IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA
(Before Sri J. Sudhakar Reddy, Accountant Member& Sri Aby T. Varkey, Judicial Member)

I.T.A. Nos. 1150 & 1151/Kol/2017
Assessment Years: 2008-09 & 2010-11

DCIT, Circle-8(1), Kolkata……Appellant

Vs.

M/s. Gujarat NRE Coke Ltd……Respondent
[PAN: AABCG 6225 H]

Appearances by:
Dr. P.K. Srihari, CIT(DR), appeared on behalf of the Revenue.
Sh. Ravi Tulsiyan, FCA, appeared on behalf of the Assessee.

Date of concluding the hearing : September 4th, 2019
Date of pronouncing the order : November 6th, 2019

ORDER

Per J. Sudhakar Reddy, AM:

Both these appeals are filed by the Revenue directed against separate orders of the Commissioner of Income Tax (Appeals)-22, Kolkata ['CIT(A)' for short] dated 01.02.2017 passed u/s 250 of the Income Tax Act, 1961 ('the Act' for short).

2. As the appeal pertains to the same assessee, they are heard together and disposed off by way of this common order.

3. Facts in brief. The assessee is a company and is engaged in the business of manufacture and sale of Low Ash Metallurgical Coke, billets, ingots, TMT bars and other rolled steel products as well as in generation of wind power. For Assessment Year ('AY' for short) 2008-09, it filed its return of income on 30.09.2008, declaring total income of Rs. 124,67,87,030/-. The Assessing Officer ('AO' for short) passed an order u/s 144C r.w.s. 143(3) of the Act on 27.02.2012 determining the total income of the assessee at Rs. 132,40,54,628/- inter alia may be transfer pricing adjustments on account of interest on loan, interest on bond and fees for providing guarantee (Guarantee Commission). The AO carried the matter in appeal. The ld. first appellate authority allowed the appeal of the assessee for the AY 2008-09.

4. Aggrieved, the Revenue is before us challenging the deletion of adjustment made u/s 92CA(3) of the Act on account of interest on loan and on account of corporate guarantees.

5. For the AY 2010-11, the assessee filed a return of income on 13.10.2010 declaring nil income. The AO completed the assessment u/s 143(3) on 30.04.2014 determining the total income at Rs. 29,41,27,197/- inter alia disallowing the claim of additional depreciation on electrical installations, disallowing deduction of PF contribution by employees, making an adjustment on account of bank guarantee commission u/s 92CA(3) of the Act and an adjustment on loan advanced to AE u/s 92CA(3) of the Act. The AO also denied relief by computing profits u/s 115JB of the Act on disallowance u/s 14A r.w. Rule 8D of the Act.

6. Aggrieved, the assessee carried the matter in appeal and ld. CIT(A) has granted relief. Further aggrieved the Revenue has filed an appeal.

7. We have heard Dr. P.K. Srihari, the ld. CIT(DR) on behalf of Revenue and Sri Ravi Tulsiyan, ld. Counsel for the assessee. Paper books were filed running into 297 and 94 pages along with written submissions. We have carefully considered rival contentions, perused the paper on record and the orders of the authorities below as well as case laws cited and held as follows.

8. We first take up appeal in ITA No. 1150/Kol/2017 for the AY 2008-09.

9. The first issue is regarding the transfer pricing adjustment made u/s 92CA(3) of the Act on account of Guarantee Commission fees. The ld. CIT(A) brought out the facts relating to the fee paid for providing guarantee (Guarantee Commission) at page 36 of his order. Some portions are extracted for ready reference:

> *"Fee for providing Guarantee (Guarantee Commission)*
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> *33. During the course of the Transfer Pricing proceedings u/s 92CA(2), it is seen from the documents furnished by the assessee that state Bank of India, Sydney Branch (SBI) Sydney) has sanctioned to INML (Same as GNAL /GNCCL/GNML) a working capital credit facility having maximum limit of AUD36,400,000 vide their letter dated 7th September, 2006. This include:*
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> *i. A pre-shipment overdraft facility up to a maximum of AUD5,400,000*
> *ii. bill discounting facility up to a maximum of AUD 20,000,000 and*
> *iii. A bank guarantee facility up to a maximum of AUD11,000,000*
>
> *34. Para 9 of the sanction letter referred above mentions that the security package would include, apart from 'first ranking fixed and floating charge over all the assets and liabilities: of*

INML (then Gujarat NRE Australia Pty Limited), a guarantee and indemnity by the assessee in favour of the lender in a form acceptable to it and a deed of priority between the assessee and the lender. The details of this guarantee and the Deed of Priority have already been discussed above.

35. It is also seen that the assessee has a high credit rating of "AA" issued by Credit Analysis Research Ltd. (CARE) for the purpose of a proposed Non-Convertible Debenture issue. It was observed that the guarantee provided by the assessee to SBI Sydney in favour of INML was not reflected in Form 3CEB filed by the assessee along with its return of income for A. Y. 2007-08. Further, the assessee did not charge any amount from INML for the service provided to the by way of this guarantee.

36. Further, it is also seen that the SBI, Sydney Branch has also provided a loan and bar guarantee facility to M/s NRE FCGL Pty Ltd, Australia (hereinafter GNFL), another AE of the assessee vide sanction letter dated 03.07.2007. For this credit facility also, the assessee has stood guarantee. A guarantee and indemnity bond has been signed between SBI, Sydney Branch (as financier) and the assessee (as the guarantor) on 12.10.2007. In the agreement GNFL has been mentioned as the "Debtor". However, Clause 1 of the agreement mentioned that

1. Guarantee:

The Guarantor unconditionally and irrevocably guarantees (as principal debtor) the due and punctual payment of the guaranteed money to the Financier. If the Debtor does not pay the guaranteed money then the Guarantor must pay the Guaranteed money to the Financier on demand. The Financier may make this demand at any time whether or not a demand has been made by the Financier of the debtor.

Thus, in the eyes of the Lender, the assessee is considered as the principal debtor and the unconditional guarantee requires the assessee to pay the guaranteed money even when no demand has been placed on the actual debtor.

Clause 2 of the agreement mentions that

The Guarantor unconditionally and irrevocably indemnifies the Financier....against all loss, damages, liabilities, costs, charges, expenses....of any kind or nature suffered or incurred by the Financier.....

Clause 4 mentions that….

This guarantee and indemnity is a continuous security and extends to the whole of the Guaranteed money. The Guarantor waives any right of first requiring the financier to proceed against or enforce any other right, power, remedy or security, or claim payment from the debtor or any other person before claiming from the Guarantor.

Clause 9.1.3 stipulates that the Guarantor warrants that "it has fully disclosed in writing to the Financier all the facts relating to it, this deed and anything in connection with it reasonably believes to be material to the assessment of the nature and amount of risk undertaken by the Financier in entering into any transaction relating to this guarantee...." These stipulations clearly demonstrate that in effect, the credit facility has been advanced by taking into account the creditworthiness of the assessee itself.

Based on such guarantee, the Bank has advanced the loan at the price of 6 month USD BBA LIBOR plus 2% per annum."

10. The ld. CIT(A) has considered the arguments of the assessee and at para 16 page 50 followed his order for the AY 2007-08 and concluded that the transaction in question, is not an international transaction as defined u/s 92B of the Act, as it then

existed. While doing so, he relied on the judgement of the Hon'ble Delhi Bench of Income Tax Appellate Tribunal ('ITAT' for short) in the case of *Bharti Airtel Ltd. Vs. ACIT in I.T.A. No.: 5816/Del/2012 for AY 2008-09 [2014] 64 SOT 50 (URO)* and other cases. This Bench of the Tribunal in the case of *DCIT vs. M/s. Manaksia Limited in ITA No. 208-209/Kol/2018 order dated 30.11.2018* at page 1-5 held as follows:

> 2. *"It emerges at the outset that the Revenue raises identical twin substantive grounds in both these appeals. Its first substantive ground is that CIT(A) has erred in law as well as on facts in deleting arm's length price adjustment of ₹2,97,86,393/- and ₹89,22,433/- (assessment year-wise); respectively in respect of assessee's corporate guarantee provided to its overseas associate enterprises "AE" as proposed by the Transfer Pricing Officer and added in the course of the assessment in issue. We find that the instant as to whether a corporate guarantee amounts to an international transaction within the meaning of sec. 92B of the Act or not is no more res integra. This tribunal's co-ordinate bench's decision in assessee own case for assessment year 2012-13 ITA No.980/Kol/2017 decided on 28.09.2018 has adjudicated this very issue in it's favour as follows:-*
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> > *"5. Ground No. 2 is on the issue of determination of ALP on corporate guarantee on loans availed by AE.*
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> > *The Ld. 'CITCA) held that the TP Provisions do not apply to the transactions of providing corporate guarantee prior to the amendment brought in by way of an explanation to Section 92B of the Act, by Finance Act, 2012. Further at page 45 he held that the methodology applied by the TPO in computing the ALP of the transactions was without reasonable and justifiable basis.*
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> > *We find that the findings of the Ld. CITCA), are in line with the decision of the Kolkata 'C' Bench of the Tribunal in the case of M/s. EIH Ltd. vs. DCIT (supra) wherein it was held as follows:-*
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> > > *12.11. Coming to the alternate plea of the assessee that, in the facts and circumstances the corporate guarantee is not an International "Transaction u/s. 92B of the Act. we note that term 'guarantee' was inserted in the definition of 'international transaction' in section 92B by inserting an Explanation in the Finance Act, 2012 with retrospective effect from 01/04/2002. The Explanation states that-*
> > >
> > > *"For the removal of doubts, it is hereby clarified that (i) the expression "international transaction" shall include ....*
> > >
> > > *(c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business."*
> > >
> > > *The Explanation states that it is clarificatory in nature and is 'for the removal of doubts'. Thus, it does not alter the basic character of definition of 'international transaction' under the main section 92B. Under this Explanation, five categories of transactions have been clarified to have been included in the definition of 'international transactions'. Clauses (a) (b) and (d) do not cover guarantee, lending or loans. Other two, (c) and (e) deal with (i) capital financing, and (ii) business restructuring or reorganization. Clause (c) refers to lending or guarantee. But the Explanation which is for removal-of doubts or is clarificatory, cannot be read- independent of Section 92B(1). Section 92B(1), provides those transactions as international transactions*

which are in the nature of purchase, sale or lease of tangible or intangible property (explained by clauses (a) and (b) of the Explanation), or provision of services, (explained by clause (d) of the Explanation), or lending or borrowing money (explained by Clause (c) of Explanation). The plain reading of provisions of sec. 92B(1) of the Act indicate that the various transactions mentioned in section 9B(1) of the Act, (i.e. purchases, sales, provision for services, lending or borrowing or any other transaction) should have bearing on the profits, incomes- losses or assets of such enterprises. In our opinion, the condition precedent of a transaction having a bearing on profits, incomes, losses, or assets would apply to each of the aforesaid transactions namely purchase, sale, or lease of tangible or intangible property or provision of services, or lending or borrowing money or any such transaction. This understanding of ours gets further clarified by, way of insertion of Explanation in section 92B(1) by the Finance Act 2012 with retrospective effect from 01.04.2002 vide clause (a) to (d). We find that in the said explanation, clause (e) alone has been carved out as an exception wherein, the transaction thereon has been specifically mandated to be an international transaction where a transaction of business restructuring or reorganization, entered into by an enterprise with an AE irrespective of the fact that it has bearing on the profits, incomes, losses, or assets of such enterprises at the time of transaction or at any future date.

12.12. Thus, we hold that when a parent company extends an assistance to the subsidiary, being associated enterprise, such as corporate guarantee to a financial institution for lending money to the subsidiary, which does not cost anything to the parent company, and which does not have any bearing on its profits, income, losses or assets, it will be outside the ambit of international transaction under section 92B(1) of the Act In this regard, we would like to hold that issuance of corporate guarantee by the assessee to its AE would have 'influence on the profits, incomes, losses or assets of enterprise' but not necessarily have 'any impact on the profits, incomes, losses or assets' as admittedly no consideration was received by the assessee in respect of this corporate guarantee from its AE. We find that the Ahmedabad Tribunal in the case of Micro Ink in ITA No. 2873/Ahd/2010 had observed that if a subsidiary (AE in the instant case) could not borrow money from third party sources on its own standing and the guarantee provided by the parent (assessee in the instant case) enables it to make such borrowing, then the guarantee could be said to be a shareholder function, not warranting a guarantee fee. This ratio would squarely be applicable to the facts of the instant case before us.

12.13 The Ld. CIT, DR's reliance in the case of Everest Kanto Cylinder Ltd. (supra) would not come to the rescue of Revenue because in that case, the parent company charged a fee of 0.5% on the AE for rendering this service. On this factual aspect, the Tribunal as well as the Hon'ble High Court held that it is an international transaction. Since in the case in hand, the assessee has not charged a penny from the AE, so the facts of the case are different and case law is distinguishable and, therefore, the Hon'ble High Court's order cannot come to the rescue of the Revenue. We find that the Ld. AR pointed out that in the said case, the Hon'ble Bombay High Court did not answer the specific question as to whether the issuance of corporate guarantee is inherently within the ambit of definition of 'international transaction' irrespective of whether or not such transactions have any "bearing on profits, income, losses or assets of such enterprises" u/s. 92B of the Act We also note that the Ahmedabad Bench of this Tribunal supra after considering the decision of the Hon'ble Bombay High Court in Everest Kanto Cylinder Ltd. (supra) observed as under:

"We are unable to see, in the judgment of Hon'ble Bombay High Court, any

support to the proposition that issuance of corporate guarantee is inherently within the ambit of definition of 'international transaction' under section92B irrespective of whether or not such transactions have any 'bearing on profits' incomes, losses, or assets of such enterprises'. Revenue, therefore, does not derive any help from the said decision.

12.14. *The Id CIT DR would have had a case where a fee has been charged for the infra service which has been rendered (in the context of corporate guarantee), and, therefore, "the assessee or the Court has treated it as an international transaction, then the charge ot corporate guarantee has to.be.in accordance with Arm's Length principle. This means that the price for corporate guarantee should be that which would have been paid and accepted by independent enterprises in comparable circumstances. In that case transfer pricing adjustments are required. In that case, it has to be determined what will be the ALP of corporate guarantee commission paid by associate enterprise to the parent company providing corporate guarantee. Since that is not the case before us, we need not go into it.*

12.15. *We also find that this very same issue came up for adjudication by this tribunal in assessee's own case for the Asst Year 2010-11 in ITA No. 530/Kol/2015 dated 9.6.2017 , wherein by placing reliance on the decision of co-ordinate bench of Mumbai Tribunal in the case of*

a) *Marico Ltd vs ACIT reported in (2016) 70 taxmann.com 214 [Mumbai Trib] wherein it was held that corporate guarantee was not an international transaction; and*

b) *Siro Clinpharm P Ltd vs DCIT in ITA No. 2618/Mum/2014 dated 31.3.2016 , wherein it was held that the Explanation introduced by Finance Act 2012 can be made applicable only from Asst Year 2013- 14 onwards.*

12.16. *Moreover, we find that though the Explanation was introduced by Finance Act 2012, the rules were notified only on 10.6.2013. Hence the assessee cannot be expected to report this transaction also as an international transaction in its transfer pricing study and the audit report thereon.*

12.17. *In view of the aforesaid findings and respectfully following the various judicial precedents, we allow the Grounds 1.1. to 1.4 raised by the assessee."*

5.1. Consistent with the view taken therein, we uphold the order of the Ld. CIT(A) on this issue and dismiss this ground of the revenue. Accordingly, Ground No. 2 of the revenue is dismissed. "

3. *Learned Departmental Representative vehemently during the course contends that a corporate guarantee is very much an international transactions post facto amendment in sec. 92B of the Act with retrospective effect dated 01.04.2002 (supra). He fails to dispute the fact that the learned co-ordinate bench hereinabove has considered amended provision as well. There is no dispute that the CIT(A) has adopted judicial consistency in following his findings on the every issue in earlier assessment years attending finality upto this tribunal as well. There is no distinction on facts or law indicated at the Revenue's behest in the impugned assessment year. We therefore affirm the CIT(A)'s findings under challenge deleting corporate guarantee's arm's length price adjustment(s) in both the impugned assessment years."*

11. Consistent with the view taken therein, we dismiss this ground of the Revenue.

12. The next ground is against the deletion of the transfer pricing adjustments, interest on loan advanced to payee. The facts of the case are brought out at page 2 and 3 of the appellate order which is extracted for ready reference:

> "(a) **Interest on loan:** In respect of the loan of Rs. 5.6 million AUD advanced to the foreign subsidiary company viz. Gujarat NRE Australia Pty Ltd. (GNAL) through loan facility agreement in F.Y. 2004-05, out of which loan of Rs.2 million AUD remained outstanding throughout F.Y. 2007-08, the TPO determined the alleged Arm's Length Price of the loan advanced by the appellant to the aforesaid Associated Enterprise at BBSY + 750 basis points and made the consequent upward adjustment of the interest receivable thereon, of an amount of Rs.35,69,109/-, which has been added back in the assessment.
>
> (b) ***Interest on bond:*** The appellant company had invested in Australian Dollar denomination fixed rate convertible bonds issues by its Associated Enterprise M/s Gujarat NRE Australia Pty Ltd. (GNAL). The interest available on these bonds was **@** 6.5% (the bonds were redeemable at 100% plus the coupon rate). The TPO held that the appellant should expect a return on investment in these bonds at the rate of 13.95% (Cost of funds being 6.45% and spread should be 750 basis points). Accordingly, the TPO calculated expected interest from the bonds at the hypothetical rate of 13.95% and made an upward adjustment of Rs. 11,06,479/-. The A.O. also added back the said amount of Rs. 11,06,479/- in the assessment."

13. The ld. CIT(A) at para 3 page 28 & 29 held as follows:

> *"3. I have carefully considered the submissions of the appellant-assessee in the light of the adjustment made by the Ld. AO / TPO. There is no dispute on facts that the interest charged by the appellant was@ BBSY + 2.5%. This according to the appellant is arm's length and no adjustment ought to be made. It is the contention of the appellant that the impugned loan transaction can be benchmarked against the credit facilities provided to the AE by SBI, Sydney, and that although the credit facilities were guaranteed by the appellant, the said guarantee did not have any bearing on the amount of facilities and rate of interest charged by the bank. The appellant has also enclosed a copy of the bank issued by the Bank in the matter. I find adequate merit in the contention of the appellant that as the said benchmarked transaction carried interest of LIBOR plus 1.25%, and as independent benchmark is available for the same borrower, no separate benchmarking was required in the case at hand. From the factual details emanating in the case, it is apparent that the assessee has charged interest @ BBSY plus 2.5% from its AE. As the AE in the case at hand is an Australian company, the appellant has also been able to compare the interest in assessee's case and AUD LIBOR plus 2%. From the table submitted, it is quite apparent that the interest rate charged by the assessee was higher than the benchmark, i.e. AUD LIBOR Plus 2%. This would certainly indicate, in my considered view that the price charged by the assessee was clearly at arm's length. It has also to be observed that various Benches of the Hon'ble ITAT have been holding that in case of international transactions involving interest on loan, LIBOR can be held to be a bench march for comparing the interest charged for uncontrolled transaction. The appellant has relied upon certain judgements which are applicable to its case, and wherein it has been held that LIBOR is to be taken as the benchmark for transactions of the type under discussion."*

14. For the proposition that LIBOR can be held as benchmark. The ld. CIT(A) relied on the following decisions:

i. *Siva Industries & Holdings Ltd. vs. ACIT [145 TTJ (Chennai) 497]*
ii. *Tata Autocomp System vs. ACIT [149 TTJ 233]*
iii. *Aurinpro Solutions Ltd. vs. ACIT [36 CCH 006]*

15. Thereafter in para 4 he held as follows:

> *"4. I have also examined the contentions of the appellant wherein it has been argued that the impugned ALP computed by the Ld. TPO is erroneous and hence cannot be used as a benchmark. I find factual merit in the contention of the appellant that the Ld. TPO in computing the ALP has considered the average cost of borrowed funds to the assessee/ domestic interest rates and added a spread of 750 basis points to the same. However, for the case at hand, there is no dispute that loan to the AE was made out of own funds of the appellant-company and therefore there would be no cost appellant while extending such a loan. The order of the Ld. TPO has remained silent about such factual contention of the appellant, and he has held the average cost of borrowed funds as the cost of making loan to the AE, which in my considered view is without factual and legal justification. Also, the contention of the appellant-company has strength that the loan was made in Australian Dollars i.e. foreign currency and hence domestic lending rates cannot be used as a base for calculating ALP, as has beer calculated by the Ld. TPO. Such a view is well supported by the decisions of the Hon'ble ITAT discussed supra, about what rates should be used for benchmarking a case. I has also been advanced by way of argument by the appellant that the computation on spread of 750 bp by the Ld. TPO is arbitrary and has no basis whatsoever, and the same has been arrived at by assigning credit rating of 'CC' to the AE, which has not been rated by any such agency. It has been contended that while doing so, the Ld.TPO relied upon a booklet 'Corporate Rating Criteria' issued by the Standard & Poor's in 2006. The booklet prescribes credit ratings based on various ratios like EBIT interest coverage, return on capital etc. and also credit ratings based on size of the corporate It is the contention of the appellant that the Income Tax Act, 1961 read with Transfer Pricing Rules prescribed for computation of arm's length price do not authorize the Ld. TPO to assign credit rating to corporate AEs, and that such action by the Ld. TPO/ AO was arbitrary and unjustified and without the sanction of law. Having examined the matter, it is to be said that the case law relied upon by the appellant, namely the judgment of ITAT(Delhi) in case of Kohinoor Foods Ltd. Vs. ACIT is applicable in the case at hand, and covers the matter. The matter is well covered by the general consensus among the Hon'ble ITAT Benches that international transactions involving cross-border country loans to AE can be benchmarked against LIBOR, as also supported by the RBI's circular that a spread ranging from 1% - 2% over LIBOR is reasonable for advancing loans. Therefore, in deciding the matter, it is held that a interest rate of LIBOR plus 2% can be held to be Arm's length rate of interest, and a for the case at hand, the interest charged by the assessee from its AE is higher than LIBOR plus 2%, the adjustment made by the Ld. TPO in the case is held to be unjustified and not sustainable. The ground of appeal stands allowed accordingly."*

16. We find no infirmity in the above finding of the ld. CIT(A) as the same is consistent with the view taken by various coordinate Benches of the Tribunal. The Kolkata Bench of Tribunal in the case of *DCIT vs. M/s. Manaksia Ltd. in ITA No. 980/Kol/2017* order dated 28.09.2018 at para 4.1 and 4.2 held as follows:

> 4.1. *"Ground No. 1, is against the deletion of upward adjustment of Rs.6,97,64,000/-, towards Arm's Length interest on loan given to associated enterprises.*
>
> *During the course of assessment proceedings, the Assessing Officer made a reference to the Transfer Pricing Officer [TPO] for calculation of arm's length interest rate in respect of loan advanced by the assessee company to its Associate Enterprise [AE], EuroAsian Ventures FZE. The TPO arrived at arm's length interest rate of 20.15%, by applying Comparable Uncontrolled Price (CUP] method and benchmarking the same against local interest rates and accordingly calculated the upward adjustment at Rs.6,97,64,000/-. Before the Ld. CIT(A], the assessee submitted that it had charged interest @ 5% on the loan given to its AE i.e. EuroAsian Ventures FZE, which is at arm's length when benchmarked against LIBOR and hence no adjustment on this account was called for. He further relied on the decision of the Chennai Bench of the Tribunal in the case of Siva Industries & Holdings Ltd. vs. ACIT (145 TTJ (Chennai) 497) and other decisions of the Tribnal for the proposition that if the loan advanced to an AE is*

denominated in foreign currency then interest rate thereon should be benchmarked against international rates being LIBOR and not against the domestic lending rate. Further, reliance was placed on the decision of the Delhi Bench of the ITAT in the case of Kohinoor Foods Ltd. vs. ACIT (67 SOT 108).

4.2. *The Ld. CIT(A) while determining the ALP of interest on loan given to AE, held that (Comparable Uncontrolled Price] CUP is the Most Appropriate Method [MAM]. He disagreed with the order of the Ld. Transfer Pricing Officer that US LIBOR cannot be considered as a benchmark against US Dollar denominated loan. At para 4 of his order, he held as follows:-*

> *"4. Having examined the matter, it is to be said that the case law relied upon by the appellant, namely the judgment of ITAT(Delhi) in case of* ***Kohinoor Foods Ltd.*** *vs.* ***ACIT*** *applicable in the case at hand, and covers the matter. The matter is well covered by the general consensus among the Hon'ble ITAT Benches that international transactions involving cross- border country loans to AE can be bench marked against LIBOR, as also supported by the RBI's circular that a spread ranging from 1 % - 2% over LIBOR is reasonable (or advancing loans. Therefore, in deciding the matter, it is held that an interest rate of LIBOR plus 2% can ,be held to be Arm's length rate of interest, and as for the case at hand, the interest charged by the assessee from its AE is higher than LIBOR plus 2%, the adjustment made by the Ld. TPO in the case is held to be unjustified and not sustainable. The ground of appeal stands allowed accordingly."*

As the Ld. CIT(A) has followed the propositions of law laid down by different benches of the Tribunal on this issue, we find no infirmity in the same. The Kolkata Bench of the ITAT has in a number of cases including M/s. EIH Ltd. vs. DCIT (supra) followed the same principles. Hence the order of the Ld. CIT(A) on this issue is upheld and Ground No. 1 of the revenue is dismissed."

17. Consistent with the view taken therein we dismiss this ground of the Revenue on the deletion of adjustment of a loan advanced by the assessee to its AE.

18. The third issue that arises, is the adjustment of interest on a loan issue by AE. The ld. CIT(A) has dealt with this issue at page 30 onwards. The facts of the issue are brought out at page 31 of the CIT(A)'s order:

> *"28. GNAL has issued Australian Dollar Denomination Fixed Rate Convertible Bonds on 10.05.2006. The Issue Amount was $5,000,000. The assessee has invested in these bonds. These bonds carry a coupon rate of 6.5% p.a. The bondholder has the right to convert these bonds into newly issued fully paid ordinary shares of common stock of GNAL at 50 cents per share any time after 30.06.2009. On the other hand, the redemption value at maturity is stated as 100% of unpaid Principal Amount of outstanding Bonds plus the accrued interest on the maturity date (10.05.2011). The assessee in its Transfer pricing study has reported that the 'management believes that the rate of interest received from GNML (as GNAL was known at that time) is at arm's length and no further analysis is required for the same'."*

19. The ld. CIT(A) at para 13.4 page 34 concluded as follows:

> *"In my considered view in the given situation, it appears that the Ld. TPO has overlooked the fact that the said* premium is payable only on redemption of bonds**.** *It has also been factually brought on record by the appellant that the major portion of the bond issue, namely 2191 out of 2200 or 99.6% of the bonds were converted to equity as on 31.3.2008. on which no premium was payable at all, and that such a fact was well within the knowledge of the Ld. TPO at the time of passing the order since the conversion had already taken place on 31.3.2008 i.e. 2.5 years before the TP order was passed. With such a factual matrix, I find myself in agreement with the appellant that the order has been passed by the Ld. TPO overlooking the facts and on a hypothetical basis. By way of further corollary to the submissions of the appellant, it has been brought on record that in the subsequent financial years, the balance 0.4% of the FCCBs were*

also converted to equity, and therefore it was later on well-established that that cost investment in 6.5% bonds is 1% as opposed to 6.5% worked out by the Ld. TPO. Thus, the contention of the appellant is found to be genuine that 100% of the FCCBs were converted to equity when the order of Ld. TPO was passed i.e. 31.10.2011. I have already held in respect of the earlier ground (Ground No 3, supra*) that the spread of 750 basis points as made by the Ld. TPO was arbitrary and without justification, and therefore it is to be held that the ALP rate of 13.95% computed by the Ld. TPO cannot be compared with that charged by the assessee from its AE. In view of these reasons and findings the adjustment made by the Ld. TPO of the impugned amount of Rs.11,06,479/- is not sustainable, and is ordered to be deleted. The ground therefore stands* allowed**."**

20. A perusal of the same demonstrates that it does not require any interference. The assessee had invested in these bonds:

"3.2 The AE of the assessee namely INML or GNAL or GNCCL had issued Australian Dollar denominated Fixed Rate (6.5%) Convertible Bonds on 10.5.2006. The assessee had invested in these bonds, which were convertible to equity any time after 30.6.2009. No analysis of the said transaction was done in the TP report.

3.3 In course of TP proceedings, the assessee explained that the bonds were convertible to equity and hence no benchmarking for such an investment was needed. Further, it was submitted that investment in the said bonds was done out of funds raised on issue of 1% FCCB (Foreign Currency Convertible Bonds) by the assessee.

3.5 With regard to the above, it is firstly submitted that interest charged @ 6.5% is at arm's length and hence no adjustment on this account is warranted. The aforesaid transaction can be benchmarked against the 1% unsecured FCCBs issued by the assessee-company (in USD) which is even listed on Luxembourg Stock Exchange. The said bonds are similar to the bonds issued by the AE as both are quasi-equity in nature. Since the coupon rate of 6.5% is higher than 1% charged by the assessee in US markets, it can be said that the bond transaction with the AE is at arm's length.

3.6 Similarly, the assessee-company has even issued zero coupon unsecured bonds which are convertible to equity. Thus, subscription to 6.5% FCCBs issued by the AE is at arm's length.

3.7 Further, it is submitted that proceeds from the 1% FCCB have been utilized in subscribing to the bond issue. Thus, following the cost plus method (as done by the TPO) also, the said bond transaction is at arm's length. The assessee has clearly earned a spread of 5.5% by investing the funds raised at 1% interest in 6.5% convertible bonds issued by the AE.

3.8 Coming to the cost of 6.45% computed by the TPO, it is submitted that the same is erroneous and is clearly contrary to the facts of the case. The TPO, while recomputing cost at 6.5% (as opposed to 1%) has spread the premium of 27.25% over the life of 5 years. He has completely disregarded the fact that the said premium is payable only on redemption of bonds. However, a major portion of the bond issue (i.e. 2191 out of 2200 or 99.6% of the bonds) were converted to equity as on 31.3.2008 on which no premium was payable at all. This fact was well within the knowledge of the TPO at the time of passing the order since the conversion had already taken place on 31.3.2008 i.e. 2.5 years the TP order was passed. Therefore, it is clear that the order has been passed by overlooking the facts and on a hypothetical basis.

3.9 In subsequent FYs balance 0.4% of the FCCBs were also converted to equity. Hence, it stands established that cost investment in 6.5% bonds is 1% as opposed to 6.5% worked out by the TPO. Thus, 100% of the FCCBs were converted to equity when the order of TPO was passed i.e. 31.10.2011."

21. In view of the above discussion and the fact that the ALP rate of 13.95% computed by the TPO cannot be compared with that charged by the assessee from its

AE, we uphold the deletion of the addition by the ld. CIT(A) and dismiss this ground as well as the appeal of the Revenue.

22. Now, we take up ITA No. 1151/Kol/2017. In this Revenue appeal, the AO disputes the deletion of the following additions/disallowances by the ld. CIT(A):

i. Additional depreciation of Rs. 10,94,727/-.
ii. Disallowance u/s 36(1)(va) r.w.s. 2(24)(x) of the Act of Rs. 10,81,915/-.
iii. Disallowance u/s 14A r.w. Rule 8D while computing book profits u/s 115JB of the IT Act of Rs. 1,60,58,154/-.
iv. Transfer pricing adjustment on account of bank guarantee commission amounting to Rs. 25,27,28,272/-.
v. Transfer pricing adjustment on account of loan advanced to AE amounting to Rs. 34,46,885/-.

23. Rival contentions heard. On a careful consideration of the facts and circumstances of the case, perusal of the papers on record, all the orders of the authorities below as well as case law cited, we hold as follows.

24. Additional depreciation: The assessee company is primarily engaged in the business of manufacture of low ash metallurgical coke. It claimed additional depreciation at the rate of 20% u/s 32(1)(ii) of the Act, on the plant and machinery including electrical installations acquired during the year. The electrical installations in question are essential parts of the plant and machinery, without which the plant manufacturing low ash metallurgical coke cannot function. This plant is integrated with co-generation power plant. During the year a total addition of Rs. 24,58,98,728/- was made in the block "Plant and Machinery". Out of this total addition, an amount of Rs. 95,06,000/- represented new electrical installations installed during the year. The issue is whether the assessee is entitled to additional depreciation on this electrical installations u/s 32(1)(iia) of the Act. The AO's case is that, the various items of electrical equipment as claimed by the assessee do not fall under the definition of "Plant and Machinery" for claiming additional depreciation. Hence he disallowed the claim of additional depreciation. The ld. CIT(A) allowed the claim of the assessee by holding as follows:

> *"3. I have carefully examined the factual matrix emanating in the case. I have also weighed the arguments and submissions of the Ld. A.R for the assessee-company as against the findings of the Ld. AO, as recorded in the impugned assessment order. I find that the Ld. AO has contended that the various items of electrical equipment as claimed by the assessee would not qualify as*

Plant, and therefore they do not qualify for any additional depreciation. On the other hand, it is the contention of the appellant that the electrical equipment that was installed was an integral and integrated part and parcel of the Plant, and was incidental to the manufacturing activities. It is observed that the appellant is engaged in the manufacture of metallurgical coke, and the Plant and equipment are acquired towards such ends. It has been brought on record that the electrical installation on which additional depreciation is being claimed by the appellant represents an essential part of the Plant and Machinery, without which the plant manufacturing low ash metallurgical coke cannot function. *The said Plant is integrated with co-generation Power Plant. The electrical installations of this Plant and other ancillary plants are used for the synchronization of the whole plant with all the equipment in order to produce/manufacture the final product i.e. low ash metallurgical coke. This Plant was set up as fully automated plant where all the equipment is connected through central distribution system with the aid of electrical installations. The appellant has also furnished the details of the electrical installations and the plant in which these were used in a table specifying the details of the asset, amounts capitalized and the usage viz, the which Plant or Machine the said electrical equipment purchased was used. In my considered view, from these facts it appears that the electrical equipment installed and capitalised were part of an integrated portion of the Plant. This is so, as the electrical equipment have been installed and integrated into the impartible portion of the Plant such as Chimney upgradation, borewell, furnace vibrator etc., which there can be little doubt are the integrated components of the Plant itself. In my considered appreciation of the matter, it has to be said that the electrical equipment is not just an ancillary equipment for the conduct of electricity, but it is an integral and* impartible *part of the Plant itself, and a portion of the main plant in the case at hand.*

4. *The appellant has also relied on the judgment of the Hon'ble jurisdictional Tribunal delivered in the case of* DCIT Vs Kumarhatty Company [2014] ITA No. 947/Kol/2012. *In that case, the assessee had claimed additional depreciation on electrical installation acquired during the year. The assessee contented that electrical installation was a part of the plant & machinery newly installed. According to the assessee, section 32(1)(iia) of the Act specifically mentioned those items of plant and machinery on which additional depreciation could not be claimed. As per assessee electrical installation was not a prohibited item. However, the Ld. AO held that plant and machinery by its very nature did not include electrical installation and accordingly disallow the additional depreciation claimed by the assessee. The assessee filed an appeal before the Ld.CIT(Appeals) which was allowed wherein it was held that electrical installation which formed a part of plant and machinery was also eligible for claim of additional depreciation. Aggrieved by the order of the CIT(A), Revenue filed an appeal before the ITAT wherein dismissing the appeal of the Revenue, it was held that,* "There is no dispute that assessee was engaged in manufacture of jute and paper related goods. Items on which depreciation is not allowable have been specifically set out in the proviso. Electrical installation does not fall within any of the provisos. Further definition of 'plant' given in section 43(3) of the Act is inclusive and even ships, vehicles, and books are considered as plant. If that be so, electrical installation is definitely part of a plant. In our opinion, Ld. CIT(Appeals) was justified in allowing this claim of assessee. Grounds No. 1 & 2 of the Revenue stand dismissed."

25. He also relied on the decision of the Hon'ble ITAT-'A' Bench, Ahmedabad in the case of *DCIT vs. Anoli Holdings Pvt. Ltd. in ITA No. 3175/Ahd/2010* order dated 13.12.2013.

26. We find no infirmity in this order of the ld. CIT(A). The term 'Plant' is defined u/s 43 of the Act and this is an inclusive definition. The Courts have interpreted the same as one with which the tool of trade is carried out. It is any equipment or article necessary for the purpose of the said business. The factual finding of the ld. CIT(A) could not be

controverted by the ld. DR. After perusing the list of electrical installations, we have no hesitation in holding that, these are plant and machinery.

27. Thus, the AO is wrong in coming to the conclusion that the said electrical equipments are not 'Plant'.

28. Section 32(1)(iia) reads as under:

> *"in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing or in the business of generation, transmission or distribution of power, a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii):*
>
> *Provided that where an assessee, sets up an undertaking or enterprise for manufacture or production of any article or thing, on or after the 1st day of April, 2015 in any backward area notified by the Central Government in this behalf, in the State of Andhra Pradesh or in the State of Bihar or in the State of Telangana or in the State of West Bengal, and acquires and installs any new machinery or plant (other than ships and aircraft) for the purposes of the said undertaking or enterprise during the period beginning on the 1st day of April, 2015 and ending before the 1st day of April, 2020 in the said backward area, then, the provisions of clause (iia)shall have effect, as if for the words "twenty per cent", the words "thirty-five per cent" had been substituted:*
>
> *Provided further that no deduction shall be allowed in respect of—*
>
> *(A) any machinery or plant which, before its installation by the assessee, was used either within or outside India by any other person; or*
>
> *(B) any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest-house; or*
>
> *(C) any office appliances or road transport vehicles; or*
>
> *(D) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any one previous year."*

29. Applying the Section to the facts of the case we hold as follows:

> *"A close observation of the aforementioned provision implies that an assessee is entitled to additional depreciation of a further sum equal to twenty percent of the actual cost of such plant & machinery under Income fax Act, 1961 when:*
>
> - *A new machinery or plant (other than ships and aircraft), is acquired and installed after 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing,*
> - *The machinery or plant which, before its installation by the assessee, was not used either within or outside India by any other person; or*
> - *The machinery or plant is not installed in any office premises or any residential accommodation, including accommodation in the nature of a guest house.*
> - *The plant or machinery is not in the nature of an office appliances or road transport vehicles; or*
> - *The whole of the actual cost of the machinery or plant has not been allowed as a*

deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any previous year.

- *The assessee would like to submit that it is already an established fact that 'electrical installation' is a 'plant' incidental for manufacturing process in the concerned case.*
- *Applying the above proviso to the facts of the assessee, it is submitted that;*
- *The electrical installations were acquired by the assessee company as a part of its manufacturing unit after the 31st day of March, 2005, for manufacturing of low ash metallurgical coke;*
- *The electrical installations acquired by the assessee company before its installation was not used either within or outside India by any other person;*
- *The electrical installations were not installed in any office premises or any residential accommodation. They were installed in the factory of the assessee company where manufacturing process is undertaken;*
- *The electrical installations are not in the nature of an office appliances or road transport vehicles; and*
- *The whole of the actual cost of the electrical installations was never allowed as deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profit and gains of business or profession" of any one previous year*

Hence as per the above provision i.e. Section 32(1)(iia) of the Income Tax Act, 1961, it is submitted that the said electrical installations stands very much eligible for additional depreciation of 20% of its actual cost in the A.Y. under consideration. In the case of the assessee,

Electrical installation was a part of the plant & machinery newly installed. Section 32(1)(iia) of the Act specifically mentions those items of plant and machinery on which additional depreciation could not be claimed. In view of the above submission, it stands clear that electrical installation is not a prohibited item. In the present case, there is no dispute that the assessee is engaged in the manufacturing of low ash metallurgical coke."

30. Hence, we uphold the order of the ld. CIT(A) and dismiss the ground of the Revenue.

31. Employees' contribution towards PF: We find that the ld. CIT(A) has followed the judgement of the Hon'ble Supreme Court in the case of *CIT vs. Alom Extrusions Ltd. [2010] 319 ITR 306 (SC)* and judgement of the jurisdictional High Court in the case of *ACIT vs. M/s. Vijay Shree Ltd. [Calcutta High Court, ITA No. 245 of 2011]* and the decision of Hon'ble Calcutta High Court in the case of *CIT, Central II vs. M/s. R.E.I. Agro Ltd. [GA No. 3022of 2013]* and deleted the disallowance. We find no infirmity in the same.

32. Computation of book profit u/s 115JB of the Act with respect to disallowance u/s 14A Rule 8D of the Act.

33. This issue as to whether the disallowance u/s 14A r.w. Rule 8D of the Act has to be made while computing book profits u/s 115JB of the Act is covered by the decision of the special Bench of the ITAT (Delhi) in the case of *ACIT vs. Vireet Investments Pvt. Ltd. [2017] 82 taxmann.com 415* wherein it was held that: "The computation under clause (f)

of Explanation 1 to section 115JB(2) is to be made without resorting to the computation as contemplated u/s 14A r.w. Rule 8D of the Income Tax Rules 1962."

34. Respectfully following the same we uphold the order of the ld. CIT(A) and dismiss this ground of the Revenue.

35. Transfer pricing adjustment on bank guarantee commission: For the AY 2009-10 the very same issue was adjudicated by us, at ground no. 1 of this order. We have held that the transaction in question is not an international transaction as defined in Section 92B of the Act. Consistent with the view taken therein, we uphold the deletion of the transfer pricing adjustment by the ld. CIT(A) for the very same reasons given for the AY 2009-10.

36. Transfer pricing adjustment on loan advanced to AE: The TPO made a Transfer pricing adjustment of interest receivable amounting to Rs. 34,46,885/-. Similar issue was dealt by us for the earlier year as ground no. 2. We have held that international transaction involving cross-border loan to AE can be benchmarked against LIBOR. The RBI Circular states that the range from 1-2% for LIBOR is reasonable for advancing loans. Interest rate of LIBOR +2% can be held as an arm's length rate of interest. As the assessee has charged an interest higher than LIBOR +2%, the ld. CIT(A) has held that the same is at arm's length and deleted the adjustment. We find no infirmity in this order.

37. Even otherwise the loan transaction can be benchmarked against the credit facilities provided to the AE by SBI, Sidney. Though the credit facilities were guaranteed by the assessee, such guarantee did not have any bearing on the facilities and rate of interest charged by the bank. Hence, this rate is an independent benchmark. When this benchmark is applied to the facts, no adjustment is called for. Thus for these reasons this ground of the Revenue is dismissed.

38. In the result, the appeal of the Revenue is dismissed.

Kolkata, the 6th November, 2019.

Sd/-	Sd/-
[Aby T. Varkey]	**[J. Sudhakar Reddy]**
Judicial Member	Accountant Member

Dated: 06.11.2019
Bidhan

Copy of the order forwarded to:

1. ***DCIT, Circle-8(1), Kolkata.***
2. ***M/s. Gujarat NRE Coke Ltd., Block-C (5th Floor), 22, Camac Street, Kolkata-700 071.***
3. CIT-
4. CIT(A)-22, Kolkata. (sent through mail)
5. CIT(DR), Kolkata Benches, Kolkata. (sent through mail)

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches