

IN THE INCOME TAX APPELLATE TRIBUNAL

"D" BENCH, MUMBAI

BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.1585/Mum./2023

(Assessment Year : 2020-21)

Asstt. Commissioner of Income Tax
Circle-3(1)(1), Mumbai

..... Appellant

v/s

M/s. Rustomjee Realty Private Limited
702, Natraj, M.V. Road, Junction
W E Highway, Andheri (East)
Mumbai 400 069 PAN-AACCR9804N

..... Respondent

Assessee by : Shri Naresh Kumar

Revenue by : Smt. Sanyogita Nagpal

Date of Hearing – 11/10/2023

Date of Order – 28/11/2023

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the Revenue challenging the impugned order dated 10/03/2023, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*"learned CIT(A)"*], for the assessment year 2020-21.

2. In its appeal, the Revenue has raised the following grounds:-

"1. On the facts and circumstances of the case and in law, the Ld.CIT(A) erred in deleting the disallowance of expenses of Rs.26,53,85,916/- when the rate of interest for secured loan at the time of issuance of debentures was 14.1% which was also reflected in the sanction order submitted by the assessee while

the assessee had issued debentures at the rate of 21.3% which was much more than the market.

2. On the facts and circumstances of the case and in law, the Ld.CIT(A) erred in deleting disallowance of interest of Rs.26,53,85,916/- paid on Non-Convertible Debentures (NCDs) by merely relying on the submissions of the assessee. The Ld.CIT(A) ought to have examined the terms contained in Debentures Subscription Agreement and the purpose for which such high interest bearing funds have been utilised particularly when huge interest of Rs.46.46 crores has been debited to Profit & Loss Account.

3. On the facts and circumstances of the case and in law, the Ld.CIT(A) erred in disallowance of 80G deduction in respect of donations made towards CSR activities without appreciating the fact that these are not voluntary donations, rather they were paid to comply with statutory requirement of CSR and the amount spent towards CSR activities was nothing but appropriation of profits.

4. The Appellant craves leave to add, amend and/or vary the grounds of Appeal/ before or during the course of hearing."

3. The issue arising in grounds no. 1 and 2, raised in Revenue's appeal, pertains to the deletion of disallowance of interest paid on non-convertible debentures.

4. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee is engaged in the business of construction and development of real estate. For the year under consideration, the assessee filed its return of income on 14/01/2021 declaring a total income of Rs. 71,49,06,790. The return filed by the assessee was selected for scrutiny and statutory notices under section 143(2) as well as section 142(1) of the Act were issued and served on the assessee. During the assessment proceedings, from the details of the borrowing cost claimed by the assessee, it was noted that the assessee has claimed interest expense @21.3% on debentures, i.e. Rs. 7851 lakh. Accordingly, the assessee was asked to show cause as to why the interest expense be not restricted to 10% on the money borrowed by issuing debentures as per the secured loan rate of interest. In response

thereto, the assessee submitted that it had issued 14,00,00,000 unsecured redeemable cumulative non-convertible debentures of Rs. 10 each for a period of 6 years amounting to Rs. 140,00,00,000 to Kapstone Construction Pvt. Ltd. It was further submitted that the debentures were issued at the interest rate of 21.3% after considering various factors such as quantum of loan, risk factor, credit, security, pledge, etc. during the period of 2014 to 2020. It was further submitted that the market situation differs from time to time and therefore there is no comparison of the interest rate of secured term loan taken on 25/02/2020 and unsecured redeemable cumulative non-convertible debentures issued on 08/03/2014. The assessee submitted that during a period of 2014, the interest rate against the secured term loan was in the range of 14%-16.5% and the assessee has itself borrowed a loan on 19/09/2013 at the rate of 14.10%. The Assessing Officer ("AO") vide order dated 26/09/2022 passed under section 143(3) read with section 144B of the Act did not agree with the submissions of the assessee and held that the rate of interest for secured loan at the time of issuance of debentures was 14.10%, however, the assessee has issued debentures at the rate of 21.3% which is much more than the market rate of interest. Accordingly, the AO restricted the interest expenses claimed on debentures to 14.1% instead of 21.3% and disallowed the excess interest claim of Rs. 26,53,85,916.

5. The learned CIT(A), vide impugned order, allowed the ground raised by the assessee on this issue and held that the interest rate on a secured loan cannot be compared with interest on unsecured non-convertible debentures, as for determining the interest rate on different instruments, various factors

comes into consideration. The relevant findings of the learned CIT(A), with respect to this issue, are reproduced as under:-

"Ground No.2

As per this Ground of appeal, the appellant has agitated the disallowance of excess interest expenses amounting to Rs. 26,53,85,916/-. On perusal of the submissions of the appellant, it has been found that the A.O. has disallowed the excess interest expenses amounting to Rs. 26,53,85,916/- by holding that the interest expenses claimed for debentures issued is restricted to 14.10% i.e. interest rate on secured loan, instead of interest rate of 21.30%. The appellant has contended that the comparison of interest rate of secured loan taken at 14.1% and on unsecured redeemable cumulative non-convertible debentures issued on 18.03.2014 at 21.3% cannot be compared as both are totally different in nature. As per appellant, the comparison of secured instrument with unsecured instruments is not logical as one of the instruments is backed by assets which are not the case in case of unsecured one of the instruments is backed by assets which are not the case in case of unsecured one which is redeemable cumulative non-convertible debentures.

The submission of appellant has been considered. It is common market practice that determining the interest rate on different instruments, various factors comes into consideration such as quantum of loan, term of loan, risk, credit, security, pledge, etc. As per the unsecured non-convertible debentures instrument Agreement clause No. 8.13.1 (vi), it is categorically mentioned that the interest at the rate of 21.30% cumulative quarterly per annum is payable only on availability of distributable cash flow. Further there are various risks such as credit risk, liquidity risk; etc. which is factored with unsecured debentures and therefore, the same cannot be compared with secured interest rate. Therefore, the appellant has justified the claim of interest on debentures @ 21.30% which is higher than the secured loan interest rate.

The Appellant has also submitted the requisite details of interest expenses to support its claim u/s 36(1) (ii) of the Act. The appellant has offered Rs.281,44,08,394/- as revenue from operations during the year against which the interest of Rs. 46,45,48,508/- has been claimed in profit and loss account. The appellant has contended that the entire funds borrowed are utilized for the project undertaken by it during the year under consideration. It has also been observed that the borrowings were actually made in AY 2014-15 and the interest on debentures @ 21.30% were claimed from AY 2014-15 till AY 2020-21 and the said interest rate on debentures was duly accepted in earlier assessment years. The disallowance of excess interest of Rs. 26,53,85,916/- has been made without any logical reasoning in the year under consideration."

Being aggrieved, the Revenue is in appeal before us.

6. We have considered the submissions of both sides and perused the material available on record. The assessee has undertaken a project under the

name and style of "Rustomjee Elements". During the year under consideration, the assessee recognised an amount of Rs. 8033 lakh as the borrowing cost. The breakup of the total finance cost of Rs. 8033 lakh is as under:-

<i>Particulars</i>	<i>Amount in Rupees (in lakhs)</i>
<i>Interest Expenses on Debentures</i>	<i>7,851</i>
<i>Interest on Borrowings from bank and others</i>	<i>149</i>
<i>Interest on Statutory Dues</i>	<i>19</i>
<i>Other Borrowing Cost</i>	<i>14</i>
<i>Total Finance Cost incurred during A.Y. 2018-19</i>	<i>8,033</i>
<i>Less: Allocated to Construction Cost i.e., capitalized to VVIP</i>	<i>(3,387)</i>
<i>Balance Interest debited to P&L Account (Revenue Expenses)</i>	<i>4,646</i>

7. Thus, the assessee incurred total interest expenses of Rs. 8033 lakh out of which Rs. 4646 lakh was debited to the profit and loss account, and a balance of Rs. 3387 lakh was capitalised to work in progress during the year under consideration. From the above, it is evident that the total finance cost of Rs. 8033 lakh also includes interest expenses on debentures of Rs. 7851 lakh. As per the assessee, it had issued 14,00,00,000 unsecured redeemable cumulative non-convertible debentures of Rs. 10 each amounting to Rs. 140,00,00,000 to Kapstone Construction Pvt. Ltd. on 08/03/2014 at the interest rate of 21.3% as per the Debenture Subscription Agreement dated 08/03/2014. As per the assessee, it has issued the non-convertible debentures for business purposes. The assessee claims that various factors come into play while determining the interest rate such as quantum of loan, risk factor, credit,

security, pledge, etc., and therefore the interest rate of a secured term loan taken at 14.10% cannot be considered for determining the interest paid on unsecured redeemable cumulative non-convertible debentures. However, the AO did not agree with the submissions of the assessee and considered the interest rate of 14.10% paid on the secured term loan borrowed by the assessee on 19/09/2013 and disallowed the excess interest of Rs. 26,53,85,916.

8. It is the plea of the assessee that the aforesaid debentures were issued by the assessee in the assessment year 2014-15 and it has been paying interest at the rate of 21.30% since then, however, no such disallowance was made in the earlier years. As per the assessee since there is no change in the basic facts, therefore following the principle of consistency the impugned addition is unsustainable. In support of this submission, the assessee has also placed on record the assessment orders passed in the assessment years 2014-15, 2017-18, and 2018-19. The assessee has also placed on record the assessment orders for the assessment years 2012-13 and 2013-14, however since the unsecured debentures were issued in the assessment year 2014-15, therefore these assessment orders are of no relevance.

9. From the perusal of the assessment order for the assessment year 2014-15, we find that the interest expense of Rs. 21,31,58,233 was not included in the work in progress and the said expense was, inter-alia, debited to the profit and loss account. The AO vide order dated 28/12/2016 passed under section 143(3) of the Act did not agree with the submissions of the assessee in the absence of project-wise breakup of the expenses and the details of the ratio in

which the revenue has been offered to tax. Accordingly, the AO, inter-alia, transferred the interest expenditure claimed by the assessee to capital work in progress.

10. From the perusal of the assessment order for the assessment year 2017-18, we find that the assessee incurred interest expenditure of Rs. 47,00,60,106 on non-convertible debentures, however, capitalised the same to work in progress and thus not debited it to the profit and loss account. Therefore, in the assessment year 2017-18, there was no question before the AO to examine the claim of allowance of interest paid on non-convertible debentures as the same was already capitalised to work in progress.

11. In the assessment year 2018-19, the assessee capitalised interest of Rs. 63,96,30,595 out of the total claim of Rs. 85,80,03,884 and thus debited the balance amount of Rs. 21,83,73,289 to the profit and loss account. From the perusal of the assessment order dated 20/04/2021 in the assessment year 2018-19, we find that the details of the interest expenditure debited to the profit and loss account are not mentioned in the order. At the same time, we find that in the assessment year 2018-19, it is the plea of the assessee that the interest expenditure of Rs. 21,83,73,289 are revenue in nature as the interest has been paid for business purpose and not for the project purpose and accordingly the same has been debited to the profit and loss account. However, this claim of the assessee was also rejected by the AO, and the entire interest expenditure of Rs. 21,83,73,289 was disallowed as revenue expenditure and transferred to the capital work in progress on the basis that all the interest expenditure have been incurred for the construction business

and towards the commencement and completion of the single project undertaken by the assessee, i.e. the project named "*Rustomjee Element*".

12. Therefore, on the basis of the documents submitted by the assessee, it is sufficiently evident that the interest expenditure on non-convertible debentures was either not debited to the profit and loss account or not claimed to be for the purpose of the project in earlier years unlike in the year under consideration. Thus, we are of the considered view that the issue of allowability of interest on non-convertible debentures, which arose in the present case, did not come up for consideration before the lower authorities in earlier years and therefore, we find no merits in the plea of the assessee that the interest paid on non-convertible debentures has been allowed in the preceding years and following the principle of consistency should be allowed in the year under consideration.

13. At the same time, we find that the AO has compared the rate of interest paid on unsecured redeemable cumulative non-convertible debentures with the rate of interest at which the secured loan was borrowed by the assessee, which in our considered view is wholly erroneous as various risks factors associated with unsecured debentures such as credit risk, liquidity risk, etc. cannot be compared with secured interest rate. Therefore, we are of the view that in order to decide whether the assessee has paid a higher interest rate on non-convertible debentures it is necessary to determine the interest rate on unsecured non-convertible debentures at the relevant time in an arm's length situation. Accordingly, we deem it appropriate to restore this issue to the file of the AO for *de novo* adjudication after determining the arm's length interest

rate during the relevant period in case of issuance of unsecured redeemable cumulative non-convertible debentures. We further find that while making the disallowance of Rs. 26,53,85,916 the AO considered the entire interest of Rs. 78,51,00,000 at the rate of 21.30%. However, it is to be noted that out of the total finance cost of Rs. 8033 lakh which comprises interest expenses on debentures of Rs. 7851 lakh the assessee has only debited Rs. 4646 lakh to the profit and loss account and the balance amount of Rs. 3387 lakh has been allocated to the capital work in progress. Thus, while adjudicating this issue if it is found that the assessee has paid higher interest than the arm's length rate of interest then the disallowance of excess interest paid on non-convertible debentures be made proportionate to the interest debited to the profit and loss account and not the entire interest at the rate of 21.30% on non-convertible debentures. During the hearing, the assessee also placed reliance upon CBDT Circular No. 6P dated 07/06/1968 to submit that there is no tax evasion as Kapstone Construction Pvt. Ltd. is also taxed at a maximum rate of tax. We direct the AO to examine this aspect while conducting the *de novo* assessment on this issue. With the above directions, this issue is restored to the file of the AO, and the impugned order passed by the learned CIT(A) is set aside to this extent. Accordingly, grounds no. 1 and 2 raised in Revenue's appeal are allowed for statistical purposes.

14. The issue arising in ground no. 3, raised in Revenue's appeal, pertains to the deletion of disallowance of deduction claimed under section 80G of the Act in respect of Corporate Social Responsibility ("CSR") expenses.

15. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the assessment proceedings, it was observed that the assessee incurred expenditure amounting to Rs. 11,00,000 on account of CSR. However, the assessee claimed a deduction to an extent of Rs. 5,55,000 under section 80G of the Act. The AO vide order dated 26/09/2022 held that the amount has not been paid by the assessee voluntarily to become eligible for entity specified under section 80G of the Act. However, the same has been paid by the assessee as a mandatory requirement as per section 135 of the Companies Act, 2013 to spend a certain amount for specified activities. The AO further held that the sums paid by the assessee cannot be considered as a donation for the purpose of section 80G of the Act as the element of charity is missing in it. Accordingly, the AO disallowed the claim of deduction under section 80G of the Act towards CSR expenditure.

16. The learned CIT(A), vide impugned order, after noting that the assessee has disallowed CSR expenditure amounting to Rs. 11,00,000 under section 37(1) of the Act and claimed the deduction under section 80G of Rs. 5,50,000 for the year under consideration allowed the ground raised by the assessee on this issue. Being aggrieved, the Revenue is in appeal before us.

17. We have considered the submissions of both sides and perused the material available on record. We find that the coordinate benches of the Tribunal have consistently taken the view in favour of the taxpayer and held that the CSR expenses even though not allowed under section 37 of the Act pursuant to insertion of Explanation-2 to section 37 vide Finance Act, 2014 with effect from 01/04/2015. However, the said expenditure is allowable under

section 80G of the Act. We find that the learned CIT(A) has also followed these judicial precedents and decided the issue in favour of the assessee, by observing as under:-

"Ground No.1

In this Ground of appeal, the Appellant has agitated the disallowance of deduction U/s 80G of the Income Tax Act, 1961, of Rs.5,50,000 which as per the appellant has been expended in compliance with the provisions of Companies Act, 2013 under head CSR expenditure. On perusal of the submission of appellant, it has been found that the A.O has disallowed the deduction claimed u/s 80G amounting to Rs 5,50,000 by holding that the CSR is a mandatory expenditure specified in Companies Act whereas deduction claimed u/s 80G of donation is voluntary in nature.

The AO's contention is that the nature and character of CSR expenditure mandated u/s 135 of the Companies Act read with provision of Section 37 of the Income Tax Act, 1961 and donation prescribed in Section 80G are totally different, distinct and independent from each other. On the other hand, it has been found that the Appellant has disallowed the CSR expenses amounting to Rs 11,00,000 u/s 37(1) of the Income Tax Act, 1961 and claimed the deduction u/s 80G of Rs 5,50,000 for the year under consideration. On perusal of the provision of Section 37(1) as well as Section 80G of the Income Tax Act, 1961, the contention of the appellant is found to be correct as there is no specific restriction for claiming the deduction u/s 80G of the Income Tax Act, 1961 and therefore, no disallowance of deduction claimed u/s 80G is warranted in this case. Appellant has relied upon the following judgements applicable to the facts of the case:

- *Goldman Sachs Services Pvt Ltd V JCIT IT(TP)A No 2355/Bang/2019.*
- *Allegis Services (India) (P.) Ltd. v. Asstt. CIT [IT Appeal No. 1693 (Bang.) of 2019, dated 29-4-2020]*
- *FNF India (P.) Ltd. v. Asstt. CIT [IT Appeal No. 1565 (Bang.) of 2019, dated 5.1.2021]*
- *JMS Mining (P.) Ltd. v. Principal Commissioner of Income Tax Kolkata 2 (2021) 130 taxmann.com 118 (Kolkata Tribunal)*

The Hon'ble ITAT Bangalore Bench decision in case of Goldman Sachs Services Pvt Ltd V JCIT IT(TP)A No 2355/Bang/2019 while adjudicating on the issue of CSR contributions which have not been paid by the appellant on voluntary basis and hence the same being not eligible for deduction u/s 80G of the Act, adjudicated the issue as follows:-

"..... But the assessing officer has rejected the assessee's claim without verifying the nature of contributions and observed that it is not a donation, and was not spent voluntarily for the eligibility of claim u/s 80G of the Act but due to legal obligation prescribed u/s 135 r.w. Schedule VII of companies Act, 2013. We find that the A.O has allowed deduction u/s 80G of the Act in respect of contribution made to PM Relief Fund which is not disputed. We are of the opinion that the A.O. has not made his observations clear that no CSR expenses are eligible for

deduction u/s 80G of the IT(TP) A No.2355/Bang/2019 Act. We consider it appropriate to refer to the Clauses (iiihk) & (iiihl) of sub-section 2 of Section 80G of the Act which are read as under:

**(iiihk) the Swachh Bharat Kost, set up by the Central Government, other than the sum spent by the assessee in pursuance of corporate social responsibility under sub-section (5) of section 135 of the companies Act, 2013 (18 of 2013); or (iiihl) the clean ganga fund, set up the Central Government, where such assessee is a resident and such sum is other than the sum spent by the assessee in pursuance of corporate social responsibility under sub-section (5) of section 135 of the companies Act, 2013) (18 of 2013)."*

Where these two exceptions are provided in section 80G of the Act, it can be inferred that the other contributions made u/s 135(5) of the companies Act are also eligible for deduction u/s 80G of Income Tax Act subject to assessee satisfying the requisite conditions prescribed for deduction u/s 80G of the Act. In the present case the AO has not dealt on these aspects, prima facie, considered the contributions as not voluntary but a legal obligation and has accepted the genuineness of the contributions.

Hence, on the facts of the case it is to be examined that the conditions are satisfying the requirements of claim u/s 80G of the Act. The appellant has also disallowed the CSR expenses amounting to Rs. 11,00,000 u/s 37(1) of the Income Tax Act, 1961.

Accordingly, the disallowance made by the A.O of Rs.5,50,000 is deleted. Accordingly, this Ground of Appeal is allowed."

18. Therefore, in view of the above, we find no infirmity in the impugned order passed by the learned CIT(A) in allowing the claim of deduction under section 80G of the Act on CSR expenses incurred by the assessee. Accordingly, ground no. 3 raised in Revenue's appeal is dismissed.

19. In the result, the appeal by the Revenue is partly allowed for statistical purposes.

Order pronounced in the open Court on 28/11/2023

Sd/-
OM PRAKASH KANT
ACCOUNTANT MEMBER

MUMBAI, DATED: 28/11/2023

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The PCIT / CIT (Judicial);
- (4) The DR, ITAT, Mumbai; and
- (5) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai