

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI J BENCH, MUMBAI**

**[Coram: Pramod Kumar (Vice President),  
and Sandeep S Karhail (Judicial Member)]**

ITA No. 2139/Mum/2021  
Assessment year: 2013-14

**Deputy Commissioner of Income Tax  
3(3)(1), Mumbai**

.....Appellant

*Vs.*

**Sikka Ports & Terminals Ltd.  
(Formerly known as Reliance Ports & Terminals Ltd.)  
3<sup>rd</sup> Floor, Maker Chambers, IV, 222, Nariman Point,  
Mumbai 400 021 [PAN: AABCR3878B]**

.....Respondent

ITA No. 2022/Mum/2021  
Assessment year 2013-14

**Sikka Ports & Terminals Ltd.  
(Formerly known as Reliance Ports & Terminals Ltd.)  
3<sup>rd</sup> Floor, Maker Chambers, IV, 222, Nariman Point,  
Mumbai 400 021 [PAN: AABCR3878B]**

..... Appellant

*Vs.*

**Deputy Commissioner of Income Tax  
3(3)(1), Mumbai**

..... Respondent

**Appearances by:**

**Nimesh Vora along with Moksha Mehta for the appellant  
Tejinder Pal Singh Anand for the respondent**

Date of concluding the hearing : 30/05/2022  
Date of pronouncing the order : 30/05/2022

**O R D E R**

**Per Pramod Kumar VP**

1. These cross appeals are directed against the order dated 6<sup>th</sup> September 2021, in the matter of assessment under section 143(3) of the Income Tax Act 1961, for the assessment year 2013-14.
2. Grievances raised by the parties, which are interconnected and will be taken up together, are as follows:-

*Grievances raised by the assessee*

*Guarantee Commission charged in respect of corporate guarantee provided on behalf of Associated Enterprises.*

1. *erred in confirming the order of the AO/TPO in treating the guarantee given by Appellant to banks for giving loan to its Associated Enterprises as International Transaction within the meaning of Section 92B r.w.s. 92(1) of the Act.*
2. *erred in determining the ALP of guarantee commission at 0.50% p.a. given by the Appellant on behalf of its Associated Enterprises instead of 0.35% as determined by the Appellant.*

*Grievances raised by the Assessing Officer*

1. *Whether on the facts and circumstance of the case and in law, the Ld. CIT(A) is right in directing to restrict the TP adjustment of corporate guarantee fee to 0.5% instead of 1.5% charged by the TPO without discussing the facts of the case and deciding the issue on the merits of the case?*
2. *Whether on the facts and circumstances of the case and law, the Ld. CIT(A) is right in arriving at the same 0.5% rate of corporate guarantee fees relying on the Everest Kanto case (378 ITR 57), which is in violation of provisions of Rule 10B(4) of IT Rules on contemporaneous nature of data as credit ratings and the interest rate vary each year?*
3. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is right in holding that the fee for the guarantee issued by the instant assessee for the loans availed by the AES from banks should be charged at 0.5% as decided in Everest Kanto case, without realizing the fact that the transfer pricing study is highly facts-based and it differs from case to case and that all the factors in Rule 10B have to be considered for every case and every year independently and that a rate decided in a different case for different set of facts and for different year cannot be adopted as such to the instant assessee, which would be violative or the specific provisions in Rule 10B?*
4. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is right in arriving at the adhoc rate of 0.5% without adopting any of the methods prescribed in Section 92C which is violation of law?*
5. *The appellant prays that the order of the CIT(A) on the above grounds be set-aside and that of the Assessing Officer be restored.*
6. *The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.*

3. The relevant material facts are as follows. The assessee before us is a company engaged in the business of port infrastructure facilities and engineering, construction and consultancy services etc. During the relevant previous year, the assessee entered into several international transactions with its associated enterprises abroad. When ascertainment of the arm's length price came up for the consideration of the Transfer Pricing Officer, it was, *inter alia*, noticed that the assessee has given certain corporate guarantees to third parties, undertaking the contractual and other obligations of its associated enterprises. It was also noted that to benchmark the guarantee commission, 'yield spread approach' has been adopted. The yield

spread analysis is based on calculating the difference in the current market interests for the guarantor and the guarantee recipient, which is termed as yield spread and which is divide between the guarantor and the beneficiary. On the basis of quote from the Royal Bank of Scotland, 70 bps was computed as yield spread and, accordingly, .35% computed as arm's length price of the corporate guarantee benefit. It was also contended that the above benchmarking done as a measure of abundant caution, and that, as is the position of law in the light of several decisions of this Tribunal, extending a corporate guarantee does not constitute an international transaction at all. Elaborate submissions were made in support of this proposition as well. None of these submissions, however, impressed the Transfer Pricing Officer. The learned TPO was of the opinion that this quote from Royal Bank of Scotland cannot be a sound basis for computing the interest differential as it was dated 01.04.2013, i.e. after the end of the relevant previous year, and in the light of the following rider given therein:-

*"Please note and it is reiterated that the above does not constitute any commitment or offer by the bank or its affiliates to extend credit to or to arrange financing on these or any other terms. Any such commitment can only be made after obtaining the relevant internal approvals by us, conduct and completion of satisfactory due diligence and documentation. The purpose of this letter is merely to facilitate further discussions between RPTL and the bank. Accordingly, we have the right to change these indicative terms and/or withdraw from further negotiations".*

4. The learned Transfer Pricing Officer further noted, in view of the above, the relevant information has been requisitioned from HDFC Bank and State Bank of India which have quoted 1.80% and 1.08% to 2.1% for "all types of guarantees." On this basis, the TPO ascertained the ALP of corporate guarantee at 1.5%. Accordingly, an ALP adjustment of Rs. 2,81,99,740/- was made. Aggrieved, assessee carried the matter in appeal before the learned CIT(A) who restricted the ALP adjustment to .5% by observing as follows:-

*I have carefully considered the matter. During the financial year relevant to the assessment year in question, the Appellant Assessee had given corporate guarantee to the Royal Bank of Scotland PLC for loan given in foreign currency to its AE, Reliance Global Holding Pte. Ltd. ('RGHPL'). The Appellant has raised various contentions, summarized as below:*

- a) Corporate guarantee is in the nature of shareholders' activities which does not justify a charge;*
- b) Corporate guarantee does not have "bearing on profits, income, losses or assets" and thus, not an international transaction;*
- c) Corporate Guarantee is not in the nature of 'provision of services';*
- d) Without prejudice to the above, corporate guarantee is distinct from bank guarantee and therefore, no benchmark is available to determine ALP, thereby leading to failure of computational provision.*

*I do not agree with the contentions raised by the Appellant that the corporate guarantee issued in favour of the AE is not an international transaction, in view of amended provisions of section 92B, vide Finance Act, 2012, inserting Explanation to section 92B of the Act.*

*The issue remained for consideration is as to what would be the arm's length price for issuing the corporate guarantee in question. Appellant has benchmarked the transaction at 35 basis points*

*i.e. 0.35% p.a, based on a letter for quotation from Royal Bank of Scotland, wherein they have stated that potential financing for Appellant's associates is expected to carry an interest pricing differential of 70 basis points to a similar direct facility for Appellant in that jurisdiction. The said interest pricing differential was apportioned between Appellant and its AE in 50:50 ratio, thereby calculating 35 bps. I have perused the said letter and I agree with the contention of the TPO that the same is dated 1s' April 2013 and hence, cannot be applied to the financial year 2012-13.*

*On the other hand, the TPO has applied the average of naked bank rates of 2% followed by ad-hoc downward adjustment of 0.5%, thereby imputing guarantee fee at the rate of 1.5%. In view of decision of Hon'ble Bombay High court in case of CIT v. Everest Kento Cylinders Ltd. (2015] 378 ITR 57 (Bom)(HC), I hold that the naked quotes adopted by the TPO is untenable and hence liable to be rejected. However, in view of fairness and justice and following the aforesaid decisions, I uphold the adjustment made by the TPO and restrict the same at the rate of 0.5%. The remaining adjustment shall be deleted.*

*Accordingly, the ground is partly allowed.*

5. None of the parties is satisfied. While the assessee is aggrieved of the ALP adjustment to the extent of 0.15%, the Assessing Officer is aggrieved of deleting the ALP adjustment to the extent of 1%.

6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

7. We are of the considered view that while adopting the yield spread approach, it is not really necessary that the quotes for the interest rates, with guarantee and without guarantee, need not strictly be on the date of entering into transaction because the material factor is the difference between these rates and not the quantum of these rates; every variation in such rates need not necessarily affect the variation between with guarantee and without guarantee interest rates, and, at the end of the day, the rate differential is an approximation-no matter how scientific or reasonable it is. If the rate differential between these two rates of interest is 70bps at the end of the relevant previous year, it is reasonable to proceed on the basis that such a differential would also prevail during the relevant previous year. The stand of the authorities below on this point, is thus not legally sustainable. As for the riders placed in quote, which have been extracted above and which have been heavily relied upon by the learned TPO, these are usual features of legally guarded business quotations, and the presence of such rider do not vitiate the nature of quotation for indicating approximate prevailing rates. Nothing, therefore, turns on this cautious language which is quite common in the commercial documents anyway, either. In this view of the matter, we are unable to see any legally sustainable merits in the objections taken by the authorities below to the yield spread approach adopted by the assessee. The rejection of this method does not, therefore, meet our approval. As for the quotations obtained from HDFC Bank and State Bank of India, these quotations are for the bank guarantees simplicitor and not corporate guarantees given to bank to support the bank guarantees. These two kinds of guarantees are materially different, as has been held by a series of co-ordinate bench decisions. The right comparable, for application of CUP in this case, would have been the consideration for which corporate counter guarantees are issued, for the benefit of an associated enterprise, to a bank. In

any event, once we come to the conclusion that the yield spread approach adopted by the assessee has been wrongly rejected, there is no need to deal with this clearly defective application of CUP method. No such inputs have been referred to, or relied upon, by the authorities below.

8. In view of these discussions, as also bearing in mind entirety of the case, we uphold the plea of the assessee. The benchmarking of corporate guarantee, on the peculiar facts of this case and in the light of yield spread method adopted by the assessee – which has not been faulted by the authorities below for any legally sustainable reasons, is upheld at 0.35%. Accordingly, plea of the assessee is upheld and plea of the Assessing Officer is rejected as infructuous.

9. In the result, the appeal of the assessee is allowed and the appeal of the Assessing Officer is dismissed. Pronounced in the open court today on the 30<sup>th</sup> day of May, 2022.

*Sd/-*  
**Sandeep S Karhail**  
(Judicial Member)

*Sd/-*  
**Pramod Kumar**  
(Vice President)

**Mumbai, dated the 30<sup>th</sup> day of May, 2022**

*Copies to:*

(1)	<i>The appellant</i>	(2)	<i>The respondent</i>
(3)	<i>CIT</i>	(4)	<i>CIT(A)</i>
(5)	<i>DR</i>	(6)	<i>Guard File</i>

*By order etc*

*Assistant Registrar/ Sr PS*  
*Income Tax Appellate Tribunal*  
*Mumbai benches, Mumbai*