

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

आयकर अपील सं. / ITA No.619/PUN/2020

निर्धारण वर्ष / Assessment Year : 2015-16

M/s. City Corporation Limited, (Earlier Known as M/s. Amanora Future Towers Pvt. Ltd.), 917/9A, City Chambers, F.C. Road, Shivajinagar, Pune-411004 PAN : AAKCA3074H	Vs.	DCIT, Circle-1(1), Pune
Appellant		Respondent

आयकर अपील सं. / ITA No.45/PUN/2021

निर्धारण वर्ष / Assessment Year : 2015-16

DCIT, Circle-1(1), Pune	Vs.	M/s. City Corporation Limited, (Earlier Known as M/s. Amanora Future Towers Pvt. Ltd.), 917/9A, City Chambers, F.C. Road, Shivajinagar, Pune-411004 PAN : AAKCA3074H
Appellant		Respondent

Assessee by
Revenue by

Shri Suhas Bora
Shri Sangram Gaikwad &
Shri Mahadevan A.M. Krishnan

Date of hearing

16-08-2021

Date of pronouncement

17-08-2021

आदेश / ORDER

PER R.S.SYAL, VP :

These two cross appeals – one by the assessee and other by the Revenue - arise out of the order passed by the Id. CIT(A) on 22.09.2020 in relation to the assessment year 2015-16.

2. The Departmental appeal is time barred by 63 days. The Id. AR did not raise any objection to the condonation of the delay. The delay is hereby condoned and the appeal is admitted for hearing.

3. Succinctly, the facts of the case are that the assessee is engaged in the business of real estate development. A return was filed declaring total income of Rs.26.93 crore. The assessee reported certain international transactions and Specified Domestic transactions (SDTs) in Form No. 3CEB. The Assessing Officer (AO) made a reference to the Transfer Pricing Officer (TPO) for determining the Arm's Length Price (ALP) of the transactions. Currently, we are concerned with the international transaction of payment of interest on CCDs paid to IIRF Cyprus V. Holding Limited and the Specified Domestic transaction of payment of interest on debentures to M/s. City Corporation Limited amounting. The assessee applied the Comparable Uncontrolled Price (CUP) method to demonstrate that the international transaction and the SDT were at ALP. The TPO observed that the assessee, in fact, availed funds from its related concerns as share capital but wrongly classified them as debentures/CCDs for claiming interest deduction. Relying on his decision for the A.Y. 2013-14, the TPO finally held that such financing by the related concerns was a shareholders'

activity. He, thus recharacterized the transactions of issue of debentures/CCDs to those of issue of equity shares and held that no interest payment was called for. That is how, he determined Nil ALP of the transactions and accordingly proposed transfer pricing adjustment of Rs.18,12,37,000/-. The AO made such an addition, which came to be deleted by the Id. CIT(A), who also directed the TPO to verify certain facts regarding the ALP determination of the interest on debentures/CCDs paid by the assessee at 17.5% and restrict the addition to 1.13% in a certain eventuality. Both the sides have come up in their respective appeals before the Tribunal.

4. We have heard both the sides through virtual court and gone through the relevant material on record. The first ten grounds of the Revenue's appeal are against the Id. CIT(A) accepting the transaction of issuance of debentures/CCDs as genuine and reversing the AO's view of re-characterising the same to that of issue of equity. The assessee's ground no.1 is against the direction given by the Id. CIT(A) in restricting the transfer pricing addition on account of payment of interest on debentures/CCD at 1.13% of the amount borrowed, after verification.

5. Both the sides are in agreement that the facts and circumstances of these grounds are similar to those of the A.Y. 2014-15. The cross

appeals for the preceding year were simultaneously heard. In fact, no fresh arguments were advanced for the year under consideration and both the sides adopted their respective arguments made for the immediately preceding year. We have discussed this issue in our separate order passed for the assessment year 2014-15. Following the same, we accord our imprimatur to the Id. CIT(A)'s view on reversing the AO's action of re-characterizing the transactions of issue of debentures/CCD to the issue of equity. We also remit the matter of re-determination of the ALP of the transaction to the file of AO/TPO. In view of the remission of the matter for re-determination of the ALP, the assessee's grievance has become infructuous.

6. Ground no.11 of the Revenue's appeal is against the direction of the Id. CIT(A) to treat Marg Limited as a comparable company.

7. The factual matrix of this ground is that the assessee reported four more specified domestic transactions, in addition to interest on debentures/CCDs, viz., Payment of services - Rs.11,30,74,180/-; Purchase of goods - Rs.23,89,120/-; Purchase of land - Rs.2,62,98,970/-; and Reimbursement of expenses - Rs.53,92,920/-. These four transactions were aggregated and the Transactional Net Margin (TNM) method was applied for claiming them at the ALP.

The TPO restricted the list of comparables of the assessee and recomputed the ALP at a higher level, which resulted in recommending a transfer pricing adjustment of Rs.10,51,97.830/-.

The Id. CIT(A) directed to include Marg Limited in the list of comparables, against which the Revenue has come up in appeal before the Tribunal.

8. Having heard both the sides and gone through the relevant material on record, we find that there is no dispute on any other issue of the ALP determination of these transactions except the direction of the Id. CIT(A) for including Marg Ltd. in the list of comparables. He held that *“this company is in the business of real estate that includes both residential and commercial sector”*. We find from the Annual report of this company, a copy of which has been placed at page 229 onwards of the paper book, that it is engaged in Port business, Real estate residential, Real estate commercial apart from Others. Stand alone financial statements from the Real estate business are available. `Income from operations' has been shown at Rs.168.18 crore, whose bifurcation has been given in Note. 20, which includes `Income from projects/operations' at Rs.154.83 crore and `Income from leasing' at Rs.13.35 crore. There is no separate segmental information

available regarding the stream of income from projects/operations. Since the income from the stream of leasing is also a part of the income from projects and no separate segmental details *qua* the income from projects stream are available, we are unable to approve the inclusion of this company in the list of comparables. Overturning the impugned order, we direct to exclude it from the list of comparables.

9. Ground No.2 of the assessee's appeal was not pressed. The same is, therefore, dismissed as 'not pressed'.

10. Ground No.3 of the assessee's appeal is against the confirmation of disallowance of Rs.9,18,700/- u/s.43CA of the Income-tax Act, 1961 (hereinafter also called 'the Act').

11. The facts concerning this issue are that the AO required the assessee to furnish a list of flat sales booked during the year under consideration along with the details of parties where the sale consideration was less than the stamp value. The assessee furnished such an information. Invoking the provisions of section 43CA of the Act in respect of one transaction where the difference in the agreed value and the stamp value was 7.24%, the AO added Rs.9,18,700/- to the total income. The Id. CIT(A) echoed the assessment order on this score.

12. It is noticed that the addition is based on the mandate of section 43CA inserted by the Finance Act, 2013 w.e.f. 01-04-2014, which is a special provision deeming stamp value as the full value of consideration in the case of transfer of land or building or both held as stock in trade, where the stamp value is higher than the transacted value. Sub-section (1) of this section provides that: “Where the consideration received or accruing as a result of the transfer by an assessee of an asset (other than a capital asset), being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration received or accruing as a result of such transfer”. In this case, the agreed value of one unit sold by the assessee is Rs.1,26,88,900/- as against its stamp value at Rs.1,36,07,600/-. This is how, the differential amount of Rs.9,18,700/- was added to the assessee’s total income as per the prescription of section 43CA(1) of the Act.

13. At this stage, it is relevant to mention that the first proviso to section 43CA was inserted by the Finance Act, 2018 w.e.f. 01-04-

2019 providing that: `where the value adopted or assessed or assessable by the authority for the purpose of payment of stamp duty does not exceed one hundred and *five per cent* of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration'. It is palpable that the rigor of section 43CA has been slackened by the first proviso inserted by the Finance Act, 2018 providing that where the stamp value does not exceed by 5% of the agreed sale consideration, only the transacted value should be considered as full value of consideration. The Memorandum explaining the provisions of Finance Bill, 2018, at the time of insertion of the first proviso, reads as under:

“Rationalization of section 43CA, section 50C and section 56.

At present, while taxing income from capital gains (section 50C), business profits (section 43CA) and other sources (section 56) arising out of transactions in immovable property, the sale consideration or stamp duty value, whichever is higher is adopted. The difference is taxed as income both in the hands of the purchaser and the seller.

It has been pointed out that this variation can occur in respect of similar properties in the same area because of a variety of factors, including shape of the plot or location. *In order to minimize hardship in case of genuine transactions in the real*

estate sector, it is proposed to provide that no adjustments shall be made in a case where the variation between stamp duty value and the sale consideration is not more than five percent of the sale consideration.

These amendments will take effect from 1st April, 2019 and will, accordingly, apply in relation to the assessment year 2019-20 and subsequent assessment years.”

14. A glance at the Memorandum clearly deciphers that the legislature recognised difficulties in the implementation of section 43CA inasmuch as the variation in the stamp value and the transacted value may sometimes genuinely arise because of a variety of reasons. In order to relax such a hardship in case of genuine transactions of sale, it was decided to take no punitive action of enhancing the full value of consideration where the difference between the stamp value and the sale consideration did not breach 5% band.

15. The assessment year under consideration is 2015-16 and the proviso to section 43CA has been inserted by the Finance Act, 2018. Under such circumstances, a question arises if the assessee can avail the benefit of the proviso which was inserted w.e.f. 01-04-2019 and further relaxed w.e.f. 01-04-2021? At this juncture, it is relevant to note the judgment of Hon'ble Supreme Court in a Constitution Bench decision in *CIT Vs. Vatika Township Pvt. Ltd.*

(2014) 367 ITR 446 (SC) in which the prospective or retrospective application of the provisions has been extensively dealt with by holding that a legislation is ordinarily presumed to be prospective unless contrary intention appears. It further went on to hold that: 'where a benefit is conferred by legislation, the rule against a retrospective construction is different. If legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally and where to confer such benefit appears to have been the legislators object, then the presumption would be that such legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective.'

16. When we examine the prescription of the proviso in the backdrop of the memorandum explaining the provisions read in conjunction with *Vatika Township Pvt. Ltd. (supra)*, it becomes graphically clear that the insertion of the proviso, which has been provided to mitigate the hardship in the case of genuine real estate transactions, should be held as retrospective. Here is a provision which has been inserted to confer a benefit on some persons (where the difference in two values is less than 5%) but without inflicting a

corresponding detriment on some other person or on the public generally and the legislator's object is clearly to confer such benefit. It would be a clear case of travesty of the provision, if in two parallel cases before the Tribunal involving such issue – one for the A.Y. 2015-16 as is the case under consideration and another for the A.Y. 2019-20 - the benefit of proviso is conferred in the case for the A.Y. 2019-20 and is denied in the other case for the A.Y. 2015-16. That is the *raison d'être* for treating the proviso retrospective notwithstanding the fact that it has been expressly made applicable from the A.Y. 2019-20.

17. At this juncture, it would be pertinent to note that another amendment was carried out by the Finance Act, 2020 w.e.f. 01-04-2021 to the first proviso to section 43CA by substituting the word 'one hundred and ten per cent of the consideration' with 'one hundred and five per cent of the consideration'. The relevant part of Memorandum explaining the provisions of Finance Bill, 2020 in this regard reads as under:

“Increase in safe harbour limit of 5 per cent. under section 43CA, 50C and 56 of the Act to 10 per cent..

Section 43CA of the Act, inter alia, provides that where the consideration declared to be received or accruing as a result of the transfer of land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government (i.e. “stamp valuation authority”) for the purpose

of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall for the purpose of computing profits and gains from transfer of such assets, be deemed to be the full value of consideration. The said section also provide that where the value adopted or assessed or assessable by the authority for the purpose of payment of stamp duty does not exceed one hundred and five per cent of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration.

.....

Thus, the present provisions of section 43CA, 50C and 56 of the Act provide for safe harbour of five per cent.

Representations have been received in this regard requesting that the said safe harbour of five per cent may be increased. It is, therefore, proposed to increase the limit to ten per cent.

This amendment will take effect from 1st April, 2021 and will, accordingly, apply in relation to the assessment year 2021-22 and subsequent assessment years.”

18. A perfunctory look at the Memorandum unmistakably transpires that complications were being faced with five per cent safe harbour limit in cases of genuine sale of land, building or both held as stock in trade, for which representations were made to the Government. Realizing the difficulty, the Parliament stepped in and enhanced the safe harbour limit from 5% to 10% in the first proviso to section 43CA. Even though this amendment has been made effective from 01-04-2021 and has been stated to apply in relation to assessment year 2021-2022 onwards, but the same being a

beneficial provision aimed at mitigating hardship to the assesseees making genuine sale transactions at a rate in variance with the stamp value, the same has also to be held as retrospective in the light of the Constitution Bench judgment of the Hon'ble Supreme Court in *Vatika Township (supra)*.

19. In the light of the above discussion, it gets vivid that where the difference between the stamp value and sale consideration is up to ten per cent, such a difference is liable to be ignored and cannot be brought within the ken of section 43CA(1). Adverting to the facts of the instant case, we find that the difference between the stamp value and the sale consideration is 7.24%. Such a difference, being less than 10%, is liable to be ignored in terms of the amended proviso to section 43CA of the Act. We, therefore, direct to delete the addition of Rs.9,18,700/- sustained in the first appeal.

20. The next ground raised by the assessee is against the confirmation of addition of Rs.3,03,72,733/-. The factual panorama of this ground is that the assessee paid interest on debentures/CCDs to its AE for the assessment year 2013-14. The TPO determined Nil ALP. When the matter came up before the Id. CIT(A), the assessee contended that the interest cost of Rs.14.20 crore was taken to work-in-progress and not claimed as deduction. Albeit the Id.

CIT(A) approved the ALP determination, but also accepted the assessee's alternative argument. He directed the AO that whenever the assessee claims deduction against this work-in-progress, the interest component for the assessment year 2013-14, whose ALP was determined at NIL, should be added back to the total income. Following the same, the AO added Rs.3.03 crore to the total income of the assessee for the year under consideration representing interest expenditure on debenture/CCDs booked for the assessment year 2013-14. The Id. CIT(A) approved the AO's action.

21. We have heard the rival contentions and perused the relevant material on record. It is seen that for the assessment year 2013-14 the Tribunal vide its order dated 18-12-2020 (ITA No.772/PUN/2018) has overturned the view of the Id. CIT(A) and held that the re-characterization of transaction of issue of debentures/CCDs to issue of equity capital was not correct and accordingly directed the AO/TPO to re-work out the ALP of the transaction of interest payment. In that view of the matter, the direction given by the Id. CIT(A) for the A.Y. 2013-14 stands substituted with that of the Tribunal for re-determining the ALP of the transaction of payment of interest on debentures/CCD. Since the assessee capitalized interest on debentures/CCDs in its WIP for the

assessment 2013-14, it is but natural that when the work-in-progress is reversed in the subsequent years at the time of sale of flats/plots, the corresponding amount of excess interest on debentures/CCDs, over and above its ALP, needs to be reversed and added back to the income of that year. To exemplify, if the WIP stood at Rs.1000 as on 31.3.2013 which included interest of Rs.100 paid on debentures/CCDS and pursuant to the directions given by the Tribunal, the ALP of interest payment is re-determined at Rs.75/-. In that case, the differential amount of Rs.25/- (Rs.100 minus Rs.75) is required to be added back proportionately to the total income as and when the corresponding amount of the work-in-progress is reversed on the sale of flats/plots etc. We, therefore, overturn the impugned order on this score and hold that the amount of capitalized interest on debentures/CCDs to the work in progress for the assessment year 2013-14, as is in excess of its ALP freshly determined by the AO/TPO, should be disallowed proportionately in the years in which the work-in-progress containing the amount of such interest standing as on 31-03-2013, is reversed on the sale of flats/plots.

22. The assessee raised an additional ground seeking deduction of Education Cess and Secondary and Higher Secondary Cess

amounting to Rs.26,66,359/- while computing the total income of the assessee company.

23. This ground is similar to the additional ground raised for the assessment year 2014-15 wherein a direction has been given to the AO for ascertaining the correct amount of education cess and then allowing a deduction for it, after allowing opportunity of hearing to the assessee. Same view is followed for the year under consideration and the AO is also directed accordingly.

24. In the result, both the appeals are partly allowed.

Order pronounced in the Open Court on 17th August, 2021.

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

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

पुणे Pune; दिनांक Dated : 17th August, 2021
सतीश

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-13, Pune
4. The PCIT-5, Pune
5. DR, ITAT, 'C' Bench, 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	16-08-2021	Sr.PS
2.	Draft placed before author	17-08-2021	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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