ITAT: Grants 40% adjustment qua J.M. Morgan Stanley Securities' brokerage-commission; Follows earlier order

Dec 02, 2022

J M Morgan Stanley Securities Pvt Ltd (Now known as Morgan Stanley India Company Pvt Ltd) [TS-831-ITAT-2022(Mum)-TP]

Conclusion

Mumbai ITAT rules on TP adjustments on account of brokerage commission and payment of overseas support fee for assessee (engaged in share broking business) for AY 2006-07; W.r.t broking services provided to AE, TPO adopted CUP over assessee's TNMM, and found that commission earned from AEs was less than commission earned from independent parties; TPO thus proposed an addition (after making an adjustment on account of marketing); ITAT relies on coordinate bench ruling in assessee's own case for AY 2005-06, and directs AO/TPO to grant adjustment to the extent of 40% to the assessee while determining ALP of brokerage and commission but dismisses assessee's plea against adoption of CUP method by TPO; ITAT also directs AO/TPO to grant the benefit of the tolerance range, while computing ALP in accordance with provisions of Sec.92C; W.r.t TPO's disallowance of fee paid to AE for availing overseas support services, ITAT notes that similar adjustment was deleted during AY 2005-06 by relying on earlier orders; ITAT opines that since this issue is recurring in nature and has been decided in assessee's favour in preceding AYs, ITAT deletes the said adjustment.:ITAT Mum

Decision Summary

The ruling was delivered by ITAT bench comprising of Shri Prashant Maharishi and Shri Sandeep Singh Karhail.

Mr. Sunil M. Lala argued on behalf of the assessee while Revenue was represented by Ms. Vatsalaa Jha.

Case Law Information

Taxpayer Name

- J M Morgan Stanley Securities Pvt Ltd (Now known as Morgan Stanley India Company Pvt Ltd)

Judicial Level & Location

- Income tax Appellate Tribunal Mumbai

Appeal Number

- ITA No 7118/Mum/2010

Date of Ruling

- 2022-11-25

Ruling in favour of

- Assessee

Section Reference Number

- 92B
- 92C

Nature of Issue

- Benefit of +/- 5%
- Comparable Uncontrolled Price Method (CUP)
- CUP more appropriate than TNMM
- Transaction Net Margin Method
- Rule of Consistency

Judges

- Shri Prashant Maharishi
- Sandeep Singh Karhail

Counsel for Tax Payer

- Dr. Sunil Moti Lala

Counsel for Department

- Vatsalaa Jha

Industry

- Investment / Finance & Related Advisory

IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.7118/Mum./2010
(Assessment Year : 2006–07)

J.M. Morgan Stanley Securities Pvt. Ltd.
(Now known as Morgan Stanley
India Company Pvt. Ltd.)
18F/19F, Tower–2, One Indiabulls Centre
841, Senapati Bapat Marg, Mumbai 400 013
PAN – AAACJ4998F ……. Appellant

v/s

Asstt. Commissioner of Income Tax
Circle–4(3), Mumbai .....Respondent

Assessee by : Shri Sunil M. Lala
Revenue by : Ms. Vatsalaa Jha

Date of Hearing – 29/08/2022	Date of Order – 25/11/2022

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned final assessment order dated 27/08/2010, passed by the Assessing Officer (*"AO"*) under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (*'the Act'*) pursuant to the directions dated 14/07/2010, issued by the learned Dispute Resolution Panel–II, Mumbai, (*"learned DRP"*) under section 144C(5) of the Act, for the assessment year 2006–07.

2. In its appeal, the assessee has raised the following grounds:

"1. On the facts and in the circumstances of the case, the learned Transfer Pricing Officer (TPO) and the learned Assessing Officer (AO) have legally erred in proposing and the Hon'ble Dispute Resolution Panel (DRP) further erred in confirming the proposed addition of Rs 22,99,91,344 on account of alleged lower commission charged to Associated Enterprises namely M/s. Morgan Stanley Dean Winter Mauritius Company Limited and M/s. Morgan Stanley & Co. International Limited, United Kingdom.

The Appellant therefore prays that the learned AO may be directed to delete the addition as mentioned above and modify the impugned assessment order, accordingly.

2. On the facts and in the circumstances of the case, the learned TPO and the learned AO have legally erred in proposing and the Hon'ble DRP further erred in confirming the proposed addition of Rs 3,71,74,349 on account of disallowance of Overseas Support Services fees paid.

The Appellant therefore prays that the learned AO may be directed to delete the addition as mentioned above and modify the impugned assessment order, accordingly.

3. On the facts and in the circumstances of the case, the learned AO has legally erred in proposing and the Hon'ble DRP further erred in confirming the proposed addition on account of disallowance of depreciation of Rs, 6,78,988 on BSE/NSE card.

The Appellant therefore prays that the learned AO may be directed to delete the disallowance of the depreciation on BSE/NSE card and modify the impugned assessment order, accordingly

4. On the facts and in the circumstances of the case, the learned AO has legally erred in proposing and the Hon'ble DRP further erred in confirming the proposed addition on account of disallowance of depreciation of Rs. 10,45,624 on other intangible assets.

The Appellant therefore prays that the learned AO may be directed to delete the disallowance of depreciation on other intangible assets and modify the impugned assessment order, accordingly.

5. On the facts and in the circumstances of the case, the learned AO has legally erred in proposing and the Hon'ble DRP further erred in confirming the proposed addition on account of disallowance of Rs 90,65,400 under section 40A(2) of the Income-tax Act, 1961 (the Act) in respect of payments made to Mr. Ashith Kampani.

The Appellant therefore prays that the learned AO may be directed to delete the disallowance of the aforesaid expenses and modify the impugned assessment order, accordingly.

6. On the facts and in the circumstances of the case, the learned AO has legally erred in proposing and the Hon'ble DRP further erred in confirming the proposed addition on account of disallowance of Rs. 69,04,902 under section 14A of the Act.

The Appellant therefore prays that the learned AO may be directed to delete the disallowance of the aforesaid disallowance and modify the impugned assessment order, accordingly.

7. On the facts and in the circumstances of the case, the learned AO has legally erred in proposing and the Hon'ble DRP further erred in confirming the proposed addition on account of disallowance of Rs. 3,04,30,352 under section 40(a)(ia) of the Act for non-deduction of tax allegedly deductible at source on transaction charges of Rs. 2,71,09,628 paid to BSE/NSE and VSAT/WAN/leased line charges of Rs. 33,20,724.

The Appellant therefore prays that the learned AO may be directed to delete the disallowance of the aforesaid expenses and modify the impugned assessment order, accordingly.

8. On the facts and in the circumstances of the case, the learned AO has legally erred in proposing and the Hon'ble DRP further erred in confirming the proposed addition on account of disallowance of Rs.14,61,606 on account of lease rentals paid for use of vehicles.

The Appellant therefore prays that the learned AO may be directed to delete the disallowance of aforesaid expenses and modify the impugned assessment order, accordingly.

9. On the facts and in the circumstances of the case, the learned AO has legally erred in initiating and the Hon'ble DRP further erred in confirming the initiation of penalty proceedings under section 271(1)(c) of the Act on a mere difference of opinion on purely legal issues.

The Appellant prays that the learned AO be directed to drop the penalty proceedings initiated under section 271(1)(c) of the Act.

Appellant craves leave to add to, alter, amend or withdraw all or any of the grounds of appeal herein above and to submit such statements, documents and papers as may be considered necessary either at or before the earing of this appeal as per law."

3. The assessee vide application dated 23/08/2022 seeks to modify the ground of appeal no.1. The said application and modified ground were taken on record. The modified ground of appeal no.1 reads as under:

"Based on the facts and circumstances of the case, in relation to the Ground of Appeal-1, the Appellant respectfully submits the following modified ground (containing sub grounds):

Ground of Appeal-1: Adjustment to the Arm's Length Price (ALP) of the commission earned by the Appellant.

1. On the facts and circumstances of the case, the Additional Commissioner of Income-tax, Transfer Pricing II- (3), Mumbai (learned TPO) and the leaned Assessing Officer (AO) have legally erred in proposing and the Honourable Dispute Resolution Panel (DRP) further erred in confirming the proposed addition of Rs 22,99,91,344 on account of alleged lower commission charged to Associated Enterprises namely M/s Morgan Stanley Dean Writer Mauritius Company Limited and M/s Morgan Stanley & CO. International Limited, United Kingdom.

In this regard, on the facts and circumstances of the case, the learned AO/ TPO and the Hon'ble DRP erred on the following grounds:

1.1. In not determining the ALP of the aforesaid transaction in accordance with section 92CA(1) and section 92CA(2) of the Act as required under section 92CA(3) of the Act.

1.2. In not accepting the Appellant's contention that the Transactional Net Margin Method is the most appropriate method for determining the ALP for the broking commission eamed on trades executed on behalf of the AES.

1.3. While applying the CUP method, by not granting an adjustment based on the comparability analysis, for:

- *the entire marketing costs;*
- *research costs; and*
- *at least 50% for the significantly higher volume of transactions of the Appellant with the AEs as compared to the independent clients (in addition to adjustment for marketing cost and research costs).*

1.4. Without prejudice to the above Grounds, in computing the ALP without considering the +/- 5 percent variation from the arithmetic mean as permitted to the Appellant under the provisions of erstwhile section 92C(2) of the Act.

1.5 In applying the Comparable Uncontrolled Price (CUP) method and while applying the CUP method, by not appreciating that during the previous year ended on 31 March 2006, the AE had also entered into similar trades with third party brokers, who had charged brokerage to them at rates lower than the brokerage rates charged by the Appellant in the said previous year, which establishes adherence to the arm's length principle of the trades entered into between the Appellant and the AE.

The Appellant craves leave to add after, amend or withdraw all or any of the Grounds of appeal herein above and submit such statements, documents and

papers as may be considered necessary either at or before the hearing of the appeal as per law."

4. The brief facts of the case are: The assessee is engaged in the share broking business and is a member of BSE as well as NSE. For the year under consideration, the assessee filed its return of income on 27/10/2006, declaring a total income of Rs. 113,65,57,515. Pursuant to the reference made by the AO, the Transfer Pricing Officer ('*TPO*') vide order dated 20/10/2009 passed under section 92CA(3) of the Act proposed a transfer pricing adjustment of Rs. 26,71,65,693, to the international transactions undertaken by the assessee. In conformity, the AO passed the draft assessment order assessing the total income of the assessee at Rs. 145,33,10,080, inter-alia, after making various disallowances/additions. The assessee filed detailed objections before the learned DRP against the additions made by the AO/TPO. Vide its directions dated 14/07/2010, issued under section 144C(5) of the Act, the learned DRP rejected the objections filed by the assessee. Accordingly, the AO passed the impugned final assessment order under section 143(3) r/w section 144C(13) of the Act. Being aggrieved, the assessee is in appeal before us.

5. Grounds no. 1.1 and 1.2 were not pressed during the hearing. Accordingly, the said grounds are dismissed as not pressed.

6. The issue arising in ground No. 1.3, raised in assessee's appeal, is pertaining to transfer pricing adjustment on account of brokerage commission.

7. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the year under consideration, the assessee provided

broking services to institutional investors in the Indian equity market. It, inter-alia, also provided broking services to its associated enterprises namely Morgan Stanley Dean Witter, Mauritius and Morgan Stanley & Co International Ltd, UK. The assessee benchmarked the aforesaid international transaction entered into with its associated enterprises by considering Transactional Net Margin Method as the most appropriate method with PLI of operating profit to total cost. Further, considering itself as the tested party, the assessee selected 9 companies as comparables and concluded that its aforesaid transaction is at arm's length. The TPO vide order dated 20/10/2009 passed under section 92CA(3) of the Act did not agree with the benchmarking analysis conducted by the assessee and following the approach adopted in the assessment year 2005–06 considered internal Comparable Uncontrolled Price ('*CUP*') method as the most appropriate method since the assessee was having similar transactions with third parties and data was available. The TPO further found that the commission earned from the associated enterprises is less than the commission earned from independent parties. Accordingly, the TPO made a total adjustment of Rs. 22,99,91,344, in respect of transaction pertaining to broking services after making an adjustment on account of marketing to an extent of 0.0313%. The learned DRP vide its directions issued under section 144C(5) of the Act rejected the objections filed by the assessee. Being aggrieved, the assessee is in appeal before us.

8. During the hearing, the learned Authorised Representative ('*learned AR*') submitted that for benchmarking the transactions by application of CUP, an adjustment of 40% has been granted by the coordinate bench of the Tribunal

in assessee's own case for the preceding year be also allowed in the year under consideration.

9. On the contrary, the learned Departmental Representative ('learned DR') vehemently relied upon the orders passed by the lower parties.

10. We have considered the submissions and perused the material available on record. We find that the coordinate bench of the Tribunal in assessee's own case in Morgan Stanley India Company Pvt. Ltd. vs Addl. CIT, in ITA No. 2206 and 2320/Mum./2011, vide order dated 22/07/2022, for the assessment year 2005–06, following the judicial precendents in assessee's own case, observed as under:

> *"020. We have carefully considered the rival contentions and perused the orders of the lower authorities. Since, the issue has already been decided by the co-ordinate Bench in assessee's own case for A.Y. 2002-03, which has been followed by co-ordinate Bench in assessee's own case for A.Y. 2004-05, we find no reason to sent the matter back to the file of the learned Transfer Pricing Officer. The co- ordinate Bench has decided the issue as under for A.Y.. 2002-03. For that assessment year the TPO granted an adjustment of marketing cost to the extent of 0.1076% and which is approximately 30% of the weighted average rate charged to 3rd party clients. The learned CIT (A) granted adjustment of 40% with respect to marketing cost adjustment for significant volume and research cost and granted relief to the assessee. This action of the learned CIT - A was challenged by the revenue in its appeal as per ground number (vi). Coordinate bench as per paragraph number 29 upheld the order of the learned CIT - A. Thus the adjustment granted by the learned CITA as per paragraph number 22 of that order of 40% was upheld. In appeal of the assessee as well as the revenue for assessment year 2004 - 05 this issue is dealt with in paragraph number five of that order wherein also at page number 5 of that decision in the last para the learned and CIT - A allowed the discounting factor of 40%. The coordinate bench upheld the order of the learned CIT - A. Therefore, the assessee cannot be allowed 50% discount on the price of the comparables (third parties) but only 40% as per the order of the coordinate benches in earlier years.*
>
> *021. We also find that rule 10 B (1) (a) (ii) of the income tax rules 1962 also allowed adjustment to the prices which could materially affect the price in the open market.*

> *022. Further guidelines (2022) at paragraph number 2.17 also suggest that in considering whether controlled and uncontrolled transaction is comparable, regard should be held to the effect on price of broader business functions other than just product comparability. Where the differences exist between the controlled and uncontrolled transaction is on between the enterprises undertaking those transactions, it may be difficult to determine reasonably accurate adjustment to eliminate the effect on price. However such difficulties should in all fairness be adjusted reasonably but that should not preclude the application of cup method. In the present case for earlier years the learned and CIT - A has granted adjustment to the extent of 40%, which is been upheld by the coordinate benches in case of the assessee for earlier years, we also direct the learned assessing officer/transfer pricing officer to adjust and grant benefit of 40% discount to the assessee.*

11. The learned DR could not show us any reason to deviate from the aforesaid decision and no change in facts and law was alleged in the relevant assessment year. Thus, respectfully following the order passed by the coordinate bench of the Tribunal in the assessee's own case cited supra, we direct the AO/TPO to grant adjustment to the extent of 40% to the assessee while determining the arm's length price of international transaction of brokerage and commission. As a result, ground No. 1.3 raised in assessee's appeal is partly allowed.

12. Insofar as ground No. 1.5 is concerned, learned AR fairly agreed that a similar issue was decided against the assessee by the coordinate bench of the Tribunal in the aforesaid decision for the assessment year 2005-06. Therefore, respectfully following the judicial precedent in assessee's own case, ground No. 1.5 raised in assessee's appeal is dismissed.

13. As regards ground No. 1.4, raised in assessee's appeal is concerned the TPO/AO is directed to grant the benefit of the tolerance range, while

computing the arm's length price, in accordance with provisions of section 92C of the Act. As a result, ground No. 1.4 is allowed for statistical purposes.

14. The issue arising in ground No. 2, raised in assessee's appeal, is pertaining to transfer pricing adjustment on account of payment of overseas support fee.

15. The brief facts of the case pertaining to this issue are: For the year under consideration, assessee made a payment of amount of Rs. 3,71,74,349 for availing the overseas support services from its associated enterprises. Since the assessee is a stockbroker and its primary activity consists of institutional equities sales, therefore, it needs people who have relationships with the FIIs and can influence investments through the assessee thereby generating revenues for the assessee. The assessee has its head office outside India and the decision, on the basis of which the assessee gets its business viz. the decision to buy and sell securities on the Indian market are made by the head office situated outside India. The overseas sales and trading support fees are fees paid directly for such services which generate revenues for the assessee. The TPO vide order passed under section 92CA(3) of the Act disallowed the sum of Rs. 3,71,74,349 paid by the assessee as an overseas support service fee. The learned DRP vide its directions issued under section 144C(5) of the Act rejected the objections filed by the assessee. Being aggrieved, the assessee is in appeal before us.

16. Having heard the submissions and perused the material available on record, we find that the coordinate bench of the Tribunal in assessee's own

case for the assessment year 2005–06 cited supra, decided a similar issue in favour of the assessee by following the judicial precedents in assessee's own case. Since this issue is recurring in nature and has been decided in favour of the assessee in preceding assessment years, therefore, respectfully following the judicial precedents in assessee's own case the AO/TPO is directed to delete the transfer pricing adjustment on account of the overseas support service fee. As a result, ground No. 2 raised in assessee's appeal is allowed.

17. The issue arising in ground No. 3, raised in assessee's appeal, is pertaining to disallowance of depreciation on BSE/NSE membership cards.

18. The brief facts of the case pertaining to this issue are: The assessee in its return of income claimed depreciation amounting to Rs 6,70,988 at the rate of 25% on BSE and NSE memberships. During the assessment proceedings, the assessee was asked to explain why the claim of depreciation on BSE and NSE cards should not be disallowed. In response, assessee's placed reliance upon the decision of the coordinate bench of the Tribunal rendered in its own case for assessment years 2000–01 to 2002–03, wherein assessee's claim of depreciation on BSE and NSE memberships was allowed. The AO by placing reliance upon the decision of the Hon'ble jurisdictional High Court in CIT vs Techno Shares and Stocks Ltd, 225 CTR 337, disallowed the claim of depreciation on BSE and NSE membership cards. The learned DRP vide directions issued under section 144C (5) of the Act rejected the objections filed by the assessee by following the aforesaid decision of the Hon'ble jurisdictional High Court. Being aggrieved, the assessee is in appeal before us.

19. During the hearing, learned AR submitted that the decision of the Hon'ble jurisdictional High Court, on which reliance was placed by AO and learned DRP, has been overruled by the Hon'ble Supreme Court in Techno Shares and Stocks Ltd vs CIT, (2010) 327 ITR 323 (SC). On the other hand, learned DR vehemently relied upon the order passed by the lower authorities.

20. We have considered the rival submissions and perused the material available on record. In the present case, the assessee claimed depreciation on BSE and NSE membership cards on the basis that the same grant licence to the assessee to carry on broking business on the BSE and NSE, respectively, and thus the said membership is in the nature of *'licence'* eligible for depreciation under section 32 of the Act. On a without prejudice basis, the assessee also submitted that they are clearly business commercial rights eligible for depreciation @25%. We find that the Hon'ble Supreme Court in Techno Shares and Stocks Ltd (supra) held that a non-defaulting continuing member of BSE is entitled to depreciation on BSE membership card, as the said right of membership is a licence or akin to licence in terms of section 32(1)(ii) of the Act. In the present case, the claim of the assessee was denied by placing reliance upon the decision of the Hon'ble jurisdictional High Court, which decision has now been set aside by the Hon'ble Supreme Court. Therefore, respectfully following the aforesaid decision of the Hon'ble Supreme Court we direct the AO to allow the depreciation on BSE and NSE membership cards to the assessee. As a result, ground No. 3 raised in assessee's appeal is allowed.

21. The issue arising in ground No. 4, raised in assessee's appeal, is pertaining to the disallowance of depreciation on other intangible assets.

22. The brief facts of the case as emanating from the record are: During the year under consideration, the assessee claimed depreciation of Rs. 10,45,624 on other intangible assets described as goodwill in the financial statements and tax audit report. The other intangible assets include a network of clients; and empanelment as a broker with various institutions/mutual funds/banks etc. During the assessment proceedings, the assessee was asked to explain why the claim of depreciation on goodwill should not be disallowed. In response thereto, the assessee submitted that the depreciation on the above mentioned intangible assets has been allowed to the assessee from the first year of operation i.e. assessment year 2000–01. The assessee also submitted that there has not been any addition to the intangible assets since their acquisition in the initial year. The AO did not agree with the submissions of the assessee and held that depreciation is allowable under section 32 of the Act on account of fall in the value of an asset due to usage, efflux of time or obsolescence. By relying upon the decision of the Hon'ble jurisdictional High Court in CIT vs Techno Shares and Stocks Ltd (supra), other intangible assets/goodwill do not fall in any category of intangible assets enumerated under section 32(1)(ii) of the Act and thus depreciation on same is not allowable. The learned DRP rejected the objections filed by the assessee against the aforesaid disallowance. Being aggrieved, the assessee is in appeal before us.

23. During the hearing, learned AR submitted that depreciation on the other intangible asset described as goodwill in the financial statement of the assessee has been allowed by the Revenue since the assessment year 2000-01. It was further submitted that there has not been any addition to the intangible asset since the preceding years.

24. On the contrary, the learned DR vehemently relied upon the order passed by the lower authorities.

25. We have heard the rival submissions and perused the material available on record. The assessee on 31/03/1999 acquired intangible assets (i.e. network of clients and empanelment as a broker with various institutions/mutual funds/banks etc.) from JM Shares and Stock Brokers Ltd. As per the assessee, the acquisition of intangible assets has led to an increase in the volume of business of the assessee. For the first time in the assessment year 2000-01, the assessee claimed depreciation @ 25% on the aforesaid intangible asset under section 32 of the Act. However, as is evident from the assessment order dated 28/03/2003 passed under section 143(3) of the Act for the assessment year 2000–01, forming part of the paper book on page no. 371–384, the AO made no disallowance in respect of the aforesaid depreciation claimed by the assessee under section 32 of the Act. Even in the preceding assessment year i.e. 2005–06, the assessee claimed depreciation amounting to Rs. 22,99,483 on intangible assets under section 32 of the Act, which was not disallowed by the AO vide order dated 29/12/2008 passed under section 143(3) of the Act. However, in the present case, the AO has

disallowed the claim of the assessee in absence of any change in the facts and law and in absence of any addition to the intangible assets in the year under consideration. As per the AO, depreciation can be allowed if the asset is shown to be capable of diminishing value. In support of its aforesaid findings, the AO has placed reliance upon the decision of Hon'ble Gujarat High Court in CIT vs Elecon Engineering Co Ltd, [1974] 96 ITR 672 (Gujarat). We find that the Hon'ble Gujarat High Court in aforesaid decision observed as under:

> *"It appears to us, therefore, that it would not be correct to limit the meaning of the word "plant" in section 32 to only such articles as are capable of diminution in value year after year by reason of wear and tear in the course of their application for the purposes of the assessee's business or profession. It would also take in other articles which diminish in value on account of other known factors such as obsolescence. It cannot be disputed that know-how, in whatever form it may be, is capable of diminishing in value over years by obsolescence. It would, therefore, be included within the meaning of the word "plant" in section 32."*

26. Thus, as observed by the Hon'ble High Court, the diminution in value is not limited to the reason of wear and tear but would also take into account other known factors such as obsolescence and thus know-how, in whatever form it may be, is also capable of diminishing value by reason of obsolescence. We find that the coordinate bench of the Tribunal in DCIT vs Weizmann Forex Ltd, (2012) 51 SOT 525 (Mumbai) allowed depreciation claimed by the assessee on right over infrastructure and other advantages attached to the marketing network under the category of intangible asset as contemplated under section 32(1)(ii) of the Act. Insofar as the decision of Hon'ble jurisdictional High Court in Techno Shares and Stocks Ltd (supra) relied upon by the AO is concerned, the said decision has been overruled by the Hon'ble

Supreme Court, as noted above. Thus, we find no basis in upholding the disallowance of depreciation as claimed by the assessee on other intangible assets, which has been allowed to the assessee since the year of acquisition i.e. assessment year 2000–01, particularly in absence of any change in facts and law. Reliance in this regard is also placed on the decision of the Hon'ble Supreme Court in Radhaswami Satsang vs CIT, (1992) 193 ITR 321 (SC). Hence, we direct the AO to grant the depreciation on other intangible assets under section 32 of the Act. Accordingly, ground No. 4 raised in assessee's appeal is allowed.

27. The issue arising in ground No. 5, raised in assessee's appeal, is pertaining to addition on account of disallowance under section 40A(2) of the Act in respect of payment made to Mr Ashith Kampani.

28. The brief facts of the case pertaining to this issue are: During the year under consideration, the assessee made a payment of Rs 1,07,39,276 to Mr Ashith Kampani. The Ministry of Company Affairs vide letter dated 04/09/2004 being the approval of Central Government under section 314(1)(B) of the Companies Act restricted the salary, perquisites, allowances, etc. payable to Mr Ashith Kampani with effect from 01/12/2004. On perusal of details, during the assessment proceedings, it was noticed that the payment made to Mr Ashith Kampani as salary, perquisites, and allowances were within the limits approved by the Central Government. However, the payment of bonus of Rs 90,55,400 was not in accordance with the approval granted. Accordingly, the AO disallowed the sum of Rs 90,55,400 under section 40A(2) of the Act being

excess payment made to Mr Ashith Kampani. The learned DRP vide directions issued under section 144C(5) of the Act rejected the objections filed by the assessee against the aforesaid addition. Being aggrieved, the assessee is in appeal before us.

29. Having considered the submissions of both sides and perused the material available on record, we find that this issue is recurring in nature and has been decided in favour of the assessee in the preceding assessment years. We find that the coordinate bench of the Tribunal in assessee's own case for the assessment year 2005–06 cited supra, while deciding a similar issue, observed as under:

> *"037. Ground no. 3 is with respect to the disallowance of remuneration paid to Mr. Ashith Kampani under Section 40A(2) of the Act. The disallowance has been made by the learned Assessing Officer holding remuneration is paid in excess of limits permitted by Ministry of law and justice vide letter dated 24th April, 2001. The learned CIT(A) found that remuneration was paid of Rs.89,17,000/- against the approval limit of 53,72,360/-. He further held that Mr. Ashith Kampani has 18 years of experience in the field of capital market. Identical issue arose in case of assessee for A.Y. 2004-05 where learned CIT(A) deleted the addition which was confirmed by ITAT. In view of this, we find no infirmity in the order of the learned CIT(A) in deleting the disallowance which has been confirmed by ITAT in assessee's own case for earlier years. We also find that the learned Assessing Officer has not given any reason that why the above remuneration is excessive and unreasonable looking to the legitimate needs of the business. Further, the approval granted under the companies Act cannot use for making disallowance under the income tax Act, for the reason that both the enactments have different objects and reasons. Accordingly, ground no. 3 is dismissed."*

30. Thus, respectfully following the judicial precedents in assessee's own case, we direct the AO to delete the disallowance made under section 40A(2) of the Act in respect of payment made to Mr Ashith Kampani. Accordingly, ground No. 5 raised in assessee's appeal is allowed.

31. The issue arising in ground No. 6, raised in assessee's appeal, is pertaining to disallowance under section 14 A of the Act.

32. The brief facts of the case pertaining to this issue are: During the year under consideration, the assessee has received a dividend income of Rs 49,97,281, which does not form part of the total income. Accordingly, during the assessment, the assessee was asked why disallowance under section 14A of the Act should not be made. The AO by applying the provisions of Rule 8D of the Income Tax Rules, 1962 ('*the Rules*') made the disallowance of Rs 69,04,902 under section 14A r/w Rule 8D. The learned DRP vide directions issued under section 144C(5) of the Act rejected the objections filed by the assessee against the aforesaid disallowance. Being aggrieved, the assessee is in appeal before us.

33. During the hearing, learned AR submitted that Rule 8D is applicable only from the assessment year 2008–09. The learned AR further submitted that in the preceding assessment years disallowance to an extent of Rs 1 lakh has been upheld in the case of the assessee under section 14A of the Act. On the other hand, learned DR vehemently relied upon the order passed by the lower authorities.

34. We have considered the rival submissions and perused the material available on record. We find that the Hon'ble Supreme Court in CIT vs Essar Teleholdings Ltd., [2018] 401 ITR 445 (SC) held that Rule 8D is prospective in operation and cannot be applied to any assessment year prior to the

assessment year 2008-09. Thus, respectfully following the aforesaid decision, we are of the considered view that the AO has erred in applying Rule 8D of the Rules in the present case for the determination of disallowance under section 14A of the Act, as the said Rule does not apply to this year. Further, we find that in the preceding assessment years disallowance to an extent of Rs 1 lakh under section 14A of the Act has been upheld in assessee's own case. In assessee's own case for the assessment year 2005–06 cited supra, the coordinate bench of the Tribunal observed as under:

> *"038. Ground no. 4 is with respect to the deletion of disallowance of Rs. 78,93,438/- under Section 14A of the Act. The learned Assessing Officer disallowed the above sum applying the provisions of Rule 8D of the Income Tax Rules, 1962 (the Rules). The learned CIT(A) held that Rule 8D applies only with A.Y. 2008-09. He therefore, upheld the disallowance of only ₹1 lacs. The learned CIT(A) also followed his own order for A.Y. 2004-05 in A.Y. 2002-03 in assessee's own case, the disallowance to the extent of Rs.1 lacs was upheld. There is no change in the facts and circumstances of the case and further Rule 8D of the Rules does not apply for this year also. Respectfully following the order of the co-ordinate Bench in assessee's own case, we upheld the order of the learned Commissioner of incometax (Appeal). Accordingly, ground no. 4 is dismissed."*

35. Thus, respectfully following the judicial precedents in assessee's own case, we direct the AO to restrict the disallowance under section 14A of the Act to an extent of Rs 1 lakh. Accordingly, ground No. 6 raised in assessee's appeal is partly allowed.

36. The issue arising in ground No. 7, raised in assessee's appeal, is pertaining to disallowance on account of transaction charges and lease line charges under section 40(a)(ia) of the Act.

37. The brief facts of the case pertaining to this issue are: during the year, assessee has paid transaction charges of Rs 2,71,09,628 to BSE/NSE and VSAT, WAN and lease line charges of Rs 33,20,724. The AO held that the aforesaid payments by whatever name called are technical services falling within the purview of section 194J and therefore liable for deduction of tax. Since the assessee has failed to deduct and pay the tax on such payment, the AO disallowed the amount of Rs 3,04,30,352 under section 40(a)(ia) of the Act. The learned DRP vide directions issued under section 144C(5) of the Act rejected the objections filed by the assessee against the aforesaid addition. Being aggrieved, the assessee is in appeal before us.

38. Having heard both sides and perused the material available on record, we find that the coordinate bench of the Tribunal in assessee's own case for the assessment year 2005–06 cited supra, following the decision of Hon'ble Supreme Court in CIT vs Kotak Securities Ltd, [2016] 383 ITR 1 (SC), held that these charges are merely the recovery of the cost of infrastructure support and therefore, neither it falls under section 194J or section 194C of the Act. The relevant findings of the coordinate bench of the Tribunal in the aforesaid decision are as under:

> *"039. Ground no.5 is with respect to the disallowance of transaction charges lease line charges and VSAT charges paid by assessee to the Stock exchanges. The assessee paid a sum of Rs.1,72,51,564/-, however, did not deduct any tax at source. The learned Assessing Officer held the same to be fees for technical services under Section 194J of the Act or under Section 194C of the Act. Therefore, he disallowed the sum applying the provisions of Section 40a(ia) of the Act. The learned CIT(A) held that these charges are merely recovery of the cost of infrastructure support and therefore, neither it falls under section 194J of the Act nor under Section 194C of the Act. Therefore, no tax is required to be deducted; hence, he deleted the disallowance. We find that now this issue is*

> *squarely covered by the decision of Hon'ble Supreme Court in case of CIT vs. Kotak Securities Limited 67 taxmann.com 356, wherein it has been held that these are the standard facilities and no tax is required to be deducted for the reason that these are the services not specifically sought by the user but are standard services. In view of this, we do not find any infirmity in the order of the learned CIT(A) in deleting the above disallowance. Accordingly, ground no. 5 is dismissed."*

39. The learned DR could not show us any reason to deviate from the aforesaid decision and no change in facts and law was alleged in the relevant assessment year. Thus, respectfully following the order passed by the coordinate bench of the Tribunal in the assessee's own case cited supra, we direct the AO to delete the disallowance made under section 40(a)(ia) of the Act in respect of transaction charges and lease line charges. As a result, ground No. 7 raised in assessee's appeal is allowed.

40. The issue arising in ground No. 8, raised in assessee's appeal, is pertaining to disallowance on account of lease rental paid for the use of vehicles.

41. The brief facts of the case pertaining to this issue are: During the year under consideration, the assessee paid lease rental of Rs. 14,61,606 in respect of vehicles used by its employees in the grade of VP and executive director. Since lease vehicles were used for the purpose of business, the assessee had claimed a deduction of lease rentals of Rs 40,61,606. During the assessment proceedings, the assessee was asked to explain why lease rental on vehicles should not be disallowed. In response thereto, the assessee submitted that the assessee has used vehicles required under a finance lease. As per accounting standard 19, on 'leases' issued by the ICAI, the assessee has recognised this

as an asset and a corresponding liability created as if the asset has been acquired on credit. The lease rentals paid by the assessee are broken up into the principal amount and the interest amount. The principal amount embedded in the lease rentals is debited to the liability and the interest amount is debited to the profit and loss account. In the books of accounts, the assessee is also claiming depreciation in respect of the asset recognised for the leased vehicles. However, Circular No. 2 of 2001 dated 09/02/2001 issued by the CBDT provides that the accounting standard issued by the ICAI will have no implication on allowance of depreciation on assets under the provisions of the Act. Accordingly, the lease rentals are claimed as a deduction, and depreciation and interest are added back in the computation of income. The AO did not agree with the submissions of the assessee and held that the assessee itself has treated the principal amount as liability and lease vehicles as assets which is a correct position of law as taken by the assessee in its books of accounts as principal amount for acquiring 'finance lease assets' is capital expenditure and not eligible for deduction as revenue expenditure. Further, the AO held that the interest payment as finance charges on lease-finance assets, which were debited to the profit and loss account and added back by the assessee in the computation of income cannot now be considered as the assessee has itself given up its claim in view of decision of the Hon'ble Supreme Court in Goetz (India) Ltd. vs CIT (2006) 157 Taxman 1 (SC). Accordingly, the AO disallowed the deduction of Rs. 40,61,606 claimed as '*lease rentals on vehicles*' claim by the assessee. The learned DRP vide directions issued under section 144C(5) of the Act rejected the objections filed

by the assessee against the aforesaid disallowance. Being aggrieved, the assessee is in appeal before us.

42. During the hearing, the learned AR submitted that lease rental on vehicles was allowed in the preceding assessment year and there is no change in facts and circumstances in the year under consideration. The learned AR further submitted that the assessee is not the owner of the vehicles as the assessee has to deliver the lease vehicles to the lessor at the end of the lease period. On the contrary, learned DR vehemently relied upon the orders passed by the lower authorities.

43. We have considered the rival submissions and perused the material available on record. The assessee in its financial statement on the basis of accounting standards issued by the ICAI recognised the vehicles as a depreciable asset and treated the principal amount embedded in the lease rental as a liability. Further, the interest amount in the lease rental was debited to the profit and loss account. However, in view of Circular No. 2 of 2001 dated 09/02/2001 issued by the CBDT, the entire lease rental was claimed as a deduction, and depreciation and interest were added back in the computation of income. The said claim of the assessee was denied by the Revenue on the basis that assessee's treatment of assets and liability in its accounts was as per the law and the principal amount for acquiring financial lease asset is a capital expenditure. It is also the claim of the assessee that these assets are not owned by the assessee and at the end of the lease period the same are returned to the lessor. The Revenue has not brought anything on

record to prove that the assessee is the owner of the leased assets. It is trite that entries in the books of account alone are not conclusive in determining the income of the assessee. Further, the Revenue has also not denied that such assets were acquired by way of lease and the same were not purchased by the assessee. Thus, we are of the considered view that the lease rental paid by the assessee is in Revenue nature. Before concluding it is also relevant to note that in the immediately preceding year the assessee has claimed lease rental paid in respect of the vehicles, which was allowed by the AO vide order dated 29/12/2008 passed under section 143(3) of the Act. Thus in absence of any change in facts and law, we find no merit in upholding the disallowance made by the AO on this issue. Accordingly, we direct the AO to delete the disallowance on account of the lease rental paid for the use of vehicles. As a result, ground No. 8 raised in assessee's appeal is allowed.

44. Ground no. 9 is pertaining to the initiation of penalty proceedings, which is premature and therefore is dismissed.

45. In the result, the appeal by the assessee is partly allowed.

Order pronounced in the open Court on 25/11/2022

Sd/-	**Sd/-**
PRASHANT MAHARISHI	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 25/11/2022

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai