**IN THE INCOME TAX APPELLATE TRIBUNAL**
**DELHI BENCH "I" DELHI**

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**
**&**
**SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER**

I.T.A. No.1065/DEL/2022
Assessment Year 2012-13

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| MUFG Bank Ltd. (Earlier known as the Bank of Tokyo Mitsubishi UFJ Ltd.)<br>New Delhi. | Vs. | ACIT,<br>Circle-2(2)(1),<br>Int. Taxation.<br>Delhi. |
| TAN/PAN: AABCT3880D | | |
| (Appellant) | | (Respondent) |

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|---|---|---|---|
| Appellant by: | Shri Nishant Thakkar, Adv. | | |
| Respondent by: | Shri Rajesh Kumar, CIT-DR | | |
| Date of hearing: | 10 | 11 | 2022 |
| Date of pronouncement: | 25 | 11 | 2022 |

**O R D E R**

**PER PRADIP KUMAR KEDIA, A.M.:**

The captioned appeal has been filed by the Assessee against the final order dated 29.04.2022 passed by the Assessing Officer for the Assessment Year 2013-14, in pursuance of direction given by the Dispute Resolution Panel-1 vide order dated 31.08.2021.

2. The grounds of appeal raised by the assessee read as under:

> *" Transfer Pricing adjustment of INR 13,66,36,735.*
>
> *1.1 That on the facts and circumstances of the case and in law, the Hon'ble DRP and Ld. AO/TPO erred in making an adjustment of INR 13,66,36,734 to the returned income of the Appellant in respect of the international transaction pertaining to "receipt of counter guarantee commission from Associated Enterprises ('AEs')" ('impugned transaction').*
>
> *1.2 That on the facts and circumstances of the case and in law, the Hon'ble DRP and Ld. AO/TPO erred in rejecting the primary as well as corroborative analysis undertaken by the Appellant for determining the*

*arm's length price ('ALP') of the impugned transaction and conducting a fresh economic analysis for the determination of ALP of the Appellant's impugned transaction and holding that the impugned transaction is not at arm's length.*

*1.3 That on the facts and circumstances of the case and in law, the Hon'ble DRP and Ld. AO/TPO erred in de-linking the impugned transaction from other international, transactions which are closely-linked to the overall banking business of the Appellant and have been benchmarked using Transactional Net Margin Method ('TNMM') as the most appropriate method applying a combined transaction approach, and have been accepted by the Hon'ble DRP and Ld. AO/TPO to be at arm's length.*

*1.4 That on the facts and circumstances of the case and in law, the Hon'ble DRP and Ld. AO/ TPO erred in characterizing the impugned transaction as corporate/ bank guarantee without appreciating the distinction in functions performed, asset utilized and risks assumed ('FAR') between the impugned transaction and corporate/ bank guarantee transaction undertaken by independent third-party banks.*

*1.5 That on the facts and circumstances of the case and in law and without prejudice to other grounds, with regard to the Comparable Uncontrolled Price ('CUP') analysis undertaken, the Hon'ble DRP and Ld. AO/TPO erred in not making any economic adjustments as provided under Rule 10B(1)(a) of the Income Tax Rules, 1962, to account for differences in the FAR of the impugned transaction vis-a-vis the comparables.*

*1.6 That on the facts and circumstances of the case and in law, the Hon'ble DRP and Ld. AO/TPO erred in determining the ALP of the impugned transaction by:*

*(a) Erroneously using CUP data, obtained by issuance of notices under Section 133(6) of the Act;*

*(b) Resorting to cherry picking of comparable banks without adopting any scientific methodology in identifying such comparables;*

*(c) Not providing an opportunity to cross-examine the third-party banks from whom data under Section 133(6) has been obtained for determining the ALP of the impugned transaction, thereby, violating the principles of natural justice; and*

*(d) Not issuing the show cause notice proposing transfer pricing adjustment during remand back transfer pricing assessment proceedings, thereby, violating the principles of natural justice.*

*1.7 That on the facts and circumstances of the case and in law and without prejudice to any other ground, the Hon'ble DRP and Ld. AO/TPO erred in using non-comparable guarantee rates from the data obtained under Section 133(6) of the Act, thereby, resorting to cherry picking of prices to determine the ALP of the impugned transaction.*

*1.8 That on the facts and circumstances of the case and in law, the Hon'ble DRP and Ld. AO/TPO erred in not following the decisions of the Hon'ble Tribunal in the Appellant's own case for earlier years.*

*2 Taxability of interest on income-tax refund of INK 8,00,57,085*

*2.1 That on the facts and circumstances of the case and in law, the Ld. AO has erred in applying tax rate of 42.024% while computing the tax demand for interest on income-tax refund despite holding in the impugned order that interest on income-tax refund is to be taxed @ 10% under Article 11 of India-Japan tax treaty.*

*2.2 That on the facts and circumstances of the case and in law, the Ld. AO has failed to appreciate that interest on income-tax refund earned by the Appellant is taxable @ 10% under Article 11 of India-Japan tax treaty.*

*3.* ***Non-reduction of interest of INR 8,46,996 received by Indian benches from Head Office ('HO')/other overseas branches .***

*That on the facts and circumstances of the case and in law, the Ld. AO erred in not reducing interest of INR 8,46,996 received by the Indian branches of the Appellant from its HO/other overseas branches from the assessed income of the Appellant.*

***4. Short grant of TDS credit of INR 2,26,026.***

*That on the facts and circumstances of the case and in law, the ld. AO erred in not granting credit for tax deducted at source of INR 2,26,026.*

***5. Excess withdrawal of interest under section 244A(3) of the Act.***

*That on the facts and circumstances of the case and in law, the Ld. AO erred in withdrawing excess interest under section 244A(3) of the Act.*

***6 Initiation of penalty proceedings***

*That on the facts and in the circumstances of the case and in law, the ld. AO erred in initiating penalty proceedings under section 271(l)(c) of the Act, being against the provisions of the Act.*

*7. General*

*7.1 Each of the above ground is independent and without prejudice to the other grounds of appeal preferred by the Appellant.*

*7.2 The Appellant crave leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to enable your Honour to decide this appeal according to law."*

3. Ground No.1 and sub-grounds thereof concerns transfer pricing adjustment of Rs.13,66,36,735/- pertaining to 'receipt of counter guarantee commission' by the Assessee from Associated Enterprises (AE) for providing counter guarantee at the instance of its overseas AE.

4. To set the context, the facts as borne out from records are that the assessee is a foreign company incorporated under the

laws of Japan and is a tax resident of Japan. The assessee operates its banking business in India under the license from RBI and is primarily engaged in wholesale banking operations in distinction to retail banking. For the assessment year 2013-14 in question, giving effect to DRP directions, the Assessing Officer while framing the assessment order under 144C(13) r.w. Section 143(3) of the Act dated 31st October, 2017 *inter alia* continued with the transfer pricing adjustments of INR 13,66,36,735/- made to the returned income of the assessee in respect of international transactions pertaining to receipt of counter guarantee commission (impugned international transaction) from its Associated Enterprises. The AO in terms of TPO/DRP directions in the instant case, made an upward adjustment to the income of the Assessee pertaining to impugned transaction by using bank guarantee rates ( average 2.63%) quoted by third party banks as comparable uncontrolled data for the purpose of determining the arms' length price (ALP) of such impugned transaction. The dispute travelled upto the ITAT. The Co-ordinate Bench of Tribunal vide order dated 11.06.2018 in ITA No.7212/Del/2017 made certain observations and remanded the issue back to the Assessing Officer for fresh adjudication in accordance with law. The relevant paragraphs dealing with the issue in the first round of proceedings before ITAT, as noted above, is reproduced herein for ready reference:

> *"Ground Nos. 9 to 9.6 relates to the issue on transfer pricing adjustment. The main grievance of the assessee in these grounds is that the Id. DRP/AO/TPO used the erroneous comparable uncontrolled price (CUP) data obtained by issuing the notices u/s 133(6) of the Act but without providing any opportunity to assessee, while determining the arm's length price of the international transaction.*
>
> *30. The Id. Counsel for the assessee submitted that the Id. DRP*

*decided, the similar issue in the assessment years 2010-11 and 2011-12 in favour of the assessee and the department had not preferred any appeal against the directions of the Id. DRP. Therefore, by keeping in view the principles of consistency, this issue is required to be decided in favour of the assessee and no addition could have been made on account of receipt of 'Counter Guarantee Commission. The reliance was placed on the judgment of the Hon'ble Supreme Court in the case of Bharat Sanchar Nigam ltd. and Another Vs Union of India and Others reported at (2006) 2 SCC 1.*

*31. In her rival submissions, the ld. CIT-DR supported the order of the AP/TPO.*

*32. We have considered the submissions of both the parties and perused the material available on the record. In the present case, it appears that the AO/TPO collected comparable uncontrolled price (CUP) data by issuing the notices u/s 133(6) of the Act and used the said data for the purpose of determining the ALP of the international transactions entered into by the assessee with its AE. It is well settled that nobody should be condemned unheard. In the present case, it is alleged that the AO/TPO did not confront the assessee with the data obtained by issuing the notices u/s 133(6) of the Act while determining the arm's length price. We, therefore, deem it appropriate to set aside this issue back to the file of the AO/TPO to be decided afresh after confronting the data obtained by issuing the notices u/s. 133(6) of the Act to the assessee. The AO is also directed to keep in mind the directions of the Id. DRP given in subsequent years i.e. assessment years 2010-11 and 2011-12 on the same issue and decide it afresh in accordance with law."*

5. The matter was thus remitted back to the AO for deciding the issue afresh in accordance with law having regard to the observations made by the co-ordinate bench.

6. In the second round of proceedings, the DRP, however, upheld the order of TPO following its own order for Assessment Year 2015-16 and passed the directions under Section 144C(5) of the Act vide order dated 23.02.2022 confirming the action of the TPO without any relief. The AO, in turn, its final order in pursuance of directions of DRP passed order dated 29.04.2022 and reiterated the additions of Rs.13,66,36,734/- towards transfer pricing adjustment on account of counter guarantee commission received from AE, applying arm length principles.

7. Aggrieved, the assessee has yet again filed the appeal

before the Tribunal.

8. When the matter was called for hearing, the ld. counsel for the assessee broadly reiterated the submissions made before lower authorities.

8.1 The Ld. Counsel submitted that BTMU Japan (AE of the assessee) along with its overseas branches caters to many multinational corporations which operate across the globe and require the service of BTMU India (the assessee) to facilitate the operations in different countries. The customers of BTMU overseas branches may need a guarantee from a bank in India to participate in a tender, performance guarantee, etc. in India whereby BTMU Japan, by virtue of its nature of transaction that it enters into with the beneficiary, needs to arrange for a guarantee from a financial institution in favour of the beneficiary ensuring that its liabilities will be duly met, i.e., if the third party fails to settle a debt that it owes to the beneficiary, BTMU India will cover it. In such a case, the customer of BTMU overseas branches approach BTMU overseas branches (AEs) to arrange for a guarantee in India. BTMU overseas branches issue a counter guarantee in favour of BTMU branches in India for issuing a further guarantee in favour of a beneficiary in India. It has further been submitted that BTMU overseas branch evaluates the credit worthiness of the applicant and sets credit limits. For the guarantee provided by BTMU India to the beneficiary, BTMU Overseas branches (AEs) provides guarantee to BTMU India. This guarantee provided by BTMU Overseas branches to BTMU India is termed as “counter-guarantee”. On receipt of counter guarantee from BTMU

Overseas branch, BTMU India prepares and issues a guarantee letter in favour of the beneficiary. BTMU Overseas branch regulates the terms and conditions of the guarantee services as well. The procedure followed is as under:

**Step 1** - Initially, a SWIFT message is received by BTMU India from BTMU overseas branch for issuance of the guarantee in favour of the beneficiary. The SWIFT message clearly states that BTMU India needs to issue a guarantee against the counter guarantee provided by overseas branches.

**Step 2** - An application is prepared by BTMU India for internal approval to ensure that the instructions received in the SWIFT message are strictly adhered to before issuance of guarantee.

**Step 3** - The guarantee is issued on behalf of BTMU overseas branch by BTMU India basis the instructions received through the SWIFT message under Step 1.

**Step 4** - Once the guarantee is issued, a SWIFT / telex is then sent by BTMU India to the respective BTMU overseas branch confirming the issuance of guarantee as per the received instructions as well as requesting for crediting BTMU India's account with the amount of guarantee commission plus additional charges, if any, incurred by BTMU India.

For rendering services by way of issue of such counter guarantee to the customers of overseas branches, the Assessee earns counter guarantee commission. Thus, in essence, issuance

of guarantee by the Assessee is backed by counter guarantee and thus fully protected and such act is nearly risk free.

8.2 For the purpose of computation of ALP of the impugned transaction i.e. the counter-guarantee commission, the assessee considered Transactional Net Margin Method ('TNMM') as the most appropriate method (MAM) by using combined transaction approach, wherein, the impugned transaction along with other international transactions was aggregated and benchmarked using aggregated approach. The operating profit/total assets ('OP/TA') of the assessee was compared with the arithmetic mean of OP/TA of comparable uncontrolled companies. Since, the assessee's OP/TA of 4.17 percent was higher than the OP/TA of comparable uncontrolled companies of 1.08 percent (update single year margin of 0.93 percent for FY 2012-13), these international transactions were considered to be at arm's length from an Indian TP perspective. For benchmarking the aforesaid guarantee commission, the TPO rejected the economics analysis conducted and the TNMM approach resorted by the assessee and obtained information from different banks u/s 133(6) of the Act and proposed to apply CUP. The TPO also held that the assessee has provided services in the shape of bank guarantee to clients of its AEs and these transactions are within the ambit of 'international transaction' and proceeded to compute the arm's length price of the said transaction using CUP as the most appropriate method for determination of ALP.

8.3 In this factual backdrop, the ld. counsel contended that the Revenue Authorities have committed error in treating the impugned transaction as corporate/bank guarantee of

independent nature without appreciating the distinction in function performed, assets utilized and risk assumed (FAR Analysis) between impugned transaction and the corporate/bank guarantee transaction undertaken by independent third party banks. It was asserted that the revenue failed to notice the negligible risk parameters in the instant case where the risk of the assessee was protected and secured by back to back counter-guarantee given by the AE and the assessee was essentially a mere facilitator unlike other guarantees where the guarantor ordinarily agrees to take responsibilities for debt repayment in case of default.

8.4 The ld. counsel next submitted that the identical issue has cropped up in Assessment Year 2009-10 as well where the Co-ordinate Bench of Tribunal in ITA No.1162/Del/2014 order dated 24.05.2020 appreciated the facts in correct prospective and accepted the TNMM method adopted by the assessee for benchmarking the international transaction in relation to receipt of guarantee commissions having regard to the fact that the assessee has acted as a facilitator only without assuming underlying risks associated with such guarantees unlike other banks providing independent guarantee and shoulders the inherent risks of providing such guarantee.

8.5 The ld. Counsel also submitted that similar issue has been tested in other assessment years also and adjudicated in favour of the assessee. It was pointed that even DRP in other assessment years have accepted the position taken by the assessee and assessment was carried out without any adjustment.

8.6 The ld. Counsel thus urged for reversal of action of revenue authorities and restoration of position taken by the assessee.

9. The CIT(DR) on the other hand, strongly defended the position taken by the revenue authorities. The Ld. CIT(DR) adverted to the decision of the co-ordinate bench dated 11.06.2018 in first round of proceedings and submitted that the ITAT set aside the issue to the file of AO in the wake of the fact that the comparables collected under S. 133(6) namely data obtained from third party banks were not confronted to assessee. It was submitted that such data are of use only when CUP method is applied and is redundant it TNMM method is endorsed. It was thus asserted the directions of the ITAT implies that CUP method adopted by AO has been endorsed by the ITAT. It was next submitted that the decisions and actions of other years relied upon by the Assessee is of no consequence in such a scenario where in those years, the proceedings were completed on the basis of TNMM method in contrast to the CUP method as vetoed by co-ordinate bench in AY 2013-14 in question. The Ld. CIT(DR) thus backed the action of the AO to be in terms of directions of ITAT in first round of proceedings and submitted that no interference therewith is called for.

10. In rejoinder, the ld. counsel submitted that ITAT in its order dated 11.06.2018 has not decided the issue of application of CUP method at all and on the contrary, the Tribunal has directed the TPO to provide CUP data to assessee as collected by him under Section 133(6) of the Act to enable the Assessee

to place its response and defend its stance on application of MAM. It was thus submitted that ITAT, in first round, has not adjudicated the application of CUP as MAM to benchmark the impugned transactions.

11. We have heard the rival submission on the transfer pricing adjustment in issue.

11.1 As noted in the preceding paragraphs, it is the case of the assessee that the issue is squarely covered by the order of the Co-ordinate Bench of Tribunal in AY 2009-10, AY 2015-16 & AY 2010-11. The assessee contends that the ITAT in these assessment years, in similar facts, has essentially held that a bank guarantee transaction is not comparable to the impugned transaction on account functional and risk differences. Similar view has been acknowledged by the DRP itself in AY 2010-11 & 2011-12 as well.

11.2 As noted above, the Co-ordinate Bench of Tribunal in ITA No.1162/Del/2014 order dated 21.05.2020 relevant to Assessment Year 2009-10 has examined the impugned issue of transfer pricing adjustments on account of guarantee commission as under:

> *"We have heard the rival contentions and perused the record. The issue raised vide ground of appeal no.12 is against the transfer pricing adjustment made on account of Receipt of guarantee commission. The assessee while benchmarking its international transactions in the transfer pricing report applied combined approach and has benchmarked under TNMM method. The case of the assessee is that the Transfer pricing analysis undertaken by applying TNMM method on combined approach should be accepted, as the margins of the assessee has been accepted and no adjustment has been made in the hands of the assessee. The only adjustment which was made in the hands of the assessee was on account of Receipt of guarantee commission. The case of the assessee before us is that as PE in India, it has limited role and was not bearing any risks. The assessee received part of guarantee*

*commission in its capacity as facilitator only. When the persons needed guarantee in India to participate in a tender, then service of the Bank was utilized for issuing guarantee in favour of the beneficiary. The evaluation of the beneficiary for the creditworthiness of the customers was performed by the overseas branches, whereas the assessee had limited role in issuing letter of guarantee, it received 1% guarantee commission. In these facts, there is no merit in comparing the rate received by the assessee with the rate charged by different banks who are operational in India and providing financial guarantee to its customers, with all risk involved therein. In such facts and circumstances, the Assessing Officer/TPO erred in applying the rate charged by Axis Bank, Canara Bank, Punjab National Bank and State Bank of India, etc. with arithmetic mean of 2.71% to benchmark the international transactions between the assessee and its overseas branches of receipt of bank guarantee commission. The details of the international transaction are tabulated in the order of the TPO itself and the same clearly reflect that no transaction is undertaken except with overseas branches. The assessee undoubtedly is also providing the services to its customers in India where it a risk bearing entity. We are of the view that where the assessee has undertaken bundle of international transactions with its AE and the same has been benchmarked by applying combined approach and the method of TNMM has been used and the margins shown by the assessee have been accepted; then there is no merit in segregating the international transaction of the receipt of the guarantee commission and benchmarking the same separately. The margins of the combined approach has been accepted at Arm's Length. Consequently, there is no merit in the transfer pricing adjustment made in the hands of the assessee. The same is thus directed to be deleted. The ground of appeal No. 12 is thus deleted."*

11.3 Likewise, the Co-ordinate Bench of Tribunal in ITA No.7895/Del/2019 order dated 16.10.2020 concerning Assessment Year 2015-16 in assessee's own case has followed the findings rendered in Assessment Year 2009-10 and yet again decided the issue in favour of the assessee.

*"Ground number [9] is related to the transfer pricing adjustment proposed by the learned transfer pricing officer confirmed by the learned Dispute Resolution Panel of? 103,485,509 to the returned income of the appellant in respect of international transaction pertaining to receipt of counter guarantee commission from associated enterprises. The fact shows that during the year the assessee has entered into various international transactions with its associated enterprises. One of the international transactions is receipt of commission for issuance of guarantee to 3rd parties against the counter counter guarantees issued by the overseas branches. The assessee has already accounted for a commission of Rs. 31,066,225/- for issuance of guarantee against the counter guarantee issued by the associated*

*enterprise. Issue is that the customers of the associated enterprise of the assessee may need a guarantee from a bank in India to participate in a tender, performance guarantee or in relation to its business in India. In such a case the customer of the associated enterprise approaches associated enterprise to arrange for a guarantee in India. Associated enterprises then issues counter guarantee in favour of the assessee for issuing a further guarantee in favour of a beneficiary in India. For the guarantee provided by the assessee to the beneficiaries, associated enterprise provides guarantee to assessee. This guarantee provided by associated enterprise to the assessee is termed as a counter guarantee. Further in this regard assessee performs very limited functions such as processing the request of guarantee from associated enterprise, issuance/delivery of the guarantee on stamp paper, seeking confirmation from the associated enterprise for cancellation/extension of the guarantee. Therefore the claim of the assessee is that assessee does not perform any function apart from issuing the guarantee in favour of the beneficiary. The claim of the assessee is also that that it does not undertake any separate evaluation of the beneficiary and all background and creditworthiness checks are performed by the associated enterprise only. It is further stated that in case a guarantee is invoked, the assessee is fully protected by the counter guarantee issued by the associated enterprise and associated cost and risk is passed on back to back by the assessee to its associated enterprises. Therefore, the entire risk of default by the borrower is completely assumed by the associated enterprise and the assessee does not bear any risk in the entire arrangement or transaction. For issuance of guarantee the associated enterprises pay the assessee commission up to 1% of the guaranteed amount. Assessee aggregated the all transaction with other banking transactions with associated enterprise as according to it it is interlinked and since all the international transactions form part of the assessee's banking operation, the assessee benchmarked the transactions applying the Transactional Net Margin Method as the Most Appropriate Method and as according to the assessee as these transaction cannot be looked into isolation for benchmarking purposes. The learned transfer pricing officer has benchmarked the above transaction applying CUP method as the most appropriate method and used naked bank guarantee rates of other banks for the purpose of benchmarking the transaction. Accordingly the TPO held that the commission at the rate of 2.23 percentage on the value of the bank guarantees/standby letter of credit issued should have been charged by the assessee from its . associated enterprise . Therefore he computed the guarantee commission receivable by the assessee of Rs. 134,380,249/-, assessee has already been paid Rs. 30,894,740/-, therefore, the net adjustment of Rs. 103,485,509 was made. On objection before the learned Dispute Resolution Panel the order of the learned Transfer Pricing Officer was upheld. Therefore assessee is aggrieved with that adjustment and is in appeal as per this ground.*

*36. The learned authorised representative submitted that the identical issue has been decided in favour of the assessee by the coordinate bench for assessment year 2009-10 in assessee's own case wherein it has been held that when the assessee has undertaken bundled of international transactions with its associated enterprise and the same has been benchmarked by applying combined approach and the*

*method adopted is transactional net margin method where the margin shown by the assessee have been accepted, then there is no merit in segregation of the international transaction of the receipt of guarantee commission and benchmarking the same separately adopting CUP method.*

*37. Before us the learned authorised representative has also raised an issue that the transfer pricing officer in the order dated 31st of October 2018 has not disputed that the all international transactions carried out by the assessee are to be aggregated for the purpose of benchmarking PF* under the transactional net margin method. In fact the learned transfer pricing officer has accepted the aggregation of the transaction for the purpose of benchmarking of international PPE transactions; however, without giving any reason as to why the aggregation of the transaction is incorrect, he used the CUP method for benchmarking the impugned international transaction. Therefore the claim of the assessee is that once the aggregation of the transaction is accepted for the purpose of applying transactional net margin method, then, it is not open to the learned transfer pricing officer to delink one transaction and apply a different method. For this proposition he relied upon the decision of the honourable Delhi High Court in case of 389 ITR 469 in case of Magneti Marelli powertrain India private limited versus the Deputy Commissioner of Income Tax. He further submitted that even otherwise the external CUP in the form of guarantees issued by the local banks with hundred percent cash margin shall be considered is the local banks do not bear any risk on account of being secured by hundred percent cash margin which is similar to the risk profile of the assessee in case of the impugned international transaction where the assessee is completely secured by back-to-back counter guarantee of the associated enterprise. He submitted that the learned TPO has used the guarantee rate of risk bearing guarantees for the purpose of benchmarking, however, I've guarantee rates 400% cash margin guarantees are considered than the arm's-length range comes to 0.50% to 0.60% with a median of 0.5433% which is lower than the average guarantee rate of 0.70% on by the assessee from its associated enterprise. Therefore, the transfer pricing adjustment is not warranted. He further submitted that even otherwise guarantee rates of the risk bearing guarantees issued by the assessee for its customers in India without any counter guarantee from associated enterprise shall be considered. He submitted that even in that case the median of 0.75% and the average guarantee fee rate of 0.70% received by the assessee from its associated enterprise for issuing completely risk-free guarantees is at arm's-length. In view of this he submitted that, the issue is squarely covered in favour of the assessee that the international transaction of guarantee cannot be separately benchmark and further even if it is separately to be benchmarked it is at arm's length.*

*The learned departmental representative vehemently supported the order of the learned transfer pricing officer and direction of the learned dispute resolution panel.*

*We have carefully considered the rival contention and perused the orders of the lower authority and the direction of the learned dispute resolution panel. As in the case of the assessee In ITA No. 1162/Del/2014 for Assessment Year: 2009-10 dated 21/5/2020 has*

*considered the identical issue as Under:-*

*"53. We have heard the rival contentions and perused the record. The issue raised vide ground of appeal no. 12 is against the transfer pricing adjustment made on account of Receipt of guarantee commission. The assessee while benchmarking its international transactions in the transfer pricing report applied combined approach and has benchmarked under TNMM method. The case of the assessee is that the Transfer pricing analysis undertaken by applying TNMM method on combined approach should be accepted, as the margins of the assessee has been accepted and no adjustment has been made in the hands of the assessee. The only adjustment which was made in the hands of the assessee was on account of Receipt of guarantee commission. The case of the assessee before us is that as PE in India, it has limited role and was not bearing any risks. The assessee received part of guarantee commission in its capacity as facilitator only. When the persons needed guarantee in India to participate in a tender, then service of the Bank was utilized for issuing guarantee in favour of the beneficiary. The evaluation of the beneficiary for the creditworthiness of the customers was performed by the overseas branches, whereas the assessee had limited role in issuing letter of guarantee, it received 1% guarantee commission. In these facts, there is no merit in comparing the rate received by the assessee with the rate charged by different banks who are operational in India and providing financial guarantee to its customers, with all risk involved therein. In such facts and circumstances, the Assessing Officer/TPO erred in applying the rate charged by Axis Bank, Canara Bank, Punjab National Bank and State Bank of India, etc. with arithmetic mean of 2.71% to benchmark the international transactions between the assessee and its overseas branches of receipt of bank guarantee commission. The details of the international transaction are tabulated in the order of the TPO itself and the same clearly reflect that no transaction is undertaken except with overseas branches. The assessee undoubtedly is also providing the services to its customers in India where it a risk bearing entity. We are of the view that where the assessee has undertaken bundle of international transactions with its AE and the same has been benchmarked by applying combined approach and the method of TNMM has been used and the margins shown by the assessee have been accepted; then there is no merit in segregating the international transaction of the receipt of the guarantee commission and benchmarking the same separately. The margins of the combined approach has been accepted at Arm's Length. Consequently, there is no merit in the transfer pricing adjustment made in the hands of the assessee. The same is thus directed to be deleted. The ground of appeal No. 12 is thus deleted."*

*40. As the facts and circumstances of the case are identical to the facts decided in case of the assessee for assessment year 2009 - 10, respectfully following the decision of the coordinate bench, we allow this ground of appeal of the assessee holding that as the banking business of the assessee and the transactions related to the issue of guarantee commission on by the assessee are interlinked and closely connected, they should have been benchmarked in a bundled manner. Accordingly ground number 9 of the appeal of the assessee is allowed."*

11.4 As observed earlier, the identical issue was also a subject matter of controversy in Assessment Year 2011-12. The Co-ordinate Bench in ITA No.238/Del/2016 order dated 27.05.2021 applied the same principles and adjudicated the issue in favour of assessee.

*"30. The Revenue by raising ground no.6 challenged the deletion of addition of Rs. 10,43,55,168/- by the Id. DRP proposed to be made by the Id. TPO qua the ALP of corporate guarantee. At the same time, the taxpayer by filing cross objection also challenged inter alia that the rejection of primary analysis made by the Id. DRP by applying CUP method for benchmarking the ALP of international transactions qua receipt of guarantee commission for guarantees counter guaranteed by the AE; that the taxpayer also challenged rejection of secondary analysis made by the taxpayer to benchmark the international transactions qua receipt of guarantee commission by applying TNMM using operating profit/total assets as the PLI; and that the taxpayer also challenged rejection of acceptance of erroneous CUP data obtained by the Id. TPO/AO by issuance of notice u/s 133 (6) of the Act which was used for computing the ALP of impugned transaction.*

*31. During the year under assessment, the taxpayer reportedly entered into international transactions as under:-*

| S.No. | Description of the transactions | Amount (Rs.) |
|---|---|---|
| 1 | Payment of software license fee | 3,427,875 |
| 2 | Payment for software development Services | 1,997,513 |
| 3 | Payment of annual maintenance charges for software maintenance | 6,634,714 |
| 4 | Payment of account maintenance charges and clearing charges | 518,007 |
| 5 | Payment of communication charges | 4,009,696 |
| 6 | Receipt of counter guarantee commission | 22,085,511 |
| 7 | Net interest received on Nostro/ Vostro Accounts | 5237307 |
| 8 | Receipt of service income for ECB syndication | 258,549,017 |
| 9 | Receipt of sundry commission | 517,292 |
| 10 | Interest paid on inter-office borrowing | 76,865,733 |
| 11 | Interest received from overnight placement of funds | 1,054,887 |
| 12 | Interest received on interest rate swap | 8,010,000 |
| 13 | Interest paid on interest rate swap | 9,875,721 |
| 14 | Interest received on currency swap | 141,388,812 |

| | | |
|---|---|---|
| *15* | *Interest paid on currency swap* | *255,573,472* |

*32. The taxpayer in order to benchmark its international transactions qua "counter guarantee commission" i.e. Comparable Uncontrolled Price (CUP) as Most Appropriate Method (MAM) by comparing representative guarantee fee charged by BTMU India from some of its local customers with counter guarantee commission rate received by BTMU from its overseas branches/AE. However, Id. TPO while rejecting the TP study made by the taxpayer proceeded to adopt average bank guarantee rate as ALP of the transaction and proposed an addition of Rs. 10,43,55,168/-.*

*33. However, Id. DRP by accepted the FAR India made by the following its earlier year order for AY analysis of BTMU India and AE of taxpayer and proceeded to delete the proposed TP addition made by the Id. TPO by returning following findings*

*"33.0 Finding:*

*DRP has duly considered submissions of the assessee. It has been noted that TPO has treated counter guarantee commission at the same footing as guarantee commission. However, from the above chart of FAR analysis, it is clear that in transaction of counter guarantee, BTMU India has very few functions to perform and few risks to' assume as compared to its foreign AEs. Moreover, counter guarantee commission of 0.10 to 1.0% as charged by BTMU India is in line with what has been held by various tribunal's decisions on issue of corporate guarantee. The facts of case under consideration are identical to those in preceding year wherein then DRP has decided the issue in favour of the assessee. Hence, the panel directs the TPOI AO to delete the addition. The objection is allowed. "*

*34. Ld. AR for the taxpayer, at the very outset, contended that identical issue has already been decided by the coordinate Bench of the Tribunal in taxpayer's own case for AYs 2009-10 & 2015-16 in ITA Nos.ll62/Del/2014 & 7895/Del/2019 respectively. However, at the same time, ld. AR for the taxpayer by filing cross objection challenged the order passed by the ld. DRP for not accepting its primary and secondary analysis by using CUP and TNMM as the MAM respectively and also challenged the order of the ld. DRP to the extent of not rejecting the erroneous CUP data obtained by the TPO by invoking the provisions contained u/s 133 (6) of the Act.*

*35. However, on the other hand, ld. DR for the Revenue challenged the impugned order passed by the ld. DRP by contending inter alia that every year is separate and independent year and as such, earlier decisions by the ld. DRP/ Tribunal are not binding on the Revenue Department; that since the taxpayer performs all the significant functions viz. creditworthiness violation, negotiation of terms, etc. before issuance of the guarantee to the customer, it is wrong to consider that the taxpayer performs limited function; that the taxpayer bears significant risk as the volume of transaction is huge and taxpayer still bears the risk of default even if there is a counter guarantee by the AE. Ld. DR has also filed written arguments on this issue which has been made part of the judicial record.*

*36. No doubt, the first contention raised by the Id. DR for the Revenue that every year is to be treated as a separate and independent year for the purpose of assessment but, at the same time, we are of the considered view that when there is no change in the business model of the taxpayer in the year under assessment vis-a-vis preceding years as well as succeeding years "the rule of consistency" gets attracted in view of the law laid down by Hon'ble Supreme Court in case of Radhasoami Satsang vs. CIT in Civil Appeal Nos.10574-10583 of 1983 and Hon'ble Delhi High Court in Rayban Sun Optics India Ltd. vs. CIT in ITA 880/2016 & CM Appl.45967/2016. So, when Id. DR has failed to point out any dissimilarity in the functional profile and facts & circumstances of the case of the year under consideration vis- a-vis preceding and succeeding years, this contention is not sustainable.*

*37. So far as second contention raised by the Id. DR for the Revenue that the taxpayer performs significant functions and bears significant risk is concerned, this contention is not sustainable when we examine the FAR analysis of BTMU India and AE of BTMU India made by the taxpayer with regard to the transaction under consideration which is extracted for ready perusal as under:*

| *Nomenclature* | *MUFG India* | *AEs of MUFG India* | *Third Party Banks* |
|---|---|---|---|
| | *Counter Guarantee* | | *Bank Guarantee* |
| *Functions Performs* | | | |
| *Evaluation of background and credit worthiness of the borrower* | *No* | *Yes* | *Yes* |
| *Negotiation of the terms and conditions of the facility* | *No* | *Yes* | *Yes* |
| *Issuance of bank guarantee* | *Limited* | *Yes* | *Yes* |
| *Maintaining and building client relationship* | *No* | *Yes* | *Yes* |
| *Processing for payments in case of default* | *Limited* | *Yes* | *Yes* |
| *Collection of claims from the defaulter* | *No* | *Yes* | *Yes* |
| *Risk Analysis* | | | |
| *Default Risk* | *No* | *Yes* | *Yes* |
| *Credit and Collection Risk* | *No* | *Yes* | *Yes* |

*38. Aforesaid FAR analysis was made and brought before the Id. TPO by applying the CUP method and as a secondary analysis TNMM.*

*39. Bare perusal of the aforesaid FAR analysis made by the taxpayer goes to prove that the taxpayer only performs limited functions, such as, processing the request of issuance of guarantee from the AEs, issuance/delivery of the guarantee on stamp paper, seeking confirmation from the AEs for cancellation or extension of the guarantee and at the same time, AE of taxpayer performs significant functions, namely, evaluation of background and credit worthiness of the borrower, negotiation of the terms and conditions of the facility, issuance of bank guarantee, maintaining and building client relationship, processing for payments in case of default,*

*collection of claims from the defaulter. So, when we compare both these functions performed by the taxpayer and its AE, we have no hesitation to record that the taxpayer performs secretarial functions assigned to it by its AE and all the significant functions are performed by its AE.*

*40. Similarly, so far as risk attributed to the taxpayer by the Id.*

*DR is concerned, we are of the considered view that the taxpayer bears no risk because the taxpayer issued guarantee as per instruction of its AE in favour of the beneficiary only on the basis of "counter guarantee" provided by the AE to the taxpayer. In other words, counter guarantee issued by AE completely protects the taxpayer by way of reimbursement by the AE in the form of counter guarantee, in case guarantee issued by the taxpayer is invoked.*

*41. By applying the aforesaid yardsticks, Id. DRP in the Assessment Year 2010-11 in taxpayer's own case decided the issue in favour of the taxpayer, which has been accepted by the Revenue Department.*

*42. Following its own order for AY 2010-11, Id. DRP decided this issue in favour of the taxpayer having identical issue. So, in these circumstances, bank guarantee rates used by the Id. TPO to benchmark the international transactions cannot be used as CUP as has been held by the coordinate Bench of the Tribunal in case of Gharda Chemicals Ltd. vs. DCIT in ITA No.2242/Mum/2006 order dated 30.11.2009 by returning following findings:-*

*"16. Albeit no such distinction between Internal and External CUP method is recognized in the Act or Rules but since the arguments of the rival parties and findings of the authorities below have revolved around these two, we will try to ascertain the difference between them. Basically the purpose of computing ALP on the basis of CUP method is to compare the adjusted price charged from or paid to the assessee for the international transactions with its AE vis-a-vis that charged from or paid to the unrelated parties under similar circumstances. In case of difference, the price settled in the uncontrolled transactions, as adjusted as per rule, is taken as ALP with the AE. The Internal CUP method envisages comparing the uncontrolled transactions of the assessee itself with other unrelated parties so as to determine the ALP with the AE. However the External CUP method disregards the price charged or paid by the assessee to or from its unrelated parties and contemplates the comparison of the price so charged from or paid to its AE with some external independent reliable price data under similar circumstances of transaction with AE. Ordinarily the Internal CUP method should be preferred over the External CUP method as it neutralizes several distinguishing factors, such as the local factors and the economies available or unavailable to the assessee in particular, having bearing over the comparison of price charged from unrelated parties and AE. The essence of determining ALP under CUP method is to ensure that the price charged by the Indian Enterprise from its AE should be consistent with that charged from unrelated parties under similar circumstances. The importance of the "similar circumstances" cannot be lost sight of in this context because a round cannot be compared with a square and a rectangle with a triangle. In other words the uncontrolled transactions which are contemplated for comparison should be alike, if not identical. Similarity between the two sets of transactions can be judged by the quality, grade and quantity of the material. In addition, the factors like the location of the parties, availability of raw material; demand and supply equation also play pivotal role in finding out as to whether the two are really comparable or not. Thus in the Internal CUP method the local factors of AE in the other country and all the relevant factors which could have bearing on the price so charged from AE must be taken into consideration. We are dealing with a case in which the assessee has its AE in USA and rate charged is 14.66 US$ per Kg of Dicamba. There is*

*no other export by the assessee to USA. The uncontrolled transactions of export made by the assessee are to other countries such as UK, Netherlands, Newzealand, Australia, France etc. in respect of which average rate of 20.67 US $ per Kg. of Dicamba has been determined by the TPO for computing the ALP. All other transactions of export by the assessee are to non-USA countries.*

*The price on which a particular product is available in one country may largely vary from the price prevailing in other countries due to host of factors. The country which is producer of a particular commodity or its raw material may have lower sale price in comparison with the country which is short of such natural resources. Similarly the price may vary from one country to another depending upon climatic conditions and the demand and supply factors. Thus the price charged by an Indian party from UK or Australia may be at much variance with that charged from USA. In such a scenario no valid comparison can be made between the price charged by the assessee from other countries with that from USA, more particularly when we view the quantity exported to USA on wholesale basis with that to other countries in small lots on retail basis. We, therefore, hold that the Internal CUP method is not suitable in the present circumstances. "*

*43. Coordinate Bench of the Tribunal in taxpayer's own case for AY 2009-10 (supra) has also held that the transaction under consideration cannot be compared with bank guarantee rates charged by the third party bank from their customers because such banks performed all the functions and bear all the risks performed/ borne by AE of the taxpayer whereas, in the instant case, the taxpayer in the subject transaction has merely facilitated its AE and bears no risk.*

*44. In view of the matter, we are of the considered view that Id.*

*DRP has rightly deleted the addition by using FAR analysis of the functions performed and risk assumed by the taxpayer qua the transaction under consideration.*

*45. No doubt, Id. DRP has extended relief to the taxpayer by deleting the impugned addition but the taxpayer by filing cross objection challenged the DRP's order for not accepting the primary analysis undertaken by the taxpayer using CUP method and not accepting secondary analysis undertaken by the taxpayer to determine ALP of impugned transactions by aggregating all the international transactions by using TNMM with OP/total assets as PLI.*

*46. Perusal of the order passed by the Id. TPO at page 29 goes to prove that Id. TPO has rejected the internal CUP applied by the taxpayer to benchmark its international transactions qua guarantee commission on the ground that it has failed to establish high degree of comparability along with dimension of contractual terms, date of transaction, alternatives realistically available with the guarantor & the guarantee and market conditions to substantiate its case.*

*47. Challenging the aforesaid findings returned by the Id. TPO,*

*Id. AR for the taxpayer contended that if local guarantee issued by the taxpayer cannot be considered as a valid CUP as observed by the Id. TPO in the preceding para then bank guarantee rates used by the Id. TPO are also liable to be rejected on the same rationale and further contented that judgment rendered by the Hon'ble Delhi High Court in case of Cotton Naturals (I) Pvt. Ltd. in ITA 233/2014 relied upon by the Id. TPO and Id. DR is not applicable to the facts and circumstances of the case.*

*48. We have perused the judgement passed in case of Cotton Naturals (I) Pvt. Ltd. (supra) which does not cover the issue before the Bench rather the same is qua benchmarking of loan advanced by the taxpayer to its AE whereas*

*the issue in the instant case is benchmarking of international transactions qua receipt of guarantee commission for guarantees counter guaranteed by the AE.*

*49. At the very outset, Id. AR for the taxpayer contended that in case, local guarantees issued by the taxpayer cannot be considered as valid CUP on account of comparability factors, in that case bank guarantee rates used by the Id. TPO also required to be rejected for the same reasons and consequently, taxpayer come up with the secondary analysis already undertaken by the taxpayer to determine the ALP of the transaction under consideration wherein all the international transactions of the taxpayer were aggregated and the ALP was determined using TNMM as the MAM using OP/total assets as the PLI as the same has already been upheld by the Tribunal in taxpayer's own case in AYs 2009-10 & 2015-16 (supra).*

*50. However, on the other hand, Id. DR for the Revenue contended that this contention of the Id. AR for the taxpayer has already been examined by the TPO and has rightly been rejected and relied upon the order passed by the Id. TPO.*

*We have perused para 6 of the transfer pricing order wherein the Id. TPO has discussed the TP analysis made by the taxpayer to benchmark its international transactions including transaction of receipt of guarantee commissions by the taxpayer as a bundled transactions but the Id. TPO declined to accept the contention raised by the taxpayer that all the international transactions of taxpayer are to be benchmarked in aggregated form by applying TNMM as the MAM with Operating Profit/total assets as the Profit Level Indicator rather proceeded to use the CUP qua receipt of guarantee commission issued by comparing with the bank guarantee rates. Ld. TPO however has not found any fault with the Transactional Net Margin Method analysis made by the taxpayer. 52. As discussed in the preceding paras, TPO's finding using CUP method comparing the counter guarantee transaction with bank guarantee issued by the third party banks to their customers has been rejected by the Id. DRP. However, Id. TPO has without returning any finding rejected the secondary analysis undertaken by the taxpayer by applying the TNMM as the MAM by OP/total assets as the PLI.*

*53. Undisputedly, TNMM as the MAM with OP/total assets as PLI as the MAM has been held to be sustainable by the coordinate Bench of the Tribunal to benchmark the international transactions qua receipt of counter guarantee commission from AE in AYs 2009-10 and 2015-16. Undisputedly there is no change in the functional profile of the taxpayer qua year under assessment vis-a-vis AYs 2009-10 & 2015-16.*

*54. We have examined the order passed by the coordinate Bench of the Tribunal for AY 2015-16 (supra) wherein identical issue as to receipt of counter guarantee commission from AE has been decided in favour of the taxpayer by applying TNMM by benchmarking the bundled of international transactions with its AE by applying the combined approach by returning following findings :-*

*"39. We have carefully considered the rival contention and perused the orders of the lower authority and the direction of the learned dispute resolution panel. As in the case of the assessee In ITA No. 1162/Del/2014 for Assessment Year: 2009-10 dated 21/5/2020 has considered the identical issue as under:-*

*"53. We have heard the rival contentions and perused the record. The issue raised vide ground of appeal no.12 is against the transfer pricing adjustment made on account of Receipt of guarantee commission. The assessee while benchmarking its international transactions in the transfer pricing report applied combined approach and has benchmarked under TNMM method. The*

*case of the assessee is that the Transfer pricing analysis undertaken by applying TNMM method on combined approach should be accepted, as the margins of the assessee has been accepted and no adjustment has been made in the hands of the assessee. The only adjustment which was made in the hands of the assessee was on account of Receipt of guarantee commission. The case of the assessee before us is that as PE in India, it has limited role and was not bearing any risks. The assessee received part of guarantee commission in its capacity as facilitator only. When the persons needed guarantee in India to participate in a tender, then service of the Bank was utilized for issuing guarantee in favour of the beneficiary.*

*The evaluation of the beneficiary for the creditworthiness of the customers was performed by the overseas branches, whereas the assessee had limited role in issuing letter of guarantee, it received 1% guarantee commission. In these facts, there is no merit in comparing the rate received by the assessee with the rate charged by different banks who are operational in India and providing financial guarantee to its customers, with all risk involved therein.*

*In such facts and circumstances, the Assessing Officer/TPO erred in applying the rate charged by Axis Bank, Canara Bank, Punjab National Batik and State Bank of India, etc. with arithmetic mean of 2.71% to benchmark the international transactions between the assessee and its overseas branches of receipt of bank guarantee commission. The details of the international transaction are tabulated in the order of the TPO itself and the same clearly reflect that no transaction is undertaken except with overseas branches. The assessee undoubtedly is also providing the services to its customers in India where it a risk bearing entity. We are of the view that where the assessee has undertaken bundle of international transactions with its AE and the same has been benchmarked by applying combined approach and the method of TNMM has been used and the margins shown by the assessee have been accepted; then there is no merit in segregating the international transaction of the receipt of the guarantee commission and benchmarking the same separately. The margins of the combined approach has been accepted at Arm's Length. Consequently, there is no merit in the transfer pricing adjustment made in the hands of the assessee. The same is thus directed to be deleted. The ground of appeal No. 12 is thus deleted."*

*40. As the facts and circumstances of the case are identical to the facts decided in case of the assessee for assessment year 2009 - 10, respectfully following the decision of the coordinate bench, we allow this ground of appeal of the assessee holding that as the banking business of the assessee and the transactions related to the issue of guarantee commission on by the assessee are interlinked and closely connected, they should have been benchmarked in a bundled manner. Accordingly ground number 9 of the appeal of the assessee is allowed."*

*55. So, following the decision rendered by the coordinate Bench of the Tribunal in taxpayer's own case for AY 2015-16*

*(supra), we are of the considered view that since issue is identical international transactions qua rate of bank guarantee commission is to be benchmarked by applying the TNMM as the MAM on combined approach basis. The taxpayer in its TP analysis has duly followed the TP analysis undertaken by the taxpayer in Assessment Years 2009-10 & 2015-16, which was perused by the Id. TPO, but has not disputed the same.*

*56. Consequently, benchmarking of bundle of international transactions by the taxpayer with its AE by applying combined approach and TNMM has been used and margin shown by the taxpayer has otherwise been accepted, in these circumstances, the international transactions qua receipt of counter guarantee commission by the AE cannot be segregated from other international transactions undertaken by the taxpayer as has been held by the*

*Id. TPO/DRP, the margin of combined approach has been accepted at arm's length, hence addition made by the TPO is not sustainable and as such is ordered to be deleted.*

*57. Consequently, ground no.6 of the Revenue is determined against the Revenue and the cross objections filed by the taxpayer are partly allowed."*

12. Apart from the decision rendered by ITAT in three different assessment years in assesses' own case, as noted above, it would be significant to note that the DRP itself in Assessment Years 2010-11 & 2011-12 has acknowledged the stand of the assessee on FAR analysis and the benchmarking, i.e., TNMM method adopted by the assessee in affirmative.

13. In the identically placed factual matrix, we see no reason to depart therefrom. We find rationale in the plea of the assessee that the counter guarantee with negligible risks can not *per se* be compared with guarantee offered by independent parties/ banks shouldering very high risk parameters as also observed by the co-ordinate bench in other assessment years. The Transfer Pricing Adjustment made in the impugned assessment order towards counter guarantee commission is thus grossly at odds with the factual position enunciated by the co-ordinate benches and hence such adjustment is totally uncalled for.

14. While holding so, we also advert to the plea raised on behalf of the revenue. The argument on behalf of the Revenue that the Assessment Year 2013-14 in question rests on a different footings vis-à-vis Assessment Year 2009-10 and other assessment years is apparently devoid of any rationale. The Co-ordinate Bench of Tribunal in Assessment Year 2009-10 has remanded the matter back simplicitor for fresh adjudication in

accordance with law after taking note of the plea that the data obtained by issuing notices under Section 133(6) for applying Comparable Uncontrolled Price [CUP] method for benchmarking the international transaction was not justified without confronting the assessee. When seen in proper perspective, the observations made by the Co-ordinate Bench not be read to mean that CUP method or benchmarking adopted by the Revenue Authorities was endorsed in any manner. There is no discussion in the order to such effect. The Tribunal has merely set aside the action of the Assessing Officer and remanded the matter back for confronting the data obtained behind the back of the assessee to enable it to counter the same effectively. Manifestly, the action of ITAT was to prevent miscarriage of justice. Significantly, the Co-ordinate Bench in the first round of proceedings also simultaneously observed that the directions of the DRP given in the subsequent assessment year, i.e., Assessment Years 2010-11 and 2011-12 on the same issue may also be kept in mind and the issue should be decided in accordance with law. As noted earlier, the directions of the DRP in Assessment Years 2010-11 and 2011-12 acknowledges the position taken by the assessee. The directions given while restoring the matter to the AO are self evident and does not admit of any such assumption of agreeability of any sort with CUP method as canvassed on behalf of the revenue. The Assessee in any case, would not be in a position to defend its case for TNMM method as MAM unless data collected is provided for its examination and rebuttal. It is manifest that the observations made by the Co-ordinate Bench in the first round

had kept the issue entirely open to be decided *denovo*. We are thus not impressed by such counter argument on behalf of the Revenue.

15. In the result, the Ground No.1 of the assessee is allowed.

16. Ground No.2 concerns applicability of appropriate tax rate payable on interest earned from refund of excess payment of Income tax in India. It is the case of the assessee that the Assessing Officer while framing the assessment order has already observed that interest on income tax refund is chargeable @ 10% in consonance with Article 11 of the Indo-Japan DTAA but however, while determining the tax liability, has wrongly applied the tax rate of 40% together with surcharge and Education cess as applicable thereon in deviation to the assessment order admitting 10% tax rate. It was next pointed out that a rectification application against such action of the Assessing Officer dated 16th May, 2022 has been filed but however remains pending before AO and not disposed off as yet. In this backdrop, it was submitted that no fresh determination of issue on merits is required and it would suffice the purposes of this ground, where appropriate directions are given to the revenue to dispose of the rectification application filed and pending on the issue.

17. The ld. CIT-DR for the Revenue, on the other hand, contended that the benefit of Article 11 to apply concessional rate of tax at 10% cannot be given to the interest on income tax refund which, in the instant case, is attributable to activities carried out by PE in India and consequently the normal rate

applicable to such income has been rightly applied by the revenue authorities.

18. In the wake of assertions made on behalf of the assessee, we do not consider it expedient to determine the issue on merits. As fairly suggested on behalf of the assessee, we direct the Assessing Officer to determine the issue and dispose of the rectification application dated 16th March, 2022 in accordance with law after giving proper opportunity to the assessee. The Assessing Officer is directed to dispose of the rectification application at the earliest and preferably within three months of the date of service of this order.

19. Ground No.2 of the appeal of the assessee is thus allowed for statistical purposes.

20. As regards Grounds No.3, 4 and 5, it was fairly submitted on behalf of the assessee that these issues are errors of apparent nature to be adjudicated by the AO and Assessee needs a direction from the Tribunal for expeditious disposal at the end of the AO for which rectification application is pending before Assessing Officer. Having regard to the submissions made on behalf of the assessee, the issue arising in Grounds No.3, 4 and 5 are also directed to be attended by the Assessing Officer as pending before him by way of rectification application. The Assessing Officer shall expeditiously dispose of the rectification application in accordance with law and preferably within three months from the date of service of this order.

21. Grounds No.3, 4 and 5 are allowed for statistical purposes.

22. In the result, the appeal of the assessee is allowed in above terms.

**Order pronounced in the open Court on 25/11/2022.**

Sd/- Sd/-

**[NARENDER KUMAR CHOUDHRY]**
**JUDICIAL MEMBER**

**[PRADIP KUMAR KEDIA]**
**ACCOUNTANT MEMBER**

DATED: **/11/2022**

*prabhat*