

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

**BEFORE SHRI AMIT SHUKLA, JM &  
SHRI S RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No.8002 & 8003/Mum/2019  
(निर्धारणवर्ष / Assessment Year: 2009-10)

<b>DY CIT CC 1(2) MUMBAI</b> 906 9 <sup>TH</sup> FLR PRATISHTHA BHAVAN OLD CGO BLDG (ANNEX) M K ROAD. Mumbai 400004	<b>बनाम/ Vs.</b>	<b>M/S. PFS SHIPPING (INDIA) LTD.</b> 5 <sup>TH</sup> FLR BHUPATI CHAMBERS 13 NATJEW ROAD, OPERA HOUSE. Mumbai 400004
स्थायीलेखासं ./जीआइआरसं ./PAN No. AADCA8387L		
(अपीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

अपीलार्थीकीओरसे/ <b>Appellant by</b>	:	None
प्रत्यर्थीकीओरसे/ <b>Respondent by</b>	:	Ms. Vatsala Jha-CIT (DR)
सुनवाईकीतारीख/ <b>Date of Hearing</b>	:	20.07.2022
घोषणाकीतारीख / <b>Date of Pronouncement</b>	:	18.10.2022

आदेश / O R D E R

**Per Amit Shukla, Judicial Member:**

The aforesaid appeals have been filed by the revenue against separate impugned order dated 23.09.2019 for the AY 2009-2010; and order dated 27.09.2019 for the AY 2010-2011, passed by the CIT (Appeals) 57 Mumbai for the quantum of assessment passed

under section 143(3) r.w.s 144 C (3). The common issue raised in the ground of appeals for both the years are that, order Ld. CIT (A) as erred and law in directing that TPO to reduced the transfer pricing adjustment of corporate guarantee given for the AE to 0.5% instead of 3% charged by the TPO relying upon the judgment of Hon'ble Bombay High Court in the case of **Everest Kanto Cylinders Ltd. Reported in 378 ITR 57.**

2. We will take up the appeal for the AY 2009-2010 and our finding given therein will apply mutatis mutandis in the Appeal for the Assessment Year 2010-2011. The brief facts are that, Assessee Company is engaged in shipping business and opted for tonnage tax scheme (115 VP). During the course of assessment proceedings reference was made by the Assessing Officer u/s 92 C A (1) of the Act to the TPO to determine Arms Length Price(ALP) with reference to international transaction reported in form 3 CEB with its AE. The TPO noted that Assessee has given Corporate Guarantee to ICICI Bank, Singapore Branch and SBI Singapore Branch in respect of loans taken by the AEs totaling to USD 22.80 Million i.e. Rs. 115.45

Crores (Exchange rate is Rs 50.64) during the year. These loans were availed by the AE on various dates as mentioned below:

07.04.2008	USD 7.7 million	Rs 38,99,28,000/-
10.11.2008	USD 2.05 million	Rs 10,38,12,000/-
10.11.2008	USD 2.05 million	Rs 10,38,12,000/-
17.12.2008	USD 11 million	Rs 55,70,40,000/-

Although this transaction was mentioned in the Form 3CEB, however the assessee has not benchmarked the transaction stating that, guarantee given to Indian banks is not a transaction between two AEs and no costs were incurred and therefore, no adjustment under transfer pricing has been done by the Company.

3. Since, Assessee had not done any bench-marking exercise of the transaction of corporate guaranty given to its AE; he proceeded to bench mark applying external CUP. He call for the information from State Bank of India wherein the rate charged by the bank was 1.75% PA for loan above 10 crore. However, he bench marked the guarantee commission at the rate of 3% after making any adjustments. This relevant observation of the TPO reads as under:-

*“In view of the above discussion, to benchmark the transaction, it may be seen that the rate of 1.75 % p.a. as mentioned above charged by the bank normally includes cash or other security for the guarantee. In this case, since there is nothing on record to prove that the assessee had covered itself with enough security, this rate of 1.75% p.a must also take into account the exchange rate risk, the country specific risk and the AE risk. Therefore, a markup is to be added to this rate. So a markup of 1.25 % added to 1.75 % (a total rate of 3%) will reflect the third party arm's length rate for financial guarantee. The Hon'ble ITAT in a recent judgment in the case of Mahindra and Mahindra Ltd (ITA No 8597/Mum/2010 for AY 2006-07) has upheld the guarantee commission chargeable @3% in similar case le between assessee and its subsidiary AE. Therefore, the guarantee commission chargeable is worked out as under:*

*Amount of loan on which guarantee was given= Rs  
115,45,92,000/-*

*Breakup of Guarantee chargeable*

*On Rs 38,99,28,000/- @3% p.a for 358 days Rs 1,14,73,498/-*

*On Rs 10,38,12,000/- @3% p.a for 141days Rs 12,03,081/-*

*On Rs 10,38,12,000/- @3% p.a for 141days Rs 12,03,081/-*

*On Rs 55,70,40,000/- @3% p.a for 104days Rs 47,61,547/-*

*Total Rs 1,86,41,207/-*

***ALP-Guarantee commission @ 3% p.a (as above) = Rs  
1,86,41,207/-***

4. The Ld. CIT(A) after following the decision of Hon'ble Bombay High Court in the case of **Everest Kanto Cylinders Ltd.(Supra)** and order of the CIT(A) for the AY 2013-2014, held that guarantee commission at the rate of 0.5 % is at ALP and directed the Assessing Officer to accept 0.5% to bench mark the guarantee commission .

5. After hearing both the parties and on perusal of the impugned order, we find that the only issue which has been argued before us is, whether the guarantee Commission of 0.5% is at ALP or not. The TPO has applied rate of 3% p.a. after considering the information received from SBI, as per which, the rate charged by the bank was 1.75% p.a. for loans above Rs.10 crore, on which TPO added further mark up of 1.25% on account of exchange rate risk, the country risk and the AE risk. On the other hand the Assessee contention

before the TPO as well as before the CIT (A) was that the Assessee Company had internal CUP 0.75% to 1% guarantee Commission charge to its bankers. Apart from that the Assessee had also relied heavily on the judgment of Hon'ble Bombay High Court in the case of **Everest Kanto Cylinders Ltd. (Supra)** where in the Hon'ble High Court it observed as under;

*"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. In view of the above discussion we are of the view that the appeal does not raise any substantial question of law and it is dismissed."*

6. Apart from that various decisions of the tribunal their cited where in courts have accepted corporate guarantee Commission to 0.5%.

7. We do not find any reason as to why guarantee commission should be taken a 3%, when Assessee itself had internal CUP which was much lower; and secondly, the Assessing Officer had add up further mark up of 1.25% on SBI rate of 1.75% PA. As observed by the Hon'ble Bombay High Court cited supra, the considerations for issuance of the corporate guarantee are distinct and separate from that of Bank guarantee and otherwise also applying blanket quote

of SBI rate specially when it is not guarantee issued by the Bank albeit corporate guarantee issued by holding company for the benefit of its AE. Thus, rate of 0.5% of the commission for providing corporate guarantee for benefit of AE under the facts and circumstances of the case is held to be at Arm's Length Price (ALP). In any case in AY 2013-2014, Guarantee Commission of 0.5% has been upheld by the first appellate authority. Accordingly we confirm the order of the Ld.CIT(A) and consequently the appeal of the revenue is dismissed.

9. Since, facts and issue involved in AY 2010-2011 are exactly the same, therefore, our findings given above will apply mutatis mutandis accordingly the appeal for AY 2010-2011 are also dismissed.

**In the result appeal of the revenue is dismissed.**

*Orders pronounced in the open court on 18<sup>th</sup> October, 2022.*

*Sd/-*  
**(S RIFAUR RAHMAN)**  
**Accountant Member**

*Sd/-*  
**(Amit Shukla)**  
**Judicial Member**

मुंबई Mumbai;दिनांक Dated : 18.10.2022

*Ms.Urmila*

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
  2. प्रत्यर्थी/ The Respondent
  3. आयकरआयुक्त(अपील) / The CIT(A)
  4. आयकरआयुक्त/ CIT- concerned
  5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
  6. गार्डफाईल / Guard File
- आदेशानुसार/ BY ORDER,**

**.उप/सहायकपंजीकार (Dy./Asstt.Registrar)**  
**आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai**