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

BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER

ITA NO.5838/MUM/2017 (A.Y: 2012-13)

A.C.I.T (LTU) – 2 World Trade Centre, Centre 1, 29th Floor, Cuffe Parade, Mumbai – 400 005	*v.*	M/s. Everest Kanto Cylinder Ltd., 204, Raheja Centre, Free Press Journal Marg, Nariman Point, Mumbai–400 021 **PAN: AAACE 0836 F**
(Appellant)		**(Respondent)**

Assessee by	**:**	**Mrs. Renu Kapoor**
Department by	**:**	**Shri Jenardhanan**
Date of Hearing	**:**	**04.02.2019**
Date of Pronouncement	**:**	**29.03.2019**

<u>O R D E R</u>

<u>PER C.N. PRASAD (JM)</u>

1. This appeal is filed by the Revenue against the order of the Learned Commissioner of Income Tax (Appeals) – 56, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 29.06.2017 for the A.Y. 2012-13 in sustaining the addition made on account of transfer pricing adjustment on guarantee commission.

2. At the outset, Learned Counsel for the assessee submitted that identical issue has been decided by the Coordinate Bench of this Tribunal in assessee's own case in ITA.No. 1131/Mum/2015 & ITA.No. 1042/Mum/2015 dated 07.10.2016 following the decision of the Hon'ble Jurisdictional High Court in its own case wherein the T.P. Adjustment made by the Transfer Pricing Officer on account of Corporate Guarantee was deleted by the Tribunal. It has been submitted that the High Court accepting the assessee's transfer pricing report in determining the ALP @ 0.5% applying CUP Method affirmed the order of the Tribunal in deleting the Adjustment made by TPO.

3. Ld. DR fairly submits that that the issue is decided in earlier years by the Tribunal in assessee's favour.

4. We have heard the rival submissions, perused the orders of the authorities below. We find that the identical issue came up before the Tribunal for the A.Y. 2010-11 in respect of transfer pricing adjustment on account of bank guarantee commission and the Coordinate Bench of this Tribunal held as under: -

> *"3. Second Ground is about addition of Rs.7.43 crores on account of guarantee commission pursuant to the direction of the Dispute Resolution Panel (DRP).During the assessment proceeding,the AO found that the assessee had entered into International Transactions (IT.s) with its Associate Enterprises (AE.s).He made a reference to the Transfer Pricing Officer (TPO),who found that the EKC International FZE ,UAE-the AE of the assessee-had taken a loan of USD 23 million from ICICI Bahrain for working capital and term loan, that as per the terms on loan agreement between the AE and the bank the assessee was required*

to give corporate guarantee to the banker,against the said guarantee it had charged guarantee commission@ 0.5% p.a., that the AE had availed the loan of USD 13 million only against the limit.The TPO further found that EKC Industries (Tianjin)Co.Ltd.,China, an AE of the assessee,availed loan of USD 4 million from Citi bank, that the assessee was required to get stand by letter of credit (SBLC/corporate guarantee) from the India Banker, that Citi Bank issued SBLC to Chinese Bank, that based on such SLBC overseas bank granted credit facility to the AE.The assessee contended that the assessee did not charge guarantee fee from EKC, China,that as per the transfer pricing regulation of China such a payment was not allowable. He also noticed that the assessee had further given corporate guarantee to CP Industries, USA for borrowing of 45 million USD.

3.1. The TPO found that in the TP report it was submitted that while determining the Arm'sLength Price(ALP) at 0.5% the assessee had applied CUP. It was contended that Yes Bank,an independent banker,had provided similar financing arrangement to EKC,India and had charged 0.5% for the said financial arrangement,that internal comparable had been used to determine arms length rate for commission charged by EKC India to EKC Dubai.After considering the submission of the assessee, the TPO suggested an adjustment of Rs.10,79, 62, 267/- on account of corporate guarantee commission as under :-

Name of the AE	***Corporate Guarantee Commission Charged***	***ALP of the Corporate Guarantee Commission***	***Adjustment***
EKC International FZE, UAE	*53,97,238*	*10,796,143*	*53,97,238*
EKC Industries (Tianjin), China	*NIL*	*75,10,361*	*75,10,361*
CP Industries Ltd., USA	*NIL*	*9,50,53,001*	*9,50,53,001*
TOTAL	*53,97,238*	*11,33,59,505*	*10,79,62,267*

The AO issued a draft assessment order on the above lines to the assessee and it filed objections before the DRP.

3.2. After considering the elaborate submissions of the assessee and the case laws relied upon by it, the DRP held that the Tribunal in assessee's own case for the AY 2007-08 had upheld the additions made on account of guarantee commission,that the ALP rate of guarantee commission in the case of USA and Chinese AE.s had been restricted to 3%, that the assessee had taken huge risks in respect of corporate guarantee regarding Dubai,US and Chinese AE.s. The DRP restricted the rate of guarantee commission to 3% with regard to US and Chinese AE.s.

4. During the course of hearing before us,the AR stated that the Hon'ble Bombay High Court while deciding the appeal for AY.2007-08(Income tax Appeal No.1165 of 13 dt.08.05.2015) had deliberated upon the issue.The DR stated that CUP *adopted by the assessee was not same. He referred to Pg-No.16 of the order of the TPO .*

5. We have heard the rival submissions and perused the material. We find that the Hon'ble High Court had considered the following question regarding guarantee commission.

> *"3. Whether on the facts and in the circumstances of the case and in law the Hon'ble ITAT "K" Bench Mumbai was right in deleting the addition of Rs.28,50,353/- on account of TP adjustment on guarantee commission."*
>
> *Upholding the order of the Tribunal, wherein the ITAT had deleted the addition on account of guarantee commission of Rs.28.50 lakhs, the Hon'ble High Court has held as under :-*
>
> > *"………..In the matter of guarantee commission, the adjustment made by the TPO were based on instances restricted to the commercial banks providing guarantees and did not contemplate the issue of a Corporate Guarantee. No doubt these are contracts of guarantee, however, when they are Commercial banks that issue bank guarantees which are treated as the blood of commerce being easily encashable in the event of default, and if the bank guarantee had to be obtained from Commercial Banks, the higher commission could have been justified. In the present case, it is assessee company that is issuing Corporate Guarantee to the effect that if the subsidiary AE does not repay loan availed of it from ICICI, then in such event, the assessee would make good the amount and repay the loan. The considerations which applied for issuance of a Corporate guarantee are distinct and separate from that of bank guarantee and accordingly we are of the view that commission charged cannot be called in question, in the manner TPO has done. In our view the comparison is not as between like transactions but the comparisons are between guarantees issued by the commercial banks as against a Corporate Guarantee issued by holding company for the benefit of its AE, a subsidiary company. In view of the above discussion we are of the view that the appeal does not raise any substantial question of law and it is dismissed. There will be no order as to costs".*

We find that there is no material difference between the facts of the earlier year and the facts for the year under consideration. Therefore, respectfully following the principle laid down by the Hon'ble High Court in assessee's own case, we hold that DRP was not justified in confirming the addition made by the AO.Reversing the order of the AO,completed in pursuance of the direction of the DRP, we decide the second ground in favour of the assessee."

5. Facts being identical and there is no material difference in facts for this year and earlier years, respectfully following the said order we uphold

the order of the Ld.CIT(A) in deleting the transfer pricing adjustment on account of corporate guarantee commission. Grounds raised by the Revenue are rejected.

6. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on the 29th March, 2019

Sd/-	Sd/-
(RAJESH KUMAR)	**(C.N. PRASAD)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai / Dated 29/03/2019
Giridhar, Sr.PS

<u>Copy of the Order forwarded to</u>:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum