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

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER
AND SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 2234/Mum/2021 (A.Y. 2015-16)
ITA No. 2232/Mum/2021 (A.Y. 2016-17)

DCIT, Central Circle-8(3), Aayakar Bhavan, Mumbai	Vs.	M/s. Shapoorji Pallonji and Co. Pvt. Ltd. First Floor, Shapoorji Pallonji Centre, 41/44, Minoo Desai Marg, Colaba, Mumbai-400005. PAN: AAACS 6994 C
(Appellant)		(Respondent)

ITA No. 2026/Mum/2021 (A.Y. 2015-16)
ITA No. 2027/Mum/2021 (A.Y. 2016-17)

M/s. Shapoorji Pallonji and Co. Pvt. Ltd. First Floor, Shapoorji Pallonji Centre, 41/44, Minoo Desai Marg, Colaba, Mumbai-400005. PAN: AAACS 6994 C	Vs.	DCIT, Central Circle-8(3), Aayakar Bhavan, Mumbai
(Appellant)		(Respondent)

CO No. 53/Mum/2022 (A.Y. 2015-16)
(Arising out of ITA No. 2234/Mum/2021)

CO No. 54/Mum/2022 (A.Y. 2016-17)
(Arising out of ITA No. 2232/Mum/2021)

M/s. Shapoorji Pallonji and Co. Pvt. Ltd. First Floor, Shapoorji Pallonji Centre, 41/44, Minoo Desai Marg, Colaba, Mumbai-400005. PAN: AAACS 6994 C	Vs.	DCIT, Central Circle-8(3), Aayakar Bhavan, Mumbai
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Rajan Vora a/w Shri Nikhil Tiwari & Ms. Palak Mehta
Revenue by : Shri Ajay Chandra, CIT/DR

Date of Hearing : 21.02.2025
Date of Pronouncement : 06.03.2025

O R D E R

PER BENCH:

These six appeals comprising four appeals filed by the assessee and two appeals filed by the Revenue pertaining to A.Y. 2015-16 to A.Y. 2016-17 are directed against the different order of ld. First Appellate Authority. Since common issue on identical facts are involved in these appeals, therefore, for the sake of convenience these appeals are adjudicated together by taking the ITA No. 2234/M/2021 filed by the Revenue and ITA No. 2026/M/2021 filed by the assessee for the A.Y. 2015-16 as a lead and its finding will be applied to the other appeals wherever these are applicable.

ITA No. 2234/M/2021 (A.Y. 2015-16) (Revenue Appeal)

"(i) Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) right in restricting the disallowance made u/s. 14A of the Act to Rs. 10,00,000/- giving relief of Rs.7,27,78,541/- contrary to CBDT Circular No. 5/2014 dated 11.02.2014 which clearly states that it is not necessary to earn exempt income in a particular year in which the disallowance is made?

(ii) Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was correct in relying on the judgment of decision of Hon'ble Special Bench in the case of Vireet Investments by holding that the disallowance made u/r. BD cannot be adopted while computing book profit u/s 115JB and held that the assessee has incurred expenses for earning of exempt income, hence, directed the AO to restrict the disallowance to the amount suo-moto disallowance by the assessee?

(iii) Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was correct in deleting the disallowance of Rs. 19,81,00,000/- u/s 36(1)(iii) of the Income Tax Act, 1961 without appreciating the fact that interest bearing funds were advanced for non business purpose?

(iv) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is right in directing to restrict the TP adjustment of corporate guarantee fee to 0.5% instead of 0.7% charged by the TPO without appreciating the facts of the case and without deciding the issue on the merits of the case?

(v) Whether on the facts and circumstances of the case and law, the Ld.CIT(A) is right in arriving at the same 0.5% rate of corporate guarantee fee relying on the Everest Kanto case (378 ITR 57), which is in violation of provisions of Rule 108(4) of IT Rules on contemporaneous nature of data as credit ratings and the interest rate vary every year, without adopting any of the methods prescribed in section 92C which is violation of law?

(vi) Whether on the fact and circumstances of the case and in law, the Ld.CIT(A) is right in holding that the fee for the guarantee issued by the instant assessee for the loans availed by the AEs from banks should be charged at 0.5% as decided in Everest Kanto case, 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 108 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 108?

(vii) Whether on the fact and circumstances of the case and in law, the Ld. CIT(A) is right in not appreciating that AE did not have the credit-worthiness and financial capacity to service its own loan and in such a situation assessee standing guarantee for the loan, it had to be remunerated at arms's length?

(vill) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is right in not appreciating the fact that letter of comfort binds the assessee to maintain its shareholding in the Associated enterprise, prevents it from creating a lien on the shares of AE and therefore, enables the associated enterprise to raise funds at a lower interest rate, and computing an ad hoc rate of 0.2% of 49% net asset value of its share investment is not only arbitrary but also against the provisions of the Act.

(ix) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is right in restricting the adjustment on account of issuing letter of comfort to 0.2% of the net asset value of subsidiary, without appreciating the fact that such letter has enabled the AE to obtain loans

at a lesser interest rate and profit arising from such transaction should have been shared between the assessee and its AE?

(x) The appellant prays that for this and other reasons it is submitted that order of CIT(A) on the grounds be set aside and that of the Assessing Officer be restored.

(xi) The appellant craves leave to amend, alter, delete or add grounds which may be necessary."

ITA No. 2026/M/2021 (Assessee's Appeal)

"1.1 The learned Commissioner of Income-tax (Appeals) erred, both in law and on the facts and in the circumstances of the case, in sustaining an upward adjustment to the extent of Rs. 5,63,45,472/-towards non-recovery of guarantee commission from Associated Enterprises ('AEs') in relation to issuance of Letter of Comfort ('LOC'), performance guarantee and financial guarantee considering the same as International transaction.

1.2 The learned Commissioner of Income-tax (Appeals) erred, both in law and on the facts and in the circumstances of the case, in not appreciating the fact that the issuance of LOC, performance guarantee and financial guarantee is an integral part of the construction /real estate industry in which the appellant operates and that the issuance of LOC, performance guarantee and financial guarantee is merely shareholder activity (i.e. stewardship activity) and is outside the scope of section 92 of the Income-tax Act, 1961.

1.3 The learned Commissioner of Income-tax (Appeals) erred in not appreciating the fact that the LOC merely state that appellant being the parent company of the Group is aware of the banks providing various financial assistance to its AEs and that the primary intention behind issuing LOC is to inform third party lenders that the appellant will not divest its holding from the subsidiaries and ought to have appreciated that the LOC does not oblige the appellant to bear the costs of repayment of loan and it cannot be called upon by the lenders to make good the default if any by its AE.

1.4 The learned Commissioner of Income-tax (Appeals) erred in disregarding the detailed submission of the appellant and judicial precedents to reject the contention that corporate and financial guarantee

are not covered under the definition of International Transaction as provided under section 928 of the Act.

1.5 The learned Commissioner of Income-tax (Appeals) erred in not appreciating the fact that issuance of LOC, performance guarantee and financial guarantee, does not involve any cost to the appellant, nor does it have any bearing on profits, income, loss or assets of the appellant company, and therefore cannot be considered as an international transaction.

1.6 The learned Commissioner of Income-tax (Appeals) erred in not appreciating the fact that issuance of LOC/performance guarantee/financial guarantee provided by the appellant company to its AEs enables them to secure credit in their respective overseas jurisdictions and to comply with the laws, in those jurisdictions and that in absence of such locally sourced funding, the appellant would have to support its AE's business operations by providing funds through equity or otherwise. Accordingly, the learned Commissioner of Income-tax (Appeals) ought to have appreciated that the transaction of issuance of LOC/performance guarantee/financial guarantee provided by the appellant company to its AEs can be said to be one of quasi-equity or shareholder activity, and it is in best interest of both AEs and the appellant to provide such LOC/performance/financial guarantee.

1.7 The learned Commissioner of Income-tax (Appeals) erred in disregarding the Safe Harbour rules issued by CBDT which states that LOC and performance guarantee is not equivalent to corporate guarantee.

1.8 The learned Commissioner of Income-tax (Appeals) erred in disregarding the definition of 'Corporate Guarantee' at Rule 10TA(c) as meaning an 'explicit corporate guarantee' extended by a Company to its wholly owned subsidiary and the explanation to the Rule which excludes a 'Letter of Comfort' or an 'implicit corporate guarantee' from the definition of 'Corporate Guarantee'.

1.9 The appellant prays that the adjustment made in respect of non-recovery of commission from AEs on issue of LOC, performance guarantee and financial guarantee be deleted."

2. The cross-objection no. 53 filed by the assessee are as under:

"A. Disallowance of expenses under section 14A of the Income-tax Act, 1961 ('the Act') r.w. Rule 8D of the Income-tax Rules, 1962 ('the Rules'): Rs. 5,60,77,316

1 erred in challenging the order of the Hon'ble Commissioner of Income-tax (Appeal) ['CIT(A)'] with regard to deletion of disallowance made under section 14A of the Act, of Rs. 5,60,77,316 on the ground that the same is contrary to the CBDT Circular no. 5/2014 dated 11 February 2014, without appreciating the fact that the disallowance made by the Respondent in the return of income towards administration expenses of Rs. 10,00,000 was appropriate

B. Adjustment of book profit under section 115JB in relation to expenditure relatable to earning exempt income u/s 14A r.w. Rule 8D: Rs. 5,60,77,316

2 erred in challenging the order of the Hon'ble CIT(A) with regard to deletion of disallowance made under section 14A (r.w. Rule 8D) of the Act of Rs. 5,60,77,316 while computing the book profit under section 115JB of the Act, without appreciating the fact that only the actual expenditure that is debited to the profit & loss account should be considered for adjustment while computing the book profit in terms of provisions contained under section 115JB of the Act;

3. erred in challenging the order of the Hon'ble CIT(A) without appreciating the fact that the Hon'ble CIT(A) has rightly deleted the disallowance while computing book profits under section 115JB of the Act, by rightly concluding that decision of the Hon'ble Special Bench in the case of ACIT vs Vireet Investments (P.) Ltd. [2017] (82 taxmann.com 415) is squarely applicable to the facts of the case.

4. The Hon'ble CIT(A) erred in restricting the total disallowance under section 14A of the Act to Rs. 8,42,51,847 (suo-moto disallowance) without appreciating the fact that no disallowance under section 14A of the Act should be made while computing the book profit in terms of provisions contained under section 115JB of the Act.

C. Disallowance of notional interest expenditure under section 36(1)(iii) of the Act: Rs. 19,81,00,000

5. erred in challenging the order of the Hon'ble CIT(A) with regard to disallowance of notional interest expenditure of Rs. 19,81,00,000 under section 36(1)(iii) of the Act, on the ground that interest bearing funds were advanced for non-business purposes without appreciating the fact that the Respondent has sufficient interest free funds, which has been used for giving advances towards acquisition of land:

6. ought to have appreciated that Hon'ble Tribunal in the respondent's own case for earlier years has deleted the disallowance towards notional interest on loans advanced for acquisition of land and thus taking different view from that which is settled in earlier years without change in facts and circumstances is not allowed in view of the principle of Consistency

7 erred in not appreciating the fact that advances given towards acquisition of land are in the course of regular business activities and thereby, there would not be any notional disallowance of interest expenditure."

Ground No. 1 of Revenue: Disallowance made u/s 14A and cross-objection no. 1 to 3 of the assessee.

3. During the course of assessment, the assessing officer noticed that assessee claimed an amount of Rs. 224,26,68,823/- as exempt u/s 10 of the I.T. Act. The AO further noticed that assessee had made suo-moto disallowance of expenditure to the amount of Rs. 5,00,000/- for earning the said exempt income. However, the assessing officer has applied Rule 8D and computed disallowance u/s 14A to the amount of Rs. 7,37,78,541/- under Rule 8D(2)(iii) of the Act.

4. The assessee filed appeal before the ld. CIT(A). The ld. CIT(A) has restricted the disallowance to the extent of Rs. 10,00,000/- under administrative expenses after following the decision of ITAT in

the case of the assessee for the A.Y. 2010-11 which was also affirmed by the Hon'ble Bombay High Court.

5. The ld. DR supported the order of assessing officer and contended that assessing officer has made disallowance without any scientific basis to the amount of Rs. 5,00,000/-. He further submitted that the assessing officer has clearly pointed out his dissatisfaction in the assessment order as per para 5.5.

6. On the other hand, ld. Counsel contended that assessing officer has not recorded his dissatisfaction in respect of the claim made by the assessee computed u/s 14A r.w. Rule 8D. The ld. Counsel also submitted that this is a recurring issue which has already been decided by the ITAT Mumbai in the case of the assessee and affirmed by the Bombay High Court as reported in the finding of the ld. CIT(A). The ld. Counsel has also referred the decision of ITAT Mumbai and decision of Hon'ble Supreme Court and Hon'ble High Courts on the issue that no disallowance u/s 14A is warranted when no satisfaction is recorded by the assessing officer.

7. Heard both the sides and perused the material on record. Sub-section (2) of section 14A provides that assessing officer shall determine the expenditure incurred in relation to the exempt income in accordance with Rule 8D if the assessing officer, having regard to the accounts of the assessee, is not satisfied that the correctness of claim of assessee in respect of such expenditure in relation to exempt income. Such dissatisfaction should be recorded by the assessing officer after examining the accounts of the assessee. Further, Rule 8D(i) of the Income Tax Rule 1962 also provides that where the

assessing officer having regard to the accounts of the assessee is not satisfied with the correctness of the claim of expenditure made by the assessee, he shall determine the amount of expenditure in relation to exempt income as per sub-rule (2) of Rule 8D. In the case of the assessee, it holds share mostly in the group companies from where it had earned exempt income. In assessee's own case, the ITAT on similar facts and circumstances for A.Y. 2008-09 vide ITA 4418/M/2018 has restricted the disallowance of administrative expenditure to the extent of Rs. 10 lakh u/s 14A of the Act. During the year under consideration, the assessee has also submitted that after considering the nature of expenditure it had determined the expenditure related to earning exempt income. However, on perusal of the assessment order, it is clear that assessing officer has not recorded any specific dissatisfaction in respect of accounts of the assessee company for the direct and indirect expenses before computing the disallowance in accordance with Rule 8D of the I.T. Rule. Looking to the above facts, the ld. CIT(A) has arrived at the conclusion that assessing officer has failed to record dissatisfaction with respect to the correctness of the claim of expenditure made by the assessee after considering the various decisions of the courts. The ld. CIT(A) has also considered the decision of Hon'ble Supreme Court in the case of Maxopp Investment Ltd. vs CIT (2018) 402 ITR 640 (SC) wherein held that the assessing officer was not empowered to invoke the provisions contained u/s 14A r.w. Rule 8D in a mechanical manner without recording satisfaction that claim of the assessee is not correct. He also considered the case of Hon'ble Supreme Court in the case of Godrej Boyce Manufacturing Company Ltd. vs DCIT (Civil Appeal No. 7020 of 2011) wherein held that the

onus is squarely on the assessing officer to conclude his dissatisfaction regarding the assessee's claim and only thereafter applies provisions of section 14A r.w. Rule 8D. Similarly, the ld. CIT(A) has considered the decision of Hon'ble Bombay High Court in the case of PCIT vs Bombay Stock Exchange Ltd. (2020) 113 taxmann.com 303. We have also considered that in the case of the assessee itself, the ITAT vide ITA No. 4418/M/2018 has restricted the disallowance of administrative expenditure to the extent of Rs. 10 lakh u/s 14A of the Act which has been also affirmed by the Hon'ble Bombay High Court vide ITA No. 1843/M/2016 dated 16.03.2019.

8. Before us, the ld. Counsel has also referred the decision of ITAT Mumbai in the case of Trent Limited vs DCIT vide ITA No. 4074/M/2024 wherein after following the decision of Hon'ble Supreme Court in the case of Maxopp Investment Ltd. & others, it is held that disallowance u/s 14A cannot be made where no satisfaction has been recorded by the assessing officer. Looking to the above facts and circumstances, we do not find any reason to interfere in the decision of ld. CIT(A). Therefore, ground no. 1 of the appeal of the Revenue are dismissed and cross objections no. 1 to3 of the assessee are also dismissed.

Ground No. 3 of Revenue: Disallowance of notional interest expenditure u/s 36(1)(iii) of Rs. 19,81,00,000/- and cross objection no. 7 to 9 of the assessee:

9. The assessee is in business of construction and real estate business. The assessee has paid aggregating amount of Rs. 141.50 crores as accumulated amounts for A.Y. 2007-08 to A.Y. 2009-10 to

M/s. PRS Enterprises, proprietorship concern of Shri N.J. Thakur and M/s. Acecard Infrasol Pvt. Ltd. in which Shri N.J. Thakur was having shareholding of 80%. The assessee explained that these amounts were in the nature of advance payments made towards acquisition of land with clear and marketable tile in an around Alibaug and other areas of Raigad District. The AO in the earlier assessment years, disallowed the interest expenditure at an average rate of 14% on the advance of Rs. 141.50 crores by treating the said advances were in the nature of regular business advance. Similarly during this year also, the assessing officer has made disallowance of interest expenses to the amount of Rs. 19,81,00,000/-.

10. On appeal, the ld. CIT(A) has deleted such disallowance of interest expenditure after following the decisions of the ITAT on this recurring issue.

11. Before us, the ld. DR supported the order of the assessing officer. On the other hand, ld. Counsel relied on the order of ITAT, Mumbai for A.Y. 2008-09 to 2011-12 and also submitted that assessee has not debited any amount in the P & L A/c and same has been shown as work-in-progress under the head current asset in the balance sheet.

12. Heard both the sides and perused the material on record. The assessee is in the business of construction and real estate business. It is undisputed fact that assessee has not debited any interest expenditure in the P&L A/c and shown the whole amount as advances towards acquisition of land in the balance sheet. We find that this is recurring issue which has been decided in favour of the

assessee by the ITAT, Mumbai in assessee's own case for A.Y. 2014-15 and earlier years. It is also undisputed fact that the interest free funds available with the assessee were more than the advances given to the aforesaid party. Looking to this fact, the ITAT in its decision in the case of the assessee for A.Y. 2014-15 vide ITA 2025/M/2021 dated 28.03.2024 after considering the decision of Hon'ble Jurisdictional High Court, Mumbai in the case of CIT vs Reliance Utilities & Power Ltd. (2009) 313 ITR 340 (Bom) has deleted the addition on the ground that if the interest free funds of the assessee are in the excess of the loan advance then it can be presumed that the funds invested by the said entities are not out of the borrowed fund. Looking to the above fact and finding, we do not find any infirmity in the decision of ld. CIT(A). Therefore, this ground of appeal of the Revenue and cross objections of the assessee are dismissed.

Ground No. 4 & 5 of the Revenue and Ground No. 1.1, 1.2, 1.4 to 1.9 of the assessee's appeal and ground no. 4 to 5 of the Revenue related to the financial guarantee resulting in adjustment of Rs. 1,33,39,011/-.

13. During the course of assessment, the assessing officer has noticed that it has entered into certain transactions with its associate enterprises therefore the case was referred to the Transfer Pricing Officer for determining the Arm's Length Price for the international transactions carried out by the assessee with its associated enterprises. The assessee had issued financial guarantees to various banks towards facilities availed by the associated enterprises of the assessee. The assessee submitted that it is a universal practice in the construction industry that contracts/agreements may be backed by a

Stand-by Letter of Credit (SBLC) / performance guaranteed by the parent company. The TPO has mentioned that assessee has not benchmarked the transaction properly. Since the internal CUP was not available therefore, external CUP was applied. The TPO mentioned various factors considered by the banks while charging fees like-fees charged decreases with the increase in the guarantee amount, discounts or concessions given when there is cash margin, security or credit rating, track record with bank, market reputation of the customer, package of other working facility, timing of the guarantee etc. The TPO applied Comparable Uncontrolled Price (CUP) method using information called from various banks u/s 133(6) of the Act which is summarized as under:

Bank Name	*Rate*
SBI	*2.10%*
UTI	*0.75% (1/4 of 3%)*
CITI	*2.125% (2+2.25/2)*
Average	***1.66%***

14. The assessee filed appeal before the ld. CIT(A). The ld. CIT(A) after considering the decision of Hon'ble Bombay High Court in the case of Everest Kanto made downward adjustment of 0.50% to the adjustment recommended by the TPO and computed arm's length rate for guarantee fees at 1.16% after following the similar decision of his predecessor for A.Y. 2014-15 as reproduced as under:

> *"I have carefully considered the matter. During the financial year relevant to the assessment year in question, the Appellant Assessee had given corporate guarantee to the Banks for loan given in foreign currency to its AE. The Appellant has raised various contentions, summarized as below:*

a) Corporate guarantee is in the nature of shareholders' activities which does not justify a charge

b) Corporate guarantee does not have "bearing on profits, income, losses or assets" and thus, not an international transaction;

c) Corporate Guarantee is not in the nature of 'provision of services';

d) Without prejudice to the above, corporate guarantee is distinct from bank guarantee and therefore, no benchmark is available to determine ALP, thereby leading to failure of computational provision.

I do not agree with the contentions raised by the Appellant that the corporate guarantee issued in favour of the AE is not an international transaction, in view of amended provisions of section 92B, vide Finance Act, 2012, inserting Explanation to section 92B of the Act. It is also held by various courts also that corporate guarantee issued in favour of the AE is an international transaction.

The issue remained for consideration is as to what would be the arm's length price for issuing the corporate guarantee in question. The TPO has applied guarantee fee at the rate of 1.5% (mentioned wrongly as 0.75% in the computation), 0.95% and 0.70%. In view of decision of Hon'ble Bombay High court in case of CIT v. Everest Kento Cylinders Ltd. [2015] 378 ITR 57 (Bom) (HC), the adjustment made by the TPO is restrict at the rate of 0.5% or actual cost incurred by assessee plus 10% markup, whichever is more. The remaining adjustment shall be deleted

Accordingly, this ground is partly allowed."

As the facts are similar to assessment year 2014-15the adjustment made by the TPO is restrict at the rate of 0.5% or actual cost incurred by assessee plus 10% markup, whichever is more. The remaining adjustment shall be deleted.

Accordingly, this ground is partly allowed."

15. Before us, the assessee submitted that issuance of financial guarantee is a general practice in the construction industry and it is provided by the parent company to reduce the risk of default by the subsidiary company executing the contract. The assessee also

submitted that TPO has not considered the guarantee fees charged by the assessee which was kind of internal CUP available for the TPO. The assessee also submitted that TPO has not examined the various factors which were there before the TPO since the assessee was not in the business of banking and some of the factors considered by the banks were not applicable to the assessee. The assessee also submitted that transaction of giving a corporate guarantee was not an international transaction. The assessee also referred the various judicial pronouncements. In its alternative submission, the assessee submitted that guarantee commission to be restricted to 0.5% based on decision of Hon'ble Bombay High Court in the case of CIT vs Everest Kento Cylinders Ltd. The assessee also referred various decisions of ITAT wherein after following the decisions of Hon'ble High Court/Tribunal, the guarantee commission was restricted to 0.5%. The assessee also submitted in its alternative claim that Mumbai ITAT in assessee's own case for F.Y. 2014-15 has remanded the matter back to the file of the TPO for the purpose of applying any of the prescribed method for determining the ALP.

16. On the other hand, ld. DR objected the additional evidences filed by the assessee. The ld. DR also submitted that since there was no internal CUP available in the case of the assessee, therefore, the TPO has rightly applied external CUP method to determine the commission for the bank guarantee extended by the assessee for the purpose of associated enterprises.

17. Heard both the sides and perused the material on record. We find that ld. CIT(A) has restricted the rate of corporate guarantee to 0.5% or actual cost incurred by the assessee + 10% mark up after

following the decision of Hon'ble Bombay High Court in the case of CIT vs Everest Kento Cylinders Ltd. (2015) 378 ITR 57 (Bom). However, the ITAT in assessee's own case for the A.Y. 2014-15 vide ITA No. 2025/Mum/2021 and C.O. No. 55/Mum/2022 has held as under:

> *"31. From the above observation, we are of the considered view that the matter should be remanded back to the file of the Id. TPO for the purpose of applying any of the prescribed methods for determining the ALP of the international transactions only to the extent of the finance guarantee given by the assessee on behalf of its AEs. As the performance guarantee has already expired in 2013, there would not be any necessity to determine the ALP and, hence, we confirm the deletion made by the Id. CIT(A) on this ground. Hence, Ground Nos. 5 to 12 of the Revenue's appeal and the ground no.1 of the assessee's appeal are allowed for statistical purpose."*

Therefore, following the decision of the ITAT this issue remanded to the file of the TPO for determining the ALP as directed in the said order. Accordingly, both the grounds of appeal of the Revenue and Assessee are allowed for statistical purpose.

Ground No. 6 to 7 of Revenue and Ground No. 1.1, 1.2, 1.4 to 1.7 and 1.9 of assessee's ground of appeal on the issue of performance guarantee resulting in adjustment of Rs. 4,02,25,936/-.

18. The assessee had issued performance guarantee on behalf of Shapoorji Palanji Qatar WLL(SP Qatar). The TPO applied CUP method using information called from various banks u/s 133(6) of the Act since there was no internal CUP available. The average bank guarantee rate was computed at 1.66%. Further, based on the decision of Hon'ble Bombay High Court in the Everest Kento Cylinder

Ltd. and Mumbai ITAT in Glenmark Pharmaceuticals Ltd., the TPO made downward adjustment of0.5% to the amount quoted to the average bank guarantee rate and computed the arm's length guarantee fees at 1.16% and made adjustment to the amount of Rs. 9,33,24,172/-.

19. In appeal, the ld. CIT(A) after considering the decision of Hon'ble Bombay High Court in the case of CIT vs Everest Kento Cylinder Ltd. restricted the adjustment made by the TPO to the rate of 0.5% or actual cost incurred by the assessee + 10% mark up whichever is more. Therefore, the arm's length margin was fixed in the case of the assessee at 0.50% and the adjustment amount computed at Rs. 4,02,25,936/-.

20. Before us, the ld. Counsel submitted that assessee provide performance guarantee to Qatar Petroleum on behalf of its associate enterprises guaranteeing the performance of duties and obligation that would be done by its AE and in the event of any such failure of performance by the AE, the assessee shall on written request of Qatar Petroleum perform the unfulfilled obligations and shall receive all the rights and benefits to it. The assessee claimed that while providing such performance guarantee it did not incur any charges or cost whatsoever and accordingly no commission was charged by the assessee to its AE for providing said performance guarantee. In support, the assessee has placed reliance on the decision of ITAT in the case of KEC International (ITA No. 6447/Mum/2015 dated 23rd March, 2011).

21. The ld. DR supported the order of TPO.

22. Heard both the sides and perused the material on record. The assessee provided performance guarantees to Qatar Petroleum on behalf of the AE. Under the performance guarantee if associated enterprise fails to execute a contract then the performance guarantee issued by the assessee get invoked then the assessee would be obliged to execute the contract on its own by using its own fund. The ld. Counsel submitted that assessee was not at risk on any financial obligation on behalf of the associated enterprises. The assessee also submitted that while providing such performance guarantee the assessee did not incur any charges or cost whatsoever and accordingly no commission was charged by the assessee to its associated enterprises for providing said performance guarantee.

23. Before us, the assessee has also referred the Safe Harbour Rule informed by the CBDT dated 18.09.2013 which clearly distinguished between a corporate guarantee and performance guarantee. It is submitted that said rule does not include performance guarantee or any other guarantee of similar nature. The assessee also submitted that under the performance guarantee in case the associated enterprises failed to perform then then the contract which was awarded to the associate enterprise gets assigned in favour of the assessee. We have also perused the decision of ITAT, Mumbai in the case of KEC International Ltd. vide ITA No. 6447/M/2015 dated 23.03.2021 referred by the ld. Counsel wherein it is held as under:

> *"5. We have heard the rival submissions. At the outset, we find that the assessee had only given performance guarantee in favour of Bahwan Engineering Company LLC on behalf of its AE nearly to indemnify the losses, claims, damages, if any, that may arise pursuant to non-performance of duties and obligations by the AE in execution of the*

contract allotted to them. Admittedly, the assessee has not charged any commission from its AE for issuance of this performance guarantee. We find that assessee had also parallelly entered into another agreement with its AE wherein in the event of AE failing in execution of the contract and the performance guarantee issued by the assessee gets invoked by Bahwan Engineering Company LLC, then the contract which is awarded to the AE gets assigned in favour of the assessee, 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 there from. In these circumstances, there is absolutely no risk involved for the assessee in issuing the performance guarantee on behalf of its AE, warranting charging of any commission to mitigate that risk. Hence, we hold that assessee was fully justified in not charging any commission from its AE in the subject mentioned performance guarantee transaction. Hence, there is no need to make any adjustment to arms length price thereof. In view of this decision in the peculiar facts and circumstances, the issue as to whether issuance of performance guarantee would fall within the ambit of an international transaction or not is left open and no decision is given herein. Hence, the various decisions quoted by the Id. Counsel for both the sides need not be gone into. Accordingly, the addition made in the sum of Rs. 69,45,342/- is hereby directed to be deleted. Accordingly, the ground No.1(a) raised by the revenue are partly allowed."

24. We have also perused the decision of ITAT, Mumbai in the case of Afcons Infrastructure Limited vs Addl. CIT vide ITA No. 1135 & 1357/M/2014 the relevant extract is as under:

"15.....

Here, in this case what has to be seen that the entire functions to carry out the work either in the form of sub-contract or executing the contract work by providing entire support services through its own infrastructure, man power, management, technological support, organizational support, etc. all has been done by the assessee. The function of the AE in the execution of work was only on paper and as a legal entity to comply with the domestic laws. In substance there is negligible function performed by the AE. Apart from that, even the assets deployed belonged to the assessee. The entire risk lied upon the assessee that is the risk assumed for executing the contract and carrying out the entire work solely

belonged to the assessee. Ergo the rewards of the risks were also entirely reaped by the assessee in the form of 99% profit. Thus, even if one does FAR analysis of the performance guarantee given by the assessee to FGB for execution of the contract where entire risk and rewards and the benefit was of the assessee only, then where is the question of making any adjustment of ALP in the hands of the assessee that any benefit has been passed on to the AE

16. Even if it is reckoned as international transaction, then also on FAR analysis and looking to fact that the reward or profit to the AE is almost negligible, ie, the ultimate profit is not even 1%, the adjustment if at all would also be negligible on the facts of the present case. Thus, on the facts of the present case we hold that no transfer pricing adjustment can be made on account of corporate guarantee. Accordingly, the addition made by the Id. TPO/ld. AO is deleted."

25. The Revenue has not brought any material on record to controvert the fact that in case an associate enterprise failed to execute a contract then by invoking the performance guarantee issued by the assessee, the assessee would be executing the contract on its own by using its own fund without any requirement of paying any fees. Therefore, following the findings of the ITAT as laid down in the decisions cited supra in this order, we inclined with the submission of the assessee that no adjustment is required in respect of performance guarantee as discussed. Therefore, ground of appeal of the assessee is allowed and grounds of appeal of Revenue are dismissed.

Ground No. 8 & 9 of Revenue and Ground No. 1.1 to 1.3 and 1.5 to 1.9 of assessee's appeal: Resulting in an adjustment of Rs. 27,80,525/-.

26. The assessee has issued letter of comfort towards credit facilities sanctioned by bank to its subsidiary AE. The assessee

explained that letter of comfort does not constitute guarantee however, the TPO has adopted the average bank guarantee rate of 1.66%. Further, based on the decision of Hon'ble Bombay High Court in the case of Everest Kanto and Mumbai ITAT in Glenmark Pharmaceuticals Ltd. made downward adjustment of 0.50% to the aforesaid average bank guarantee rate and computed the arm's length guarantee fees rate at 1.16% and the adjustment was made to the amount of Rs. 5,34,87,269/-.

27. In the appeal, the ld. CIT(A) after considering the decision of Hon'ble High Court in the case of CIT vs Everest Kento Cylinders Ltd. has restricted guarantee commission @ 0.2% to the amount of Rs. 27,80,525/-.

28. The ld. DR supported the order of TPO. On the other hand, the ld. Counsel submitted that issue of letter of comfort did not have bearing on the profit, income or assets of the assessee, therefore, the same is not an international transaction and do not attract provisions of section 92 of the Act. The assessee has also placed reliance on the decision of co-ordinate benches of the ITAT where it is held that letter of comfort is not an international transaction.

29. Heard both the sides and perused the material on record.

30. The assessee has issued letter of comfort to ICICI Bank Bahrain in F.Y. 2007-08 which was continuing in the year under consideration for performance guarantee given by ICICI Bank to the construction parties of Shapoorji Pallonji Mid-East. The TPO has applied Comparable Uncontrolled Price (CUP) method using information called from various banks u/s 133(6) of the Act since

there was no internal CUP available. Thereafter, considering the decision of Bombay High Court in the case of Everest Kanto and Mumbai ITAT in Glenmark Pharmaceuticals Ltd., the TPO has determined arm's length rate for performance guarantee at 1.16%. The ld. CIT(A) after considering the decision of Asian Paints of ITAT, Mumbai vide ITA No. 2754/Mum/2014 and CIT vs Everest Kento Cylinders Ltd. restricted the arm's length to the amount of Rs. 27,80,525/- after adopting rate of 0.2% of the investment blocked by the assessee. Before us, the assessee has placed reliance on the decision of ITAT, Mumbai in the case of the assessee itself for A.Y. 2014-15 vide ITA No. 2025/Mum/2021 and CO No. 55/Mum/2022 wherein it is held that letter of comfort is not international transaction. It is also held that letter of comfort given by the assessee on behalf of its AE does not come under the purview of an international transaction and the provisions also clearly excludes letter of comfort within the expression of international transaction. The assessee has also submitted that letter of comfort does not have bearing on the profit, income, assets or losses of the assessee and the same was of the nature of shareholder activity. It is also submitted that in the Safe Harbour Rules – Rule 10sTA it is referred as under:

> *"(c) corporates guarantee means explicit corporate guarantee extended by a company to its wholly owned subsidiary being a non-resident in respect of any short term or long term borrowing."*

31. The assessee has also referred the decision of ITAT, Mumbai in the case Tata International Ltd. vs ACIT (ITA No. 4376/Mum/2010 & Others) wherein it is held that in letter of comfort, the party issues only a letter that a subsidiary or group company would comply term of financial transaction and have no obligation to indemnify, also

ITAT, Mumbai in the case of Asian Paints Ltd. vs CIT vide ITA No. 2754/M/2014 held that in the letter of comfort the only promise made by the assessee is, it will not made any disinvestment of the shares during the pending of the loan and there is no financial implication of the assessee. On the similar proposition, the assessee has also referred the decision of ITAT, Mumbai in the case of The Indian Hotels Co. Ltd. vs Addl. CIT vide ITA No. 371/Mum/2010 & Others). Looking to the above facts and findings, we consider that nowhere the TPO and the ld. CIT(A) establish that letter of comfort create any contractual financial obligation on the assessee company for only providing letter of comfort for keeping the investment in its holding company. Therefore, following the findings of the ITAT in the decisions as referred supra, the addition of Rs. 27,80,525/- is deleted. Accordingly, the grounds of appeal of Revenue are dismissed and grounds of appeal of the assessee are allowed.

Ground No. 2 of Revenue and Cross Objection No. 4 to 6 of the assessee: Adjustment of book profit u/s 115JB in relation to expenditure relatable to earning exempt income u/s 14A r.w. Rule 8D to the amount of Rs. 7,37,78,541/:

32. The assessee while computing the book profit in terms of section 115JB of the Act had suo moto made addition u/s 115JB(2) of the Act of an amount of Rs. 40,32,630/- towards administrative cost and interest cost for collection of dividend. However, the assessing officer while computing the book profit of the assessee in the assessment order made further adjustment of an amount of Rs. 7,37,78,541/- u/s 14A r.w. Rule 8D u/s 115JB of the Act.

33. The assessee filed appeal before the ld. CIT(A). The ld. CIT(A) after following the decision of the ITAT for A.Y. 2014-15 in the case of the assessee itself has restricted the disallowance u/s 115JB to the extent of suo moto disallowance made by the assessee.

34. Heard both the sides and perused the material on record. The assessee while computing difference book profit in terms of section 115JB of the Act had suo moto made adjustment u/s 115JB(2) of the Act of an amount of Rs. 40,32,630/- towards administrative cost and interest cost for collection of dividends. The assessing officer while computing the book profit in the assessment order had made further adjustment of an amount of Rs. 7,37,78,541/- (disallowance computed by the assessing officer under Rule 8D of the I.T. Rule). We find that Special Benches of ITAT in the case of Vireet Investment (P) Ltd. held that disallowance made under Rule 8D cannot be added while computing book profit u/s 115JB of the Act. Therefore, we consider merit in the decision of ld. CIT(A) in restricting the addition u/s 115JB to the extent of suo moto disallowance made by the assessee. Accordingly, the appeal of the Revenue is dismissed and cross objection of the assessee is dismissed.

ITA No. 2232/M/2021 (A.Y. 2016-17) (Revenue Appeal) &

ITA No. 2027/M/2021 (A.Y. 2016-17) (Assessee Appeal) &

C.O. No. 54/M/2022 (A.Y. 2016-17) (Assessee Appeal)

35. Ground No. 1 of Revenue and Cross-Objection No. 1 of the assessee are dismissed after applying the findings of Ground No. 1 and Cross Objection No. 1 to 3 mutatis mutandis as adjudicated vide

ITA No. 2232/M/2021 (Revenue) and C.O. No. 54/M/2022 supra in this order.

Ground No. 2 of Revenue and Cross Objection 2 to 4 of the assessee:

36. Applying the findings of the Ground No. 2 of the appeal of the Revenue vide ITA No. 2232/M/2021 and Cross Objection No. 4 to 6 of 54/M/2022 of the assessee mutatis mutandis as supra, the appeal of the Revenue and Cross Objection of the assessee are also dismissed.

Ground No. 3 of Revenue and Cross Objection No. 5 to 7 of the assessee:

37. Applying the findings of the Ground No. 3 of the Revenue Appeal vide ITA No. 2232/M/2021 and Cross Objection No. of 54/M/2022 as supra grounds of Revenue and Cross Objections of the assessee are dismissed.

Ground No. 1.1, 1.2, 1.4 to 1.9 of the Assessee appeal and Ground No. 4 to 5 of the Revenue relating to Financial Guarantee Adjustment of Rs. 150,08,067/-:

38. Applying the findings of the ITA No. 2232/M/2021 (Revenue) and ITA No. 2027/M/2021 (Assessee) on the similar issue as adjudicated above mutatis and mutandis both the grounds of appeal of the assessee and Revenue are allowed for statistical purpose.

Ground No. 1.1, 1.2, 1.4, 1.5, 1.6 and 1.9 of assessee appeal and Ground No. 4 t 7 of Revenue appeal related to performance guarantee in an adjustment of Rs. 4,27,68,565/-:

39. The similar grounds of appeal have been adjudicated vide ITA No. 2232/M/2021 and ITA No. 2027/M/2021. Applying the same findings mutatis mutandis, the grounds of appeal of the Revenue is dismissed and grounds of appeal of the assessee are allowed.

Ground No. 1.1 to 1.3 and 1.5 to 1.9 of Assessee's appeal and Ground No. 8 and 9 of Revenue appeal relating to Letter of Comfort resulting in adjustment of Rs. 44,69,215/-:

40. Since similar issue on identical facts are adjudicated vide ITA No. 2232/M/2021 and ITA No. 2027/M/2021 as supra in this order therefore the same findings mutatis mutandis, the grounds of appeal of the Revenue is dismissed and grounds of appeal of the assessee is allowed.

41. Ground No. 1 of Revenue's appeal and cross objection no. 1 of the assessee are dismissed after applying the findings of Ground No. 1 and cross objection no. 1 to 3 mutatis mutandis as adjudicated vide ITA No. 2232/Mum/2021 (Revenue) and C.O. No. 54/Mum/2022 supra in this order.

Ground No. 2 of Revenue and cross objection 2 to 4 of the assessee:

42. Applying the findings of Ground No. 2 of the appeal of the Revenue vide ITA No. 2232/Mum/2021 and cross objection no. 4 to 6 of 54/Mum/2022 of the assessee mutatis mutandis as supra, the

appeal of the Revenue and cross objections of the assessee also dismissed.

Ground No. 3 of Revenue and cross objection no. 5 to 7 of the assessee:

43. Applying the findings of Ground No. 3 of the Revenue appeal vide ITA No. 2232/Mum/2021 and cross objection no. 54/Mum/2022 as supra, the appeal of the Revenue and cross objections of the assessee are dismissed.

Ground No. 1.1, 1.2, 1.4 to 1.9 of the assessee's appeal and Ground No. 4 to 5 of the Revenue related to Financial Guarantee Adjustment of Rs. 150,38,067/-.

44. Applying the findings of ITA No. 2232/Mum/2021 (Revenue) and ITA No. 2027/Mum/2021 (Assessee) on the similar issue as adjudicated above mutatis mutandis both the grounds of appeal of the assessee and Revenue are allowed for statistical purpose.

Ground No. 1.1, 1.2, 1.4, 1.5, 1.6 and 1.9 of assessee's appeal and Ground No. 4 to 7 of Revenue's appeal related to performance guarantee in an adjustment of Rs. 4,27,68,565/-.

45. The similar grounds of appeal have been adjudicated vide ITA No. 2232/Mum/2021 and ITA No. 2027/Mum/2021. Applying the same findings mutatis mutandis, the grounds of appeal of the Revenue is dismissed and grounds of appeal of the assessee are allowed.

Ground No. 1.1 to 1.3 and 1.5 to 1.9 of assessee's appeal and Ground No. 8 and 9 of Revenue's appeal related to letter of comfort resulting in adjustment of Rs. 44,69,215/-.

46. Since similar issue on identical facts are adjudicated vide ITA No. 2232/Mum/2021 and ITA No. 2027/Mum/2021 as supra in this order therefore applying the same findings mutatis mutandis, the ground of appeal of the Revenue are dismissed and grounds of appeal of the assessee is allowed.

47. In the result, both the appeals of the assessee are partly allowed and cross objections are dismissed. The Revenue appeals are dismissed and allowed for statistical purpose.

Order pronounced in the open court on 06.03.2025.

Sd/-	**Sd/-**
(RAHUL CHAUDHARY)	**(AMARJIT SINGH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated: 06.03.2025
Biswajit, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent:
3. The CIT,
4. The DR

//True Copy//

By Order

Assistant Registrar
ITAT, Mumbai Benches, Mumbai