IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT, AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.2785/Mum./2017 (Assessment Year : 2010–11)	**ITA no.2786/Mum./2017** (Assessment Year : 2011–12)

Mizuho Bank Ltd.
(Formerly Mizuho Cooperative Bank Ltd.)
Level–17, Tower–A, Peninsulal Business Park
Lower Parel, Mumbai 400 059
PAN – AADCM0940P ……. Appellant

v/s

Dy. Director of Income Tax
International Taxation
Circle–4(1), Mumbai .....Respondent

ITA no.2711/Mum./2017 (Assessment Year : 2010–11)	**ITA no.2712/Mum./2017** (Assessment Year : 2011–12)

Dy. Director of Income Tax
International Taxation
Circle–3(2)(2), Mumbai ……. Appellant

v/s

Mizuho Corporate Bank Ltd.
Maker Chambers–III, 1st Floor
Jamnalal Bajaj Road, Nariman Point
Mumbai 400 021 PAN – AADCM0940P .....Respondent

Assessee by : Shri Madhur Agarwal
Revenue by : Shri K.C. Selvamani

Date of Hearing – 26/05/2022	Date of Order – 24/08/2022

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present cross appeals have been filed by the assessee and the Revenue challenging the separate orders of even date 24/01/2017, passed under section 250 of the Income Tax Act, 1961 (*'the Act'*) by the learned Commissioner of Income Tax (Appeals)–57, Mumbai [*'learned CIT(A)'*], for the assessment years 2010–11 and 2011–12.

2. Since both the cross appeals pertains to the same assessee and issues involved are also common, therefore, these cross appeals were heard together as a matter of convenience and are adjudicated by way of this common order. In both the cross appeals, identical grounds have been raised except with variance in figures. Accordingly, with the consent of the parties, cross appeals for assessment year 2010–11 are treated as the lead matter and findings rendered therein shall apply *mutatis mutandis* to the cross appeals for assessment year 2011–12.

ITA No. 2711/Mum/2017
Revenue's appeal- A.Y. 2010–11

3. In its appeal for assessment year 2010-11, Revenue has raised following grounds:

> *"1. Whether on facts and in circumstances of the ease and a law, the CIT(A) is correct in holding that the addition has been wrongly made without appreciating the fact that the PE in India has to be treated as separate entity and the interest payable by the said PE is to be taxed in India in the hands of PE as income.*

2. Whether on facts and in circumstances of the case and in law, the CIT(A) is correct in holding that the provisions of section 40(a)(i) do not apply without appreciating that the interest was chargeable to income. Whether on facts and in circumstances of the case and in law, the CIT(A) erred in directing the AO to verify the details and allow depreciation without appreciating the fact that the AO had disallowed the depreciation only after verification.

4. Whether on facts and circumstances of the case and in law, CIT(A) is empowered to set aside the issue to the file of AO for verification of depreciation, without calling for remand report from the AO as AO has rightly verified the issue and disallowed the depreciation claimed by the assessee.

5. Whether in the facts and circumstances of the case and in law, the Ld. CIT(A) erred in directing to re-compute the ALP rate of commission in respect of the guarantees by making an addition of 10% increase in the rate of commission currently being charged by the assessee to arrive at the arm's length rate without citing any basis for arriving at this ALP rate determination and applying to the facts of the case?

6. Whether in the facts and circumstances of the case and in law, the Ld. CTT(A) erred in directing to re-compute the ALP rate of commission in respect of the guarantees by making an addition of 10% increase in the rate of commission currently being charged by the assessee to arrive at the arm's length rate without citing any basis for arriving at this ALP rate determination and applying to the facts of the case, when, such adhoc method is not a prescribed method for determination of ALP U/s 92C of the LT Act. 1961?

7. Whether in the facts and circumstances of the case and in law, the Ld. CIT(A) erred in directing to re-compute the ALP rate of commission in respect of the guarantees by making an addition of 10% increase in the rate of commission currently being charged by the assessee to arrive at the arm's length rate, as against the ALP rate computed by the TPO in his order based on the rate chart of State Bank of India @ 1% where amount of loan was more than 1 USD and 1.8% for rest amount of loan, to issue guarantee against 100% counter guarantee by reputed international Banks, without adjudicating as to how the rate applied by the TPO is not comparable with the relevant international transaction.

8. Whether in the facts and circumstances of the case and in law, the Ld. CIT(A) was correct in directing to re-compute the ALP rate of commission in respect of the guarantees by making an addition of 10% increase in the rate of commission currently being charged by the assessee to arrive at the arm's length rate without analysing the functions performed, assets used and risks undertaken by the assessee bank?

9. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) was right in the allowing relief to the assessee based on the decision of the Bombay High Court in Everest Kento Cylinder Limited (378

ITR 57 (Bom)), which clearly stated that no comparison(for transfer pricing purposes) can be made between guarantees issued by commercial banks(like the assessee) with corporate guarantee issued by a holding company for benefit of its A.E. (subsidiary company)and the commission to be charged in the case of bank guarantees necessarily has to be higher than that of corporate guarantees?

10. The Appellant prays that the order of the Ld. CIT(A) on the above ground(s) be set aside and that of the Assessing officer be restored.

11. The Appellant prays that the appeal is maintainable in this case in view of Circular No. 21/2015 dated 10.12.2015 of the CBDT."

4. The issue arising in grounds no. 1 and 2, raised in Revenue's appeal, is pertaining to taxability of interest payable to head office of the assessee.

5. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee is a bank incorporated in Japan having its head office at Tokyo. The assessee opened branch offices in India at Mumbai and Delhi. For the assessment year 2010–11, assessee filed its return of income on 25/09/2010, declaring total income of Rs. 38,94,70,202. The assessee is engaged in the business of banking in India and it earns income from interest (i.e. interest on loans; interest on investments; interest on balances with RBI), commission, exchange and brokerage transactions as well as foreign exchange transactions. During the assessment year 2010–11, the head office of the assessee in Japan had received interest on borrowings made by Indian branch amounting to Rs. 77,13,474, net of taxes, i.e. on which tax was deducted at source. The Assessing Officer ('*AO*'), vide order dated 29/04/2014, passed under section 143(3) read with section 144C(3) of the Act, treated the interest

income received by the head office from the branch office in India as income deemed to accrue or arise in India and accordingly, taxable in India. The AO further held that the branch office is representative assessee/agent of the head office as per section 163(1)(c) of the Act. Accordingly, the AO taxed the interest income @ 10% of gross amount under Art 11(2)(a) of the India Japan DTAA. In appeal, learned CIT(A) vide impugned order following the decision of coordinate bench of Tribunal in assessee's own case for assessment year 2005–06 allowed the appeal filed by the assessee on this issue. Being aggrieved, the Revenue is in appeal before us.

6. During the course of hearing, learned Departmental Representative ('*learned DR*') vehemently relied upon the findings of AO on this issue.

7. On the other hand, learned Authorised Representative ('*learned AR*') submitted that this issue has been decided in favour of the assessee by coordinate bench of the Tribunal in assessee's own case in preceding assessment years.

8. We have considered the rival submissions and perused the material available on record. We find that coordinate bench of the Tribunal in ADIT (International Taxation) vs M/s Mizuho Corporation Bank Ltd., in ITA No. 3282/Mum./2009 etc., vide order dated 26/03/2014, for assessment year 2005–06, while deciding similar issue in favour of assessee, observed as under:

"16. The issue with regard to addition of interest income earned by the head office from the branch office had already been decided by the Tribunal in assessee's own case in favour of the assessee by relying on the decision of the ITAT Special Bench in the case of Sumitomo Mitsu Banking Corp. 136 ITD 66 (Mum)(SB), wherein it was held that interest paid by Indian branch of the assessee bank to its overseas head office is not chargeable to tax in India. The Tribunal in assessee's own case in ITA No.7479/Mum/2007, vide order dated 25-7-2012, has held as under :-

> *"The Ld. DR, however, has fairly and frankly conceded that both the issues involved in this appeal of the revenue are squarely covered by the recent decision of Special Bench of the Tribunal in the case of Sumitomo Mitsu Banking Corp. vs. DDIT 136 ITD 66 (Mum)(SB) wherein it has been held that interest paid by the Indian Branch of the assessee bank to its overseas head office is not chargeable to tax in India. As further held by the Special Bench in the said case, the provisions of sec.195 consequently would not be attracted in case of such payment of interest by the Indian Branch to overseas Head office and the question of disallowance of the said interest by invoking the provisions of sec.40(a)(i) does not arise. Respectfully following the said decision of the Special Bench of this Tribunal, we uphold the impugned order of the Ld. CIT (A) giving relief to the assessee on both the issues involved in this appeal of the revenue and dismiss the said appeal."*

9. Similar findings were rendered by coordinate bench of Tribunal in DCIT vs M/s Mizuho Corporation Bank Ltd., in ITA No. 2484/Mum/2017, vide order dated 28/02/2019, for assessment year 2009–10. The learned Departmental Representative could not show us any reason to deviate from the aforesaid orders and no change in facts and law was alleged in the relevant assessment year. Thus, respectfully following the orders passed by coordinate bench of the Tribunal in assessee's own case cited (supra), we find no infirmity in the impugned order passed by the learned CIT(A) on this issue. Accordingly, grounds no. 1 and 2, raised in Revenue's appeal, are dismissed.

10. The issue arising in grounds no. 3 and 4, raised in Revenue's appeal, is pertaining to disallowance of depreciation.

11. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee bank has claimed depreciation expenses of Rs. 3,07,80,374 under section 32 of the Act, inter-alia, in respect of addition to others assets made during the assessment years 2007–08 and 2008–09. In view of the fact that in assessment years 2007–08 and 2008–09, depreciation was disallowed in respect of these assets, AO vide order passed under section 143(3) of the Act consequently disallowed Rs. 12,00,321 for the year under consideration. In appeal, learned CIT(A) vide impugned order following its earlier decision for assessment years 2007–08 and 2008–09 allowed the appeal filed by the assessee on this issue. Being aggrieved, the Revenue is in appeal before us.

12. During the course of hearing, learned DR vehemently relied upon the order passed by the AO. On the other hand, learned AR placed reliance on the impugned order on this issue.

13. We have considered the rival submissions and perused the material available on record. In the present case, depreciation was claimed, inter-alia, in respect of addition to the assets made during the assessment years 2007–08 and 2008–09. We find that in the aforesaid assessment years, AO has passed orders giving effect to the directions of the learned CIT(A) and accordingly, granted depreciation under the Act. Since, in

respect of assets added in preceding years, depreciation is year to year deduction available to the taxpayer and therefore is dependent on the order(s) passed in previous years. Thus, we find no infirmity in order passed by the learned CIT(A) on this issue. Accordingly, grounds no. 3 and 4, raised in Revenue's appeal, are dismissed.

14. The issue arising in grounds no. 5 to 9, raised in Revenue's appeal, is pertaining to transfer pricing adjustment on account of back-to-back counter bank guarantee.

15. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the year, head office of the assessee in Japan executed inter-bank indemnities, against which Indian branch issued guarantees on behalf of the clients of overseas branches. The Indian branch received guarantee commission ranging from 0.10% to 0.50% depending on loan. For the year under consideration, Indian branch received Rs. 78.09 lakhs as commission. During the course of transfer pricing assessment proceedings, assessee was asked to furnish complete details regarding this international transaction. In reply, assessee submitted that the commission was received for furnishing the bank guarantees to the Indian customers at the request of the head office. The assessee further submitted that in issuing of guarantee on behalf of the client of the head office, it does not face any default/credit risk as it is secured by a back-to-back inter-bank indemnity issued by the overseas branch. The assessee was further asked to show cause as to

why any fee should not be charged from the associated enterprise at the rate at which it has been charged from the non-associated enterprise. The assessee was also asked to benchmark the aforesaid transaction and workout the without prejudice adjustments. In reply thereto, the assessee submitted that the functions performed by the Indian branch are in nature of provision of administrative support services only. On without prejudice basis, assessee submitted that other nationalised banks are charging lower rate of commission on bank guarantee backed by a counter guarantee as compared to issuance of bank guarantee. The TPO vide order dated 29/01/2014 passed under section 92CA(3) of the Act rejected the submission of the assessee and considered the rate charged by Bank of Baroda to issue the guarantee as the Comparable Uncontrolled Price (‘*CUP*’) and accordingly, made an adjustment of Rs. 1,13,17,486 by applying guarantee fee of 0.75%. In appeal, learned CIT(A) vide impugned order directed the TPO to recompute the commission for guarantee by making an addition of 10% increase in the rate of commission currently being charged by the assessee to arrive at the arm’s length rate. Being aggrieved, both the parties are in appeal before us.

16. During the course of hearing, learned DR vehemently relied upon the order passed by the TPO. On the other hand, learned AR submitted that the entire transaction of issuing the bank guarantee on behalf of the clients of the overseas branches is secured by the counter/back to back guarantee issued by the overseas branch. The learned AR further

submitted that there is no credit risk in this transaction. In support of its submissions, learned AR placed reliance upon the decision of coordinate bench of Tribunal in Australia and New Zealand Banking Group Ltd vs DCIT, in ITA No. 1106/Mum./2017, vide order dated 13/04/2022.

17. We have considered the rival submissions and perused the material available on record. In the present case, certain overseas branches of Mizuho Corporate Bank Ltd and Mizuho Bank Ltd have clients who require guarantees to be issued in India. Given that these clients are located in India, the overseas branches of Mizuho Corporate Bank Ltd and Mizuho Bank Ltd request the Indian branch to provide such guarantees to the beneficiary and provide a back-to-back counter bank guarantee to the Indian branch. It is the plea of the assessee that such back-to-back counter bank guarantee is to cover any financial liability that Indian branch would incur on behalf of these overseas branches in connection with the guarantees issued to Indian clients on their behalf. It is further submitted that where the client of the overseas branch defaults and the guarantee would be invoked then under the back-to-back guarantee issued to Indian branch, the overseas branch would make the payment to Indian branch, which would then onward make the payment to the beneficiary in India. In this regard, it is also the submission that Indian branch provide support services towards processing of these guarantees such as receiving swift instructions, issuing the guarantee on stamp paper and couriering the same to the party in India, maintenance of log of original documents, sending reports on project basis, reconciliation of

transactions received versus those processed etc. Thus, as per the assessee the entire risk of discharging the bank guarantee is borne by the overseas branches issuing the counter bank guarantee. As per the assessee, Indian branch only faces element of foreign exchange risk as it would receive processing fee from its associated enterprise in foreign currency and there could be difference in USD, Yen and Indian rupee conversion rates as on the date of receipt of remittance and the booking date. As per Form No. 3CEB, forming part of the paper book, the assessee claimed to have applied CUP method for determining the arm's length price of the international transaction of issuing bank guarantee against counter guarantee issued by the associated enterprise. The TPO rejected the contention of the assessee and noted that functions performed, assets used and risk undertaken by the assessee for both transactions i.e. for inter-bank indemnity transaction with its associated enterprises and for the guarantee issued to the third-party customers without any back-to-back guarantee is same. The TPO also noted that even for the similar third party transactions the bank always secures itself fully with collateral security to cover against the risk. Ultimately, the TPO, by applying the rate charged by the Bank of Baroda for issuance of guarantee against 100% counter guarantee by reputed international banks, made the adjustment in the present case. During the course of hearing, learned AR placed reliance upon the decision of coordinate bench of the Tribunal in Australia and New Zealand Banking Group Ltd. (supra). We find that the basic facts of the aforesaid case are as under:

> *"3.5. At the outset, we find that overseas branches of ANZ have clients who require guarantees to be issued to the beneficiaries in India. Since the beneficiaries are situated in India, the overseas branches of ANZ are situated in India. The overseas branches of ANZ request the assessee to provide such guarantees to the beneficiaries and inturn provide a back to back inter-bank guarantee / indemnity to assessee to cover any financial liability that assessee may incur in connection with guarantees issued to Indian beneficiaries on behalf of overseas ANZ branches. This is the prime function / activity carried out by the assessee with regard to the impugned international transaction. In case where the client of the overseas branch defaults and the guarantee would be invoked then, under the back to back guarantee issued to assessee, the overseas branch would make payments to assessee which would onward then make the payment to the beneficiary in India."*

18. The coordinate bench of the Tribunal, in the aforesaid decision, noted that the taxpayer does not bear any risk in its books as it is fully protected by overseas counter guarantee/indemnity and there is also no foreign exchange risk as whenever the taxpayer is called upon to discharge the guarantee on behalf of the overseas branches, the taxpayer would first receive the money from overseas branches because of the existing counter guarantee, and then it would discharge the same. The coordinate bench further noted in the aforesaid decision that the assessee received the processing fee from the associated enterprise in foreign currency and the said fees is received immediately after the invoices are raised for the same, thereby the risk of exchange fluctuation would be very negligible due to reduce time span involved therein. We find that the coordinate bench of the Tribunal in para 3.7 of the aforesaid decision also considered the details of fee charged by the taxpayer for each type of services rendered by it. Further, in the aforesaid decision, as noted by the coordinate bench in para 3.7, the taxpayer also filed details of guarantees

issued by it based on the counter guarantee received from the overseas branches of the taxpayer. It is also noted that the taxpayer furnished the sample documents enclosing the copy of swift message received from the overseas branch advising the taxpayer to issue guarantee to Indian beneficiaries, and providing counter guarantee. The taxpayer, in the aforesaid decision as noted by the coordinate bench, also furnished the details of fresh guarantees issued during the year. Thus, it is evident that the coordinate bench of the Tribunal after detailed perusal of facts available on record deleted the transfer pricing adjustment made in respect of guarantee fee.

19. However, in the present case, apart from the claim of the assessee that guarantees have been issued to the clients of the overseas branches, in respect of which counter/inter-bank indemnity was executed by the overseas branches, the assessee in the factual paper book has filed the details of commission earned from the bank guarantee issued on behalf of the overseas branches. We find that there is no detail/ document with regard to the counter guarantee/indemnity executed by the overseas branch. Also there is nothing available on record in support of assessee's claim that money has been charged to the overseas branch and overseas branch recover these amounts from the third-party clients and paid them to the assessee. There are also no details regarding whether the aforesaid process of charging and payment by the overseas branch is prior to or post the discharge of bank guarantee in favour of the beneficiary in India, in case of default. Thus, no details have been furnished to support the

claim that no risk was borne by the Indian branch. Further, though in Form No. 3 CEB assessee has claimed to determine the arm's length price of international transaction of issuing bank guarantee against the counter guarantee issued by the associated enterprise by applying CUP method, however, there are no details available on record as to how such benchmarking has been carried out by the assessee. On the other hand, we find that the TPO, by considering the rate charged by Bank of Baroda for issuance of guarantee against 100% counter guarantee by reputed international banks, has made the transfer pricing adjustment by considering it to be an appropriate CUP. However, there is no further analysis as to how the said transaction is an appropriate CUP to the transaction undertaken by the assessee's Indian branch considering the FAR in both the transactions and whether any adjustment for differences as per Rule 10B(1)(a) of the Income Tax Rules is possible. We find that the learned CIT(A) vide impugned order on an *ad hoc* basis directed computation of commission for guarantee by making addition of 10% increase in the rate of commission charged by the assessee to arrive at the arm's length rate. Thus, in view of the above, we deem it appropriate to remand this issue to the file of TPO for *de novo* benchmarking of impugned international transaction of issuing bank guarantee against counter guarantee issued by the associated enterprise. The assessee is directed to produce all the documents before the TPO in support of its claim. Further, the TPO shall be at liberty to call for any details or documents for proper benchmarking of the impugned international

transaction. In the remand proceedings, the assessee shall have the liberty to file any alternative benchmarking in respect of the aforesaid impugned transaction. As a result, grounds no. 5 to 9 raised in Revenue's appeal are allowed for statistical purpose.

20. In the result, appeal by the Revenue is partly allowed for statistical purpose.

ITA No. 2785/Mum/2017
Assessee's appeal – A.Y. 2010 – 11

21. In this appeal, the assessee has raised following grounds:

> *"On the facts and in the circumstances of the case and in law –*
>
> *1. The Learned CIT(A) has erred in confirming the TPO stand towards adjustments made on Interest on borrowings made during the year from Associated Enterprises resulting in addition to the Appellant income amounting to a sum of Rs. 7,92,204/–.*
>
> *2. The Learned CIT(A) has erred in confirming the TPO stand towards the adjustments I made on interest on placements made during the year with the Associated Enterprises resulting in an addition to the Appellant income amounting to Rs. 11,10,660/–.*
>
> *3. The Learned CIT(A) has erred in confirming addition to guarantee commission @ 10% on all guarantees issued by the Appellant to the Associated enterprises thereby resulting in an addition amounting to Rs. 7,80,974/–."*

22. As regards ground no.3 raised in assessee's appeal, the grievance of the assessee is against the transfer pricing adjustment on account of back-to-back counter bank guarantee. In Revenue's appeal for assessment year 2010 – 11, we have directed the TPO to conduct *de novo* benchmarking of impugned international transaction of issuing bank guarantee against counter guarantee issued by the associated enterprise.

Accordingly, ground no.3 raised in assessee's appeal is allowed for statistical purpose.

23. The issue arising in grounds no. 1 and 2, raised in assessee's appeal, is pertaining to transfer pricing adjustment on account of interest received/paid on interbank placements amongst the assessee and the foreign branches.

24. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the year under consideration, the assessee entered into international transactions in respect of granting of loans/advances to associated enterprise as well as receiving of loans/advances from associated enterprise. Under Form no. 3CEB, assessee submitted that it has applied CUP method for determining arm's length price of the aforesaid international transaction. The assessee paid interest ranging from 0.35% to 3.65% in respect of loans/advances received from associated enterprise. Similarly, in respect of the loans and advances granted to the associated enterprise, the assessee received interest ranging from 0.05% to 0.25%. The TPO vide order passed under section 92CA(3) of the Act by applying the LIBOR rate made the transfer pricing adjustment of Rs. 7,92,204 and Rs. 11,10,660 in respect of aforesaid international transactions. Learned CIT(A) vide impugned order dismissed the appeal filed by the assessee on this issue. Being aggrieved, assessee is in appeal before us.

25. Having considered the submissions of both the sides and perused the material available on record, we find that in the present case the assessee used USD depo rates for the purpose of granting of loans/advances to associated enterprise as well as receiving of loans/advances from associated enterprise. As per the assessee, these rates keep on fluctuating throughout the day and are also negotiated amongst the parties, therefore, same leads to variation in borrowing/lending rates. However, on the contrary, the TPO vide order passed under section 92CA(3) of the Act noted that the assessee has benchmarked the interest rates with LIBOR rate. Therefore, from the perusal of the record it is evident that the TPO has not correctly appreciated the benchmarking undertaken by the assessee. Further, there are no adverse findings against USD depo rates used by the assessee for the purpose of granting/receiving of loans/advances from the associated enterprise. Accordingly, we deem it appropriate to remand this issue to the file of TPO for *de novo* benchmarking of international transaction pertaining to borrowing/lending by applying the USD depo rates, after necessary verification/examination of the details. We further direct that if upon examination it is found that the interest rate paid or received by the assessee is within the high and low of US depo rates, during the day of payment/receipt, then the international transaction of borrowing/lending be considered to be at arm's length. As a result, grounds no. 1 and 2 raised in assessee's appeal are allowed for statistical purpose.

26. In the result, appeal by the assessee is allowed for statistical purpose.

ITA No. 2786/Mum/2017 (Assessee's Appeal)
ITA No. 2712/Mum/2017 (Revenue's Appeal)
Assessment Year – 2011–12

27. In its appeal, the assessee has raised following grounds:

"1. The Learned CIT(A) has erred in confirming the TPO stand towards adjustments made on Interest on borrowings made during the year from Associated Enterprises resulting in addition to the Appellant income amounting to a sum of Rs. 5,64,692/–.

2. The Learned CIT(A) has erred in confirming the TPO stand towards the adjustments made on interest on placements made during the year with the Associated Enterprises resulting in an addition to the Appellant income amounting to Rs. 2,61,405/–.

3. The Learned CIT(A) has erred in confirming addition to guarantee commission @ 10% on all guarantees issued by the Appellant to the Associated enterprises thereby resulting in an addition amounting to Rs. 5,64,731/–."

28. While, the Revenue has raised following grounds in its appeal:

"1. Whether on facts and in circumstances of the case and in law, the CIT(A) is correct in holding that the addition has been wrongly made without appreciating the fact that the PE in India has to be treated as separate entity and the interest payable by the said PE is to be taxed in India in the hands of PE as income.

2. Whether on facts and in circumstances of the case and in law, the CIT(A) is correct in holding that the provisions of section 40(a)(1) do not apply without appreciating that the interest was chargeable to income.

3. Whether on facts and in circumstances of the case and in law, the CIT(A) is erred in directing the AO to verify the details and allow depreciation without appreciating the fact that the AO had disallowed the depreciation only after verification.

4. Whether on facts and circumstances of the case and in law, CIT(A) is empowered to set aside the issue to the file of AO for verification of depreciation, without calling for remand report from the AO as AO has

rightly verified the issue and disallowed the depreciation claimed by the assessee.

5. Whether in the facts and circumstances of the case and in law, the Ld. CIT(A) erred in directing to re-compute the ALP rate of commission in respect of the guarantees by making an addition of 10% increase in the rate of commission currently being charged by the assessee to arrive at the arm's length rate without citing any basis for arriving at this ALP rate determination and applying to the facts of the case?

6. Whether in the facts and circumstances of the case and in law, the Ld. CIT(A) erred in directing to re-compute the ALP rate of commission in respect of the guarantees by making an addition of 10% increase in the rate of commission currently being charged by the assessee to arrive at the arm's length rate without citing any basis for arriving at this ALP rate determination and applying to the facts of the case, when, such adhoc method is not a prescribed method for determination of ALP U/s 92C of the I.T. Act 1961.?

7. Whether in the facts and circumstances of the case and in law, the Ld. CIT(A) erred in directing to re-compute the ALP rate of commission in respect of the guarantees by making an addition of 10% increase in the rate of commission currently being charged by the assessee to arrive at the arm's length rate, as against the ALP rate computed by the TPO in his order based on the rate chart of State Bank of India @ 1% where amount of loan was more than 1 USD and @ 1.8% for rest amount of loan, to issue guarantee against 100% counter guarantee by reputed international Banks, without adjudicating as to how the rate applied by the TPO is not comparable with the relevant international transaction.

8. Whether in the facts and circumstances of the case and in law, the Ld. CIT(A) was correct in directing to re-compute the ALP rate of commission in respect of the guarantees by making an addition of 10% increase in the rate of commission currently being charged by the assessee to arrive at the arm's length rate without analysing the functions performed, assets used and risks undertaken by the assessee bank?

9. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) was right in the allowing relief to the assessee based on the decision of the Bombay High Court in Everest Kento Cylinder Limited (378 ITR 57 (Bom)). which clearly stated that no comparison(for transfer pricing purposes) can be made between guarantees issued by commercial banks(like the assessee) with corporate guarantee issued by a holding company for benefit of its A.E. (subsidiary company)and the commission to be charged in the case of bank guarantees necessarily has to be higher than that of corporate guarantees?

10. The Appellant prays that the order of the Ld. CIT(A) on the above ground(s) be set aside and that of the Assessing officer be restored.

11. The Appellant prays that the appeal is maintainable in this case in view of Circular No. 21/2015 dated 10.12.2015 of the CBDT."

29. As stated earlier, the facts for the assessment year 2010–11 as well as the issues involved are identical to the assessment year 2011–12 except with variance in figures. Hence, the decision rendered hereinabove in cross appeals by the assessee and the Revenue for assessment year 2010–11 shall apply *mutatis mutandis* to the cross appeals for assessment year 2011–12.

30. As a result, appeal by the assessee is allowed for statistical purpose, while the appeal by the Revenue is partly allowed for statistical purpose.

Order pronounced in the open Court on 24/08/2022

Sd/-	**Sd/-**
PRAMOD KUMAR	**SANDEEP SINGH KARHAIL**
VICE PRESIDENT	**JUDICIAL MEMBER**

MUMBAI, DATED: 24/08/2022

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai