IN THE INCOME TAX APPELLATE TRIBUNAL,
'C' BENCH, KOLKATA

Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Girish Agrawal, Accountant Member

I.T.A. Nos. 320 & 321/KOL/2021
Assessment Years: 2015-16 & 2016-17

Deputy Commissioner of Income Tax,.....Appellant
Circle-5(1), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700069
-Vs.-

Karam Chand Thapar &
Bros. Coal Sales Limited,.....Respondent
25, Brabourne Road,
Kolkata-700001
[PAN;AABCK1281H]

Appearances by:
Shri G. Hukugha Sema, CIT, appeared on behalf of the Revenue
Shri N.S. Saini, A.R., appeared on behalf of the assessee

Date of concluding the hearing : January 02, 2023
Date of pronouncing the order : February 28, 2023

O R D E R

Per Girish Agrawal, Accountant Member:

Revenue is in appeals before the Tribunal against the orders of ld. Commissioner of Income Tax (Appeals), Kolkata-22, both dated 29.06.2021, against assessment order passed by ld. DCIT/TPO-II, Kolkata u/s 143(3) rws 144C of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 31.12.2018 for AY

2015-16 and by ACIT-5(1), Kolkata dated 28.11.2019 for AY 2016-17.

2. At the outset, we take note that there is a delay of three days in filing the present appeals. Impugned order by the ld. CIT(Appeals) is dated 29.06.2021 owing to which the limitation period for filing the appeals before the Tribunal falls during the period of pandemic of COVID-19. It is noted that the period of delay falls during the time of Pandemic of Covid-19, which has been excluded by the Hon'ble Supreme Court in the case of Suo moto Writ Petition (C) No. 3 of 2020 dated 10.01.2022 by which the period from 15.03.2020 to 28.02.2022 has been directed to be excluded for the purpose of limitation. Vide this order a further period of 90 days has been granted for providing the limitation from 01.03.2022. Accordingly, we condone the delay and proceed to adjudicate upon the matters.

3. Grounds of appeal taken by the Revenue are reproduced as under:-

Assessment Year: 2015-2016

(1) That on the facts and circumstances of the Case, the Ld. CIT(A) has erred in deleting the Transfer Pricing adjustment of INR 7,53,60,879 (later on rectified at 7,71,77,867) made on account of Corporate guarantee given by the assessee on behalf of its AE.

(2) That on the facts and circumstances of the Case, the Ld. CIT(A) has erred in not following a recognised approach for arriving at the CG Fee and further erred in arbitrarily adopting a rate of CG Fees based on judgments which are factually distinguishable.

(3) That on the facts and circumstances of the Case, the Ld. CIT(A) has erred in not appreciating that the Interest Saved approach adopted by the TPO is a legally valid method for

arriving at the CG Fee to be charged by the assessee from its AE.

(4) That on the facts and circumstances of the Case, the Ld. CIT(A) has erred in not appreciating that, based on facts of the case, standalone rating of AE ought to be taken for the purpose of arriving at the interest saved.

(5) That on the facts and the circumstances of the case, the Ld. CIT(A) has erred in restricting the disallowance under section 36(1)(va) of the Act to only those payments made beyond the due date of filing return under section 139(1) of the Act.

4. From the perusal of grounds, broadly two issues are involved, one relating to Transfer Pricing Adjustment on account of fees / commission for Corporate Guarantee given by the assessee on behalf of its Associated Enterprise (in short 'AE'), and the second relating to disallowance towards deposit of employee PF & ESI contribution claimed under section 36(1)(va) of the Act since payment was made beyond the due date of filing the return.

5. On the second issue relating to disallowance under section 36(1)(va) of the Act which has been raised only in appeal for AY 2015-16 , ld. Counsel for the assessee fairly submitted that the issue is squarely covered against the assessee in view of the recent judgment by the Hon'ble Supreme Court in the case of Chekmate Services Pvt. Ltd. v. CIT [2022] 143 taxmann.com 178 (SC), wherein it has been held that "deduction u/s 36(1)(va) in respect of delayed deposit of amount collected towards employees' contribution to PF cannot be claimed when deposited within the due date of filing of return even when read with Section 43B of the Income-tax Act,1961." Relevant extract of the said judgment is reproduced as under:

"The deduction made by employers to approved provident fund schemes, is the subject matter of Section 36(1) (iv). It is noteworthy, that this provision was part of the original IT Act; it has largely remained unaltered. On the other hand, Section 36(1)(va) was specifically inserted by the Finance Act, 1987, w.e.f. 01-04-1988. Through the same amendment, by Section 3(b), Section 2(24) – which defines various kinds of "income" – inserted clause (x). This is a significant amendment, because Parliament intended that amounts not earned by the assessee, but received by it, - whether in the form of deductions, or otherwise, as receipts, were to be treated as income. The inclusion of a class of receipt, i.e., amounts received (or deducted from the employees) were to be part of the employer/assessee's income. Since these amounts were not receipts that belonged to the assessee, but were held by it, as trustees, as it were, Section 36(1)(va) was inserted specifically to ensure that if these receipts were deposited in the EPF/ESI accounts of the employees concerned, they could be treated as deductions. Section 36(1)(va) was hedged with the condition that the amounts/receipts had to be deposited by the employer, with the EPF/ESI, on or before the due date. The last expression "due date" was dealt with in the explanation as the date by which such amounts had to be credited by the employer, in the concerned enactments such as EPF/ESI Acts. Importantly, such a condition (i.e., depositing the amount on or before the due date) has not been enacted in relation to the employer's contribution (i.e., Section 36(1)(iv)).

The significance of this is that Parliament treated contributions under Section 36(1)(va) from those under Section 36(1)(iv). The latter (hereinafter, "employers' contribution") is described as "sum paid by the assessee as an employer by way of contribution towards a recognized provident fund". However, the phraseology of Section 36(1)(va) differs from Section 36(1)(iv). It enacts that "any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date." The essential character of an employees' contribution, i.e., that it is part of the employees' income, held in trust by the employer is underlined by the condition that it has to be deposited on or before the due date.

The differentiation is also evident from the fact that each of these contributions is separately dealt with in different clauses of Section 36 (1). All these establish that Parliament, while introducing Section 36(1)(va) along with Section 2(24)(x), was aware of the distinction between the two types of contributions. There was a statutory classification, under the IT Act, between the two.

There is no doubt that in Alom Extrusions, this court did consider the impact of deletion of second proviso to Section 43B, which mandated that unless the amount of employers' contribution was deposited with the authorities, the deduction otherwise permissible in law, would not be available. This court was of the opinion that the omission was curative, and that as long as the employer deposited the dues, before filing the return of income tax, the deduction was available. A reading of the judgment in Alom Extrusions, would reveal that this court, did not consider Sections 2(24)(x) and 36(1)(va). Furthermore, the separate provisions in Section 36(1) for employers' contribution and employees' contribution, too went unnoticed.

When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 36(1)(iv)). At that point in time, there was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts not amounting to income. When Parliament introduced the amendments in 1988-89, inserting Section 36(1)(va) and simultaneously inserting the second proviso of Section 43B, its intention was not to treat the disparate nature of the amounts, similarly. As discussed previously, the memorandum introducing the Finance Bill clearly stated that the provisions – especially second proviso to Section 43B - was introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods. That Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Section 2(24)(x) too, deems amount received from the employees (whether the amount is received from the employee or by way of deduction authorized by the statute) as income - it is the character of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on the one hand it brought into the fold of "income" amounts that were receipts or deductions from employees income; at the time, payment within the prescribed time – by way of contribution of the employees' share to their credit with the relevant fund is to be treated as deduction (Section 36(1)(va)). The other important feature is that this distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to be deposited by the employer (Section 36(1)(va)) was maintained - and continues to be maintained. On the other hand, Section 43B covers all deductions that are permissible as expenditures, or out-goings forming part of the assessees' liability. These include liabilities such as tax liability, cess duties etc. or interest liability having

regard to the terms of the contract. Thus, timely payment of these alone entitle an assessee to the benefit of deduction from the total income. The essential objective of Section 43B is to ensure that if assessees are following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only on book entries, would not be given. To pass muster, actual payments were a necessary pre-condition for allowing the expenditure.

The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.

The non-obstante clause in section 43B would not in any manner dilute or override the employer's obligation under section 36(1)(va) to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due

dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction."

5.1. Accordingly, respectfully following the judgment of the Hon'ble Supreme Court (*supra*), this ground of appeal is dismissed.

6. Now taking up the issue relating to upward adjustment for fees / commission for Corporate Guarantee, there are two appeals by the Revenue, one for AY 2015-16 and the other for AY 2016-17. Grounds taken by the Revenue in both the years are same in respect of addition made towards Corporate Guarantee Fees except for variation in the amount. Appeal for both the years is disposed of by this consolidated order. We take up the appeal relating to AY 2015-16, whose findings will apply *mutatis mutandis* to the other year of AY 2016-17 also. We thus, take up facts from AY 2015-16 for adjudication on the issue.

7. At the outset, ld. Counsel submitted that the issue is settled and fairly covered in favour of the assessee which the ld. CIT(Appeals) has exhaustively dealt with in his order by considering the facts of the case as well as the decision of the Hon'ble High Court of Bombay in the case of *CIT v. Everest Kanto Cylinder Limited [2015] 58 taxmann.com 254 (Bom)* as well as by

the decision of Coordinate Bench of ITAT, Kolkata in the case of *Berger Paints India Limited in ITA Nos. 917 & 918/KOL/2017 dated 29.07.2022*.

8. Brief facts of the case are that the assessee is engaged in the business of Coal Sales. It filed its return of income on 30.11.2015 reporting total income of Rs.34,64,50,050/-. Assessment was completed *inter alia*, by making an upward adjustment and addition thereto under section 92CA of Rs.7,53,60,879/- in respect of fees for Corporate Guarantee given by the assessee on behalf of its AE.

9. Factual matrix in respect of the addition made towards Corporate Guarantee Fee which is under challenge by the Revenue before us are extracted as under:-

2.1) The brief facts of the case are that the assessee company stood guarantor to a Standby Letter of Credit (SBLC - in short) issued by DBS Bank and Axis Bank in favour of its wholly-owned subsidiary KCT Global Pte Ltd against likely purchase of imported coal. The TPO/AO treated the same as an international transaction. According to the TPO/AO as per the International Transfer Pricing Study Report, the method to be applied to such a transaction for determining the arm's length price of the transaction is a comparable uncontrolled price method. The assessee company submitted before the TPO/AO that it provided only 15% security deposit against the SBLC issued in favour of subsidiary company KCT Global Pte Ltd. Details of SBLC utilization, security deposit and guarantee commission charges are as follows:

Bank	SBLC Amount	Utilization Amount	Security Deposit	Issue Date	Calculation Date	Day Used	Comm. Amount(USD)	Effective Rate
DBS	10000000	10000000	1500000	01.04.14	12.01.15	287	39315.07	2.06%
Axis	14000000	14000000	2100000	01.04.14	30.01.14	305	158493.15	2.33%
Axis	4000000	4000000	600000	25.04.14	31.03.15	341	18684.93	2.90%
HSBC	11500000	11500000	1725000	10.05.14	31.03.15	326	51356.16	2.65%

2.2) It was submitted that as per provisions of Sec. 92(1) any income arising from an international transaction is to be computed having regard to the arms-length price. It was submitted that the allowance of any expense or interest arising from an international transaction shall also be determined having regard to the arms-length price. The impugned transaction neither has any direct nexus to any income nor is charged as an expense in the books of the assessee company, hence the provisions of the Income Tax Act concerning transfer pricing i.e. Sec. 92(1) and Sec. 92E are

not applicable.

2.3) The TPO after considering Sec. 126 & 127 of the Contract Act 1872 observed that guarantee is a guarantee and a guarantee of payment with the assessee acting as a 'Guarantor of the payment'. That the assessee in the eyes of the lender is considered as principal debtor and the unconditional guarantee requires the assessee to pay the guaranteed money even when no demand has been placed on the actual debtor. Therefore the TPO opined that the guarantee was a 'continuing guarantee'. The guarantee provided by the assessee gives a benefit to the AE is like service to the AE and constitutes international transaction therefore the stand of the assessee that provisions of corporate guarantee to AE is not like provision of service and could not be defined as an international transaction is rejected.

2.4) The TPO observed that generally it is argued that corporate guarantee is taken by the bank from the parent company as collateral/additional security and do not have any bearing on the costs charged by the bank for the credit facilities to the subsidiaries. The TPO observed that the arms-length price is the price that would have been agreed upon by two independent uncontrolled parties in the market place, and thus, it needs to be shown in actual practice by the bank/lender that it has charged similar rates on credit facilities to similar enterprises having similar creditworthiness/credit ratings without any guarantee behind it.

2.5) The TPO then observed that on the standalone financial of the AE its credit rating analysis has to be considered. As the borrower is an investment company its credit rating would not be more than CCC therefore a search was undertaking for comparable loan instruments or CC rating and the following instruments were identified.

Name of borrower	Secured	Margin	Credit rating
Bio Scrip Inc	Yes	546	CC
Laureate Education	Yes	750	CCC+
Mashantucket Pequot Tribal Nation	Yes	688	CCC-
Sprint Industrial Holdings LLC	Yes	710	CCC-

Azure Midstream Energy LLC	Yes	592	CCC+
Azure midstream energy LLC	Yes	580	CCC+
Sungard Availability Services Capital Inc	Yes	510	CCC
Average		**625 bps**	

2.6) The TPO thereafter observed that a difference by way of uplift due to guarantee will come to 625 basis points required to be shared between the guarantor and the borrower in an arms-length situation. Accordingly, he computed the adjustments as under:

Value of CG In USD	Days	CG fee	Conversion Rate	CG Amount in INR	Amount of Adjustment
1,00,00,000	287	3.125%	62.53	625300000	15364820
1,40,00,000	305	3.125%	62.53	875420000	22859854
40,00,000	341	3.125%	62.53	250120000	7302305
1,15,00,000	326	3.125%	62.53	719095000	200670631
35,00,000	316	3.125%	62.53	218855000	5921077
15,00,000	310	3.125%	62.53	93795000	2489422
1,20,00,000	173	3.125%	62.53	750360000	11114065
80,00,000	55	3.125%	62.53	500240000	2355582
20,00,000	54	3.125%	62.53	125060000	546067
1,20,00,000	60	3.125%	62.53	750360000	3854589
				Total	**9,18,78,413**

Less: Already offered by the assessee	1,65,17,534
Amount of adjustment	**7,53,60,879**

2.7) The Appellant submits that the assessee is engaged in the business of Coal handling and logistics. The assessee has a pan-India presence. The assessee had also expanded its operations in foreign countries, primarily Singapore. The group/associate companies' set-up in Singapore is also engaged in the business of mining acquisition & other operations. The assessee had set up a wholly-owned subsidiary KCT GLOBAL PTE LTD in Singapore is essentially the nodal vehicle of the Group through which the Karam Chand Thapar And Brothers Coal Sales Ltd Group have expanded its operations in Singapore. KTCL, therefore, arranged loans/credit facilities from banks in Singapore in foreign currency at much better & competitive interest rates than in India. The DBS Bank & Axis Bank provided the necessary **Standby Letter of Crediti.e.SBLC** to KCT GLOBAL PTE LTD against the likely purchase of imported coal. For obtaining the **Standby Letter of Crediti.e.SBLC from** DBS Bank and Axis Bank, the Assessee issued corporate guarantees in the favour of the AE. Given the foregoing, it shall thus be noted that there was no actual outflow of funds from the accounts of the Assessee. No transaction had taken place between the assessee and KCT GLOBAL PTE LTD which would have a bearing on the income, costs, profits & losses reported in the financial statements of both the AEs. The Assessee had not hypothecated any assets etc. with the Banks and therefore it could not also be said that any indirect cost/ liability was incurred by the assessee. In the foregoing background, therefore, one has to see the economic and business interests of the assessee behind issuing such corporate guarantee to KCT GLOBAL PTE LTD. Such kind of corporate comfort was given by the assessee to its wholly-owned subsidiary for making strategic investments to increase the volume of the business, sales and profit. It is thus submitted that the corporate guarantees were given on purely commercial considerations and therefore it was like quasi-capital for which no benchmarking exercise was required. Issuance of corporate guarantee did not entail any cost or expenditure in the hands of the Assessee. The corporate guarantee was extended to the wholly-owned (100%) subsidiary of the Assessee. Accordingly, it was a pure shareholder activity and like quasi-capital to further the business interests of the Group.

11. Aggrieved by the above upward adjustment, assessee went in appeal before the ld. CIT(Appeals). After elaborate discussion on the factual matrix as well as the applicable law and the judicial precedents, ld. CIT(Appeals) deleted the addition made in this respect. While giving relief to the assessee, ld. CIT(Appeals) dealt with the proposition of treating the Corporate Guarantee as an International Transaction within the meaning of section 92B of the Act. He also dealt with the proposition relating to Corporate Guarantee being purely owner-shareholder activity in respect of the adjustment so made. Ld. CIT(Appeals) also analyzed the manner and methodology adopted by the ld. TPO for the purpose of arriving at an upward adjustment towards fees for Corporate Guarantee after considering plethora of judgments including those stated above. Ld. CIT(Appeals) held that since the assessee has already charged Corporate Guarantee Fee @ 0.50% from its AE, no upward adjustment is called for and thus deleted the same. Detailed and analytical observations and findings given by the ld. CIT(Appeals) are reproduced as under:-

4.3 I have gone through the submissions of the appellant, perused the material available on record and gone through the order of the TPO/AO. The only solitary issue that needs to be resolved is whether corporate guarantee issued by entity on behalf of its AE comes within the definition of international transaction before insertion of Explanation to Sec. 92B of the Act, by the Finance Act, 2012. No doubt the Finance Act, 2012 has inserted Explanation to Sec. 92B with retrospective effect from 01 April 2002 to include the term guarantee within the definition of international transaction. But various Benches of the Tribunal have taken a view that insertion of explanation to Sec. 92B by the Finance Act, 2012 is considered to be prospective in nature therefore, held that corporate guarantee issued by an entity on behalf of its AE is not an international transaction and accordingly no need to compute ALP of said transactions. However, I find that the Hon'ble Bombay High Court in the case of CIT Vs Everest Kento Cylinder Ltd reported in [2015] 58 taxmann.com 254 (Bom.) has considered identical issues in the light of provision of Sec.92B and Explanation to come to the conclusion that guarantee issued by an entity on behalf of its AE, a subsidiary is international transaction. However, while bench marking the rate of commission, no comparison can be made between guarantee issued by the Commercial Bank as against corporate guarantee issued by holding company for benefit of its AE subsidiary company for computing ALP of guarantee commission. The relevant observations of the Court are extracted below:-

> *"The adjustment made by the TPO was based on instances to the commercial banks providing guarantees and did not contemplate the issue of 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 assesse-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 assesse would make good the amount and repay the loan. The considerations which apply for issuance of a corporate guarantee are distinct and separate from that of bank guarantee and, accordingly commission charged cannot be called in question, in the manner TPO has done. 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, appeal does not raise any substantial question of law and it is dismissed."

4.4 In another case, the ITAT, Mumbai Bench in the case of DCIT vs Rolta India Ltd. (101 taxmann.com 40) had taken a similar view in the light of the judgment of the Hon'ble Bombay High Court in IL & FS Technology Limited the case of CIT vs Everest Kanto Cylinder Ltd. and held that guarantee issued on behalf of AE subsidiary is international transaction however no comparison can be made between issued by commercial bank and corporate guarantee issued by entity on behalf of its AE subsidiary company while benchmarking the ALP transaction, accordingly estimated 0.5% commission on corporate guarantee.

4.5 I find that in the computation of the arm's length price of corporate guarantee provided on behalf of the AE the AO/TPO followed an approach to determine the benefits which possible would have accrued to AE, in the form of lower cost of borrowing, as part of guarantee provided on behalf of the AE.

4.6 To apply the interest saving approach, the AO/TPO has undertaken the following steps:

1. Assumed the credit rating for the AE at CCC+/CCC.
2. Proposed to compute the average interest rate for a loan by randomly selecting comparable data.
3. Arm's length guarantee fee is determined at 50% of interest saving.

4.7 The approach taken by the TPO is that "*the amount of benefit that accrues on*

account of the guarantee provided by the appellant would be equal to the interest cost savings which in turn is determined by comparing the interest cost of unguaranteed debt to that of guaranteed debt. The interest cost of unguaranteed debt is computed by finding out, using a suitable method, , the standalone credit rating of the Ans of the appellant and he rice often loan a company of equivalent credit rating would have fetched in the open market."

In this regard, I find that the AO/TPO has incorrectly assumed the credit rating of the Assessee (around CCC+ or CCC-) and hence arriving at the credit rating for AE at CCC+/CCC- without providing any basis for arriving at the same. The fallacy lies in assuming that in this context the AE can be ascribed an independent credit rating on which a judgment can be based. The fact is that the existence of the appellant as an established holding company provides a financial umbrella to the AE, thus disturbing its credit rating. The closer the connect lion of the parent with the wholly owned AE I the particular facts and circumstances, the greater the unreliability of fixing an independent credit rating to the AE. It cannot be ignored that a holding company would do its utmost in commercial and financial terms, to protect its investment represented by the wholly owned subsidiary. This is a fact acknowledged by the TPO himself in his order. In fact looking at the entire conversely, from the point of view of the appellant -a fully holding company - it becomes clear that the providing of the said guarantee is more in the nature of protecting its investments rather than a commercial venture designed to derive profit from the transaction.

4.8 In view of the above discussions on the fallacy of fixing the standalone credit rating of the AE, the entire exercise of selecting seven comparable based upon similar standalone credit ratings, undertaken by the AO/TPO to arrive at the median of 6.25%, becomes vitiated and can hardly be relied upon to arrive at an ALP.

4.9 The comparable data points considered by AO/TPO are not backed by a structured search process and do not consider the specific terms and conditions of the loan covered under the guarantee. When the TPO says that "***This difference (of 625 points arrived at by him) is required to be shared between the curator and borrower I an arm's length situation***". He is ignoring the particular facts of the case wherein the guarantor and borrower stand in a close knit situation and are not standalone entities, nor are they driven by profit making motive from within the structure of the transaction itself. The solution of appropriate comparables should have reflected the particular setting of the standalone credit guarantee in a situation where the two entities were in close relationship that exists between the appellant

and AE, with motions not being making profit.

4.10 In this connection, reference can be made to the decision of the Hon'ble Delhi High Court judgment in the case of **CIT vs Cotton Natural India Pvt. Limited [ITA No. 233/2014, TS-117-HC-2015(DEL)-TP].** Salient features of this ruling are extracted below:

> *"41. The Indian transfer pricing administration has followed a quite sophisticated methodology for pricing inter-company loans which revolves around:*

1. ***Examination of the loan agreement**;*
2. *A **comparison of terms and conditions** of loan agreements;*
3. *The determination of **credit ratings of lender** and **borrower**;*
4. *The identification of comparable third party loan agreements: and*
5. *Suitable adjustments to enhance comparability…"*

> *42. The first paragraph quoted above, rightly stipulates that inter-company loans would require examination of the **loan agreement**, **comparison of the terms and conditions of loan agreements, the determination of credit rating of the lender and the borrower, identification of comparable third party loan agreements and** suitable adjustments should be made."*

4.11 Based on the above high court ruling, given the shortcomings of the search conducted by AO/TPO, the same cannot be considered in determining the ALP.

4.12 In my considered opinion, the AE is a newly incorporated company that does not have sufficient financial strength to borrow a loan on its own. No lender would give a loan to AE without the support of the Parent through a guarantee. The reason and intention behind the providing of this guarantee, by the appellant, to its admittedly wholly owned subsidiary company - the AE - during the nascency of the latter's inception, must be taken into consideration before venturing into evaluation of ALP in such contexts The intention of the appellant here is plainly not to make this a commercial venture and to earn a profit out of the transaction, but to protect and support its own investments and commercial ventures by means of providing support to its own subsidiary. The approach adopted by AO/TPO to arrive at arm's length rate for guarantee fee is not sustainable. The assumption of a credit rating for AE at CCC+/CCC

and the selection of comparable data leaves a lot to be desired and does not take into consideration the particular commercial scenario of the instant case and transaction.

4.13 Further, I find that in a series of rulings, the corporate guarantee commission has been taken to be 0.5%. They are as follows:-

Sr No.	Name of the Ruling	Synopsis	Authority	Rate of Guarantee fee approved by the authority
1	Nimbus Communication Limited	ALP was determined @ 0.5% against TPO's determination of 1.5% [ITA No. 3644/Mum/2010]	Mumbai ITAT	0.50%
2	Godrej Household Products limited	Mumbai ITAT restricted TP adjustment on guarantee commission to 0.5%, following co-ordinate bench ruling in Nimbus Communications[TS-229-ITAT-2013(Mum)-TP] [ITA No. 7369/Mum/2010]	Mumbai ITAT	0.50%
3	Godrej Sara Lee Ltd	Mumbai ITAT referred to the assessee's case in AY 2006-07, wherein ITAT, following the Tribunal ruling in Nimbus Communications Ltd had directed the AO to re-compute TP adjustment by applying the rate of 0.5% for guarantee commission [ITA No. 7227/Mum/2011]	Mumbai ITAT	0.50%
4	Everest Kanto Cylinder Ltd.	Mumbai ITAT held that TPO was not correct in determining arm's length guarantee commission @3% bases on quotes on the bank's website and considered 0.5% as ALP for guarantee commission. [2015](58 taxmann.com 254)	Bombay High Court	0.50%

Sr No.	Name of the Ruling	Synopsis	Authority	Rate of Guarantee fe approved by the authori
5	Reliance Industries Limited (dated September 13, 2013) (Mumbai Tribunal)	Mumbai ITAT upheld the order of CIT(A) to charge guarantee commission at the rate of 0.38% being the ALP for the guarantee (ITA No. 885/Mum/2009 and ITA No.1725/Mum/2009)	Mumbai ITAT	0.38%
6	Manugraph India Ltd	Mumbai ITAT directed the AO/TPO to adopt the 0.5% as guarantee commission charges in respect of the guarantee provided by the assessee for obtaining the loan by the AE. (ITA No. 4761/Mum/2013)	Mumbai ITAT	0.50%
7	Aditya Birla Minacs Worldwide Ltd	ITAT directed The learned TPO to adopt 0.5% as guarantee commission charges in respect of the guarantee provided on behalf of its AEs (ITA No. 4761/Mum/2013)	Mumbai ITAT	0.50%
8	Nimbus Communications Ltd	ITAT directed AO to restrict the TP adjustment by re-computing the guarantee commission as 0.5% as ALP (ITA No 6816/Mum/2010, ITA No. 7105/Mum/2011	Mumbai ITAT	0.50%
9	Godrej Consumer Products Ltd.	ITAT directed the AO to re-compute the arm's length price of the corporate guarantee should at 0.5 per cent [2016] 69 taxmann.com 436 (Mumbai - Trib.)	Mumbai ITAT	0.50%

4.14 A perusal of the above table shows that, the average rate of Corporate Guarantee commission that has been accepted by several ITAT Rulings is 0.5%. It is not in dispute that the Appellant in the instant case has already charged a guarantee commission @0.50% from the AE. Further this charge of commission compares favourably with the fact the banks on Singapore usually charge commissions of the order of 0.15%. The above discussions clearly indicate that the upward adjustment made on account of Corporate Guarantee commission cannot be sustained and is therefore deleted. The grounds of appeal of the appellant are allowed.

11.1. Aggrieved, Revenue is in appeal before the Tribunal.

12. Before us, ld. Sr. D.R. vehemently argued and supported the "interest saved approach" applied by the ld. TPO, which according to him is a well recognized method. Ld. Sr. D.R. also referred to the yield approach mentioned in the latest guidance of fiscal transaction issued by OECD. According to ld. Sr. D.R., the approach adopted by ld. TPO to assign 50% of the interest saved as Corporate Guarantee Fee to the assessee, deserves to be upheld. In this respect, he also made a written submission, which is placed on record. He thus strongly supported the order of the ld. TPO/A.O. to uphold the upward adjustment made in respect of Corporate Guarantee Fee.

13. Per contra, ld. Counsel for the assessee reiterated the submissions and relied on the judicial precedents referred above. The same are not repeated to avoid duplicity.

14. We take note of the position that the issue in respect of Corporate Guarantee Fee is no longer *res integra*, which has been dealt in favour of the assessee by plethora of decisions referred above and dealt elaborately by the ld. CIT(Appeals) in his order. In most of the decisions referred above, the rate of Guarantee Fee has been taken to be in the range of 0.3% to 0.5%. In the present case, it is admittedly a fact on record that assessee *suo motu* has charged Guarantee Fee @ 0.50% from its AE. We also take note of the observations made by ld. CIT(A) in respect of basis of 'CCC' credit rating adopted by the ld. TPO for the purpose of benchmarking of fee towards Corporate Guarantee which is

devoid of any comparative factual data. Also, ld. CIT(A) has considered the equal split of benchmarking rate arrived by ld. TPO between the assessee and its AE which doesn't bear any rationality.

15. Further, this issue has been considered by the Coordinate Bench of ITAT, Kolkata in the case of Berger Paints India Limited (supra) and the relevant observations and findings, which deal with the identical issue in hand, are reproduced as under:-

21.1 In our considered view, issue relating to whether corporate guarantee is an international transaction or not is no longer *res integra*. Reliance placed by ld. CIT(A) on the decision of *Tega Industries Ltd* (*supra*) to hold that it is not an international transaction, has been held to be *per incuriam* by the Co-ordinate bench of ITAT Kolkata in the case *National Engineering Industries Ltd* (*supra*).

21.2 Further, we are inclined to follow the recent judgment of *Hon'ble High Court of Madras in the case of PCIT v. Redington (India) Ltd [2020] 122 taxmann.com 136 (Mad) dated 10.12.2020* which has held that corporate guarantees are covered by the definition of international transaction after the retrospective amendment made by the Finance Act, 2012. Relevant extract is reproduced as under:

> *"75. The concept of Bank Guarantees and Corporate Guarantees was explained in the decision of the Hyderabad Tribunal in the case of Prolifics Corpn. Ltd. (supra). In the said case, the Revenue contended that the transaction of providing Corporate Guarantee is covered by the definition of international transaction after retrospective amendment made by Finance Act, 2012. The assessee argued that the Corporate Guarantee is an additional guarantee, provided by the Parent company. It does not involve any*

cost of risk to the shareholders. Further, the retrospective amendment of section 92B does not enlarge the scope of the term "international transaction" to include the Corporate Guarantee in the nature provided by the assessee therein. The Tribunal held that in case of default, Guarantor has to fulfill the liability and therefore, there is always an inherent risk in providing guarantees and that may be a reason that Finance provider insist on non-charging any commission from Associated Enterprise as a commercial principle. Further, it has been observed that this position indicates that provision of guarantee always involves risk and there is a service provided to the Associate Enterprise in increasing its creditworthiness in obtaining loans in the market, be from Financial institutions or from others. There may not be immediate charge on P & L account, but inherent risk cannot be ruled out in providing guarantees. Ultimately, the Tribunal upheld the adjustments made on guarantee commissions both on the guarantees provided by the Bank directly and also on the guarantee provided to the erstwhile shareholders for assuring the payment of Associate Enterprise.

76. In the light of the above decisions, we hold that the Tribunal committed an error in deleting the additions made against Corporate and Bank Guarantee and restore the order passed by the DRP."

21.3 Having held that corporate guarantee is an international transaction which is governed by transfer pricing regulations, we deal with the alternate plea submitted by the ld. Counsel on imputing a charge of guarantee commission / fees in the range of 0.2% and 0.5% for which reliance was placed on catena of decisions referred in the above paragraphs. We note that in most of the cases where Co-ordinate benches of this Tribunal have upheld adjustment on account of corporate guarantee, the rate adopted has been between 0.2% and 0.5%. In this regard, we hold that guarantee fees / commission @ 0.35% will meet the arm's length criteria in the present case for which assessee has furnished the details relating to interest charged by the lenders of Cyprus and Nepal subsidiaries as reproduced in the order of ld.

CIT(A) in para 3.73 to 3.75 and para 4. For this finding, we draw our force from some of the decisions listed below in the case of –

i) Everest Kanto Cylinders Ltd. v. DCIT [2013] 34 taxmann.com 19 (Bom)

(ii) Britannia Industries Ltd. v. DCIT ITA No. 745/Kol/2017 dated 18.05.2018

(iii) Asian Paints Ltd. v. Addl. CIT [2014] 41 taxmann.com 71 (Mum) affirmed by the Hon'ble Bombay High Court in CIT v. Asian Paints (India) Ltd. [2016] 75 taxmann.com 152 (Bom) and

(iv) ACIT v. Network 18 Media & Investment Ltd. ITA No. 7501/Mum/2018 dated 22.09.2021

16. Considering the above facts and circumstances of the case, detailed findings given by the ld. CIT(Appeals) as extracted above, plethora of decisions dealt herein and the fact that the assessee itself has *suo motu* charged Guarantee Fees/Commission @ 0.50%, we do not find any reason to interfere with the findings given by the ld. CIT(Appeals) on this issue. Accordingly grounds taken by the Revenue in this respect are dismissed.

17. In the result, appeal of the Revenue for AY 2015-16 is partly allowed and appeal for AY 2016-17 is dismissed.

Order pronounced in the open Court on 28th February, 2023.

Sd/-	Sd/-
(Rajpal Yadav)	**(Girish Agrawal)**
Vice-President (KZ)	**Accountant Member**

Kolkata, the 28th day of February, 2023

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(3) Commissioner of Income Tax (Appeals),
Kolkata-22;
(3) Commissioner of Income Tax- ;
(4) The Departmental Representative
(5) Guard File
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By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.