IN THE INCOME TAX APPELLATE TRIBUNAL
"K" BENCH, MUMBAI

SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 33/MUM/2022
(Assessment Year: 2013-14)

Deputy Commissioner of Income Tax, 5(2)(1), Mumbai 5th Floor, Room No. 571, Aayakar Bhavan, M.K. Road, Mumbai - 400020	.....	**Appellant**
KEC International Limited, 463, RPG House, Dr. Annie Besant Road, Worli, Mumbai – 400030 [PAN: AACCK5599H]	Vs	**Respondent**

ITA No. 2453/MUM/2021
(Assessment Year: 2013-14)

KEC International Limited, 463, RPG House, Dr. Annie Besant Road, Worli, Mumbai - 400030 [PAN: AACCK5599H]	.....	**Appellant**
Deputy Commissioner of Income Tax, 5(2)(1), Mumbai Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs	**Respondent**

ITA No. 502/MUM/2022
(Assessment Year: 2017-18)

KEC International Limited, 463, RPG House, Dr. Annie Besant Road, Worli, Mumbai – 400030 [PAN: AACCK5599H]	.....	**Appellant**
Deputy Commissioner of Income Tax, 5(2)(1), Mumbai Room No. 571, 5th Floor, Aayakar Bhawan, M.K. Road, Mumbai - 400020	Vs	**Respondent**

Appearance

For the Appellant/Department	:	Shri Pravin Shekhar
For the Respondent/Assessee	:	Shri Vijay Mehta

Date

Conclusion of hearing	:	18.04.2023
Pronouncement of order	:	31.05.2023

O R D E R

Per Rahul Chaudhary, Judicial Member:

1. This is a batch of three appeals contains a cross appeals for the Assessment Year 2013-14 and appeal preferred by the Assessee for the Assessment Year 2017-18. All the appeals were heard together on account of common issues and are being disposed by way of a common order.

Assessment Year 2013-14

2. These are cross-appeals pertaining to Assessment Years 2013-14 arising from the order, dated 11/11/2021, passed by the Learned Commissioner of Income Tax (Appeals)-56, Mumbai [hereinafter referred to as 'the CIT(A)'] partly allowing the appeal preferred by the Assessee against the Assessment Order, dated 29/12/2016, passed under Section 143(3) read with Section 144C(3) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'].

3. The Revenue has raised the following grounds in ITA No. 33/Mum/2022:

> *"On TP issues:*
>
> *1.Interest on Advances given to AE*
>
> *i. On the facts and in the circumstances of the case and in law, the Ld CIT (A) erred in deleting an upward Transfer Pricing adjustment on account of interest on advance given to AE of*

Rs.6,06,09,173/- as this business advance being treated as loans given to AE.

2.Performance Guarantee

i. *On the facts and circumstances of the case, the Hon'ble CIT(A) was not justified in deciding that the guarantee commission for performance of contract provided by assessee to Chadian Company for Water & Electricity (CCWE) on behalf of its AE KEC Global was at arm's length without appreciating the fact that the AE get benefited from guarantee provided by the assessee, AE was a newly floated entity and the credit rating of the AE was very low.*

ii. *On the facts and circumstances of the case, the Hon'ble CIT(A) was not justified in deciding that the cost recovery was at arm's length itself as the assessee has recovered 0.93% from its AE for providing guarantee for performance of contract to CCWE, and ignored that benefit derived as a whole by the AE and also not appreciated the fact that this service will be available to any third party by the assessee.*

iii. *On the facts and of the case, the Hon'ble CIT(A) was not justified in deciding that the guarantee for advance payment provided by assessee to Chadian Company for Water & Electricity (CCWE) on of its AE KEC Global was at length without appreciating the fact the AE get benefited from the guarantee provided by the applicant, the AE was a newly floated entity, and the credit rating of the AE was very low.*

iv. *On the facts and circumstances of the case, the Hon'ble CIT(A) was not justified in deciding that the cost recovery for providing guarantee for advance payment to CCWE was at arm's length itself as the assessee has recovered 0.93% from its AE, and ignored the benefit derived as a whole by the AE and also not appreciated the fact that this service will not be available to any third party by the assessee.*

v. *On the facts and circumstances of the case, the Hon'ble CIT(A) was not justified in deciding that the performance guarantee provided to third party Le. Bahwan Engineering Company LLC on behalf of its AE ie. KEC Global FZ LLC was not an international transaction without appreciating the fact that the transaction was of nature of tripartite agreement and the AE get benefited from the performance guarantee provided by the assessee, which was a facility provided by the assessee to its AE*

vi. On the facts and circumstances of the case, the Hon'ble CIT(A) was not justified in deciding that the performance guarantee provided to third party ie. Bahwan Engineering Company LLC on behalf of its AE ie. KEC Global FZ LLC was not an international transaction without appreciating the fact that the TPO has determined the benefits of the AE as ALP.

vii. On the facts and circumstances of the case, the Hon'ble CIT(A) was not justified in deciding that the performance guarantee provided to third party ie. Bahwan Engineering Company LLC on behalf of its AE Le. KEC Global FZ LLC was not an international transaction appreciating the fact that the term "guarantee" clearly mentioned in Explanation of section 92B(1)(c) of IT Act 1961 as an International Transaction.

viii. On the facts and circumstances of the case, the Hon'ble CIT(A) was not justified in deciding that the guarantee commission for performance of contract provided by assessee to that guarantee commission for performance of contract provided by assessee to SNC LAVALIAN, Canada on behalf of its AE SAE Towers Holding Towers USA was arm Length without appreciating the fact that the AE get benefited from the guarantee provided by the assessee, AE was a newly floated entity and the credit rating of the AE was very low.

ix. On the facts and circumstances of the case, the Hon'ble CIT(A) was not justified in deciding that the cost recovery was at arm's length itself as the assessee has revered 0.70% from its AE for providing guarantee for performance of contract to SNC LAVALIAN, Canada and ignored the benefit derived as a whole by the AE and also not appreciated the fact that this service will not be available to any third party by the assessee.

3.Corporate guarantee:

i. On the facts and circumstances of the case, the Hon'ble CIT(A) was not justified in deciding that the corporate guarantee providing to ICICI Bank on behalf of KEC USA LLC & Transmission LLC USA was not an international transaction without appreciating the fact that the transaction was of nature of guarantee given and the AE get benefited from the corporate guarantee provided by the assessee, was a facility provided to its AE.

ii. On the facts and circumstances of the case, the Hon'ble CIT(A) was not justified in deciding that the corporate guarantee

provided to ICICI Bank on behalf of KEC USA LLC & Transmission LLC USA was not an international transaction without appreciating the fact that the TPO has determined the benefits of the AE as ALP.

iii. *On the facts and circumstances of the case, the Hon'ble CIT(A) was not justified in deciding that the Corporate guarantee provided to ICICI Bank on behalf of its AE Le. KEC USA LLC & Transmission LLC USA was not an international transaction without appreciating the fact that the term "guarantee" clearly mentioned in Explanation of section 92B(1)(c) of the IT Act 1961 as an International Transaction.*

4. Non-TP Issues

i. *The Ld. CIT(A) erred in deleting the addition in respect of Mark-to- market losses on foreign contracts outstanding at the end of the year under normal provisions of Income tax Act as well as while computing book profits u/s. 115JB of the Act failing to appreciate the Boards Instruction No. 3/2010 dated 23.3.2010 which has clarified that in cases where no sale or settlement has actually taken place and loss on MTM basis has resulted in reduction of book profits, such a notional loss would be contingent in nature and cannot be allowed to be set off against taxable income?"*

ii. *The Ld. CIT(A) erred in deleting the addition in respect of Mark-to-market on foreign contracts outstanding at the end of the year by ignoring the Instruction No. 3/2010 dated 23.3.2010 when it is judicially acknowledged that CBDT Circulars constitute important clarifications of legislative intent?"*

iii. *The Ld. CIT(A) erred in allowing the addition ground raised by the assessee and thereby allowing deduction of education case and higher and secondary education case paid by the assessee as deductable while computing business income.*

iv. *The CITIA) erred in holding that education case and higher and secondary education case is not covered under provisions of section 40(a)(ii) of the Act ignoring the provisions of Finance Act of 2004 and 2011 as per which the education case is an additional surcharge levied on the income-tax.*

v. *The CIT(A) erred in holding that education case and higher and secondary education case ignoring the Supreme Court ruling in K. Srinivasan where surcharge and additional surcharge were held to be a part of the income-tax. The appellant prays that*

the order of the Ld. CIT (A) be set aside and the order of the AO be restored. The appellant craves leave to amend or alter any ground or add any other grounds which may be necessary."

4. The Assessee has raised the following grounds of appeal in ITA No. 2453/Mum/2021:

"Ground No. 1

i CIT(A) erred in confirming adjustment on account of computation of arm's length price of the corporate guarantee commission@0.20% (Rs.115.23 lakh) which ought to be earned by the appellant for guarantee given on loans taken by Associated Enterprises (AE).

ii. The learned CIT(A) erred in not appreciating corporate Guarantee by the appellant for its AE is not an "International Transaction "as per Provision of Income Tax Act, 1961.

iii. The learned CIT (A) erred in not appreciating that transaction of Corporate Guarantee for loans taken by its associated enterprise has no bearing on the profit, income, loss or assets of the Appellant therefore same is not international under section 92B of the Act. It does not come within ambit of section 92B of the Act as no income arises from the said transaction.

Ground No.2:

On the facts and circumstance of the case the learned CIT(A) erred in confirming disallowance /addition of Rs. 5.63 Lacs made by AO under section 14A of the Income Tax Act r.w.r 8D of the Income Tax Rules in computing Book Profits section 115JB of the Act

Ground No.3:

On the facts and circumstances of the case the learned CIT(A) erred in not allowing deduction in respect of tax paid at foreign location."

5. The relevant facts in brief are that the Assessee is a leading Engineering, Procurement, and Construction (EPC) company. The Appellant is engaged in laying of power transmission lines, providing

telecommunication infrastructure and tower testing services. The Appellant had project offices in India as well as outside India to execute the erection/installation portion of Transmission Line Projects.

6. The Assessee filed return of income for the Assessment Year 2013-14 on 30/11/2013 declaring total income of INR 24,88,63,040/-, which was revised to total income of INR 23,09,74,130/- vide revised return filed on 31/03/2015. The case of the Assessee was selected for regular scrutiny. During the assessment proceedings, the Assessing Officer noted that the Assessee had entered into international transactions with Associated Enterprises (AEs) and therefore, made a reference to the Transfer Pricing Officer (TPO) for computation of Arm's Length Price (ALP) under Section 92CA(1) of the Act.

7. The TPO noted that the Assessee had reported, inter alia, following international transactions:

Sr. No.	Nature of transaction	Associates enterprise	Amount (In Rs.)	Method adopted
1	Corporate Guarantee	AI Sharif Group & KEC Saudi Arabia	36,99,461	Other
2	Corporate Guarantee	KEC Global UAE	3,87,48,120	Other
3	Bank Guarantees	KEC Global UAE	7,83,872	CUP
4	Corporate Guarantee	KEC Global UAE	1,18,24,842	Other
5	Bank Guarantee	SAE Towers USA	2,25,144	CUP

7.1. TPO noted that the Assessee had given guarantee on behalf of its AEs including foreign subsidiaries. However, in the Transfer Pricing Study

Report (for short 'TPSR'), the Assessee had taken a position that providing guarantees to its AEs does not constitute an international transaction. However, without prejudice to the aforesaid, the Assessee carried out benchmarking analysis. The TPO noted that as per TPSR the Assessee had provided following performance/corporate guarantees to third parties on behalf of its AEs.

7.2. Performance Guarantee

Name of Borrower AE	KEC Global FZ LLC	KEC Global FZ LLC RasUlkhaimah	KEC Global FZ LLC RasUlkhaimah	SAE Tower Holding LLC USA
Country	UAE	UAE	UAE	USA
Bank Name and Country	Bank of India	Bank of India	N.A.	Royal Bank of Scotland - India
Whether amount borrowed by AE from third party without corporate guarantee	No	No	No	Yes
Amount guaranteed	6,98,14,360	13,96,28,719	2,39,70,64,946	3,62,43,950
Loan amounted availed	N.A.	N.A.	N.A.	N.A.
When guaranteed given	2009	2009	2009	2010
No. of days during the year which guarantee was given	365	365	365	365
Rate recovered	0.93%	0.93%	0.60%	0.70%

Purpose	Towards performance of contract	Towards advance payment made by customer	Towards performance of contract	Towards performance of contract

Corporate Guarantees

Name of Borrower AE	KEC US LLC & KEC Transmission LLC	KEC Global FZ LLC RasUlkhaimah	AI Sharif Group & KEC Ltd. Company	AI Sharif Group & KEC Ltd. Company
Country	USA	UAE	Saudi Arabia	Saudi Arabia
Bank Name and Country	ICICI Bank- UK	National Bank of Oman	State Bank of India- Jeddah	Bank Muscat S.A.O.G.
Whether amount borrowed by AE from third party without corporate guarantee	No	No	No	No
Amount guaranteed	5,76,15,50,461	74,24,02,536	1,61,66,73,437	1,22,45,86,450
Loan amounted availed	5,76,15,50,461	74,24,02,536	1,61,66,73,437	1,22,45,86,450
When guaranteed given	2010	2010	2012	2012
No. of days during the year which guarantee was given	365	334	332	243
Rate recovered	-	0.60%	0.60%	0.60%
Purpose	Towards availing a loan from bank	Towards availing a loan from bank	Towards availing a loan from bank	Towards availing a loan from bank

7.3. After examining the details of various guarantees given by the Assessee to its AEs, the TPO called for information from various banks under Section 133(6) of the Act. After analysing the information furnished by State Bank of India, Central Bank of India, Bank of Baroda etc., the TPO asked for further details/information from the banks regarding factors which affect the charging of bank guarantee fee in the context of guarantees given by Indian companies to it AEs outside India which are newly formed with low credit ratings and are not in a position to raise loans from banks on their own. After taking into consideration the replies received from various banks, the TPO concluded that the rates for bank guarantee fee charged by the banks vary from 1.10% to 3% per annum depending upon various factors. Thereafter, the TPO proceeded to examine judicial precedents wherein rate of arm's guarantee fee was determined by the Tribunal. The TPO finally concluded that Comparable Uncontrolled Price (CUP) Method with adjustments could be adopted as the Most Appropriate Method for benchmarking the transaction of giving guarantee as the same offers least complicated approach with maximum available data. On the basis of the aforesaid, the TPO observed that guarantee fee varied from 1.5% to 3.5%, and thereafter, estimated the arm's length corporate guarantee fee at 2% and arm's length performance guarantee fee at 1% for the Appellant. Thus, the TPO computed the deficit in the fee recovered by the Appellant from it's AE to arrive at aggregate transfer pricing adjustment of INR 98,43,602/- and INR 15,30,31,639/- on account of the performance guarantees fee and corporate guarantees fee, respectively.

7.4. In addition the TPO also proposed transfer pricing adjustment of INR

6,06,09,173/- in respect of advances given by the Appellant to its AE (i.e. EJP KEC JV, South Africa). According to the TPO, the Assessee had advanced loans to its AE in South Africa without charging any interest. After carrying out search process on Bloomberg Database, the TPO arrive at the interest of 14.16% for the advance/loan of INR 8,28,80,000/- given by the Appellant to its AE for the Financial Year 2010–11; interest rate of 10.92% for the advance/loan of INR 19,03,83,00/- given by the Assessee to its AE for the Financial Year 2011–12; and interest rate of 10.81% for the running balances of the aforesaid advances/loan for the Financial Year 2012-13. Thus, the AO computed aggregate arm's length interest of INR 6,06,09,173/- in respect of the aforesaid advances/loans. Since the Appellant had not charged any interest on advances/loan, the TPO proposed transfer pricing adjustment of INR 6,06,09,173/-.

7.5. Thus, the TPO proposed aggregate transfer pricing adjustments of INR 22,34,84,414/- vide order, dated 31.10.2016, passed under Section 92CA(3) of the Act consisting of transfer pricing adjustment on account of (a) Performance Guarantee Fee of INR.98,43,602/-, (b) Corporate Guarantee Fee of INR.15,30,31,639/- and (c) Interest on advances/loan given to AE of INR.6,06,09,173/-.

8. The Assessing Officer incorporated the aforesaid transfer pricing adjustment of INR 22,34,84,414/- in the Assessment Order, dated 29/12/2016, passed under Section 143(3) read with Section 144C(3) of the Act.

9. Being aggrieved, the Assessee preferred appeal before CIT(A) against the Assessment Order dated 29/12/2016. Before the CIT(A) it was contended on behalf of the Assessee that the transaction of

guarantee was not an international transaction and that TPO had incorrectly arrived at arm's length rate of guarantee fee. The CIT(A) held that the transaction of guarantee was international transaction. However, the CIT(A) granted substantial relief to the Assessee by following the decisions of the Tribunal in the case of the Assessee for the Assessment Year 2011-12 [ITA No 6447/Mum/2016, dated 23/03/2021] and 2012-13 [ITA No 17 & 115/Mum/2018, dated 14/09/2020].

10. Being aggrieved, the Revenue has challenged the order, dated 11/11/2021, passed by the CIT(A) before the Tribunal on the grounds reproduced in paragraph 2 whereas the Assessee has, not being satisfied with the relief granted by the CIT(A), preferred cross appeal on the grounds reproduced in paragraph 3 above.

11. We note that the Assessee has in Ground No. 1 challenged the order of CIT(A) contending that the transaction of corporate guarantee do not constitute international transaction. We also note that the Revenue has, in its appeal for the Assessment Year 2013-14, raised certain grounds on incorrect understanding that CIT(A) has held that transaction of providing performance/corporate guarantee did not constitute an international transaction. On perusal of order passed by CIT(A), we find that the CIT(A) has held that transaction of granting corporate/performance guarantee constitutes an international transaction keeping in view Explanation (i)(c) to Section 92B of the Act (inserted with retrospective effect from 01.04.2002 by Finance Act 2012), whereby 'guarantee' has been specifically included in the definition of 'international transaction' as defined in Section 92B of the Act. The view taken by the CIT(A) is supported by decision of the Tribunal in Assessee's own case for the Assessment Year 2012-13

(ITA No. 17 & 115/Mum/2018, dated 14/09/2020). Accordingly, we hold that the transaction of giving guarantee is international transaction requiring determination of ALP and transfer pricing adjustment, if any, as per applicable provisions of the Act, and we proceed to adjudicate the grounds raised in the cross-appeals.

12. We have heard both the sides and perused the material on record including the order passed by the authorities below and the decision of the Tribunal in the case of the Assessee on which reliance was placed during the course of the hearing.

ITA No. 33/Mum/2022 : Appeal By Revenue

13. We would first take up Appeal of the Revenue for the Assessment Year 2013-14. The grounds raised in appeal by the Revenue have been reproduced in paragraph 3 above and are taken up hereinafter.

Ground No. 1 (i)

14. In Ground No. 1 the Revenue has challenged the order passed by the CIT(A) deleting the upward transfer pricing adjustment of INR.6,06,09,173/-.

15. On perusal of the record, we find that the Assessee had advanced INR 61,19,16,491/- to EJP KEC JV, South Africa without charging any interest. Assessee claimed that the advances were paid on account of business expediency to meet business requirements of the AE which was facing cash deficit due to enormous losses from the projects of the joint venture. TPO rejected the aforesaid explanation/submission and made the above transfer pricing adjustment by holding the aforesaid advance given by the Assessee were akin to loan and therefore, TPO calculated the arm's length interest that should have

been paid on the advance/loan to arrive at transfer pricing adjustment of INR.6,06,09,173/-. In appeal preferred by the Assessee, the CIT(A) deleted the addition by placing reliance of the decision of the Tribunal in the case of the Assessee for the Assessment Year 2012-13 [ITA No. 17&115/Mum/2018, dated 14/09/2020] wherein it was held by the Tribunal as under:

> *"4. Upon careful consideration, the undisputed position that emerges are that the advances have been given by the assessee to an entity in which it held 50% share. The assessee has entered into a Joint Venture (JV) agreement with an entity namely Edison Jehamo Power (PTY) Ltd. (EJP) on 25/11/2009 with respect to transmission line construction project. The assessee's proportionate share in the JV was 50%. From the financial statements of JV entity as placed on record, it is quite discernible that the accumulated losses of that entity, at year-end, stood at 98.26 Million Rands which are substantially funded out of joint venture partners' account amounting to 162.80 Million Rands. The assessee's contribution in the JV account is 41.12 Million Rands. The JV incurred losses of 108.13 Million Rands during the year, which has primarily triggered the assessee to make the stated advances to its JV. These advances have been classified under the head Joint Venture partners' account. All these facts would lead strength to the argument of Ld. AR that there was pre-existing liability to make such advances to JV and the business interest of the assessee would have been adversely impacted by not making such advances. The advances were more in the nature of capital contribution and by advancing the same, the assessee had protected its own business interest which is evident from the financial statements of JV. The advances were towards fulfilment of the assessee's obligation of being a JV partner as any financial incapacitation of JV would adversely affect the continuation of the project and ultimately jeopardize the interest of the assessee. Therefore, the said advances could not be put in the category of loans as done by the lower authorities. Further, it could not be said that JV entity derived / gained certain benefits out of such advances but rather it was the assessee who would ultimately gain by continuing with the projects and taste the fruits of the success of project. Hence, not convinced with impugned adjustments as confirmed by first appellate authority, we direct Ld. AO to delete the same." (Emphasis Supplied)*

16. There is nothing on record to persuade us to take a view different from the view taken by the Co-ordinate Bench of the Tribunal. Thus, facts and circumstances being identical, we dismiss Ground No.1 raised by the Revenue by following the above decisions of the Tribunal in the case of the Assessee for the Assessment Year 2012-13.

Ground No. 2.(i) to (ix)

17. Ground No. 2(i) to (ix) raised by the Revenue are directed against the relief granted by the CIT(A) in relation to aggregate transfer pricing adjustment of INR 98,43,602/- pertaining to different Performance Guarantees.

18. We note that the Assessing Officer/TPO had arrived at the arm's length rate of guarantee fee for performance guarantees at 1% and had computed transfer pricing adjustment for the four performance guarantees specified in paragraph 7.2 above. In appeal preferred by the Assessee before CIT(A), the transaction of performance guarantee was held to be an 'international transaction'. However, the CIT(A) deleted the transfer pricing addition in respect of performance guarantees by placing reliance of the decision of the Tribunal in the case of the Assessee for preceding assessment years. The CIT(A) observed that the issue relating to transfer pricing adjustment on account of guarantee fee to be recovered by the Assessee from its AEs in relation to performance guarantee was recurring in nature and was decided in favor of the Assessee and against the Revenue in appeals for the Assessment Year 2010-11/2011-12 as identical ground raised by the Revenue regarding the benchmarking of the transaction of giving performance guarantee was dismissed.

19. On perusal of the decision of the Tribunal in the case of the Assessee for the Assessment Year 2010-11, 2011-12 and 2012-13 (placed at pages 76 to 148 of the paper-book), we find that two performance guarantee on behalf of KEC Global FZ, LLC, UAE to Chadian Company for Water & Electricity (CCWE) have been continuing since Financial Year 2009-10 relevant to Assessment Year 2010-11.

20. First performance guarantee of Euro 10,03,126/- was granted in 2009 while the Second performance guarantee of Euro 20,06,252/- was granted in August, 2009. Both the aforesaid performance guarantees were given by the Bank of India, Mumbai Branch in favour of CCWE, a customer of Assessee's AE (i.e. KEC Global FZ LLC), and Bank of India, had charged guarantee commission of 0.93% per annum in respect of the same which was recovered by the Assessee from the AE. For Assessment Year 2010-11, 2011-12 and 2012-13, the Tribunal has accepted the aforesaid rate of 0.93% as arm's length rate of guarantee fee.

21. Similarly, the third performance guarantee granted by the Assessee to Bahawan Engineering Company, LLC, Oman on behalf of KEC Global FZ, LLC for securing performance of the contract has also been continuing since Financial Year 2009-10 relevant to Assessment Year 2010-11. The AE had assigned its rights and obligation under the aforesaid contract to the Assessee. For Assessment Year 2010-11, 2011-12 and 2012-13, the Tribunal has accepted rate of 0.60% as arm's length rate of guarantee fee.

22. Whereas, the fourth performance guarantee was given in December 2010 by Royal Bank of Scotland, Mumbai Branch to SNC Lavalin Canada on behalf of Assessee's AE (i.e. SAE Tower Holding, LLC). For

Assessment Year 2012-13, the Tribunal has accepted rate of 0.70% as arm's length rate of guarantee fee.

23. There is nothing on record to persuade us to take a view different from the view taken by the Co-ordinate Benches of the Tribunal for the preceding assessment years for the same performance guarantees. Thus, facts and circumstances being identical, we dismiss Ground No.2(i) to (ix) raised by the Revenue by following the above decisions of the Tribunal in the case of the Assessee for the Assessment Years 2010-11 [ITA No. 5611/Mum/2015, dated 10/07/2019], 2011-12 [ITA No 6447/Mum/2016, dated 23/03/2021] and 2012-13 [ITA No 17 & 115/Mum/2018, dated 14/09/2020].

Ground No. 3.(i) to (iii) : Corporate Guarantee

24. Ground No. 3(i) to (iii) raised by the Revenue are directed against the relief granted by the CIT(A) in relation to aggregate transfer pricing adjustment of INR 15,30,31,639/- pertaining to different Corporate Guarantees.

25. We note that the Assessing Officer/TPO had arrived at the arm's length rate of guarantee fee for corporate guarantees at 2% and had computed transfer pricing adjustment for the four corporate guarantees specified in paragraph 7.2 above.

26. In appeal preferred by the Assessee before CIT(A), it was observed by the CIT(A) that corporate guarantees were given by the Assessee to ICICI Bank, UK on behalf of its wholly owned subsidiaries KEC Transmission LLC and KEC US LLC, USA, for the purpose of arranging financing provided for the aforesaid overseas SPVs for utilization for the purposes of downstream acquisition of the business of SAE

Towers Ltd. USA. According to the CIT(A), the issue was covered by the decision of the Tribunal in appeal preferred by the Revenue for Assessment Year 2012-13 [ITA No. 1115/Mum/2018, dated 14.04.2020]. Therefore, the CIT(A) restricted the arm's length corporate guarantee fee rate to 0.2% by following the aforesaid decision of the Tribunal. We concur with the decision of the CIT(A). The issues stands decided in appeal preferred by the Revenue for the Assessment Year 2012-13 wherein it has been held as under:

> *"7.11 Coming to the benchmarking rate of 2% as adopted by Ld. TPO, the same do not convince us since a pertinent fact to be noted that both the AEs were subsidiaries of the assessee which were special purposevehicle to enable certain acquisition on behalf of the assessee and the assessee would be the ultimate beneficiary of such acquisition. Therefore, the assessee's risk in such a case would be very low since both the AEs were assessee's subsidiaries only. Therefore, considering the fact that it was a corporate guarantee for which no fees was paid by the assessee and going by the ratio of the decision of coordinate bench of the Tribunal in Everest Kanto Cylinders Ltd. Vs. DCIT [34 Taxmann.com 19] as affirmed by Hon'ble Bombay High Court on 08/05/2015 [58 Taxmann.com 254], we estimate the TP adjustments against both these transactions @0.20%. The Ld. TPO / Ld. AO is directed to recompute the same in terms of our above order. The grounds stand partly allowed."*

27. The above decision of the Tribunal was followed in appeal by the Revenue for the Assessment Year 2011-12.

28. There is nothing on record to persuade us to take a view different from the view taken the Co-ordinate Benches of the Tribunal for the preceding assessment years for the same corporate guarantee. Thus, facts and circumstances being identical, we dismiss Ground No. 3(i) raised by the Revenue by following the above decisions of the Tribunal in the case of the Assessee for the Assessment Years 2011-12 [ITA No 6447/Mum/2016, dated 23/03/2021] and 2012-13 [ITA

No 17 & 115/Mum/2018, dated 14/09/2020].

29. As regards the balance 3 corporate guarantees, we find that same were given by the Assessee on behalf of its AEs to banks for the purpose of availing loans. In respect of the aforesaid three corporate guarantees that the CIT(A) has held as under:

> *"7. Now I consider benchmarking of 3 transactions of Corporate guarantees Details are as under*
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> *(i) Corporate guarantee given to National Bank of Oman on behalf of KEC Global FZ LLC RasUI Khaimah of OMR 52,60,323/-: As per the order of the TPO. this corporate guarantee was given in 2010 for availing loan of Rs 74.24.02,536/- (OMR 52,60,323) from National Bank of Oman The Appellant recovered guarantee fee @ 0.6% of Rs 44,54,415/-. The TPO determined the ALP at 2% and computed adjustment of Rs 91,32,568/-*
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> *(ii) Corporate guarantee given to State Bank of India, Jeddah on behalf of Al Sharif Group and KEC Limited Co. of SAR 11,15,94,000/- .: As per the order of the TPO, this corporate guarantee was given in 2012 for availing loan of Rs 1,61,66,73.437/- (SAR 11,15,94,000) from State Bank of India, Jeddah The Appellant has recovered guarantee fee @0.6% of 97.00.041/- The TPO determined the ALP at 2% and computed adjustment of Rs 1,97,10,128/-.*
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> *(iii) Corporate guarantee given to Bank Muscat SAOG on behalf of Al Sharif Group and KEC Limited Co. of SAR 8,45,29,440/-: As per the order of the TPO, this corporate guarantee was given in 2012 for availing loan of Rs 1.22 45,86,450/- (SAR 8,45,29,440) from Bank Muscat SAOG. The recovered guarantee fee @ 0.6% of Rs 73,47,519/- The TPO determined the ALP at 2% and computed adjustment of Rs 89,57,934/-*
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> *7.1 Submission: The Appellant has made a common submission. It is submitted that corporate guarantee is not an international transaction The Appellant has also submitted that corporate guarantees were issued to enable AEs to avail credit facilities as a matter of commercial prudence primarily to protect the business interest of the group by fulfilling the shareholder's obligations.*

The Appellant has also claimed that non-charging of commission is justified where additional security is provided. In case of Al Sharif Group which obtained financing facility from SBI. Jeddah and Bank of Muscat, the banks obtained primary right over AEs contract receivables of project of Saudi Electricity company. While these receivables were security for the credit facility provided, the Appellant provided corporate guarantee to comply with administrative requirements. It is thus claimed that no risk was borne by the Appellant under the circumstances. As such charging of guarantee commission is not warranted.

The Appellant has further stated that benchmarking rate of 2% adopted by the TPO is ad hoc and is not justified Reliance is placed on decision of the Hon'ble Bombay High Court in the case of Everest Kanto Cylinders Ltd v CIT (ITA 1165 of 2013) for the proposition that consideration applied for issuance of corporate guarantee are from that of the bank guarantee and that high rate of commission in case of corporate guarantee issued by holding company for subsidiary is not justified.

It is submitted without prejudice that Appellant has charged guarantee commission @ 0.6% to AES. The said rate is based on rate mentioned under the facility letter issued by the assessee's bank. It is claimed that this rate is most direct comparable uncontrolled transaction to benchmark the rate of guarantee commission

Lastly, the Appellant has relied on ITAT's decision in its case for AY 2012-13. by reproducing Para 7.11 of the order (already reproduced in Para 6.7 1 above) and submitted that benchmarking be done @ 0.2%

7.2 I have considered the order and submissions of the Appellant. The transaction of issue of corporate guarantee is covered under the definition of International Transaction' u/s 92B rw. Explanation. As per Explanation (1) (c) of 92B (inserted with retrospective effect from 01.04.2002 by Finance Act 2012), 'guarantee' has been specifically clarified to be an international transaction. The legislature is aware that there are some conditions to be satisfied under section 92B for qualifying as an International transaction. The very fact that it has included certain items as international transaction in the explanation implies that in the view of the legislature, these items fulfil the conditions of section 92B(1) and have been included in the explanation as a matter of abundant caution. Therefore there

can be no onus on department to show that a guarantee is an international transaction in terms of section 92B(1) in the case of corporate guarantee If the assessee fails to show a guarantee as International Transaction and claims that it is not an international transaction in terms of section 92B(1), it is for the assessee to show that there is no service or impact on income

xx

7.2.1 As regards the benchmarking rate, the Appellant has already charged 0.6% as guarantee commission. The TPO has increased this benchmarking rate to 2% in all the 3 cases. The Appellant has submitted that benchmarking be done at 0.2% following the decision of the Hon'ble ITAT in its case in respect of benchmarking of corporate guarantee Issued by the Appellant to ICICI, UK on behalf of its AE KEC US LLC & KEC Transmission LLC The operative part of the decision is already. produced in Para 6.7. It is seen that the facts of 2 corporate guarantees are different. The 3 guarantees under consideration are for availing of regular credit facilities whereas credit facilities from ICICI, UK was for certain of which the Appellant was to be the ultimate beneficiary Therefore, the benchmarking rates cannot be same. The Appellant has already charged 0.6% rate which is based on a facility letter by its own bank, which is a good comparable. It is, therefore, held that no interference is called for in the benchmarking @ 0.6% done by the Appellant and the adjustments made by the TPO are deleted" (Emphasis Supplied)

30. On perusal of the above, it can be seen that the CIT(A) held that the transaction of issuance of corporate guarantee to be an international transaction as per Explanation (1)(c) to Section 92B of the Act (inserted with retrospective effect from 01.04.2002 by Finance Act 2012). The CIT(A) rejected the contention of the Assessee to benchmark the guarantee fee in respect of the three corporate guarantees at the rate of 0.2% by highlighting the difference in the purpose of giving corporate guarantees and the reasoning given by the Tribunal that corporate guarantee issued by the Assessee to ICICI, UK on behalf of its AE KEC US LLC and KEC Transmission LLC,

was for the ultimate benefit of the Assessee. The CIT(A) pointed out that the 3 guarantees under consideration were given for the purpose of availing of regular credit facilities whereas credit facilities from ICICI, UK benchmarked at the rate of 0.2% was for the ultimate benefit of the Assessee itself. The CIT(A) noted that the Assessee had already recovered the guarantee fee at the rate of 0.6% from the AEs on the basis of letter issued to the Appellant by its bank for similar facility. Perusal of the order passed by TPO shows that the TPO had determined arm's length guarantee fee at the rate of 2% by way of estimation. During the course of hearing, it was pointed out by the Learned Authorised Representative for Assessee that the corporate guarantee was given for working capital loan facility granted to the AE in which the Assessee was 50% partner, and therefore, there was no default risk. Further, repayment of loan was secured by way of charge against the receivables from Saudi Electric Company, a Government Undertaking and a client of the Assessee's AE and therefore, the Assessee had only provided secondary security. The aforesaid submission, at best, supports the view taken by the CIT(A) to adopt the lower rate of 0.6% proposed to be charged by the bank of the Assessee as the arm's length rate for corporate guarantee fee instead of 2% determined by the TPO/Assessing Officer. Given the facts and circumstances of the present case, we are not inclined to interfere with the order passed by the CIT(A) on this issue. Accordingly, Ground No. 3(ii)–(iii) raised by the Revenue are dismissed.

Ground No. 4 (i) & (ii)

31. Ground No. 4(i) & (ii) raised by the Revenue are directed against (a) the order of CIT(A) deleting the disallowance of INR 10,52,37,427/-

made by the Assessing Officer while computing income normal provisions of the Act holding the same to be unrealized foreign exchange loss arising from foreign exchange contracts, and (b) the order of CIT(A) holding that the aforesaid amount of INR 10,52,37,427/- is not required to be added back to the profits as per Profit & Loss Account while computing Book Profits under Section 115JB of the Act read with Clause (c) of Explanation 1 thereto.

32. We note that the CIT(A) allowed the appeal of the Assessee on this issue by following the decision of CIT(A) for the Assessment Year 2012-13 as well as the decision of the Tribunal in the case of the Assessee for the preceding Assessment Years holding as under:

> *"8.1 In the assessment order, the AO has noted that this amount is debited under the head other expenses. Before the AO, the appellant submitted that due to huge exports and foreign exchange transactions associated with foreign project, the Appellant has to hedge against forex losses. Therefore, loss if any on marked to market of such transaction is allowable business expenditure. Reliance was placed on Supreme Court decision in the case of Woodward Governor India Pvt. Ltd 312 ITR 254 (SC) where it was held that foreign exchange losses are allowable on accruable basis. The AO did not accept this contention and disallowed unrealised exchange loss of Rs 10,52,37,427/- in the same manner as in AY 2012-13 Observing that provision was reversed during the current year, provision for AY 2012-13 (Rs 8,73,55,000/-) was allowed as deduction and net disallowance was worked out at Rs 1,78,82,427/-.*
>
> *8.2 During the appellate proceedings, the Appellant has reiterated the submission before the AO In addition, it is stated that the issue has been decided in its favour by CIT(A) as well as the Tribunal in addition to placing reliance on decision in case of Woodward Governor India pvt. Ltd 294 ITR 451(Del), affirmed in 312 ITR 254 (SC) by the Hon'ble Supreme Court*
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> *8.3 The issue stands covered in favour of the assessee for earlier years including AY 2012-13 by CIT(A) as well as the Tribunal. Facts*

and circumstances remaining the same, the AO is directed to delete the addition. The ground no 4(a) is allowed."

33. The decision of CIT(A) for the Assessment Year 2012-13 followed by the CIT(A) in the Assessment Year 2013-14 has, since, been confirmed by the Tribunal vide order, dated 14/09/2020, passed in ITA No. 17 & 115/Mum/2018 wherein it has been held as under:

"7.12 Ground Nos. (xiii) & (xiv) are related with mark-to-market losses arising on the foreign exchange contracts which were outstanding at the year-end. During assessment proceedings, it transpired that the assessee debited an amount of Rs.1227.24 Lacs on account of exchange (gain) / loss (net). An amount of Rs.873.55 Lacs represented foreign exchange losses due to marked-to-market (MTM) losses. The Ld. AO observed that unrealized foreign exchange loss was neither accrued loss nor actual loss and therefore, the same could not be allowed as deduction. Since the provision of AY 2011-12 for Rs.533.16 Lacs was disallowed in that year but reversed during the year under consideration, the net disallowance was worked out to be Rs.340.38 Lacs and added to the income under normal provisions as well as while computing Book Profits u/s 115JB. 7.13 The Ld. CIT(A), relying upon appellate order for AY 2011-12, deleted the addition. The decision for AY 2011-12 was based on the decision of Hon'ble Supreme Court rendered in Woodward Governor Ltd. (312 ITR 254). Also, the issue was stated to be covered in assessee's favor by the decision of Tribunal in assessee's own case for AY 2009-10. Similar view was taken by first appellate authority in AY 2010-11.

7.14 As evident from factual matrix itself, the issue is covered in assessee's favor by the decision of this Tribunal for AY 2009-10. In fact, the decision of learned first appellate authority for AY 2010-11 was under challenge before this Tribunal by the revenue vide ITA No. 5611/Mum/2015 order dated 10/07/2019 wherein the co-ordinate bench followed the order for AY 2009-10 and held that MTM losses on hedging contracts would be accrued losses and hence, an allowable expenditure.

7.15 Facts being pari-materia the same, we see no reason to deviate

from the earlier stand of Tribunal in assessee's own case. Respectfully, following the same, both these grounds stands dismissed."

34. There is nothing on record to persuade us to take a view different from the consistent view taken by the Tribunal in the case of the Assessee for the Assessment Year 2009-10 to 2012-13. Accordingly, we dismiss Ground No. 4(i) & (ii) raised by the Revenue.

Ground No. 4 (iii) to (v)

35. Ground No. 4 (iii) to (v) directed against the order of CIT(A) allowing deduction for education cess as well as higher & secondary education cess of INR 44,06,085/- claimed by the Assessee by way of additional ground filed before CIT(A) by following the decision of Hon'ble Rajasthan High Court in the case of Chambal Fertilizers and Chemicals Limited Vs. Joint Commission of Income Tax: [2019] 107 taxmann.com 484 (Rajasthan)[31-07-2018].

36. Both sides agreed that this issue stands covered in favour of the Revenue by the judgment, dated 14.12.2022, passed by the Hon'ble Supreme Court in the case of JCIT Vs. Chambal Fertilizers & Chemicals Limited [SLP APPEAL (C) NO(S). 6655 OF 2019] reported in [2023] 291 Taxman 438 (SC) wherein it has been held that as per Explanation 3 to provision of Section 40(a)(ii) of the Act inserted by Finance Act, 2022 (with retrospective effect from 01.04.2005) surcharge or cess forms a part of 'tax' and therefore, deduction for the same cannot be allowed under Section 37 of the Act. The aforesaid judgment read as under:

"1. Leave granted.

2. Learned senior advocate appearing on behalf of the respondent-assessee states that in view of the amendment vide the Finance

Act, 2022 with retrospective effect from 1-4-2005 to section 40(a)(ii) of the Income Tax Act, 1961, the present appeal has to be allowed.

3. In view of the statement made, we direct that the Education cess paid by the respondent-assessee would not be allowed as an expenditure under section 37 read with 40(a)(ii) of the Income-tax Act, 1961.

4. Learned senior advocate appearing on behalf of the Respondent-assessee states that they have also paid the applicable tax on the disallowance."

37. In view of the above, Ground No. 4(iii) to (v) raised by the Revenue are allowed.

ITA No. 2453/Mum/2021: Appeal by Assessee

38. We would now take up cross appeal preferred by the Assessee for the Assessment Year 2013-14.

Ground No. 1(i) to (iii)

39. Ground No. 1(i) to (iii) raised by the Assessee pertains to transfer pricing adjustment pertaining to corporate guarantees. While disposing off Ground No. 3(i) to (iii) raised in the appeal preferred by the Revenue in paragraph 24 to 30 above, we have held that the order passed by CIT(A) does not call for any interference. We concur with the reasoning and decision of the CIT(A). Accordingly, Ground No. 1(i) to (iii) raised by the Assessee are dismissed.

Ground No. 2 & 3

40. Ground No. 2 raised by the Assessee is directed against the order of CIT(A) confirming the order passed by the Assessing Officer whereby the Assessing Officer had added the amount of INR 5,63,606/- disallowed by the Assessee under Section 14A of the Act read with

Rule 8D of the Income Tax Rules, 1962 under normal provisions of the Act to the profits as per Profit & Loss Account while computing 'Book Profits' in terms of Section 115JB of the Act. The Ld. Authorised Representative for the Assessee appearing before us, under instructions, stated that the Assessee does not wish to pursue this ground on account of small amount involved. In view of the aforesaid, Ground No. 2 raised by the Assessee is dismissed as not pressed.

In Ground No. 3 raised the Assessee has claimed that the CIT(A) erred in not allowing deduction for tax paid in foreign location. On perusal of grounds of appeal raised before CIT(A) we find that no such ground was raised before CIT(A). Ground No. 3 raised by the Assessee is dismissed as the same not arising from the order passed by the CIT(A) impugned by way of the present appeal.

Assessment Year 2017-18

The present appeal is directed against the Assessment Order dated, 21/01/2022, passed under Section 143(3) read with Section 144C(13) read with Section 144B of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'], as per directions, dated 27/12/2021, issued by the CIT [Dispute Resolution Panel-I, Mumbai-1] (hereinafter referred to as 'the DRP') under Section 144C(5) of the Act pertaining to the Assessment Years 2017-18.

41. The Assessee has raised the following grounds of appeal in ITA No. 502/Mum/2021:

1. "Denial of natural justice:

1.1. On the facts and circumstances of the case and in law, the AO

erred in passing the draft order in contrary to and without complying with the provisions of section 144B of the Act.

1.2. The Appellant prays that the draft assessment order be held as bad in law and consequently, the assessment proceedings and the final assessment order be quashed.

2. <u>Transfer pricing addition on corporate guarantee:</u>

2.1. On the facts and circumstances of the case and in law, the DRP erred in conforming the action of the TPO/AO in holding that issuance of corporate guarantee is an 'international transaction' and consequently, transfer pricing addition of Rs. 13,40,33,405/- should be made at the rate of 1.16% of the guarantee amount.

2.2. He failed to appreciate and ought to have held that mere issuance of corporate guarantee is not an 'international transaction'.

2.3. The Appellant prays that the TPO/AO be directed to delete the transfer pricing adjustment on account of corporate guarantee.

2.4. Without prejudice to the above, the rate of corporate guarantee commission be reduced reasonably.

3. <u>Disallowance of Education Cess:</u>

3.1. On the and the circumstances of the case and in law, the DRP erred in not allowing the claim of Education and Secondary Higher Education Cess ("Education Cess") amounting to Rs. 1,99,58,060/- on the alleged ground that the claim was not made in the return of income.

3.2. The Appellant prays that the AO be directed to allow the deduction of Education Cess amounting to Rs. 1,99,58,060/- while computing the total income of the Appellant.

4. <u>Computation of interest u/s. 244A:</u>

4.1. On the facts and the circumstances of the case and in law, the AO erred in granting short interest u/s.244A of the Act.

4.2. The Appellant prays that the AO be directed to allow interest u/s. 244A for the period starting from the first day of April of the assessment year till the date of on which refund is granted."

42. The Assessee filed its return of income for the Assessment Year

2017-18 on 30/11/2017 which was revised on 30/03/2019. The case of the Assessee was selected for regular scrutiny. During the assessment proceedings, the Assessing Officer noted that the Assessee had entered into international transactions with Associated Enterprises (AEs) and therefore, made a reference to the Transfer Pricing Officer (TPO) for computation of Arm's Length Price (ALP) under Section 92CA(1) of the Act.

43. The TPO noted that the Appellant had reported, inter alia, into following international transactions:

Sl.No	Nature of transaction	Amount (INR)	Method
1	Corporate Guarantee (commission charge)	2,71,90,399	CUP Method
2	Corporate Guarantee (commission not charge)	Nil	Other Method

43.1. TPO noted that the Appellant had given guarantee on behalf of its foreign subsidiaries. However, in the Transfer Pricing Study Report (for short 'TPSR'), the Appellant had taken a position that providing guarantees to its AEs does not constitute an international transaction, and without prejudice to the aforesaid, carried out benchmarking analysis. The TPO noted that as per TPSR the Appellant had provided thirteen corporate guarantees to third parties on behalf of its AEs. After undertaking analysis similar to one undertaken for the Assessment Year 2013-14, the TPO rejected the contention of the Assessee that transaction of granting corporate guarantee does not constitute an international transaction. As regards, the benchmarking of rate of corporate guarantee fee, the TPO concluded the TPO concluded that Comparable Uncontrolled Price (CUP) Method with adjustments could be adopted as the Most

Appropriate Method for benchmarking the transaction of giving corporate guarantee as the same offers least complicated approach with maximum available data and . On the basis of the aforesaid, the TPO observed that guarantee fee charged by banks to Indian companies varied from 1.10 % to 3% per annum depending upon various factors. On the basis of the aforesaid, the TPO arrived at the range of 1.5% to 3.5% for corporate guarantee fee for foreign based transactions. Observing that in the case of the Assessee the loan has been taken for business purposes, the TPO estimated applicable corporate guarantee fee at 2%. Thereafter, the TPO proceeded to examine judicial precedents wherein rate of arm's guarantee fee was determined and thereafter, estimated the arm's length corporate guarantee fee at 1.16%. Thus, the TPO computed the deficit in the corporate guarantee fee recovered by the Appellant from it's AE arrive at aggregate transfer pricing adjustment of INR 13,40,33,405/-. Hence, the TPO proposed aggregate transfer pricing adjustments of INR 13,40,33,405/- vide order, dated 28/01/2021.

44. The Assessing Officer incorporated the aforesaid transfer pricing adjustment of INR 13,40,33,405/- in the Draft Assessment Order, dated 31/03/2021, passed under Section 143(3) read with Section 144C of the Act.

45. Against the Draft Assessment Order, the Assessee filed objections which were rejected by the DRP on 27/12/2021. The DRP also rejected the claim for deduction of INR 199,58,060/- in respect of Education Cess and Higher & Secondary Education Cess made for the first time before the DRP. As per the directions issued by the DRP vide order, dated 27/12/2021, Final Assessment Order, dated 21/01/2022, was passed under Section 143(3) read with Section

144C(13) and 144B of the Act.

46. Being aggrieved, the Assessee has preferred the present appeal on the grounds reproduced in paragraph 41 above which are taken up hereinafter.

47. We have heard the rival submission and perused the material on record including the order passed by the lower authorities and the decision of the Tribunal relied upon by the Assessee.

Ground No. 1 to 1.2

48. We do not find any merit in Ground No. 1 to 1.2 raised by the Assessee challenging the assessment order on the ground of violations of principles of natural justice. Perusal of the record shows that no objections were raised before the DRP to this effect. There is nothing on record to support the ground raised by the Assessee. Accordingly, Ground No. 1 to 1.2 raised by the Assessee are dismissed.

Ground No. 2 to 2.4

49. Ground No. 2 pertains to transfer pricing adjustment of INR.13,40,33,405/- made in respect of corporate guarantee fee. The Assessee has contended that transaction of corporate guarantee does not constitute an international transaction, and has challenged the transfer pricing addition made by adopting 1.16% as arm's length rate of guarantee fee.

50. While disposing of appeal for the Assessment Year 2013-14 we have confirmed the order of CIT(A) holding that transaction of corporate guarantee qualifies as an international transaction in view

Explanation (i)(c) to Section 92B of the Act (inserted with retrospective effect from 01.04.2002 by Finance Act 2012), whereby 'guarantee' has been specifically included in the definition of 'international transaction' as defined in Section 92B of the Act and the decision of the Tribunal in appeal for the Assessment Years 2012-13 (ITA No. 17 & 115/Mum/2018, dated 14/09/2020). Accordingly, Ground No. 2.2 raised by the Assessee is dismissed.

51. We note that during the relevant previous year, Assessee had provided various corporate guarantees.

52. The corporate guarantees aggregating to USD 8,03,00,000/- were given in the earlier years by the Assessee to ICICI Bank, UK on behalf of its wholly owned subsidiaries KEC Transmission LLC and KEC US LLC, USA, for the purpose of arranging financing provided for the aforesaid overseas SPVs for utilization for the purposes of downstream acquisition of the business of SAE Towers Ltd. USA. In appeal preferred by the Revenue for Assessment Year 2012-13 [ITA No. 1115/Mum/2018, dated 14.04.2020], the Tribunal had dismissed the ground raised by the Revenue challenging the order of the CIT(A) restricted the arm's length corporate guarantee fee rate to 0.2%. The aforesaid decision of the Tribunal was followed by the Tribunal in appeal by the Revenue for the Assessment Year 2011-12 [ITA No 6447/Mum/2016, dated 23/03/2021]. There is nothing on record to persuade us to take a view different from the view taken the Co-ordinate Benches of the Tribunal for the preceding assessment years in respect of the same corporate guarantee. Thus, facts and circumstances being identical, we restrict the rate of guarantee fee to 0.2% as against 1.16% determined by the TPO/Assessing Officer and confirmed by the CIT(A).

53. We find that the Assessee had granted three separate corporate guarantees on behalf of its foreign AE (i.e. AI Sharif Group and KEC Company Ltd.) to Abu Dhabi Commercial Bank, Banque Saudi Fransi-Jeddah and Bank of Muscat, Saudi Arabia for making available credit and other fund based banking facilities. The Assessee has charged commission at the rate of 0.60% from its AE. However, we note that no guarantee fee has been charged by the Assessee from its AEs in respect of other corporate guarantees issued on behalf of (a) Al Sharif Group & KEC Ltd Company, (b) SEA Towers Mexico S De RL de CV Mexico and (c) SEA Towers Limited, USA. The Assessee has tried to justify not charging any corporate guarantee fee in respect of the aforesaid corporate guarantees by contending that (a) there was no risk element involved; (b) the Assessee was discharging shareholder obligations as financial incapacity of the AEs would have jeopardised the investment made by the Assessee; (c) credit facility secured for the AE was non-fund based, and (d) the corporate guarantees were granted on account of administrative requirements. It was contended on behalf of the Assessee that the Assessee gave corporate guarantee to Steal Force NV, Belgium aggregating to USD 30,00,000/- for the purpose of securing credit terms for its AE (i.e. SAE Towers Mexico S De RL de CV). Since no default was made by the in repayment, there was no credit risk of losses was borne by the Assessee. Corporate guarantee to EXIM Bank given on behalf of its AE (ie. SAE Towers Ltd) aggregating to USD 1,27,00,000/– were granted for the purpose of working capital, export project cash flow deficit financing etc. in discharge of shareholder obligation. It was also contended on behalf of the Assessee that corporate guarantees granted on behalf of Al Sharif Group & KEC Ltd Company to Bank

Muscat SAOG, Banque Saudi Fransi, Jeddah, Abu Dhabi Commercial Bank, Deutsche Bank AG, Axis Bank, Kotak Mahindra Bank Ltd and ICICI Bank Ltd were given by the Assessee is only as a secondary security since the amount borrowed by the AE were primarily secured against receivables from Saudi Electric Company, a government undertaking.

54. However, we find that there is nothing on record to support the averments/contentions made by the Assessee that investments made by the Assessee in AEs would have been adversely impacted if the corporate guarantees under consideration (except corporate guarantees for USD 8,03,00,000/-) were not granted by the Assessee, or that the corporate guarantees were given on account of administrative requirements only. We are also not inclined to accept that the grant of corporate guarantee was merely on account of shareholding obligation. As regards contention of the Assessee that there was no risk element involved we find that the contention runs counter to the commercial prudence subject to which the lender/vendors agreed to extent the credit facilities or better credit terms to the AEs. Clearly the corporate guarantees provided recourse to the lender/vedors of AEs to make recoveries from the Assessee in case of default by the AEs putting the Assessee at some risk. The fact that subsequently the Assessee would, in turn, be able to make recoveries from AE is a mitigation factor which may not eliminate the risk in entirety. An independent third party would have charged fee for providing such corporate guarantee. The fact that the credit facilities granted to the AEs by the Lender/Vendor were non-fund based or the fact that the AE did not actually commit a default during the relevant previous year cannot lead to a conclusion that there was

no risk involved. Therefore, we are not inclined to accept this contention of the Assessee that no guarantee fee was to be recovered from AE on account of 'nil' risk. However, the aforesaid reasons pointed out by the Assessee can be factored in while arriving at the arm's length rate of corporate guarantee fee in support of the alternative contention of the Assessee that rate of 1.16% determined by the TPO/Assessing Officer is high and should be reduced considerably.

55. We note that while the Assessee has sought rejection of the corporate guarantee fee rate of 1.16% adopted by the TPO/Assessing Officer on the ground of failure by the Assessing Officer to carry out comparability analysis taking into account the Function, Asset & Risk involved. However, the Assessee has itself not carried out any comparability analysis and has adopted the rate of 0.6% offered by the bank to the Assessee to benchmark the corporate guarantee fee in case of 3 corporate guarantees where recovery of guarantee fee has been made by the Assessee from the AEs. In case of the balance corporate guarantees where no recoveries have been made, the alternative contention of the Assessee is that the aforesaid rate of 0.6% may be closest to an internal CUP and therefore, the same may be adopted for benchmarking the transaction of corporate guarantee. The aforesaid alternative contention, in our view, merits consideration. Even for the Assessment Year 2013-14, in relation to some other corporate guarantees given by the Assessee on behalf of Al Sharif Group & KEC Ltd. Company for similar purposes and on similar terms, we have accepted Assessee's contention that 0.60% be accepted as arm's length rate of corporate guarantee fee. Accordingly, given the facts

and circumstances of the case, we accept the alternative contention of the Assessee and direct the TPO/Assessing Officer to recomputed the transfer pricing adjustment by taking rate of 0.6% as arm's length rate for corporate guarantee fee for all corporate guarantee given by the Assessee, *(except for the corporate guarantees aggregating to USD 8,03,00,000/- given on behalf of wholly owned subsidiaries KEC Transmission LLC and KEC US LLC, USA in which case arm's length corporate guarantee fee shall be determined by adopting rate of 0.02%)*. With the aforesaid directions, Ground No. 2.1 and 2.3 raised by the Assessee is partly allowed. We have already dismissed Ground No. 2.2 in paragraph 50 above. Ground No. 2.4 is disposed off as being infructuous.

Ground No. 3.1. & 3.2

56. Ground No. 3.1. & 3.2 raised by the Assessee are directed against the order of CIT(A) rejecting claim of deduction for education cess as well as higher & secondary education cess of INR 1,98,58,060/- claimed by the Assessee for the first time before DRP.

57. Both sides agreed that this issue stands covered in favour of the Revenue by the judgment, dated 14.12.2022, passed by the Hon'ble Supreme Court in the case of JCIT Vs. Chambal Fertilizers & Chemicals Limited [SLP APPEAL (C) NO(S). 6655 OF 2019] reported in [2023] 291 Taxman 438 (SC) wherein it has been held that as per Explanation 3 to provision of Section 40(a)(ii) of the Act inserted by Finance Act, 2022 (with retrospective effect from 01.04.2005) surcharge or cess forms a part of 'tax' and therefore, deduction for the same cannot be allowed under Section 37 of the Act. Accordingly, Ground No. 3.1 & 3.2 raised by the Assessee are dismissed.

Ground No. 4.1 & 4.2.

58. Ground No. 4.1. & 4.2 relating to interest charged under Section 244A of the Act are concerned, the same are consequential in nature and are disposed off with the directions to the Assessing Officer to recomputed interest under Section 244A of the Act as per law while passing appeal effect order.

59. In result, for Assessment Year 2013-14 the appeal preferred by the Revenue is partly allowed while the appeal preferred by the Assessee is dismissed. For the Assessment Year 2017-18, the appeal preferred by the Assessee is partly allowed.

Order pronounced on 31.05.2023.

Sd/-	***Sd/-***
(B.R. Baskaran)	**(Rahul Chaudhary)**
Accountant Member	**Judicial Member**

मुंबई Mumbai; दिनांक Dated : 31.05.2023
Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai