs. 6,04,80,001/-

A. Analysis of the TP Study of the assessee and the TPO in order dated 24.11.2022:

A.1. Comparison of the TP studies done by the Assessee and TPO:

	Assessee	TPO
Methodology adopted	CUP	CUP
Database used	PROWESS & CAPITALINE	BLOOMBERG
Comparables selected	2	3
Period for which data used	FYs 2005-06 and 2006-07	FY 2007-08

A.2. Filters applied by the Assessee in its TP study:

Step	Description
1.	Companies not having sufficient financial data to undertake analysis - rejected

Step	Description
2.	Companies that have issued convertible debentures prior to FY 2005-06 - rejected
3.	Companies not having sufficient information about debentures - rejected
4.	Companies that have issued non comparable instruments - rejected

A.3. Comparables selected by Assessee and interest rates:

Sl. No.	Name of the company	Interest rate
1.	Kinetic Motor Company Limited	11%
2.	Saurashtra Cement Limited	11%
Arithmetic Mean		11%
Plus risk adjustment		4%
Arm's length interest rate of the comparables		15%

Note: The TPO rejected all the comparables selected by the Assessee.

A.4. Filters applied by the TPO:

Step	Description
	Companies rendering Information technology enabled services selected
1.	Companies in the asset classes- Corporates - included.
2.	Companies having active security bonds – included
3.	Companies using Indian Rupee as currency for their securities – included
4.	Companies having issued the securities in the FY 2007-08 – included
5.	Companies issuing unsecured securities - included
6.	Companies issuing the securities in fixed coupon type - included
7.	Companies issuing securities whose maturity period is more than 15 years - included

A.5. Comparables selected by TPO and interest rate of the companies:

Sl. No.	Name of the Company	Interest rate
1.	Ireo Pvt. Ltd.	15%
2.	Indian Instruments Finance Co. Ltd.	8.82%
3.	Esplande Developers Pvt. Ltd.	10%
Average		11.27%

A.6. Computation of arm's length interest rate by the TPO and the adjustment made:

Particulars	
Arm's length coupon rate of the comparables (A)	11.27
Interest rate charged by the taxpayer to its AE (B)	15.75
Excess rate of interest charged by taxpayer (C = B - A)	4.48
Interest paid by the taxpayer during the year @ 15.75%	Rs. 21,26,25,004/-
Interest to be paid @ 11.27%	Rs. 15,21,45,002/-
Excess Interest paid by the taxpayer / TP Adjustment	Rs. 6,04,80,001/-

B. DIRECTIONS ISSUED BY DRP:

Briefly, the directions issued by the DRP are as follows:

- i. The DRP accepted the contentions of the Assessee that Indian Infrastructure Finance company is not comparable to the Assessee and thus, directed its exclusion.
- ii. The DRP failed to adjudicate the contentions of the Assessee that Esplande Developers Pvt. Ltd. is not comparable to the Assessee and thus it remained included;
- iii. The DRP failed to adjudicate on the contentions of the Assessee that Kinetic Motor Company Limited and Saurashtra Cement Limited are comparable to the Assessee and thus, they remained excluded;
- iv. The DRP failed to appreciate the contentions of the Assessee that the TPO failed to consider the risk involved and did not provide adequate risk adjustment during benchmarking analysis.

C. FINAL ASSESSMENT ORDER:

Pursuant to the directions of the DRP, the AO passed a final assessment order, wherein the TP adjustment stood reduced to Rs. 4,38,75,001/-.

D. Grounds for our consideration i.e. Ground No.3.4

a. That the TPO and DRP erred in not excluding Esplande Developers Pvt. Ltd., from the final list of comparables as being functionally incomparable. (Ground No. 3.4);

5. In this regard, the ld. A.R. submitted that the Assessee is seeking the exclusion of Espalade Developers Private Limited (formerly known as Millenia Properties Pvt. Ltd.) ("Espalade" for short): He submitted that this company was included by the TPO in the final list as being comparable. The DRP erred in failing to adjudicate on the comparability of this company, though an objection to that effect had been raised by the Assessee before the DRP.

A. Related party transactions: He submitted that the fully convertible debentures issued by this company of Rs. 248,35,88,100/-, which is selected by the TPO as a comparable, were issued to its related parties- AIGRRE India OL Pvt. Ltd., and India Infinity Limited. This is evident from schedule 3 to the annual report for the financial year 2008-09 read with the notes to account at point 10 deals with related party transaction. He submitted that in terms of Section 92C of the Act read with Rule 10B of the Rules, the arm's length price of an international transactions is to be determined by having regard to the prices charged/paid in a comparable uncontrolled transaction. The term "uncontrolled transaction" is defined in Rule 10A(ab) of the Rules as a transaction between enterprises other than associated enterprises. He submitted that the transaction undertaken by Espalade was with its associated enterprises, and therefore the said transaction does not fall within

the meaning of “uncontrolled transaction”. On that count alone, this company is liable to be excluded from the final list of comparables.

B. Lack of data: He submitted that details of the issue of the CCDs by this company is not available, and therefore the factors and circumstances behind charging of interest at 10% cannot be determined. For instance, it is not clear which class of equity shares the debentures would be converted into, since the company has issued equity shares of classes A1, A2, B1, B2 and C. Therefore, since there is lack of data available to determine the comparability of the debenture, the company ought to be excluded from the final list of comparables.

C. Functionally dissimilar: He submitted that this company is a special purpose entity formed for the development of a project known as “RMZ Esplanade”. Since it is a special purpose entity, it is possible that the debentures issued also are for a specific and limited purpose, which is unlike the case of the Assessee, and therefore the interest paid on the debentures by this company cannot be taken to be comparable to the interest paid by the Assessee. Therefore, he submitted that this company ought to be excluded from the final list of comparables.

6. The ld. D.R. submitted that the issue may be remitted to the file of ld. DRP for fresh consideration to consider the present objections raised by the ld. A.R.

7. We have heard the rival submissions and perused the materials available on record. Before ld. DRP, assessee has raised the ground of appeal as follows:

Objection No.1.2: the Learned Transfer Pricing Officer (TPO) erred in law and on facts in holding that M/s. Ireo Pvt Ltd., Indian Infrastructure Finance Company Ltd. and Esplande Developers Pvt. Ltd. are comparable entities.

This ground was disposed by ld. DRP as follows:

“2.1.4.1 Having considered the submissions, the Panel perused the written submissions of the Assessee and conclusions reached by the AO in the draft assessment order.

2.1.4.2 It is noticed that the Assessee's determined ALP for the interest rate is based on unreliable and incorrect data. The financial years for the interest rates of selected comparables i.e., Kinetic Motor Company Ltd. and Saurashtra Chemical Ltd., are different from that of the FY in the case of the Assessee, violating strict comparability requirements in the Comparable Uncontrolled Price (CUP) method. Since interest rates fluctuate, comparable data should ideally be from the same year. The Assessee has taken the rate of interest of these two comparables pertaining to F.Y. 2006-07 and 2005-06 whereas the year in question is F.Y. 2008-09 relevant to A.Y. 2009-10. Since the Most Appropriate Method chosen by the Assessee, CUP requires strict comparability which is lacking in the Assessee's case, the Panel is of the opinion that the TP study undertaken by the Assessee is faulty and hence, was correctly rejected by the TPO.

2.1.4.3 The TPO carried out a search process on Bloomberg database and finalised a list of three comparable companies and the Assessee was provided with the details of the search process vide a show cause notice dated 22/10/2022. Hence the contention of the Assessee that no details of the search process were provided to it are not correct.

2.1.4.4 The Assessee contended that the Prime lending rate of the SBI at 12.93% should have been adopted by the TPO and he should have allowed a risk adjustment of 4%.

2.1.4.5 We have perused the Assessee's arguments. The TPO has identified proper comparables after adopting CUP as the Most Appropriate Method and during the search process included those key words such as Unsecured, for payment risk, Rupee for Payment Currency and coupon type as Fixed which is what the Assessee has also used. Hence to say that the TPO did not consider the risks involved as the CCDs are unsecured is not correct.”

7.1 Admittedly, there was no adjudication of the above issue raised by assessee by Id. DRP independently and it has been adjudicated by the Id. DRP in a wholesome manner without touching the issue raised by assessee in proper manner. Hence, it is appropriate to remit this issue to the file of Id. DRP to consider the argument of the Id. A.R. and decide accordingly. The issue in dispute in ground No.3.4 is remitted to the file of Id. DRP for fresh consideration after giving an opportunity of hearing to the assessee.

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

Order pronounced in the open court on 4th June, 2024

Sd/-
(Keshav Dubey)
Judicial Member

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore,
Dated 4th June, 2024.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.