IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K" MUMBAI

BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

IT(TP)A No. 6447/MUM/2016
Assessment Year: 2011-12

Dy. Commissioner of Income Tax, Circle – 5(2)(1), Room No. 571, Aayakar Bhavan, M.K. Road, Mumbai - 400020	**Vs.**	M/s KEC International Ltd., 463, CEAT Mahal, Dr Anne Besant Road, Worli, Mumbai - 400030
		PAN No. AACCK 5599 H
Appellant		**Respondent**

Revenue by	:	Shri Sushil Kumar Mishra, DR
Assessee by	:	Shri Anuj Kisnadwala, AR
Date of Hearing	:	21/01/2021
Date of pronouncement	:	23/03/2021

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the Revenue. The relevant assessment year is 2011-12. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-56, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143 (3) r.w.s. 144C (3) of the Income Tax Act 1961, (the 'Act').

2. Briefly stated, the facts of the case are that the assessee filed its original return of income for the assessment year (AY) 2011-12 on 30.11.2011 declaring total income under normal provisions at Rs. 139,34,07,542/- after claiming set off of brought forward losses to the tune of Rs. 52,91,33,759/-. It has shown books profits u/s 115JB of the Act at Rs. 230,87,92,525/- and computed its tax liability thereon. Subsequently, the assessee filed a revised return of income on 30-03-2013 declaring total income under normal provisions at Rs. 113,00,88,168/- after claiming set off of brought forward losses and the same book profits u/s 115 JB of the Act.

The assessee is engaged in the business of design, fabrication, galvanizing and testing of transmission lines and telecom towers, all types of masts, erection of complete transmission lines and telecom towers, supply and erection of sub-station structures and overhead equipment for Railways electrification and managing infrastructure sites for telecommunication services.

3. The 1st, 2nd and 3rd grounds of appeal relate to disallowance of Rs. 18,12,94,916/- made by the Assessing Officer (AO) on depreciation claimed on assets of transmission business. Pursuant to a composite scheme of arrangement between the assessee and other companies, which was sanctioned by the Hon'ble Bombay High Court on 27.09.2006, the entire moveable and immoveable assets and liabilities of the power transaction business of KEC Infrastructure were acquired by the assessee. The assessee got these revalued and started claiming depreciation on the enhanced revalued amount instead of the book value of the assets. The AO was of the view that the transaction was nothing but a demerger u/s 2(19AA) of the Act , hence the

assessee was entitled to claim depreciation on the WDV of the block of assets and not on the inflated value arrived after revaluation. The AO following the treatment given in the assessment orders of AY 2007-08, 2008-09 and 2009-10, disallowed the excess claim of depreciation of Rs. 18,12,94,916 and added the same to the total income of the assessee.

4. In appeal, the Ld. CIT (A) followed the order of the Hon'ble Bombay High in assessee's own case for AY 2006-07 and order of the Tribunal for AYs 2007-08 to 2009-10 and allowed the appeal filed by the assessee.

5. Before us, the Ld. Departmental Representative (DR) relies on the order of the AO, whereas the Ld. counsel for the assessee relies on the order of the Tribunal for immediate preceding assessment year 2010-11.

6. We have heard the rival submissions and perused the relevant materials available on record. We find that at para 12 and 12.2, the Tribunal in assessee's own case for AY 2010-11 (ITA No. 5611/Mum/2015) , by following the order of the Co-ordinate Bench for earlier years has dismissed the appeal filed by the Revenue. Facts being identical, we follow the above-mentioned order of the Co-ordinate Bench in assessee's own case and dismiss the 1st, 2nd and 3rd ground of appeal.

7. The 4th and 5th grounds of appeal relate to disallowance of Rs. 7,60,05,478/- made by the AO towards mark-to-market loss. The assessee had debited a sum of Rs. 1094.81 lacs on account of foreign exchange gain/loss in the Profit & Loss account for the year under consideration. The AO was of the view that unrealized forex loss of Rs. 5,33,16,399/- was neither an accrued loss nor an actual loss and it does not fit into any of the criteria prescribed for

allowability of an expenditure or loss as per the provisions of the Act. Part D of the Chp IV of the Act prescribes provision for computation of income under the head profits and gains from business and profession. None of the provisions of Part D of the Act specified any allowances or deductions of the unrealized forex loss computed on MTM basis by the assessee. Therefore, the AO added back a sum of Rs. 5,33,16,399/- to the total income of the assessee. By virtue of clause (c) to Expln1 of Section 115JB (2), the AO also added Rs. 5,33,16,399/- while arriving at Book profits under MAT provisions.

8. In appeal, the Ld. CIT (A) followed the order of the Tribunal in assessee's own case for AY 2009-10 and allowed the appeal filed by the assessee.

9. Before us, the Ld. DR reliance of the order of the AO, whereas the Ld. counsel relies on the order of the Tribunal in assessee's own case for the immediate preceding assessment year 2010-11.

10. We have heard the rival submissions and perused the relevant material available on record. The Tribunal in assessee's own case for AY 2010-11 (para 12.1 and 12.5) has followed the order of the Co-ordinate Bench for earlier years and dismissed the appeal filed by the Revenue. Facts being identical, we follow the above order of the Co-ordinate Bench and dismiss the 4th and 5th ground of appeal.

11. The 6th, 7th & 8th ground of appeal relate to performance guarantee.

During the year under consideration, the assessee has provided performance guarantees for its AEs. However, these were not considered as international transactions in Form 3CEB. However, the assessee filed details of

such guarantee in the transfer pricing report in response to the notice u/s 92CA(2). In absence of any benchmarking by the assessee, the TPO proceeded to estimate the ALP of the performance guarantee by making inquiries u/s 133(6) of the Act from various banks. This information was made available to the assessee during the course of transfer pricing proceedings. The TPO computed the transfer pricing adjustment in respect of performance guarantee at Rs.2,05,58,246/- taking rate of 1.04% per annum for the number of days in which these guarantees were enforced. The assessee, thereafter, filed a rectification application before the TPO stating that towards the amount of performance guarantee, an amount of Rs.1.55 crores had already been recovered from the AE by the assessee and therefore, the TP adjustment, for the year as far as performance guarantee is concerned, should be net of the aforesaid recovery.

In the assessment order passed u/s 143(3) r.w. section 144C(3) of the Act dated 24.04.2015, the AO has mentioned that :

> "During the course of assessment proceedings, the AR has submitted a copy of application for rectification submitted by them to TPO vide their letter dated 27.02.2015 contending that towards Performance Guarantee Fees they have already re-covered from that AE KEC Global Fee of Rs.155 lakhs. The said fees is also offered to tax in the revised return of income. Therefore, TP Adjustment for the year should be net of such recovery and net TP adjustment should be Rs.582 lakhs. However, no order to that effect has been received from TPO till date. Therefore the total income of the assessee is computed by making adjustment of Rs.7,37,18,234/- to the total income assessee."

12. In appeal, the Ld. CIT(A) held that there is no element of cost in the case of indemnity given by the assessee and hence the transaction of issuance of

guarantee is out of the ambit of Indian Transfer Pricing Regulations; since the transaction of issue of guarantee is not an international transaction, the provisions of Chapter-X of the Act is not warranted in the present case

13 Before us, the Ld. DR relies on the order of the AO, whereas the Ld. counsel relies specifically on the order of the Tribunal in assessee's own case for AY 2010-11.

14. Similar issue arose before the Tribunal in assessee's own case for AY 2010-11 (ITA No. 5611/Mum/2015). The Tribunal has held at para 5 the following :

> "5. We have heard the rival submissions. At the outset, we find that the assessee had only given performance guarantee in favour of Bahwan Engineering Company LLC on behalf of its AE nearly to indemnify the losses, claims, damages,if any,that may arise pursuant to non-performance of duties and obligations by the AE in execution of the contract allotted to them. Admittedly, the assessee has not charged any commission from its AE for issuance of this performance guarantee. We find that assessee had also parallelly entered into another agreement with its AE wherein in the event of AE failing in execution of the contract and the performance guarantee issued by the assessee gets invoked by Bahwan Engineering Company LLC, then the contract which is awarded to the AE gets assigned in favour of the assessee, wherein the assessee would be obligated to execute the contract on its own by using its own infrastructure, which would in turn result in assessee deriving the entire contractual revenue and huge profits there from. In these circumstances, there is absolutely no risk involved for the assessee in issuing the performance guarantee on behalf of its AE, warranting charging of any commission to mitigate that risk. Hence, we hold that assessee was fully justified in not charging any commission from its AE in the subject mentioned performance guarantee transaction. Hence, there is no need to make any adjustment to arm's length price thereof. In view of this decision in the peculiar facts

and circumstances, the issue as to whether issuance of performance guarantee would fall within the ambit of an international transaction or not is left open and no decision is given herein. Hence, the various decisions quoted by the ld. Counsel for both the sides need not be gone into. Accordingly, the addition made in the sum of Rs.69,45,342/-is hereby directed to be deleted."

Facts being identical, we follow the above order of the Co-ordinate Bench in assessee's own case and dismiss the 6th, 7th & 8th grounds of appeal.

15. The 9th, 10th & 11th grounds of appeal relate to bank guarantee and corporate guarantee provided to Chadian Company for Water and Electricity (CCWE).

During the year under consideration, the assessee has provided corporate guarantee for its AEs. However, these were not considered as an international transaction in Form 3CEB. However, the assessee filed details of such guarantee in the TP report in response to notice u/s 92CA(2) of the Act. As the assessee had not benchmarked these transactions of corporate guarantee, the TPO called various details so as to enable him to compute the ALP of the guarantee. Based on the decision of the Court in Canada in GE Canada's case, the TPO computed the guarantee fee based on yield approach and the difference in the yields between the unsecured bonds corresponding to credit rating of the taxpayer and the AE on standalone basis. Thereby, the TPO made an adjustment of Rs.5,31,59,988/- on corporate guarantee.

16. In appeal, the Ld. CIT(A) held that there is no cost element involved in the transaction of issuance of corporate guarantee, accordingly no income is chargeable to tax which is a pre-requisite of Indian Transfer Pricing Regulations ; the assistance provided by the assessee to its AE does not have

any bearing on its profits, income, losses or assets. Relying on the order of the Tribunal in the case of *Manugraph India Limited v. DCIT* [TS-190-ITAT-2016 (Mum)-TP], *Micro Inks Ltd. v. Addl. CIT* [(2015) 63 taxmann.com 353 (Ahmedabad-Trib.), *Bharti Airtel Limited v. Addl. CIT* [TS-76-ITAT-2014(Del)-TP)] and *Videocon Industries Ltd. v. ACIT* [TS-37-ITAT-2015 (Mum)-TP], the Ld. CIT(A) held that if the transaction of issuance of guarantee does not involve any cost, then there would not be any income chargeable to tax and also it will have no bearing on profits, losses, incomes and assets of the assessee and in such a case, transaction of issuance of guarantee is out of the ambit of international transaction u/s 92B(1) of the Act.

17. Before us, the Ld. DR relies on the order of the AO, whereas the Ld. counsel relies on the order of the ITAT in assessee's own case for AY 2010-11 and supports the order passed by the Ld. CIT(A).

18. Similar issue arose before the Tribunal in assessee's own case for AY 2010-11. We find that the Tribunal has held at para 8 the following :

> "8. We have heard rival submissions. The primary facts stated hereinabove remain undisputed and hence, the same are not reiterated for the sake of brevity. We find that the ld. CIT(A) had rightly appreciated the contentions of the assessee which are stated hereinabove and the same are not reproduced hereunder for the sake of brevity. It is well known in the financial market that the banks ascertain the rate of guarantee commission for each party based on its creditworthiness and the said creditworthiness would depend on several factors such as profitability ratios, economies of scale, number of years of relationship of the bank with those customers, future potential of that customer which in turn would enlarge the business of the bank, tangible and immovable securities offered by the customer, if any etc., Hence, the rate of commission issued by the bank for its customers would vary from one

customer to another customer and accordingly, the same cannot be used as a benchmark for the purpose of comparability. In the instant case, the assessee's credit rating is A+ as given by a reputed credit rating agency CARE. The rate of 0.93% charged by the bank includes the commission rate of 0.25% + 0.68% for the Export Credit Guarantee Corporation (ECGC) cover. The credit rating of the AE was not done in the instant case. It is not in dispute that the said guarantee rate of 0.93% which is charged by the bank on the assessee for issuing the bank guarantee in favour of CCWE on behalf of its AE, had been duly recovered by the assessee from its AE. Hence, it is only a case of recovery of cost by assessee without any margin. We are inclined to accept the argument of the ld. AR that in the instant case, 0.93% of guarantee commission charged by Bank of India could be considered as the most direct comparable uncontrolled transaction to benchmark the rate of guarantee commission. In any case, the average rate adopted by the ld. TPO at 1.04% is only an external data in the form of third party guarantees issued by the bank. When internal comparable uncontrolled price is available that should be considered as the most direct and reliable way to apply the arm's length principle. In any case, there is absolutely no loss to the assessee and no bearing on the profits or losses as the entire cost of 0.93% has been duly recovered by the assessee from its AE. Hence, the action of the ld. CIT(A) in holding no further adjustment to ALP is required in respect of the subject mentioned guarantee commission transaction and consequently directing the deletion of addition of Rs.39,354/- thereof, requires no interference. Accordingly, Ground No.1(b) and 2(a) raised by the revenue are dismissed."

19. As recorded by the Tribunal for AY 2010-11 in assessee's own case, the assessee-company had given advance payment guarantee to CCWE on behalf of AE of the assessee for a total amount of Euro 20,06,252 (Rs.12,14,73,944/-). This guarantee was required by CCWE, who had given contract to the AE, before giving any advance to the AE. In effect, this bank guarantee was issued to CCWE for securing the advance payment from CCWE by the AE. It was the contentions of the assessee before the TPO that bank had charged 0.93% as the

guarantee commission and there was no formal guarantee agreement entered in this regard ; that the credit rating issued by CARE is A+ and credit rating of the AE was not done; no benchmarking was done by the assessee as executing guarantee in favour of a bank on behalf of the AE was not an international transaction. Also the assessee explained to the TPO that the corporate bond rates for United Arab Emirates (UAE) were not available; however, the rate of interest on borrowings made in the country in which the AE is situated is quite low in comparison with bond rate prevailing in India; therefore, Indian Corporate Bond Rates should not be applied for benchmarking ; the bank had charged the assessee 0.93% for issuing this bank guarantee to CCWE on behalf of its AE for securing the advance payment for executing contract. Thus the submission of the assessee is that this guarantee fee of 0.93% has been duly recovered by it from its AE and hence, there is no impact and profit or loss of the assessee. The Tribunal observed that :

> "9.3. The assessee pleaded that the ld. TPO had adopted two different rates for benchmarking the bank guarantees given by the assessee. It may be noted that the two bank guarantees, one is performance bankguarantee and other is advance payment guarantee were given to CCWE on behalf of AE of the assessee. The bank had charged the assessee the same rate of 0.93% for both the cases as guarantee commission. The assessee pleaded that there is no much difference with regard to the said two guarantees and being identical in nature, the ld. TPO had adopted two different principles to benchmark the said transactions. The ld. CIT(A) observed that advance payment guarantee and also the performance guarantee are identical in nature. Hence, both the guarantees being identical in nature, the arm's length rate of commission in case of both the guarantees should be the same. Accordingly, he held that the ALP of guarantee commission should be 0.93% in case of advance payment

guarantee also and held that no further adjustment towards that rate would be required.

10. Aggrieved, the revenue is in appeal before us.

11. We have heard the rival submissions. The findings given hereinabove in respect of performance guarantee to CCWE by us would hold good for this bank guarantee also. Accordingly, we hold that the finding of the ld. CIT(A) and consequently deletion of adjustment on account of bank guarantee of Rs.12,73,646/- does not call for any interference. Accordingly, the Ground No.2(b) raised by the revenue is dismissed."

20. Facts being identical, we follow the above order of the Co-ordinate Bench in assessee's own case and dismiss the 9th, 10th and 11th grounds of appeal.

21. The 12th, 13th and 14th ground of appeal relate to corporate guarantee provided to ICICI Bank on behalf of KEC USA LLC and Transmission LLC USA. During the year under consideration, the assessee-company had given corporate guarantee to the ICICI Bank who had advanced to their AE $ 121 million (Rs.5394180000/-). This guarantee was required by the lender who had given advances to AE. The details of the guarantee are as under :

Guarantee	Borrowing done by	Provided to whom	Purpose	Amount in Rs.
Corporate guarantee provided as collateral security	KEC US LLC and KEC Transmission LLC, USA Global	ICICI Bank (lead Arranger)	Corporate Guarantee for Facility taken Facility A : USD 61.2 Million Facility B : 40.8 Million	Rs.5394180000

The AO computed the ALP of the international transactions entered into by the assessee (providing financial facility in the form of corporate guarantee to its AEs) as under :

The CUP rate for guarantee fee is arrived at as below:

Credit rating of Guarantor (i.e. the taxpayer)	'A+'
Yield or interest rate for 5 year unsecured bond	9.45%
Credit rating of AE (as discussed above)	'BBB'
Yield or interest rate for 5 year unsecured bond	11.22% p.a.
Benefit to AE on account of Guarantee given by the taxpayer	1.77%

Particulars	Amount
Outstanding Guarantee Amount in foreign currency	$ 121 millions
Equaling to Rs.	5394180000
Borrowing of KEC US LLC, USA outstanding loan	$61200000
Borrowing of KEC Transmission LLC, USA outstanding loan in equivalent rupee	$40800025
Total borrowings by AE in $ and equivalent amount of Rs. as on 31.3.2011	$102000025 Rs.4547161114
No. of days the guarantee is outstanding during the year	199
Arms Length Guarantee Fee	1 .77%
Arms Length price on the outstanding corporate guarantee (INR)	52054575
Guarantee fee charged to AE	Nil
Adjustment on a/c of Corporate guarantee	5,20,54,575

22. In appeal, the Ld. CIT(A) held that there is no cost element involved in the transaction of issuance of corporate guarantee, accordingly no income is chargeable to tax which is a pre-requisite of Indian Transfer Pricing Regulations ; the assistance provided by the assessee to its AE does not have any bearing on its profits, income, losses or assets. Thus it is held by him that the transaction of issuance of guarantee is out of the ambit of international transaction u/s 92B(1) of the Act.

23. Before us, the Ld. DR submits that since term 'guarantee' is inserted in the definition of 'international transaction' by an *Explanation* in Finance Act,

2012, with retrospective effect from 01.04.2002 and the said amendment is stated to be clarificatory, corporate guarantee provided by the assessee is an international transaction. The Ld. DR argues that following the judgment of the Hon'ble Bombay High Court in the case of *CIT v. Everest Kento Cylinders* (2015) 378 ITR 57 (Bom), guarantee commission be charged at 0.5%.

24. On the other hand, the Ld. counsel submits that the above issue is covered by the order of the Tribunal in assessee's own case for A.Y 2012-13, wherein the Tribunal has stated that arm's length guarantee commission should be 0.20%. The other arguments advanced by the Ld. counsel are well discussed by the Tribunal in assessee's own case for A.Y 2012-13, to which we turn below.

25. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

Since term 'guarantee' is inserted in the definition of 'international transaction' by an Explanation in Finance Act, 2012, with retrospective effect from 01.04.2002 and the said amendment is stated to be clarificatory, corporate guarantee provided by the assessee is an international transaction . Thus it is well-settled that provision of corporate guarantee in respect of loans availed by AEs do form part of international transaction as per section 92B of the Act.

The Ld. DR has referred to and relied upon the judgment of the Hon'ble Bombay High Court in *Everest Kento Cylinders Ltd*. (supra), which is referred to and relied upon before the Hon'ble Jurisdictional High Court in *CIT v.*

Glenmark Pharmaceuticals Ltd(2017) 85taxmann.com 344 (Bom.). It is to this relevant case that we turn below.

In *Glenmark Pharmaceuticals Ltd v. Addl. CIT* (2014) 43 taxmann.com 191 (Mum-Trib.), the relevant assessment year was 2008-09. The assessee stood guarantor for two loans besides having provided a guarantee on the letter of credit facilities granted to its AE. The assessee had charged a guarantee fee of 0.53 per cent of the guaranteed amount from its AE. The TPO holding that the assessee had failed to discharge its primary onus of benchmarking the transactions, adopted the Comparable Uncontrolled Price (CUP) for determining the arm's length price of the transactions relating to guarantee commission price charged to the AEs. He considered four comparables, which charged its customers a guarantee fee at the rate of 3 per cent per annum. Accordingly, certain adjustment was made to assessee's ALP. The Commissioner (Appeals) confirmed the addition made by Assessing Officer. The Tribunal held that "the TPO's comparables are IUPs' i.e. Incomparable Uncontrolled Prices. The GC rates of 0.53% and 1.47% benchmarked by the assessee are fair and reasonable and they should be accepted without any modification. In the result, the order of the CIT(A)/TPO/AO on the TP adjustments is set aside." On appeal by the Revenue, the Hon'ble Bombay High Court (2017) 85taxmann.com 344 (Bom.), referring to the decision in *Everest Kento Cylinders Ltd.* (Supra) and agreeing with the order of the Tribunal held that "considerations which apply for issuance of a corporate guarantee are distinct and separate from that of bank guarantee and, therefore, no transfer pricing adjustment can be made in respect of guarantee commission by making comparison between guarantees issued by commercial banks as against a corporate guarantee issued by

holding company for benefit of its AE". On further appeal by the Revenue, the Hon'ble Supreme Court (2019) 107 taxmann.com 445(SC) agreed with the decision of the High Court affirming the order of the Tribunal.

25.1 We are of the considered view that the decision in Everest *Kento Cylinders Ltd.* (supra), relied on by the ld. DR, has relevance in the instant case. In that case, the TPO observed that in the financial year 2006-07, the AE had taken loan of Rs.86.88 crores i.e. USD 20,00,000 from ICICI Bank and one of the clause of term loan was to provide a corporate guarantee by the assessee. In this behalf, the assessee had provided a corporate guarantee/ guaranteeing repayment of borrowings made by the AE at Dubai for purchase of assets and inventories and for working capital and as a term loan. The assessee had charged guarantee commission @ 0.5%. The TPO found that the guarantee fees charged was at a lower rate and proceeded to compare guarantee costs. The provision of guarantee was found to be an international transaction as defined u/s 92B of the Act and it was found that the transaction would have a bearing on the profits, income, losses or assets of the assessee. It was observed that overall risks exposure of the assessee-company becomes higher by virtue on account of guarantee and company becomes more leveraged including by virtue of its debit equity ratio which would ultimately affect the cost of borrowing. The TPO came to the conclusion that the banks and companies are charging at least 3% for providing guarantees and therefore, the benchmark ALP of the guarantee given by the assessee to ICICI for the benefit of the AE at 3% of the amount of guarantee. In this manner, he arrived at an amount of Rs.34,99,003/- as guarantee commission and made adjustment of Rs.28,50,353/-, since the amount of Rs.6,48,650/- (equivalent to 0.5%) had

already been provided for. In appeal, the Ld. CIT(A) held that the return of 3% arrived at by the TPO is justified. In further appeal by the assessee, the Tribunal deleted the adjustment of Rs.28,50,253/- made by the TPO/AO. In appeal filed by the Revenue, the Hon'ble Bombay High Court held that :

> "The Tribunal as the second fact finding authority had gone into factual aspects in great detail and therefore having interpreted the law as it stood on the relevant date the order passed cannot be faulted. In the matter of guarantee commission, the adjustment made by the TPO were based on instances restricted to the commercial banks providing guarantees and did not contemplate the issue of a Corporate Guarantee. No doubt these are contracts of guarantee, however, when they are Commercial banks that issue bank guarantees which are treated as the blood of commerce being easily encashable in the event of default, and if the bank guarantee had to be obtained from Commercial Banks, the higher commission could have been justified. In the present case, it is assessee company that is issuing Corporate Guarantee to the effect that if the subsidiary AE does not repay loan availed of it from ICICI, then in such event, the assessee would make good the amount and repay the loan. The considerations which applied for issuance of a Corporate guarantee are distinct and separate from that of bank guarantee and accordingly we are of the view that commission charged cannot be called in question, in the manner TPO has done. In our view the comparison is not as between like transactions but the comparisons are between guarantees issued by the commercial banks as against a Corporate Guarantee issued by holding company for the benefit of its AE, a subsidiary company."

25.2 However, in assessee's own case for A.Y.2012-13 (ITA 117 & 115 /Mum/2018) dated 14.09.2020, the Tribunal has held that:-

> "7.5 Ground Nos. (x) to (xii) arises out of corporate guarantees provided by the assessee on behalf of its 2 AEs namely KEC Transmission LLC, USA and KEC US LLC, USA. The corporate guarantees were given to ICICI Bank, UK to secure the finances provided by the said bank to two of assessee's AEs. The said financing was stated to

be utilized for the purpose of downstream acquisition of the business of SAE Towers Ltd., USA. The assessee submitted that for the aforesaid purposes, a special purpose vehicle (SPV) i.e. KE US LLC was formed to facilitate KEC to make downstream acquisition of business in USA. The guarantee was stated to be wholly and exclusively for the purpose of facilitating the assessee and hence, it was not a case where any services were rendered to the SPV in any manner. Rather SPVprovided services to KEC by way of facilitating the downstream acquisition. Therefore, no fees were charged against the same. Another plea raised was that the assessee merely fulfilled shareholders' functions. To put it differently, if the guarantee was not given, KEC would have to infuse equity capital in the company which would not have given rise to any taxable event. Merely because, KEC chose to provide a guarantee instead of infusing equity capital into the SPV, the transactions would not give rise to any taxable event. The assessee also placed reliance on the decision of Hon'ble Apex Court in S.A. Builders (238 ITR1) to justify non-charging of fees / commission.

7.6 However, Ld. TPO, noticing the amendment made by Finance Act 2012 in Sec.92B, concluded that international transactions would include capital financing by way of guarantees which were to be benchmarked on the principle of Arm's Length Price (ALP). The Ld. TPO also reached a conclusion that that on simple comparison of the risk borne in corporate guarantee would be more than risk borne in bank guarantee since the risk in the case of default would not be covered by any asset of the entity guaranteed. The ratio of various decisions rendered by the Tribunal including the decision rendered in Everest Kanto (ITA No. 542/Mum/2012 23/11/2012) and Glenmark Pharmaceuticals (ITA No.5031/Mum/2012 13/11/2013) was considered. These decisions have already been tabulated and summarized on page nos. 19 to 21 of Ld. TPO's order. The Ld. TPO noticed that in the stated decisions, the Tribunal relied upon internal CUP and held that the commission paid by Indian assessee to the local banks for its credit arrangement constitutes an internal CUP for comparing the transactions with its AE. However, the said rates as per internal CUP were to be adjusted since by the very nature, the foreign financial transactions are riskier than domestic ones because of the difficulties in enforcing recovery in foreign jurisdiction. Since the spread on loans depend on credit ratings of the borrowing party, it is the credit rating of borrower AE which would be relevant and not the credit rating of assessee extending the guarantee to facilitate the borrowing of its AE. The banks would charge lower fees while giving guarantees for entities having high credit ratings and on the other hand, high fees would be charged for entities having low credit ratings and that too, in a foreign jurisdiction. Since the credit rating of the assessee guarantor was better than the rating of the guaranteed, it was natural that rate charged by the bank from the guarantor would be different in comparison to situation where the guarantee was provided to the guaranteed. Therefore, the fees charged by the bank from the holding company could not constitute internal CUP for charging the rate from AE without proper adjustment. Since the rates charged by the banks to Indian

companies ranged between 1.10% to 3% depending upon various factors, the ALP rate would be between 1.5% to 3.5%. Since the loan was taken for business purposes, the appropriate rate would be 2%. Accordingly, the transactions were benchmarked @2% and adjustments were proposed. The TP adjustments, thus proposed, were incorporated in the assessment order. Upon further appeal, Ld. CIT(A) directed Ld. AO to apply the appellate decision dated 28/07/2016 for AY 2011-12.

7.7 The perusal of appellate order for AY 2011-12, as placed on record, would show that Ld. CIT(A) observed that there was no cost element involved in the transaction of issuance of corporate guarantee. The assistance provided by the assessee to its AE would not have any bearing on profits, incomes, losses or assets of the assessee and therefore, the transaction of issuance of guarantee would be out of ambit of international transactions u/s 92B(1) of the Act. Similar view has been applied in the year under consideration. Aggrieved, the revenue is in further appeal before us.

7.8 The Ld. DR specifically drew our attention to the amendment brought in by Finance Act, 2012 w.e.f. 0/04/2002 in Explanation (i)(c) to Sec. 92B, to submit that the capital financing by way of guarantees have specifically been included within the ambit of international transactions.

7.9 *Au Contraire*, Ld. AR, by way of written as well as oral submissions, pleaded that the transactions would not fall within the definition of international transaction as defined in Sec. 92B since the guarantee was provided by assessee to its subsidiary AEs so that AEs could avail loan for the purpose of acquiring the business. It was pleaded that guarantees issued by assessee would have no bearing on profits / losses of the assessee since there was no cost involved and no guarantee commission has been paid by the assessee. The aforesaid amended explanation would have no application in terms of decision of Delhi Tribunal in Bharti Airtel Ltd. (43 Taxmann.com 150) wherein it has been held that even after the amendment to explanation to Sec.92B, corporate guarantee given for the benefit of AE having no cost to the assessee would be outside the ambit of international transactions. Another plea raised by Ld.AR is that this was shareholder's activities and hence not covered by the term international transactions as defined inexplanation to Sec.92B. Reliance has also been placed on following decisions: -

(i) DCIT V/s Mastek Ltd. (ITA No. 2879/Ahd/2014 dated 19/03/2018, Ahd. Tribunal)

(ii) Siro Clinpharm Pvt. Ltd. V/s DCIT (ITA No. 2618/Mum/2014 31/03/2016, Mumbai Tribunal)

(iii) Marico Ltd. V/s ACIT (ITA No. 8858/Mum/2011 dated 18/05/2016, Mumbai Tribunal)

(iv) DCIT V/s Rohit Ferro Tech Ltd. (ITA Nos. 262 & 263/Kol/2018 dated 12/10/2018, Kolkata Tribunal)

(v) DCT V/s EIH Ltd. (89 Taxmann.com 417, Kolkata Tribunal)

7.10 Upon careful consideration of factual matrix, it is noted that the assessee has provided unconditional, absolute and irrevocable corporate guarantee to secure the finances advanced by ICICI bank to two of its wholly owned AEs. The guarantor guarantees to finance party the punctual performance by the borrower of all the secured obligation and undertake with finance party that whenever either borrower does not pay the amount as and when due under or in connection with any finance document, the guarantor will immediately on demand by the bank, pay that amount as it was the principal obligor in respect of that amount. The AEs were stated to be Special purpose vehicle with a view to enable the assessee in downstream acquisition of the business of an entity namely SAE Towers Ltd., USA. The assessee has not charged any fees from its AEs in providing the corporate guarantee, inter-alia, by submitting that no cost was involved and the stated transactions would have no bearing on profits, incomes, losses or assets of the assessee. However, upon perusal of terms of corporate guarantee deed executed by the assessee in favor of the bank, as placed on record, we find that in case of payment default, the assessee was obligated to pay the amount demanded by the bank as if it was the principle obligor in respect of that amount. The liability of the assessee extended to the guaranteed amount of 110 Million US Dollars. In the event of default, the assessee as a guarantor, was liable to pay without demur or protest the amount stated in the demand certificate. The assessee had independent contractual obligation to pay the guaranteed amount. Further, in case of default by the guarantor, the guarantor was liable to pay further interest also. Therefore, it is quite discernible that the assessee had definite obligation under the corporate guarantee and to say that that the same shall have no bearing on profits, incomes, losses or assets of the assessee would not be a correct proposition. Even as per assessee's own submissions, if the said guarantee was not provided, the assessee would have been obligated to infuse equity capital in its wholly owned SPV AEs with a view to enable downstream acquisition of SAE Towers Ltd. USA which would have entailed assessee's resources. This is further fortified by the fact that fact that guarantees have specifically been brought within the ambit of term international transactions by way of amendment to explanation (i)(c) to Sec.92B by Finance Act, 2012 w.e.f. 01/04/2002. Therefore, the arguments that the said transactions could not be considered to be international transaction do not convince us and therefore, we hold that the same was to be benchmarked on ALP principles. The aforesaid reasoning / conclusion would also make the cited case laws of Ld. AR inapplicable to the facts of the present case. 7.11 Coming to the benchmarking rate of 2% as adopted by Ld. TPO, the same do not convince us since a pertinent fact to be noted that both the AEs were subsidiaries of the assessee which were special purpose vehicle to enable certain acquisition on

behalf of the assessee and the assessee would be the ultimate beneficiary of such acquisition. Therefore, the assessee's risk in such a case would be very low since both the AEs were assessee's subsidiaries only. Therefore, considering the fact that it was a corporate guarantee for which no fees was paid by the assessee and going by the ratio of the decision of coordinate bench of the Tribunal in Everest Kanto Cylinders Ltd. Vs. DCIT [34 Taxmann.com 19] as affirmed by Hon'ble Bombay High Court on 08/05/2015 [58 Taxmann.com 254], we estimate the TP adjustments against both these transactions @0.20%. The Ld. TPO / Ld. AO is directed to re-compute the same in terms of our above order. The grounds stand partly allowed."

25.3 Facts being identical, we follow the above order of the Co-ordinate Bench in assessee's own case and direct the TPO/AO to re-compute the arm's length of the guarantee commission @ 0.20%. Thus the 12th, 13th, 14th grounds of appeal are partly allowed for statistical purposes.

26. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 23/03/2021.

Sd/-	Sd/-
(VIKAS AWASTHY)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 23/03/2021
Rahul Sharma, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Assistant Registrar)
ITAT, Mumbai