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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
MS. KAVITHA RAJAGOPAL, JM

ITA No. 1852/Mum/2022
(Assessment Year: 2014-15)

KEC International Ltd. 463, RPG House, Dr. Annie Besant Road, Worli, Mumbai-400 030 **(Appellant)**	Vs.	Dy. Commissioner of Income Tax Circle 5(2)(1) 5th Floor, Aaykar Bhavan, M.K. road, Mumbai-400 020 **(Respondent)**

PAN No. AACCK5599H

ITA No. 1883/Mum/2022
(Assessment Year: 2014-15)

Dy. Commissioner of Income Tax Circle 5(2)(1) 5th Floor, Aaykar Bhavan, M.K. road, Mumbai-400 020 **(Appellant)**	Vs.	KEC International Ltd. 463, RPG House, Dr. Annie Besant Road, Worli, Mumbai-400 030 **(Respondent)**

Assessee by	:	Shri Vijay Mehta, AR
Revenue by	:	Shri Akhtar Hussain Ansari, DR

Date of hearing: 07.09.2023
Date of pronouncement : 04.12.2023

O R D E R

PER PRASHANT MAHARISHI, AM:

01. These are the cross appeals filed by KEC International Limited (assessee /appellant) (ITA No.1852/Mum/2022) and the Dy. Commissioner of Income Tax, 5(2)(1), Mumbai (the learned Assessing

Officer) (ITA No.1883/Mum/2022) against the appellate order passed by The Commissioner of Income-tax (Appeals)-56, Mumbai [the learned CIT (A)] for A.Y. 2014-15, wherein the appeal filed by the assessee against the assessment order passed under Section 143(3) read with section 147(3) of the Income-tax Act, 1961 (the Act) on 26th February, 2018, by the learned Assessing Officer, was partly allowed. Therefore, both the parties are aggrieved and are in appeal before us.

02. The assessee/appellant aggrieved in ITA No.1852/Mum/2022, has raised following three grounds of appeal:-

"Ground no.1

i. On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in confirming adjustment on account of computation of arm's length price of the corporate guarantee commission@0.20% (Rs.127.46 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 transaction 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.93,145 made by AO under section 14A of the Income Tax Act r.w.r 8D of the Income Tax Rules in computing Book Profits under section 115JB of the Act.

Ground No.3

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

03. The learned Assessing Officer aggrieved by the appellate order preferred the appeal in ITA No.1883/Mum/2022, raising following grounds of appeal:-

"TP Issue:

Interest on advances given to Associated Enterprises

(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. 13.90.72.569/ by stating that these advances were made towards the fulfillment of Appellants obligations of being a JV partner, without considering that the purposed of the advances doesn't change the character of the transaction as a loan transaction.

(ii) 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. 13.90.72.569/- without considering that there is cost associated with these advances to the assessee, therefore the interest need to be charged.

Corporate guarantee:

(i) Whether on the facts and circumstances of the case, the Hon'ble CIT(A) is right in not recognizing the facts of the case that the assessee has given corporate guarantee, as a co-guarantor, on behalf of its AE i.e. Al Sharif Group & KEC Ltd. Company & KEC US LLC & KEC Transmission LLC, thereby exposing itself to a lending business; risk, foreign exchange rate risk, country specific risk as well as the 'single customer' risk, without charging any fee for such guarantee at ALP which the assessee

would have done, had it stood guarantee to any third party uncontrolled conditions as section 92F(ii)?"

(ii) *Whether on the facts and circumstances of the case, the Hon'ble CIT(A) is right in holding that the fee for the guarantee issued by the instant assessee for the loans availed by KEC US LLC & KEC Transmission LLC from banks should be estimated at 0.20% placing reliance upon the decision in assessee's own case by Hon'ble ITAT for AY 2012-13, which relied on Everest Kanto case | 58 Taxmann.com 254), without realizing the fact that the transfer pricing study is highly facts-based and it differs from case to case and that all the factors in Rule 10B have to be considered for every case and every year independently and that a rate decided in a different case for different set of facts and for different year cannot be adopted as such to the instant assessee, which would be violative of the specific provisions in Rule 10B?"*

(iii) *Whether on the facts and circumstances of the case, the Hon'ble CIT(A) is right in holding that the fee for the guarantee issued by the instant assessee for the loans availed by KEC US LLC & KEC Transmission LLC from banks should be estimated at 0.20% placing reliance upon the decision in assessee's own case by Hon'ble ITAT for AY 2012-13, which relied on Everest Kanto case [58 Taxmann.com 254], without realizing*

the fact that there was an independent sanction letter of credit arrangement with ICICI Bank, wherein under a guarantee scheme commission of 0.6% per annum was paid by Everest Kanto and so the rate of 0.5% was adopted for corporate guarantee, whereas there are no such facts in the instant case?

(iv) Whether on the facts and circumstances of the case, the Hon'ble CIT(A) is right in directing to restrict the TP adjustment of corporate guarantee fee to 0.20% instead of 2% charged by the AO without discussing the facts of the case and deciding the issue on the merits of the case?"

(v) Whether on the facts and circumstances of the case, the Hon'ble CIT(A) is right in arriving at the ad hoc rate of 0.20%, without adopting any of the methods prescribed in section 92C which is violation of law?

Non-TP issues:

1. On the facts and circumstances of the case, whether the Ld. CIT(A) has erred in deleting the addition on account of unrealized foreign exchange loss (Mark to Market) under normal provisions as well as for the purpose of computation of book profit u/s 115JB of the Act failing to appreciate the CBDT's instruction no. 03/2010 dated 23.03.2010 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 as notional loss would be contingent in nature and cannot be allowed to be set off against taxable income.

2. *On the facts and circumstances of these, whether the CITIA) has erred in deleting the addition on account of realized Foreign exchange (Mark to Market) under normal provisions as well as the pose of compute book profit u/s 115JB of the Act ignoring the CBDT ruction no. 03/2010 dated 23.03.2010 when it is judicially acknowledged that CBI circulars constitute important clarifications of legislative intent."*

04. Brief facts of the case shows that assessee is a company engaged in the business of designing, fabrication, galvanizing and testing of transmission line towers and telecom, supply and erection of sub-infrastructure station structures, overhead equipments for Railway electrification. During the year, the assessee has also started manufacturing of power cables, optical fiber cables, Jelly filled telephone cables, etc.

05. Assessee filed its return of income on 30th November, 2014, which was revised on 31st March, 2016, at a total income of ₹239,13,35,680/-. The return of income was selected for scrutiny.

06. As assessee has entered into several international transactions with its Associated Enterprises,

reference was made to the Addl. Commissioner of Income Tax (Transfer Pricing) 2(3), Mumbai (the learned Transfer Pricing Officer) on 28th July, 2016. After discussion, the learned Transfer Pricing Officer made three adjustments to the Arm's Length Price of the international transaction and proposes a total adjustment of ₹28,62,73,044/-, by order under Section 92CA(3) of the Act on 30th October, 2017.

07. The learned Assessing Officer incorporated the above Arm's Length Price adjustment in the assessment order. As the learned Transfer Pricing Officer in his order mentioned that assessee has entered into international transaction of performance guarantee, corporate guarantee and interest on advances given to its Associated Enterprises and the penalty may be initiated under Section 271G of the Act.

08. During the course of assessment proceedings, the learned Assessing Officer noted that assessee has claimed an amount of ₹19,14,56,000/- on account of exchange loss and the learned Assessing Officer asked the assessee that why same should not be disallowed. Assessee submitted that this exchange loss is in respect of forward contracts on Mark to Market basis and same is neither contingent nor merely a provision and therefore, it should be allowed. The learned Assessing Officer noted that it is neither agreed loss nor an actual loss but is a notional loss of contingent nature and therefore,

same is not allowable. Accordingly, ₹19,14,56,000/- was disallowed.

09. The learned Assessing Officer further noted that the assessee has earned dividend of ₹70,23,31,373/- and no disallowance under Section 14A of the Act was offered. The assessee submitted that assessee has received dividend income from foreign companies and therefore, same are not exempt but are chargeable to tax under Section 115BBD of the Act. The learned Assessing Officer rejected the contention of the assessee and thereafter invoking the provisions of Rule 8D disallowed a sum of ₹93,145/- under Section 14A of the Act. Similar adjustment was also made in book profit computed u/s 115JB of the Act.

010. Accordingly, the assessment order under Section 143(3) read with section 144C of the Act dated 26th February, 2018, was passed determining the total income of the assessee at ₹276,39,20,405/- as per normal computation of total income. The book profit was also increased by provision of doubtful debts and also by an addition under Section 14A of the Act.

011. Assessee aggrieved with that assessment order preferred an appeal before the learned CIT (A).

i. The learned CIT (A) with respect to the transfer pricing adjustment of interest on advances given to its Associated Enterprises amounting

to ₹30,90,72,569/-, the learned CIT (A) held that the issue is squarely covered in favour of the assessee by the decision of the co-ordinate bench for A.Y. 2012-13, wherein it was held that the advances given by the assessee cannot be put into category of loan as the advances were given towards the fulfillment of assessee's obligation of being joint venture partner to avoid financial incapacitation of the joint venture. Accordingly, the transfer pricing adjustment of ₹13,40,72,569/- was deleted.

ii. On the issue of performance guarantee adjustment of ₹2,87,730/- and corporate guarantee adjustment of ₹14,69,12,705/-, the learned CIT (A) directed the learned Assessing Officer to apply corporate guarantee rate of 0.2% based on the decision of the co-ordinate Bench in assessee's own case for A.Y. 2012-13 in ITA No.115/Mum/2018, dated 14th September, 2020, with respect to the corporate guarantee of ICICI Bank on behalf of KEC US LLC and KEC transmission LLC USA global amounting to ₹567,15,50,461/-, which was benchmarked by the learned Transfer Pricing Officer determining the Arm's Length Price at the rate of 2% computing an adjustment of ₹12,74,68,445/-.

iii. With respect to ground no.3, other corporate guarantees issued by the assessee where the assessee itself has charged guarantee and commission at the rate of 0.6% based on a facility letter by its own bank at the same rate was held to be at arm's length. Thus, on the corporate guarantee adjustment of ₹14,16,12,705/-, was partly deleted. The learned CIT (A) followed the decision of the co-ordinate Bench in assessee's own case.

iv. With respect to the disallowance under Section 14A, under Section 115JB of the Act was conformed.

012. Accordingly, the appellate order was passed, where both the parties are aggrieved.

013. The ld Authorised representative submitted that :-

i. Coming to the appeal, in the grounds of appeal of assessee, ground number 1 relates to the adjustment confirmed by the learned CIT – A on account of the arm's-length price of the corporate guarantee commission at the rate of 0.20% on guarantee given by the assessee to the bankers for the loans taken by the associated enterprises. He further stated that the assessee has challenged that the corporate guarantee issued by the assessee in favour of the bankers for the loan obtained by the

associated enterprises is not an international transaction and further the above transaction does not have any bearing on the profit, income, loss or assets of the appellant and therefore it cannot be considered as international transaction. On this issue he submitted a chart wherein he submitted that assessee has a wholly-owned subsidiary in united states of America by the name of the AE is transmission LLC and KE the US LLC USA wherein assessee has issued corporate guarantee to ICICI bank United Kingdom for loans availed by those associated enterprises for financing for acquisition of business in USA. He submitted that the total loan is of US$ 106,047,312 equivalent to ₹ 6,373,422,242/–. The assessee has not charged any guarantee fees. The learned TPO benchmarked the guarantee at the rate of 2% and made an addition of ₹ 127,468,445/–. He submitted that the learned CIT – A has affirmed the arm's-length price of the guarantee commission at the rate of 0.20 percentage. He further stated that the guarantee was given in earlier years and the coordinate bench in assessee's own case for assessment year 2011 – 12, 2012 – 13 and 2013 – 14 and 2017 – 18 has confirmed the arm's-length price of the guarantee commission at the rate of 0.20%. Therefore in the earlier

years as well as in the subsequent years the coordinate bench has decided this issue upholding the guarantee commission rate at the rate of 0.20%.

ii. With respect to guarantee given by the assessee to the state bank of India, Jeddah for working capital loans availed by its associated concern Al Sharif group and KEC limited company of ₹ 798,558,730/– was benchmarked by the assessee adopting the corporate guarantee rate of 0.60%. The learned transfer pricing officer computed the arm's-length price at the rate of 2% and therefore for differential sum and adjustment of ₹ 10,585,431/– was made. The learned CIT – A relying on the decision of the coordinate bench in assessee's own case for assessment year 2013 – 14 accepted the benchmarking at the rate of 0.60%.

iii. To the same associated enterprises assessee has also given a guarantee to bank of Muscat for availing working capital loan from the Bank of ₹ 52,28,78,445 which was benchmarked by the assessee at the rate of guarantee commission fee of 0.60%, the learned transfer pricing officer adopted the arm's-length price at the rate of 2% and made an addition of differential sum of ₹ 1,894,260/– which was

also considered by the learned CIT – A following the decision of the coordinate bench in assessee's own case adopted 0.60% as the arm's-length price.

iv. guarantee to the same associated enterprise which was given to bancs Saudi for availing working capital loan from Bank by the associated enterprises which is guaranteed by the assessee amounting to ₹ 1,183,322,139/– which has been benchmarked by the assessee adopting the corporate guarantee fee of 0.6% which was benchmarked by the learned transfer pricing officer at the rate of 2% and made a differential addition of ₹ 6,964,569/–. The learned CIT – A following the decision of the coordinate bench in assessee's own case for assessment year 2017 – 18 has determined the arm's-length price at the rate of 0.60%.

v. On ground number 2 of the appeal of the assessee and stated that the learned CIT – A has confirmed the adjustment to the book profit computed under section 115JB of the income tax act by confirming the addition of ₹ 93,145/– made by the assessing officer under section 14 A of the act read with rule 8D of the income tax rules. He submits that no adjustment can be made to the book profit for disallowance under section 14 A of the income

tax act. He even otherwise submitted that the assessee has received income from its foreign subsidiary and joint ventures which is taxable in India and therefore there is not exempt income earned by the assessee and therefore even otherwise in normal computation of book profit computation that cannot be any addition under section 14 A of the income tax act for the impugned assessment year.

vi. Coming to the appeal of the learned assessing officer he submits that the second issue on transfer pricing is respect to the corporate guarantee which is already been discussed in the appeal of the assessee and therefore he supported the order of the learned CIT – A.

vii. With respect to the interest on advance given to an associated enterprises which is raised as per issue number 1 where he referred to paragraph number 3 of appellate order wherein the learned CIT – A has allowed the deletion of the adjustment based on the decision of the coordinate bench in assessee's own case for assessment year 2012 – 13. He extensively read that and submitted that the issue is decided by the learned CIT – A for the reason that advances cannot be put on the category of loan as considered by the learned transfer pricing Officer as the advances were made

towards the fulfilment of the assessee's obligation of being a joint-venture partner to avoid financial incapacitation of the joint-venture. He submits that this issue is squarely covered in favour of the assessee by the decision of the coordinate bench in assessee's own case for assessment year 2012 – 13.

viii. Coming to the third issue of corporate adjustment where the learned CIT – A deleted the addition on account of unrealised foreign exchange loss on Mark to market basis under the normal provisions as well as for the purpose of computation of the book profit under section 115JB of the act where the learned assessing officer's claim is that same is against the instruction number 03/2010 dated 23/3/2010. He specifically referred to paragraph number 7 of the appellate order and submitted that issue is squarely covered in favour of the assessee as held by the learned CIT – A. Therefore he submits that this issue is also covered in favour of the assessee.

ix. He extensively referred to the various orders of the coordinate benches in assessee's own case as well as the written submissions made before the learned CIT – A) in respect of transfer pricing additions/–. In the result, he submitted that there is no infirmity in the order of the

learned CIT – A so far as the appeal of the learned AO is concerned.

014. The learned departmental representative vehemently supported the orders of the ld TPO and AO. He submitted that

i. corporate guarantee is an international transaction is now considered and decided in favour of the revenue by the several benches as well as the honourable madras High Court in case of Redington India Ltd. Therefore, the ground of the assessee that corporate guarantee cannot be considered as an international transaction is devoid of any merit. On the issue of the benchmarking he submitted that there are 2 types of guarantees provided by the assessee. Assessee has provided a performance guarantee as well as the corporate guarantees, performance guarantee is not considered by the assessee as an international transaction and also has not been benchmarked. He submits that the learned transfer pricing officer has considered the performance guarantee issued by the assessee as an international transaction and further arm's-length price of such guarantee fee was considered at 1%. He submitted that amount guaranteed is ₹ 82,834,635 which continued for the whole of the year the assessee has

recovered ₹ 540,616 whereas the arm's-length price of such guarantee fee is considered at 1% and therefore the arm's-length price of guarantee fee was ₹ 828,346 and therefore the adjustment of ₹ 287,730/– was made. He submits that as per paragraph number 5.5 of the order of the CIT – A where the learned CIT – A has held that this is recurring issue as the corporate guarantee is continued since 2009 and for assessment year 2013 – 14 the coordinate bench has decided this issue in ITA number 5611/M/2015 as per order dated 10/7/2019 he referred to paragraph number 7.2 of that order at page number 14 and stated that the coordinate had followed coordinate bench has followed the order for assessment year 2010 – 11 in case of the assessee wherein 0.6% of the guarantee fee is considered to be at arm's-length price. He submitted that there is no benchmarking and the learned CIT – A has also followed that order and therefore same is not sustainable without fresh benchmarking.

ii. On the issue of advance provided to the associated enterprises in South Africa the learned departmental representative submitted that assessee has advanced loan of ₹ 863,645,539 on various dates. Assessee has not charged any interest on the same and

therefore the assessee should have charged interest thereon, as no independent party would have paid such an amount of capital financing transaction without interest. He submits that the assessee has stated that the amount advanced to the joint-venture was to meet the business requirement of the associated enterprises which was facing cash deficit to an enormous losses from the Project of the JV and that the transaction was a matter of business expediency. He submitted that this could not be a consideration for not charging interest on the advance given by the assessee. Therefore the learned transfer pricing officer based on the Bloomberg data determined interest rate at the rate of 15.52% for financial year 2010 – 11, 12.51% for financial year 2011 – 12, 10.70 per 4% for financial year 2012 – 13 and 10.36% for financial year 2013 – 14. Correspondingly and adjustment of ₹ 139,072,569/– was made. The learned that CIT – A has deleted the addition following the decision of the coordinate bench in assessee's own case for assessment year 2012 – 13. He submits that no independent party would have given such a huge advance to its joint-venture and therefore the interest should have been charged by the assessee, the deletion of the

arm's-length price adjustment by the learned CIT – A is incorrect.

015. The learned authorised representative reiterated the submission already made in its rejoinder.

016. We have carefully considered the rival contention and perused the orders of the lower authorities. We have also carefully considered the various judicial precedents cited before us in the assessee's own case for earlier years and subsequent years.

017. During the course of hearing we directed the assessee to furnish the fresh guarantee fee benchmarking based on the present functions, assets and risk involved considering the economic circumstances. The assessee is adopted interest saving approach method and benchmarked the guarantee fee income by determination of the credit rating of the associated enterprises. The assessee benchmarked by adopting Moody's credit rating values of its associated enterprises, adjusted it with geographical scope and the terms of guarantee. It also applied several filters to the database and ultimately reached at four comparables. The comparison of interest spread was found that comparable interest paid as per the associated enterprise credit rating is 320 bps whereas actual interest spread as per loan agreement is 400 bps and indicative interest saving is 80 Bps. However it was

submitted that arithmetic mean of interest rate margin/spread of the comparable entities with the given credit rating is 302 bps whereas the margin in case of the associated enterprise is 400 bps. The margin maintained by the lenders of the associated Enterprises higher than that of the comparable spread and that indicated that there is no interest saving due to the provision of corporate guarantee from assessee to its associated enterprises and funds are borrowed with higher interest rates. Therefore it was stated that even if a corporate guarantee commission needs to be charged it can be very negligible in the given scenario. We find that interest saving approach is the maximum guarantee fee that can be charged. The coordinate bench in assessee's own case in earlier years has upheld the higher rate of corporate guarantee fee as arm's-length price.

018. Coming to the first ground of appeal of the learned assessing officer on the issue of interest on advances given to associated enterprises, we find that the assessee has disclosed the international transaction of advances given (outstanding balances) of ₹ 863,645,534/– to its joint-venture entity and adopting 'Other method' as the most appropriate method did not charge any interest. The facts show that the assessee has advanced loans to its associated enterprises in South Africa and assessee has not charged any interest. There is joint-venture

entity in South Africa of the assessee and a South African entity wherein share of profit of each of the members is 50%. This JV was awarded the contract for construction of transmission lines in South Africa. The assessee manufactures and supplies transmission towers to joint-venture. The assessee being one of the JV partner advanced a sum of ₹ 863,645,539/– which is outstanding without charging any interest. The claim of the assessee is that the amount was given in earlier years and the joint-venture is now facing a huge cash crunch due to operational losses and therefore it is not appropriate to charge any interest. The assessee also claimed that the advance has been made to the joint-venture to meet the deficit in cash flow while executing project in South Africa. It is the advance out of matter of commercial prudence to protect the business interest of the assessee in the project of the joint-venture. Assessee has also stated that there is a difference between providing advance and loan to its associated enterprises and providing advances as a business partner. It is also claimed by the assessee that the entire advances are not recoverable and therefore substantial part of those advances are written off in the financial year 2016 – 17. Therefore, no interest could be charged. The learned transfer pricing officer held that no independent party would have given such advance to any third-party and therefore the interest is required to be charged. As

the advance was pertaining to financial year 2010 – 11 onwards, various rates on the Bloomberg database was adopted by the learned TPO for determination of the arm's-length price. We find that in ITA number 17/M/2018 for assessment year 2012 – 13 in ITA number 115/M/2018 for same assessment year dated 14/9/2020 [2021] 88 ITR (Trib) 246 (ITAT [Mum])wherein as per ground number 1 in ITA number 17/M/2018 wherein the transfer pricing adjustment of ₹ 245.43 lakhs were made on account of interest on business advances, the coordinate bench has deleted the adjustment as under: –

> *"2.1 First, we take up assessee's appeal ITA No.17/Mum/2018 wherein the ground read as under: -*
>
> *1. On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in making an upward Transfer Pricing adjustment under Section 92CA of the Income Tax Act, 1961 of ₹ 2,45,43,617/- by treating the transaction of business advance as loans given to AE. The appellant prays that the aforesaid action of the Hon'ble CIT(A) may please be held as bad-in-law and be deleted.*
>
> *As evident, the sole subject matter of assessee's appeal is Transfer Pricing (TP) adjustment of ₹ 245.43 Lacs against business advances given by the assessee to its AE.*
>
> *2.2 We have carefully considered the arguments advanced by both the representatives and perused relevant material on record including documents placed in the paper-book. We have also deliberated on various judicial pronouncements as cited before us during the course of hearing. Our adjudication*

to the subject matter of appeal would be as given in succeeding paragraphs.

2.3 Briefly stated, the assessee being resident corporate assessee is stated to be engaged in the business of designing, fabrication, galvanizing and testing of transmission lines & telecom towers, supply and erection of sub-station structures and overhead equipment for railway electrification and managing infrastructure sites for telecommunication services. The assessment for year consideration was framed u/s 143(3) r.w.s. 144C(3) on 31/03/2016 wherein the income was determined at ₹ 251.41 Crores after certain additions / disallowances / adjustments as against returned income of ₹ 185.05 Crores e-filed by the assessee on 29/11/2012 which was later on revised to ₹ 198.26 Crores. However, during assessment proceedings, the assessee furnished revised computation of total income reflecting income of ₹ 229.71 Crores.

2.4 Since the assessee carried out certain international *transactions with its Associated Enterprises (AE), a reference u/s 92 CA (1) was made to Ld. Joint Commissioner of Income Tax (Transfer Pricing)-2(3), Mumbai (in short 'TPO') for determination of Arm's Length Price (ALP) of these transactions. One of such transaction was advances given by the assessee to one of its AE for ₹ 2069.94 Lacs. The advances were given to an AE namely EJP* KEC *Joint Venture, South Africa in various tranches during the year, which has been tabulated at para 6.1 of Ld. TPO's order. The perusal of the same would show that the advances given in earlier years were ₹ 828.80 Lacs whereas fresh advances given during the year were for ₹ 1903.83 Lacs (after adjusting forex fluctuations of ₹ 166.11 Lacs), thus aggregating in all to ₹ 2732.63 Lacs. The currency of loan was denominated in US dollars without any security. Accordingly, the assessee was asked to provide requisite details as to benchmarking of this transaction.*

2.5 The assessee submitted that comparable uncontrolled price (CUP) was selected as most appropriate method (MAM) with AE being the tested party. The assessee explained that its AE had availed a loan facility from ICICI Bank UK @ 3 months LIBOR + 120 bps. This transaction could be used as internal CUP to benchmark the transaction.

The advances were stated to be given out of assessee's accumulated / undistributed profits and it was submitted that the assessee did not avail any external commercial borrowings (ECB). Since the transaction was stated to be in the nature of advances, no interest was charged during the year.

2.6 The assessee explained that during year under consideration, the joint venture (JV) faced cash crunch due to huge operational losses in the project. In support, financials of the JV were placed on record. It was submitted that the funds were advanced to meet the deficit in cash flow while executing projects in South Africa. The advancement was nothing but a matter of commercial prudence primarily to protect the business interest of the assessee in projects of JV. This was just a fulfilment of the 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. Since the advances were purely in the nature of business advances to fulfil the obligations of the assessee as a JV partner, the assessee has not charged any interest on the said advance. It was also submitted that relationship on account of advancing funds could not be considered in isolation without considering crucial business scenarios and expediency.

2.7 However, the aforesaid submissions could not convince Ld. AO and therefore, internal CUP as proposed by the assessee was rejected since loans taken by the assessee from Bank were secured loans and guaranteed by the assessee himself and

therefore, the same could not constitute as internal CUP.

2.8 Since the assessee did not offer any suo-moto TP adjustment, the provisions of Sec. 92CA(3)(a) & (c) were invoked and Ld. AO proceeded to benchmark the same against appropriate rate. Finally, it was held that the interest should be charged at the rates applicable for fixed rates loan.

The benchmarking was to be done on the basis of LIBOR plus some spread. Adopting Bloomberg database, the benchmark rates were held to be 15.36% for FY 2010-11 & 11.29% for FY 2011-12. Applying the said rates to opening advances and fresh advances, net TP adjustment thus proposed worked out to be ₹ 245.43 Lacs, as computed in para 6.1 of the order. The TP adjustment, thus proposed, was incorporated while framing assessment order.

3. Before Ld. CIT(A), the assessee reiterating the submissions asserted that the advances given to its AE were not in the nature of loan and hence, interest was not charged on such advances. The Ld. TPO failed to appreciate that assessee's role in the transaction as an entity substantially interested in the joint venture and proceeded to treat the assessee merely a fund provider. The funds were advanced as a business partner so as to sustain the business of joint venture and with a view to protect own interest. The advances were given to resolve the problem of cash crunch and the therefore, the ultimate beneficiary would be assessee himself since the assessee was 50% partner in the joint venture. Therefore, the concept of loan could not be applied to the assessee's case since the cost and benefit would ultimately accrue to the same person. However, not convinced, the adjustment was confirmed, against which the assessee is under further appeal before us.

The Ld. CIT(A) agreed with assessee's submissions that that the ALP of the loans was to be

determined on the basis of rate of interest being charged in the country where the loan was received /consumed and directed Ld. AO to recompute the ALP.

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.

5. The assessee's appeal stands allowed in terms of our order."

019. As there is no change in the facts and circumstances of the case, and the adjustment of the arm's-length price is also on identical facts and circumstances, we respectfully following the decision of the coordinate bench upholding order of the learned CIT – A – ground number (issue number 1) of the appeal of the learned AO is dismissed

020. Issue number 2 is with respect to the corporate guarantee. The learned CIT – A has decided this issue following the decision of the coordinate bench in assessee's own case for earlier years. We find that identical issue has been considered by the coordinate bench in assessee's own case for earlier years as under:-

"6.1 The grounds raised by the revenue read as under: -

PERFORMANCE GUARANTEE:

i. On the facts and circumstances of the case, the Ld.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 Ld.CIT(A) was not justified in deciding that the cost recovery was at arm's length itself as the assessee has recovered 0.60% 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 circumstances of the case, the Ld.CIT(A) was not justified in deciding that the guarantee for advance payment 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 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 Ld.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 0.60% 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 Ld.CIT(A) was not justified in deciding that the performance guarantee provided to third party i.e. Bahwan Engineering Company LLC on behalf of its AE i.e. 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 Ld.CIT(A) was not justified in deciding that the performance guarantee provided to third party i.e. Bahwan Engineering Company LLC on behalf of its AE i.e. 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 Ld.CIT(A) was not justified in deciding that the performance guarantee provided to third party i.e. Bahwan Engineering Company LLC on behalf of its AE

i.e. KEC Global FZ LLC was not an international transaction without appreciating the fact that the term "guarantee" clearly mentioned in Explanation of section 92B(l)(c) of IT Act 1961 as an International Transaction.

viii. On the facts and circumstances of the case, the Ld.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 Ld.CIT(A) was not justified in deciding that the cost recovery was at arm's length itself as the assessee has revered 0.60% 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.

CORPORATE GUARANTEE :

x. On the facts and circumstances of the case, the Ld.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, which was a facility provided to its AE.

XI. On the facts and circumstances of the case, the Ld.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.

xii. On the facts and circumstances of the case, the Ld.CIT(A) was not justified in deciding that the Corporate guarantee provided to ICICI Bank on behalf of its AE i.e. 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.

xiii. Mark to Market Loss: "On the facts and in the circumstances of the case, the Ld.CIT(A) erred in holding that the mark to market loss arising on the

foreign exchange contracts which were outstanding as at the year end is an accrued loss and not a notional loss.

xiv. On the facts and in the circumstances of the case, the Ld CIT(A) erred in holding that the mark to market loss arising on the foreign exchange contracts which were outstanding as at the year end, is an accrued loss and is not contingent, unascertained or notional in nature and hence, no adjustment could be made to the book profit under clause (c) of the Explanation (1) to section 115JB(2).

As evident, the grounds raised by revenue are related with addition arising out of TP adjustment against performance guarantee and corporate guarantee given by the assessee on behalf of its AE. In ground nos. (xiii) & (xiv), the revenue has assailed the action of Ld.CIT(A) in treating the Market-to-mark (MTM) losses on forex contracts to be an accrued loss.

6.2 The Ld. AR, at the outset, submitted that substantial issues of revenue's appeal are covered in assessee's favor by the earlier decision of this Tribunal for AY 2010-11, ITA No.5611/Mum/2015 order dated 10/07/2019 and therefore, the same view may be taken in this year. The copy of the same has been placed on record. The Ld. DR could not controvert the said position but supported the adjustments proposed by Ld. TPO.

6.3 In the above background, during proceedings before Ld. TPO, it transpired that the assessee advanced certain corporate and performance guarantee for its AE, the details of which are as follows: -

Performance Guarantees:

Name of Borrower AE	*KEC Global FZ LLC Ras Ul Khaimah*	*KEC Global FZ LLC Ras Ul Khaimah*	*KEC Global FZ LLC Ras Ul Khaimah*	*SAE Tower Holding LLC USA*
Country	*UAE*	*UAE*	*UAE*	*USA*
Bank Name and Country	*Bank of India – India*	*Bank of India – 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	*6,81,60,907*	*13,63,21,814*	*223,96,50,902*	*3,46,52,829*
Loan Amount availed	*N.A.*	*N.A.*	*N.A.*	*N.A.*
When guarantee given	*2009*	*2009*	*2009*	*2010*
No of days during the year which guarantee was given	*365*	*365*	*365*	*365*
Rate recovered	*0.60%*	*0.60%*	*-*	*0.60%*
Purpose	*Towards performance of contract*	*Towards advance payment made by*	*Towards performance of contract*	*Towards performance of contract*

		customer		

Corporate Guarantees:

Name of Borrower AE	*KEC Transmission LLC USA*	*KEC US LLC, USA*
Country	*USA*	*USA*
Bank Name and Country	*ICICI Bank-UK*	*ICICI Bank-UK*
Whether amount borrowed by AE from third party without corporate guarantee	*No*	*No*
Amount guaranteed	*323,67,76,046*	*215,78,50,697*
Loan Amount availed	*323,67,76,046*	*215,78,50,697*
When guarantee given	*2010*	*2010*
No of days during the year which guarantee was given	*365*	*365*
Rate recovered	*-*	*-*
Purpose	*Towards availing a loan from bank*	*Towards availing a loan from bank*

It is evident that the assessee has recovered rate of 0.60% with respect to performance guarantees in 3 out of 4 cases whereas no rate has been recovered against corporate guarantees.

6.4 The assessee, in its TP study report, justified the rates so charged and submitted that these transactions were at Arm's Length price. The assessee also submitted that guarantee extended by the assessee was in the form of shareholders or stewardship activities. Various other submissions were made by the assessee before Ld. TPO to justify the rates recovered.

6.5 However, Ld. TPO benchmarked performance guarantees @1% and Corporate Guarantees @2% and proposed aggregate adjustment of ₹ 1312.45 Lacs. The Ld.CIT(A) directed Ld. AO to apply the first appellate decision for AY 2011-12 and partially allowed the appeal. The perusal of appellate order for AY 2011-12 dated 28/07/2016, as placed on record, would reveal that Ld. CIT(A) has preferred to follow the stand taken in AY 2010-11. Aggrieved, the assessee is under further appeal before us.

6.6 At the outset, the adjustment, as proposed by Ld. TPO, could be tabulated in the following manner: -

Performance Guarantees:

Name of Borrower AE	KEC Global FZ LLC Ras Ul Khaimah	KEC Global FZ LLC Ras Ul Khaimah	KEC Global FZ LLC Ras Ul Khaimah	SAE Tower Holding LLC USA
Country	UAE	UAE	UAE	USA
Bank Name and Country	Bank of India -India	Bank of India – 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	68160907	136321814	2239650902	34652829
Loan Amount availed	N.A.	N.A.	N.A.	N.A.
When guarantee given	2009	2009	2009	2010
No of days during the year which guarantee was given	365	365	365	365
Rate recovered	0.60%	0.60%	-	0.60%
Purpose	Towards performance of contract	Towards advance payment made by customer	Towards performance of contract	Towards performance of contract
Guarantee fee charged	408,965	817,931		207,917
ALP Guarantee fee	1.00%	1.00%	1.00%	1.00%
ALP Guarantee fee (Rs.)	681,609	1,363,218	22,396,509	346,528
Adjustment	272,644	545,287	22,396,509	138,611

Corporate Guarantees:

Name of Borrower AE	KEC Transmission LLC USA	KEC US LLC USA
Country	USA	USA
Bank Name and Country	IC1CI Bank -UK	ICICI Bank -UK
Whether amount borrowed by AE from third party without corporate guarantee	No	No
Amount guaranteed	3236776046	2157850697
Loan Amount availed	3236776046	2157850697
When guarantee given	2010	2010
No of days during the year which guarantee was given	365	365
Rate recovered	-	-
Purpose	Towards availing a loan from bank	Towards availing a loan from bank
Guarantee fee charged		
ALP Guarantee fee	2.00%	2.00%
ALP Guarantee fee (Rs.)	64,735,521	43,157,014
Adjustment	64,735,521	43,157,014

6.7 As evident from the impugned order, Ld. CIT(A) has directed Ld. AO to follow the first appellate order for AY 2011-12 which, in turn, relies upon appellate order for AY 2010-11. We find that revenue was under further appeal for AY 2010-11 before this Tribunal vide ITA No.5611/Mum/2015 order dated 10/07/2019, assailing the stand of Ld. first appellate authority in providing the relief to the assessee, in this regard. The copy of the order has been placed on record wherein we find that the revenue's appeal was partly allowed by the co-ordinate bench.

In the above background, ground-wise adjudication to the appeal would be as follows.

7.1 Ground Nos. (i) & (ii) are related with adjustment arising out of performance guarantee of ₹ 6.81 Crores provided by assessee to an entity namely Chadian Company for Water & Electricity (CCWE) on behalf of its AE KEC Global, FZ LLC. It transpired that the assessee gave a bank guarantee to CCWE, a customer of its wholly owned subsidiary company (KEC Global, FZ LLC) for performance of contract entered into between AE and its customer i.e. CCWE. The bank guarantee was given by Bank of India. The bank utilized the guarantee facility sanctioned to assessee while sanctioning aforesaid bank

guarantee to assessee's AE. The assessee, based on letter obtained from the bank, charged guarantee commission of 0.60% from its subsidiary. The Ld. TPO estimated the same @1%. We find that this issue is contained in paras 5.1 to 8 of the cited decision of Tribunal in assessee's own case for AY 2010-11. The Tribunal has concluded that internal CUP in the shape of commission charged by the bank, would be most direct and reliable way to apply Arm's Length Principle. Further, when there was absolutely no loss to the assessee and entire cost was recovered from the AE, no further adjustment would be required.

Applying the said principle to year under consideration, we find that the assessee has charged commission in accordance with the bank's sanction letter and therefore, no further adjustment, as proposed by Ld. TPO, would be justified. Accordingly, these grounds stand dismissed.

7.2 Ground Nos. (iii) & (iv) are related with adjustment arising out of guarantee for advance payment provided by assessee to Chadian Company for Water & Electricity (CCWE) on behalf of its AE KEC Global, FZ LLC for ₹ 13.63 Crores. The assessee has given a bank guarantee to its wholly owned subsidiary company (KEC Global, FZ LLC), to guarantee the advance payments by assessee to its AE towards a contract to be executed by the AE. The bank guarantee was given by Bank of India. The bank utilized the guarantee facility sanctioned to assessee while sanctioning bank guarantee to assessee's AE. The bank charged a guarantee commission of 0.60% from assessee and the said rate was recovered from its AE. The Ld. TPO estimated the same @1%.

We find that this issue is contained in paras 8.1 to 11 of the cited decision of Tribunal in assessee's own case for AY 2010-11. The Tribunal has concluded that the rate as applicable to performance guarantee would apply to this guarantee also. Following the same principle, we hold that the rate of 0.60% as adopted for performance guarantee to CCWE would apply to this guarantee also. Since, the assessee has already charged a rate of 0.60%, no further adjustment would be required. Accordingly, these grounds stand dismissed.

7.3 Ground Nos. (v), (vi) & (vii) are related with adjustment arising out of performance guarantee of ₹ 223.96 Crores provided by assessee to a third party i.e.

Bahwan Engineering Company LLC (BEC, an Oman based entity), on behalf of its AE namely KEC Global FZ LLC. The transaction is in the form of indemnity provided by the assessee to BEC with a view to secure the performance of the contract entered into by BEC with assessee's AE. The assessee did not charge any commission by submitting that the assessee was entirely compensated and therefore, no further charge was called for. The Ld. TPO estimated the same @1%. We find that this issue is contained in paras 2 to 5 of the cited decision of Tribunal in assessee's own case for AY 2010-11. The Tribunal has concurred with assessee's submissions that the contract which was awarded to its AE would get assigned in assessee's favor wherein the assessee would be obligated to execute the contract on its own by using its own infrastructure, which would in turn, result in assessee deriving the entire contractual revenue and huge profits therefrom. Hence, there would be no need to make any adjustment on Arm's Length principles. Facts being pari-materia the same, respectfully following the same, we hold that the assessee was justified in not charging any fees against the same. These grounds stand dismissed.

7.4 Ground Nos. (viii) & (ix) are related with adjustment arising out of performance guarantee of ₹ 3.46 Crores provided by the assessee in favor of an entity namely SNC Lavalin, Canada (SNC) on behalf of its AE namely SAE Towers Limited, USA (a subsidiary of the assessee). The guarantee was towards performance of the contract entered into between SNC and assessee's AE-SAE Towers Limited. The bank utilized the guarantee facility sanctioned to assessee while giving the said guarantee and charged fees of 0.60%. The company, in turn, recovered the same from its AE. We find that facts are pari-materia the same as contained in Ground Nos. (i) & (ii) of the revenue's appeal.

Following the same principle, we hold that the fees charged by the assessee was at Arm's Length Price. Therefore, the impugned order would not require any interference on our part. These grounds stand dismissed.

7.5 Ground Nos. (x) to (xii) arises out of corporate guarantees provided by the assessee on behalf of its 2 AEs namely KEC Transmission LLC, USA and KEC US LLC, USA. The corporate guarantees were given to ICICI Bank, UK to secure the finances provided by the said bank to two of

assessee's AEs. The said financing was stated to be utilized for the purpose of downstream acquisition of the business of SAE Towers Ltd., USA. The assessee submitted that for the aforesaid purposes, a special purpose vehicle (SPV) i.e. KE US LLC was formed to facilitate KEC to make downstream acquisition of business in USA. The guarantee was stated to be wholly and exclusively for the purpose of facilitating the assessee and hence, it was not a case where any services were rendered to the SPV in any manner. Rather SPV provided services to KEC by way of facilitating the downstream acquisition. Therefore, no fees were charged against the same. Another plea raised was that the assessee merely fulfilled shareholders' functions. To put it differently, if the guarantee was not given, KEC would have to infuse equity capital in the company which would not have given rise to any taxable event. Merely because, KEC chose to provide a guarantee instead of infusing equity capital into the SPV, the transactions would not give rise to any taxable event. The assessee also placed reliance on the decision of Hon'ble Apex Court in S.A. Builders (238 ITR1) to justify non-charging of fees / commission.

7.6 However, Ld. TPO, noticing the amendment made by Finance Act 2012 in Sec.92B, concluded that international transactions would include capital financing by way of guarantees which were to be benchmarked on the principle of Arm's Length Price (ALP). The Ld. TPO also reached a conclusion that that on simple comparison of the risk borne in corporate guarantee would be more than risk borne in bank guarantee since the risk in the case of default would not be covered by any asset of the entity guaranteed. The ratio of various decisions rendered by the Tribunal including the decision rendered in Everest Kanto (ITA No. 542/Mum/2012 23/11/2012) and Glenmark Pharmaceuticals (ITA No.5031/Mum/2012 13/11/2013) was considered. These decisions have already been tabulated and summarized on page nos. 19 to 21 of Ld. TPO's order. The Ld. TPO noticed that in the stated decisions, the Tribunal relied upon internal CUP and held that the commission paid by Indian assessee to the local banks for its credit arrangement constitutes an internal CUP for comparing the transactions with its AE. However, the said rates as per internal CUP were to be adjusted since by the very nature, the foreign financial transactions are riskier than domestic ones because of the difficulties in enforcing recovery in foreign jurisdiction.

Since the spread on loans depend on credit ratings of the borrowing party, it is the credit rating of borrower AE which would be relevant and not the credit rating of assessee extending the guarantee to facilitate the borrowing of its AE. The banks would charge lower fees while giving guarantees for entities having high credit ratings and on the other hand, high fees would be charged for entities having low credit ratings and that too, in a foreign jurisdiction. Since the credit rating of the assessee guarantor was better than the rating of the guaranteed, it was natural that rate charged by the bank from the guarantor would be different in comparison to situation where the guarantee was provided to the guaranteed. Therefore, the fees charged by the bank from the holding company could not constitute internal CUP for charging the rate from AE without proper adjustment. Since the rates charged by the banks to Indian companies ranged between 1.10% to 3% depending upon various factors, the ALP rate would be between 1.5% to 3.5%. Since the loan was taken for business purposes, the appropriate rate would be 2%.

Accordingly, the transactions were benchmarked @2% and adjustments were proposed. The TP adjustments, thus proposed, were incorporated in the assessment order. Upon further appeal, Ld. CIT(A) directed Ld. AO to apply the appellate decision dated 28/07/2016 for AY 2011-12.

7.7 The perusal of appellate order for AY 2011-12, as placed on record, would show that Ld. CIT(A) observed that there was no cost element involved in the transaction of issuance of corporate guarantee.

The assistance provided by the assessee to its AE would not have any bearing on profits, incomes, losses or assets of the assessee and therefore, the transaction of issuance of guarantee would be out of ambit of international transactions u/s 92B(1) of the Act. Similar view has been applied in the year under consideration. Aggrieved, the revenue is in further appeal before us.

7.8 The Ld. DR specifically drew our attention to the amendment brought in by Finance Act, 2012 w.e.f. 0/04/2002 in Explanation (i)(c) to Sec. 92B, to submit that the capital financing by way of guarantees have specifically been included within the ambit of international transactions.

7.9 Au Contraire, Ld. AR, by way of written as well as oral submissions, pleaded that the transactions would not fall within the definition of international transaction as defined in Sec. 92B since the guarantee was provided by assessee to its subsidiary AEs so that AEs could avail loan for the purpose of acquiring the business. It was pleaded that guarantees issued by assessee would have no bearing on profits / losses of the assessee since there was no cost involved and no guarantee commission has been paid by the assessee. The aforesaid amended explanation would have no application in terms of decision of Delhi Tribunal in ***Bharti Airtel Ltd. (43 Taxmann.com 150)*** *wherein it has been held that even after the amendment to explanation to Sec.92B, corporate guarantee given for the benefit of AE having no cost to the assessee would be outside the ambit of international transactions.*

Another plea raised by Ld.AR is that this was shareholder's activities and hence not covered by the term international transactions as defined in explanation to Sec.92B. Reliance has also been placed on following decisions: -

(i) DCIT V/s Mastek Ltd. (ITA No. 2879/Ahd/2014 dated 19/03/2018, Ahd.Tribunal)

(ii) Siro Clinpharm Pvt. Ltd. V/s DCIT (ITA No. 2618/Mum/2014 31/03/2016, Mumbai Tribunal)

(iii) Marico Ltd. V/s ACIT (ITA No. 8858/Mum/2011 dated 18/05/2016, Mumbai Tribunal)

(iv) DCIT V/s Rohit Ferro Tech Ltd. (ITA Nos. 262 & 263/Kol/2018 dated 12/10/2018, Kolkata Tribunal)

(v) DCT V/s EIH Ltd. (89 Taxmann.com 417, Kolkata Tribunal)

7.10 Upon careful consideration of factual matrix, it is noted that the assessee has provided unconditional, absolute and irrevocable corporate guarantee to secure the finances advanced by ICICI bank to two of its wholly owned AEs. The guarantor guarantees to finance party the punctual performance by the borrower of all the secured obligation and undertake with finance party that whenever either borrower does not pay the amount as and when due under or in connection with any finance document, the

guarantor will immediately on demand by the bank, pay that amount as it was the principal obligor in respect of that amount. The AEs were stated to be Special purpose vehicle with a view to enable the assessee in downstream acquisition of the business of an entity namely SAE Towers Ltd., USA. The assessee has not charged any fees from its AEs in providing the corporate guarantee, inter-alia, by submitting that no cost was involved and the stated transactions would have no bearing on profits, incomes, losses or assets of the assessee.

However, upon perusal of terms of corporate guarantee deed executed by the assessee in favor of the bank, as placed on record, we find that in case of payment default, the assessee was obligated to pay the amount demanded by the bank as if it was the principle obligor in respect of that amount. The liability of the assessee extended to the guaranteed amount of 110 Million US Dollars. In the event of default, the assessee as a guarantor, was liable to pay without demur or protest the amount stated in the demand certificate. The assessee had independent contractual obligation to pay the guaranteed amount. Further, in case of default by the guarantor, the guarantor was liable to pay further interest also.

Therefore, it is quite discernible that the assessee had definite obligation under the corporate guarantee and to say that that the same shall have no bearing on profits, incomes, losses or assets of the assessee would not be a correct proposition. Even as per assessee's own submissions, if the said guarantee was not provided, the assessee would have been obligated to infuse equity capital in its wholly owned SPV AEs with a view to enable downstream acquisition of SAE Towers Ltd. USA which would have entailed assessee's resources. This is further fortified by the fact that fact that guarantees have specifically been brought within the ambit of term international transactions by way of amendment to explanation (i)(c) to Sec.92B by Finance Act, 2012 w.e.f. 01/04/2002.

Therefore, the arguments that the said transactions could not be considered to be international transaction do not convince us and therefore, we hold that the same was to be benchmarked on ALP principles. The aforesaid reasoning / conclusion would also make the cited case laws of Ld. AR inapplicable to the facts of the present case.

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 purpose vehicle 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."*

021. As all financial guarantee and performance guarantee issued by the assessee are covered by the decision of the coordinate bench in assessee's own case wherein the guarantee fees with respect to various guarantees where the assessee has recovered the guarantee commission at the rate of 0.6% was upheld, therefore all these guarantees are continuing guarantee from the earlier years and there is no change pointed out before us in the functions, assets and risk of the parties or any change in the economic conditions, respectfully following the decision of the coordinate bench we confirm the order of the learned CIT – A.

022. With respect to the financial guarantee given to ICICI bank United Kingdom on behalf of keys the

transmission LLC and KC US LLC (whole owned subsidiary of the assessee), no guarantee fee was charged, the learned CIT – A following the decision of the coordinate bench in assessee's own case has upheld the arm's-length guarantee fees of 0.20%. As the learned departmental representative could not point out any change in the facts and circumstances of the case as well as any variation in the functions, assets and risk of the parties or change in economic conditions and further as it is a continuing guarantee from earlier years, respectfully following the decision of the coordinate bench we uphold the order of the learned CIT – A in benchmarking the guarantee fee income at the rate of 0.20%.

023. Accordingly, issue number two of the appeal of the learned AO and ground number 1 of the appeal of the assessee are dismissed.

024. Coming to ground number (issue number 3) of the appeal of the learned assessing officer which is with respect to the deletion of the addition on account of foreign exchange loss mark to market provided by the assessee. The learned CIT – A has held that this issue is also covered in favour of the assessee by the decision of the coordinate bench in assessee's own case. We find that the coordinate bench has dealt with this issue 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 ₹ 1227.24 Lacs on account of exchange (gain) / loss (net). An amount of ₹ 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 ₹ 533.16 Lacs was disallowed in that year but reversed during the year under consideration, the net disallowance was worked out to be ₹ 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."

025. Therefore, respectfully following the decision of the coordinate bench in assessee's own case we also dismiss ground number 3 of the appeal of the learned assessing officer and uphold the order of the learned CIT – A.

026. Coming to the remaining grounds of appeal of assessee, as per ground number 2 the learned CIT – A has confirmed the addition of ₹ 93,145/– paid by the learned assessing officer under section 14 A of the income tax act read with rule 8D of the income tax rule in computing the book profit under section 115JB of the act. We find that this issue is squarely covered in favour of the assessee by the decision of special bench in case of ACIT versus vireet investments private limited 165 ITD 27. Even otherwise it is stated that assessee has not received any exempt income during the year and therefore there is no question of making any disallowance under section 14 A of the income tax act even in the normal computation of total income and therefore the same also cannot be imputed while computing the book profit under section 115JB of the act. Accordingly ground number 2 of the appeal of the assessee is allowed.

027. Ground number 3 of the appeal of the assessee is with respect to the deduction of taxes paid at foreign location. This ground of appeal was not substantiated by any argument by the learned authorized representative and therefore same is dismissed.

028. In the result appeal filed by the assessee is partly allowed and appeal of the learned assessing officer is dismissed.

Order pronounced in the open court on 04 December 2023.

Sd/-	Sd/-
(MS. KAVITHA RAJAGOPAL)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 04 December, 2023
Sudip Sarkar, Sr.PS & Dragon

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai