



ITA Nos.17 & 115/Mum/2018
KEC International Limited
Assessment Year :2012-13

आयकर अपीलीय अधिकरण “के” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“K” BENCH, MUMBAI

माननीय श्री अमरजीत सिंह, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI AMARJIT SINGH, JM AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ I.T.A. No.17/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2012-13)

KEC International Ltd. 463, CEAT Mahal Dr. Annie Besant Road, Worli Mumbai-400 030.	बनाम/ Vs.	DCIT-5(1)(1) Room No.568 Aaykar Bhavan, M.K. Road Mumbai-400 020.
स्थायी लेखासं./जी आइ आर सं./PAN/GIR No. AACCK-5599-H		
(□ पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

&

आयकर □ पील सं./ I.T.A. No.115/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2012-13)

DCIT-5(1)(1) Room No.568 Aaykar Bhavan, M.K. Road Mumbai-400 020.	बनाम/ Vs.	KEC International Ltd. 463, CEAT Mahal Dr. Annie Besant Road, Worli, Mumbai-400 030.
स्थायी लेखासं./जी आइ आर सं./PAN/GIR No. AACCK-5599-H		
(□ पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	S/Shri Vijay Mehta and Anuj Kisnadwala- Ld. Ars
Revenue by	:	S/Shri Akhtar Husain Ansari & Shri Michael Jerald- Ld.Sr.DRs

सुनवाई की तारीख/ Date of Hearing	:	04/09/2020
घोषणा की तारीख / Date of Pronouncement	:	14/09/2020



आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid cross-appeals for Assessment Year [in short referred to as 'AY'] 2012-13 contest the order of Ld. Commissioner of Income-Tax (Appeals)-56, Mumbai, [in short referred to as 'CIT(A)'], *Appeal No. CIT(A)-56/DCIT-5(1)(1)/2017-18/473* dated 13/10/2017 on certain grounds of appeal.

Assessee's Appeal ITA No. 17/Mum/2018

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 Rs.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 Rs.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*



ITA Nos.17 & 115/Mum/2018
KEC International Limited
Assessment Year :2012-13

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 Rs.251.41 Crores after certain additions / disallowances / adjustments as against returned income of Rs.185.05 Crores e-filed by the assessee on 29/11/2012 which was later on revised to Rs.198.26 Crores. However, during assessment proceedings, the assessee furnished revised computation of total income reflecting income of Rs.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 Rs.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 Rs.828.80 Lacs whereas fresh advances given during the year were for Rs.1903.83 Lacs (after adjusting forex fluctuations of Rs.166.11 Lacs), thus aggregating in all to Rs.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 Rs.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



ITA Nos.17 & 115/Mum/2018
KEC International Limited
Assessment Year :2012-13

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.

Revenue's Appeal ITA No.115/Mum/2018

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 recovered 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



ITA Nos.17 & 115/Mum/2018
KEC International Limited
Assessment Year :2012-13

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 UI Khaimah	KEC Global FZ LLC Ras UI Khaimah	KEC Global FZ LLC Ras UI 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 customer	Towards performance of contract	Towards performance of contract

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



ITA Nos.17 & 115/Mum/2018
KEC International Limited
Assessment Year :2012-13

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 Rs.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 UI Khaimah	KEC Global FZ LLC Ras UI Khaimah	KEC Global FZ LLC Ras UI 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



ITA Nos.17 & 115/Mum/2018
KEC International Limited
Assessment Year :2012-13

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	ICICI 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	-	-



ITA Nos.17 & 115/Mum/2018
KEC International Limited
Assessment Year :2012-13

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 Rs.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 Rs.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 Rs.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 Rs.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



ITA Nos.17 & 115/Mum/2018
KEC International Limited
Assessment Year :2012-13

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.



ITA Nos.17 & 115/Mum/2018
KEC International Limited
Assessment Year :2012-13

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



ITA Nos.17 & 115/Mum/2018
KEC International Limited
Assessment Year :2012-13

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



ITA Nos.17 & 115/Mum/2018
KEC International Limited
Assessment Year :2012-13

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.

7.12 Ground Nos. (xiii) & (xiv) are related with mark-to-market losses arising on the foreign exchange contracts which were outstanding at the year-end. During assessment proceedings, it transpired that the assessee debited an amount of Rs.1227.24 Lacs on account of exchange (gain) / loss (net). An amount of Rs.873.55 Lacs represented foreign exchange losses due to marked-to-market (MTM) losses. The Ld. AO observed that unrealized foreign exchange loss was neither accrued loss nor actual loss and therefore, the same could not be allowed as deduction. Since the provision of AY 2011-12 for Rs.533.16 Lacs was disallowed in that year but reversed during the year under consideration, the net disallowance was worked out to be Rs.340.38 Lacs and added to the income under normal provisions as well as while computing Book Profits u/s 115JB.



ITA Nos.17 & 115/Mum/2018
KEC International Limited
Assessment Year :2012-13

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.

Additional Ground of Appeal

8.1 During the course of hearing before us, Ld. AR raised an additional ground of appeal which read as under: -

On the facts and circumstances of the case and in law the Id. CIT(A) ought to have held that the education cess and higher and secondary education cess Rs.204,08,473/- paid by the assessee is allowable as deduction while computing business income of the assessee.

The Ld. AR sought admission of the same by us, *inter-alia*, in terms of decision of Hon'ble Apex Court in **National Thermal Power**



ITA Nos.17 & 115/Mum/2018
KEC International Limited
Assessment Year :2012-13

Corporation Ltd. V/s CIT (229 ITR 383); Jute Corporation of India Ltd. V/s CIT (187 ITR 688) & the decision of Hon'ble Bombay High Court in Ahmedabad Electricity Co. Ltd. V/s CIT (199 ITR 351).

The Ld. AR, pointed out that the issue, on merits, is covered in assessee's favor by the recent decision of Hon'ble Bombay High Court in **Sesa Goa Limited V/s JCIT (117 Taxmann.com 96 dated 28/02/2020).**

On the other hand, Ld. DR opposed the admission of additional ground at this stage and submitted that the issue would require factual verification which has not been done by any of the lower authorities.

8.2 Upon careful consideration of ratio of decisions as cited before us in support of admission of additional ground of appeal, the bench formed an opinion that the additional ground was to be admitted particularly when the assessee has, *prima facie*, favorable view on merits from jurisdictional High Court. Therefore, we admit the additional ground of appeal and direct Ld. AO to bring the relevant facts *qua* the same on record and re-adjudicate the same after affording reasonable opportunity of hearing to the assessee. This ground is admitted and allowed for statistical purposes.

Conclusion

9. The assessee's appeal stands allowed to the extent indicated in the order whereas the revenue's appeal stands partly allowed.

Order pronounced on 14th September, 2020.

Sd/-

(Amarjit Singh)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**



ITA Nos.17 & 115/Mum/2018
KEC International Limited
Assessment Year :2012-13

मुंबई Mumbai; दिनांक Dated : 14/09/2020
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**