

IN THE INCOME TAX APPELLATE TRIBUNAL “H” BENCH, MUMBAI

BEFORE SHRI. AMARJIT SINGH, AM
AND
MS. KAVITHA RAJAGOPAL, JM

ITA No.5862/Mum/2024
(Assessment Year: 2021-22)

M/s. SP Imperial Star Private Limited Shapoorji Pallonji Centre, 41/44, Minoo Desai Marg, Colaba, Mumbai – 400005.	Vs.	The National Faceless Assessment Centre, Income Tax Department, ITO Ward 3(3)(3), Aaykar Bhavan, M. K. Road, New Marine Lines, Mumbai – 400020.
PAN/GIR No. AAXCS6491H		
(Assessee)	:	(Respondent)

Assessee by	:	Shri. Dharan Gandhi
Respondent by	:	Shri. Ajay Chandra, CIT DR

Date of Hearing	:	05.02.2025
Date of Pronouncement	:	26.03.2025

ORDER

Per Kavitha Rajagopal, J M:

This appeal has been filed by the assessee, challenging the final assessment order of the learned Assessing Officer ('ld. AO' for short), dated 19.09.2024, passed u/s. 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 ('the Act'), pursuant to the direction of the Hon'ble Dispute Resolution Panel ('Hon'ble DRP' for short) dated 21.08.2024, u/s. 144C(5) of the Act, pertaining to Assessment Year ('A.Y.' for short) 2021-22.

2. The assessee has raised the following grounds of appeal along with additional grounds of appeal:

Grounds of Appeal:



"1. The learned Assessing officer (hereinafter referred to as "AO") /the learned Transfer Pricing Officer (hereinafter referred to as "TPO") /the Hon'ble Dispute Resolution Panel (hereinafter referred to as "DRP") have erred in law, facts and circumstances of the case by completely ignoring the revised Form 3CEB filed by the appellant & rejecting the working under internal CUP method which reflected the correct position as per the law.

2. The learned TPO / DRP / AO have erred in law, facts and circumstances of the case by ignoring the fact that the benchmarking under internal CUP method results in NIL TP adjustment.

3. The learned DRP has erred in ignoring various judicial pronouncements wherein it is held that internal comparable transactions are to be preferred over the external transactions. comparable

4. The learned TPO / DRP / AO have erred in law, facts and circumstances of the case by making an adjustment of 13,77,54,756/- towards the interest paid on Non-Convertible Debentures. The learned AO has erred in law, facts and circumstances of the case by treating the said adjustment of 13,77,54,756/- as income of the appellant without considering that the appellant has suo moto disallowed same under section 94B of the Income Tax Act, 1961 & hence adding the same to the total income as well as restricting the carry forward under section 948 leads to the double disallowance.

5. The learned DRP / AO have erred in considering the loan amount from the Credit opportunities II Pte. Limited at 5,85,50,00,000/-instead of 5,58,50,00,000/-thereby increasing the amount of Transfer Pricing adjustment by 63,52,482/-.

6. The learned AO has erred in reducing the amount of loss to be carried forward to the future years by 13,77,54,756/- from 2,89,43,42,680/- to 275,65,87,924/-.

Additional Grounds of Appeal:

7. The disallowance u/s 94B of the Act should be restricted to ₹ 99,91,94,979/-to the extent of interest payable to M/s Credit Opportunities II PTE Limited and consequently, the loss determined should be allowed to be carried forward.

8. Without prejudice to the above, the transaction with Credit Opportunities II PTE Limited should not be treated as international transaction and that the adjustment made u/s 92 should be deleted.

9. Without prejudice to the above, M/s Credit Opportunities II PTE Limited should not be treated as Associated Enterprises and the adjustment made u/s 92 should be deleted.



10. *In the event the above ground is accepted, then the disallowance u/s 94B of the Act should be deleted completely, and consequently, the loss determined should be allowed to be carried forward.*

11. *Without prejudice to the above, the transaction with Credit Opportunities II PTE Limited should be benchmarked by using "Any other method" and since the entire process of issuing the non-convertible debentures was done through a process of bidding on the platform of a recognised stock exchange i.e., Bombay Stock Exchange, with a non-AE at that point of time, therefore, such transaction per se should be considered as at Arm's Length Price.*

12. *The final assessment order dated 19.09.2024 is time barred and therefore, bad in law and ought to be quashed."*

3. As the additional grounds raised by the assessee requires no new facts which are on record in the assessment proceeding, the same is admitted in view of the decision of the Hon'ble Apex Court in the case of ***National Thermal Power Corporation vs. CIT (1999) 97 Taxmann.com 358/(1998) 229 ITR 383 (SC)***.
4. Brief facts are that the assessee is a private limited company engaged in the business of providing consultancy business support and port related services such as dredging, bathymetry study, geo technical and other kind of site investigations, port planning, equipment lease, manning services, etc., to entities engaged in port operation and was incorporated in 19.03.2016 under Companies Act, 2013, which is also a joint venture of Shapoorji Pallonji and Company Private Limited (holding 60% stakes in SPIS) and ESP Diabolical Private Limited (holding 40% stakes in SPIS). The assessee company had filed its return of income dated 15.03.2022, declaring total income at Rs.1,43,080. The assessee's case was selected for scrutiny under CASS for following reasons:
 - a. Very low PBDIT ratio in specific business code and turnover range where deficiency is reported in audit report.



- b. International Transaction(s) in respect of lending or borrowing of money (T.P. Risk Parameter).
5. Notices u/s. 143(2) and 142(1) were duly issued and served upon the assessee. The Id. AO observed that the assessee has entered into international transaction for which the same was referred to the Transfer Pricing Officer ('Id. TPO' for short) u/s. 92CA(1) of the Act, with respect to the lending or borrowing of money (T.P. Risk Parameter) for determination of Arm's Length Price ('ALP' for short) of the transaction as per Section 92CA of the Act. The Id. TPO issued notice u/s. 92CA(2) of the Act, for furnishing documents maintained as per Section 92D r.w.r. 10D. Notice u/s. 92D(3) of the Act was also issued to the assessee. It is observed that the assessee had issued secured, redeemable, rated, listed, non-convertible bonds to certain foreign enterprises which are held by Credit Opportunities II PTE Limited, DB International (Asia Limited) and Omers Administration-Corporation, GMAA EM and the total amount outstanding with respect to the said debentures was Rs.1,24,341.44 lacs as on 31.03.2021. The assessee treated all these 3 foreign enterprises which had advanced loan of more than 51% of the book value of the total assets of the assessee company, as its AEs and reported the same in form 3CEB, filed on 15.02.2022. Further, the interest rate to be paid on these bonds was determined at 17.18% as per the TP Study Report and the details of the interest payments made by the assessee to its AEs during the year under consideration are tabulated herein under:

<i>Sr. No.</i>	<i>Name of Associated Enterprises</i>	<i>Amount Rupees in Lakhs (INR)</i>
<i>1.</i>	<i>Credit opportunities II PTE Limited</i>	<i>10,061.63</i>
<i>2.</i>	<i>DB International (Asia) Limited</i>	<i>4,981.27</i>



3.	<i>Omers Administration – Corporation GMAA</i>	<i>5,080.36</i>
	<i>Total</i>	<i>20,123.26</i>

6. The Id. AO/TPO observed that in the TP Study Report, the assessee has adopted CUP as the most appropriate method by relying on the SBI Prime Lending Rates for benchmarking the transactions of payment of interest to its AEs at SBI PLR + 300 basis points at the time of investment and benchmarked the Arm's length interest rate at 15.90% (12.90% + 3%). The interest paid or payable to its AEs was much higher than the Arm's length interest rate for which it sought for downward adjustment towards the excess interest paid on the international transactions and the assessee worked out the adjustment at Rs. 25,93,87,674/- towards interest exceeding the Arm's length interest (ALP for short). The assessee further contended that as it had disallowed the interest of Rs. 201,11,17,614/- u/s. 94B of the Act, no further disallowance towards the interest exceeding the said Arm's length interest was to be made. The Id. AO/TPO sought for explanation from the assessee as to why the Arm's length price of the interest rate as per TP Study Report @ 15.90% which was much lower than the actual interest paid at 17.18% should not be determined at Rs. 175,29,38,799/- as per the TP Study Report. The assessee contended that all three enterprises reported in form 3CEB will not fall under the preview of AEs as per Section 92A of the Act. The assessee further contended that as per Section 92A(2)(c) of the Act, only Credit Opportunities II PTE Limited shall be deemed to be an Associated Enterprise (AE) and the other 2 enterprises have been wrongly treated as AEs, where they do not exceed the prescribed limit of 51% as per the provisions and the same would fall under the category of independent enterprises



and the rate of interest paid to them should be determined using internal CUP method.

The assessee worked out the interest paid to AE (Credit opportunities II PTE Limited)

as under:

<i>Date</i>	<i>Days</i>	<i>Interest @ 17.18% p.a.</i>	<i>Repayment</i>	<i>Outstanding Amount</i>
31/03/2020				5,60,51,44,142
23/09/2020	176	44,47,69,563	16,89,27,123	5,88,09,86,581
23/03/2021	181	47,99,15,050	16,61,72,877	6,19,47,28,755
31/03/2021	8	2,23,43,329		6,21,70,72,084
Total	365	94,70,27,942	33,51,00,000	
Add: TDS		5,91,35,294		
Total Interest		1,00,61,63,236		

Working of interest paid to independent parties

DB International (ASIA) Limited

31/03/2020				2,77,49,72,883
23/09/2020	176	22,01,94,779	8,36,31,781	2,91,15,35,881
23/03/2021	181	23,75,94,470	8,22,68,219	3,06,68,62,132
31/03/2021	8	1,10,61,648		3,07,79,23,780
Total	365	46,88,50,897	16,59,00,000	
Add: TDS		2,92,76,471		
Total Interest		49,81,27,368		

Omers Administration Corporation – GMAA EM

31/03/2020				2,83,01,71,259
23/09/2020	176	22,45,74,784	8,52,95,342	2,96,94,50,700
23/03/2021	181	24,23,20,580	8,39,06,657	3,12,78,66,623
31/03/2021	8	1,12,81,681		3,13,91,48,304
Total	365	47,81,77,045	16,92,00,000	
Add: TDS		2,98,58,823		
Total Interest		50,80,35,869		

7. The assessee contends that it has also revised form 3CEB to rectify the said error. The Id. TPO rejected the assessee's contentions for the reason that the assessee has merely declared the direct shares of these entities in the bonds and that it has failed to prove further that these entities are not its AEs. The Id. TPO/AO further stated that the



assessee has failed to furnish the total assets as on the date of issuance and has failed to substantiate that other two entities would be independent entities and not its AEs. Further, the Id. TPO pointed out that form 3CEB was filed by one Chartered Accountant, whereas the TP Study Report was prepared by another Chartered Accountant firm, where in both the documents, the lenders were treated as AEs of the assessee. The Id. AO/TPO rejected the assessee's revised form 3CEB also for the reason that it was revised after the commencement of the TP proceedings. The Id. TPO also rejected the assessee's contentions that it had disallowed the whole interest expenses u/s. 94B of the Act and Section 92(1) was not applicable, for the reason that both the provisions are independent and the disallowance made u/s. 94B could be carried forward for 8 assessment year immediately succeeding the assessment year for which the excess interest expenditure was computed. The Id. AO/TPO stated that the disallowance made during the year under consideration is allowable in the subsequent years and that it was beyond the powers of Id. TPO to decide the issue of disallowance which was to be decided only by the Id. AO. The Id. AO/TPO held that the Arm's length interest rate on the bonds issued by the assessee to its AEs was to be determined at 15.90% as per the TP study report of the assessee as against the actual payment made by the assessee at 17.18%. The Id. AO/TPO made an adjustment of Rs.25,93,87,674/- towards the excess interest paid over and above the Arm's length interest rate by using CUP method. The Id. AO/TPO passed the draft assessment order, dated 01.11.2023, u/s. 144C(1) of the Act, against which the assessee filed its objection before the Hon'ble DRP, which disposed of the said objection giving partial relief to the assessee thereby



proposing an adjustment of Rs.13,77,54,756/-. Subsequent to which, the Id. AO passed the final assessment order, dated 19.09.2024, u/s. 143(3) r.w.s. 144C(13) r.w.s. 144B of the Act, where the total income of the assessee was determined as under:

Sr. No.	Description	Amount (in INR)
1.	<i>Income as per Return of Income filed</i>	<i>1,43,080/-</i>
2.	<i>Income as computed u/s. 143(1)(a)</i>	<i>1,43,080/-</i>
3.	<i>Addition made in respect of issue of arm's length price (ALP for short) interest payable as discussed above.</i>	<i>13,77,54,756/-</i>
4.	<i>Total income determined</i>	<i>13,78,97,836/-</i>
5.	<i>Less: Set off from brought forward losses of Rs. 2,89,43,42,680</i>	<i>13,77,54,756/-</i>
6.	<i>Total taxable income</i>	<i>1,43,080/-</i>
7.	<i>Total loss to be carried forward for future years</i>	<i>275,65,87,924/-</i>

8. The assessee is in appeal before us, challenging the impugned order of the Id. AO.
9. We have heard the rival submissions and perused the materials available on record. The moot issue to be adjudicated in this appeal is whether the adjustment made towards the interest paid on non-convertible debentures is at Arm's length price and whether the disallowance u/s. 94B of the Act, is to be restricted only to the extent of interest payable to M/s. Credit Opportunities II PTE Limited being the deemed AE and not to the other two entities which are to be treated as independent enterprises, by adopting internal CUP method.
10. The learned Authorised Representative (Id. AR for short) for the assessee elaborated on how only one entity viz. Credit Opportunities II PTE Limited will come under the preview of deemed to be associated enterprise as per Section 92A(2) of the Act, for which disallowance of interest payable/paid by the assessee is to be determined as per Section 94B is to be considered. The Id. AR contended that the Id. AO/TPO failed to



consider the revised form 3CEB filed before the ld. TPO during the TP proceeding but before completion of the TP assessment. The ld. AR further reiterated that the Hon'ble DRP has categorically in its direction has mentioned that only Credit Opportunities II PTE Limited is deemed to be an AE of the assessee and the other two entities are to be treated as Non-AEs. The ld. AR stated that this direction of the Hon'ble DRP has not been complied with by the ld. AO and all three parties have been treated as AEs erroneously. The ld. AR prayed that the ld. AO/TPO be directed to recompute the adjustment in accordance with Section 92A of the Act and relied on various decision in support of the assessee's contentions.

11. The learned Departmental Representative (ld. DR for short) on the other hand controverted the said fact and stated that the assessee has not furnished any details to show that these entities are Non-AEs and further stated that in the TP Study Report and in the original form 3CEB, the assessee itself has treated all these three entities as its AEs. The ld. DR further stated that the ld. TPO has not considered the revised form 3CEB, for the reason that the same was filed after commencement of the TP proceeding. The ld. DR relied on the order of the lower authorities.

12. In the above factual matrix of the case, it is observed that Section 92A of the Act, categorizes the enterprises which would fall under the category of associated enterprises as per Sub Section 1 and deemed to be associated enterprises as stated in Sub Section 2 of the said provision. In the present case in hand, deemed associated enterprises would fall under clause (c), where when a loan is advanced by one enterprise to another enterprise, here in this case, the assessee being the borrower, where the quantum of the



said loan is not less than 51% of the book value of the total assets of the assessee company then the lender would be deemed to be AE of the assessee company. The Id. AR's submissions that though initially in the original form 3CEB all three entities were treated as AEs during the TP proceeding, the assessee vide a revised form 3CEB restricted only one entity to be AE as per Section 92A(2)(c) of the Act. It is also observed that the assessee has filed revised form 3CEB before passing of the TP order u/s. 92CA(3) of the Act, which was treated to be filed belatedly by the Id. AO/TPO. It is pertinent to consider the provision of Section 92CA(3) of the Act, which is cited herein under for ease of reference:

“92CA (3) *On the date specified in the notice under sub-section (2), or as soon thereafter as may be, after hearing such evidence as the assessee may produce, including any information or documents referred to in sub-section (3) of section 92D and after considering such evidence as the Transfer Pricing Officer may require on any specified points and after taking into account all relevant materials which he has gathered, the Transfer Pricing Officer shall, by order in writing, determine the arm's length price in relation to the international transaction or specified domestic transaction in accordance with sub-section (3) of section 92C and send a copy of his order to the Assessing Officer and to the assessee.*”

13. On a bare perusal of the said provision, it is evident that the statute has not prescribed any time limit for filing of form 3CEB as contended by the Id. AO/TPO and had merely relied on the original form 3CEB without taking into consideration, the assessee's submission that all three entities have been treated as AEs out of abundant caution and subsequently, the assessee withdrew the same by stating that only Credit Opportunities II PTE Limited is deemed to be an AE as per Section 92A(2)(c) of the Act and the other two entities are to be treated as independent enterprises which has not crossed the specified limit of 51% of the book value of the total assets of the assessee company at



any time during the previous year under consideration. It is also evident that the Hon'ble DRP in its direction has also considered the submission of the assessee in treating only one entity as AE of the assessee and the others to be independent enterprises. Further, it is observed that for the purpose of computing the disallowance u/s. 94B of the Act, prima facie the issue of whether an enterprise is an associated enterprise/deemed to be associated enterprise or an independent enterprise has to be determined before considering whether the transaction is at ALP. The assessee has claimed the benefit of Section 94B of the Act, in the absence of EBIDT details, which provides for restriction of interest payments made by the assessee to its AEs which should be restricted to 30% of the revenue before any interest, taxes, depreciation and amortization or interest paid to an associated enterprise whichever is less. The provision also facilitates carry forward of the interest expenditure for a maximum period of 8 years, only when the interest payments exceeds Rs.1 crore and where the borrower is an Indian company or PE of a foreign company and the interest payment is made to Non-Resident associated enterprise as per *Thin Capitalization Rule*, where the intention of the legislature was to 'limit base erosion involving interest deduction and other financial payments' as per the initiative of the OECD adopting BEPS Action 4 recommendation. The proviso to Section 94B(1) states that where a loan has been provided by a third party lender, but the AE provides explicit or implicit guarantee to such lender or deposits the corresponding or matching amount of funds with the lender, such debt shall be deemed to have been issued by an associated enterprise. On a perusal of the said provision, there is no iota of doubt that the first and foremost criteria for invoking the provision is to



identify whether an enterprise is an associated enterprise/deemed associated enterprise. On this note, we find justification in the arguments enhanced by the Id. AR and are of the considered view that the issues in hand are to be remanded back to the file of the Id. AO for re-computing the adjustment as per revised form 3CEB filed by the assessee for determination of Arm's length price of the interest payable to the AE. The assessee is directed to satisfy the Id. AO as how the other two entities will not be AEs of the assessee by cogent evidences and the Id. AO is directed to decide the issue on the merits of the case and in accordance with law. As we have remitted all these issues back to the file of Id. AO for *denovo* assessment, we have not expressed our view on any of the issues on the merits of the case.

14. In the result, the appeal filed by the assessee is allowed for statistical purpose.

Order pronounced in the open court on 26.03.2025

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Mumbai; Dated: 26.03.2025

Karishma J. Pawar (Stenographer)

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent
3. CIT- concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai