[2023] 146 taxmann.com 444 (Mumbai - Trib.)[15-12-2022]

TRANSFER PRICING : Where more than one price is determined by most appropriate method, arm's length price shall be taken to be arithmetical mean of such prices

[2023] 146 taxmann.com 444 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'J'

Morgan Stanley India Company (P.) Ltd.

v.

Assistant Commissioner of Income-tax*

PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER
IT APPEAL NOS. 1715 AND 1794 (MUM.) OF 2016
CO NO. 145 (MUM.) OF 2016
[ASSESSMENT YEAR 2011-12]
DECEMBER 15, 2022

Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (CUP method) - Assessment year 2011-12 - Whether where more than one price is determined by most appropriate method, arm's length price shall be taken to be arithmetical mean of such prices - Held, yes - Assessee, a financial services company, was engaged in providing institutional equity sales and trading services - During year, it earned brokerage for clearing house (CH) and DVP trades from its AEs - In order to benchmark its international transactions with AE, assessee adopted TNMM - TPO took a view that CUP method was most appropriate method to determine ALP of aforesaid international transactions - DRP, in view of earlier assessment years, directed TPO to compute weighted average brokerage rate for CH trades and DVP trades - Whether, since DRP allowing weighted average of prices and TPO himself taking it as weighted average in subsequent years was not in accordance with law, accordingly, only arithmetic mean of prices of brokerage should be taken to determine arm's length price of said international transaction - Held, yes - Whether, in view of aforesaid, direction given by DRP were unsustainable in law - Held, yes [Paras 32 and 40] [In favour of revenue]

Words & Phrases : 'Arithmetic mean' as occurring in section 92C(2) of the Income-tax Act, 1961

FACTS

- The assessee, a financial services company, was engaged in providing institutional equity sales and trading services to both domestic and overseas institutional clients.
- During the year under consideration, the assessee earned brokerage for clearing house and DVP trades . It benchmarked said transaction using Transactional Net Margin Method (TNMM) as the most appropriate method (MAM).
- The TPO, however, applied CUP method using the arithmetic mean and, accordingly, made an adjustment for sales and marketing of clearing house and DVP trades.
- The DRP, following its earlier year's direction, directed the TPO to compute the weighted average brokerage rate.
- On cross appeal:

HELD

- 'Arithmetic mean' means add up all the values and divide the sum by the number of values. It does not have any scope for any weight to any value. To interpret it in any other manner is violence to plain meaning of the section. It has no reason to include weighted average. The plain meaning rule dictates those statutes are to be interpreted using the ordinary meaning of the language of the statute. [Para 32]
- On the issues that there are decision of Tribunal in case of the assessee in assessment year 2002-03, allowing weighted average, the DRP allowing the weighted average of the prices and the TPO himself taking it as weighted average in subsequent years are not in accordance with law. To perpetuate an error is no heroism. [Para 39]
- Accordingly, it is to be held that only arithmetic mean of the prices of brokerage should be taken and not weighted average of such prices to determine arm's length price of the international transaction. Therefore, the directions given by the DRP are unsustainable in law. [Para 40]

CASE REVIEW

Distributors (Baroda) (P.) Ltd. v. *Union of India* [1985] 22 Taxman 49/155 ITR 120/47 CTR 349 (SC) (para 39) *followed*.

ITO v. *Saunay Jewels (P.) Ltd.* [2010] 42 SOT 4 (Mum.) (URO) (para 38) *distinguished.*

CASES REFERRED TO

RBS Equities (India) Ltd. v. *Asstt. CIT* [2017] 79 taxmann.com 87 (Mum. - Trib.) (para 26), *ADIT (International Taxation)* v. *ABB Lummus Heat Transfer BV* [2015] 64 taxmann.com 210/[2016] 156 ITD 168/177 TTJ 82 (Delhi -Trib.) (para 26), *CIT* v. *J.P. Morgan India (P.) Ltd* [IT Appeal No. 599 of 2014, dated 7-7-2017] (para 27), *ITO* v. *Saunay Jewels (P.) Ltd.* [2010] 42 SOT 4 (Mum.) (URO) (para 27), *A.N. Roy Commissioner of Police* v. *Suresh Sham Singh* AIR 2006 SC 2677 (para 33), *Adamji Lookmanji & Co.* v. *State of Maharashtra* AIR 2007 Bom. 56 (para 34), *State of Haryana* v. *Suresh* 2007 (3) KLT 213 (para 35), *Visitor Amu* v. *K.S. Misra* [2007] 8 SCC 594 (para 36), *Phool Patti* v. *Ram Singh* [2009] 13 SCC 22 (para 37), *Pierce* v. *Delameter* AIR 2011 SC 1989 (para 39) and *Distributors (Baroda) (P.) Ltd.* v. *Union of India* [1985] 22 Taxman 49/155 ITR 120/47 CTR 349 (SC) (para 39).

Sunil M. Lala, AR *for the Appellant.* **Samuel Pitta**, DR *for the Respondent.*

ORDER

Prashant Maharishi, Accountant Member. - These are two appeals and one cross objection in case of the assessee M/s Morgan Stanley India Company Private Limited [the Assessee/Appellant] for the same assessment year. ITA No. 1794/Mum/2015 is filed by the Asst. Commissioner of Income Tax, Circle 4(3)(2), Mumbai (the learned Assessing Officer), ITA No. 1715/Mum/2016 is filed by Morgan Stanley India Company Private Limited(the assessee/Appellant) and CO No. 145/Mum/2016 in ITA No. 1794/Mum/2016 is filed by the assessee for A.Y. 2011-12 against the assessment order passed by the Asst. Commissioner of Income Tax, Circle 4(3)(2), Mumbai for A.Y. 2011-12 under section 144C read with section 143(3) of the Income-tax Act, 1961 (the Act) dated 28th January, 2016, where the return of income filed by the assessee on 15th January, 2011 at a total income of Rs. 328,69,20,549/- was assessed at Rs. 330,57,25,170/-.

2. The respective grounds of appeal in ITA No. 1715/Mum/2016 is under:—

> "Based on the facts and circumstances of the case, Morgan Stanley India Company Private Limited (hereinafter referred to as the 'Appellant] respectfully craves leave to prefer an appeal under section 253 of the Act against the order dated 28 January 2016 (received on 1 February 2016) passed by the Assistant Commissioner of Income-tax-4(3)(2), Mumbai [hereinafter referred to as the learned AO], in pursuance of the directions issued by Dispute Resolution Panel-III, Mumbai (DRP).
>
> *Ground 1: Disallowance under section 14A of the Act*
>
> 1. On the facts and circumstances of the case, the learned AO, based on the directions of Honourable DRP, erred in disallowing Rs 1,70,70,056 under section 14A of the Act.
>
> 2. On the facts and circumstances of the case, the learned AO, based on the directions of the Hon'ble DRP erred on the following grounds.
>
> 2.1 In not appreciating the fact that the no expenditure having direct and proximate connection with earning of exempt income has been incurred by the Appellant and thus, no disallowance (in addition to the Suo-moto disallowance of Rs. 4,29,944 by the Appellant) as expenditure incurred in relation to earning exempt income is warranted under the provisions

of section 14A of the Act.

2.2 Without prejudice to the above, in applying Rule 8D of the Income-tax Rules, 1962 (Rules) for computing disallowance under section 14A of the Act without recording sufficient reasons for not being satisfied with the correctness of the claim of the Appellant in respect of the expenditure of Rs. 4,29,944 Suo-moto disallowed by the Appellant under section 14A of the Act in its return of income.

2.3 Without prejudice to the above, the learned AO in considering the investment made by the Appellant in the shares of subsidiary company/group companies and Bombay Stock Exchange Limited while computing the disallowance under Rule 8D(2)(*ii*) of the Rules.

Ground 2: Short grant of credit for Taxes Deducted at Source (TDS)

3. The learned AO has erred in granting credit for TDS amounting to only for Rs. 17,09,87,733 as against the amount to which the Appellant is entitled to *i.e.* Rs. 17,24,18,686.

Ground 3: Non grant of deduction under section 80G of the Act

4. The learned AD has erred in law and on facts in not granting deduction amounting to Rs 1,25,000 under section BOG of the Act for the donation of Rs. 2,50,000 made to Marathi Vidnyan Parshat

Each of the grounds of appeal referred above is separate, and may kindly be considered independent of each other .

The 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 hearing of this appeal as per law."

3. The grounds of appeal in Appeal of ld. AO in ITA No. 1794/Mum/2016 is as under:-

1." The learned DRP erred on the facts and law directing to adopt weighted average methodology in computing the arithmetic mean of non AE transactions for arriving at Arm's Length Price of brokerage charged for CH and DVP Trades. The Dispute Resolution Panel erred in appreciating the fact that the charging of brokerage is not dependent either on the no. of scripts involved, or on the value of contract, and the aspect of no. of contracts' is vital in determining the brokerage to be charged."

4. The grounds in the Cross Objection No. 145/Mum/2016 is as under:—

"Based on the facts and circumstances of the case. Morgan Stanley India Company Private Limited (hereinafter referred to as the Respondent) craves leave to prefer cross objections against the appeal filed by the Assistant Commissioner of Income-tax, Circle 4(3)(2). Mumbai (hereinafter referred to as the learned AO] against the order issued under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (Act) in pursuance of the directions of the Honourable Dispute Resolution Panel-Ill, Mumbai (hereinafter referred to as the Honourable DRP) for the AY 2011-12

Ground of Appeal - 1: Adjustment to the Arm's Length Price (ALP) of the brokerage received

by the Respondent

1. On the facts and circumstances of the case, the learned AO and the Honourable DRP have legally erred in law and in fact in determining the ALP of brokerage received by the Respondent on Clearing House (CH) trades and Delivery versus Payment (DVP) executed for the associated enterprises (AEs). In this regard, the learned AO and the Honourable DRP erred on the following grounds:

In using Comparable Uncontrolled Price (CUP) method and while applying the CUP method, in:-

1.1.1. Not appreciating that during the previous year ended on 31 March 2011, the AES 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 Respondent in the said previous year, which establishes adherence to the arm's length principle of the trades entered into between the Respondent and the AEs

1.1.2. Not granting an adjustment based on the comparability analysis (over and above the marketing cost adjustment) for.

- research costs, and
- at least 50% for the significantly higher volume of transactions of the Respondent with the AEs as compared to the independent clients

1.2. In not accepting the Respondent's contention that the Transactional Net Margin Method is the most appropriate method for determining the ALP for the brokerage received from trades executed for the AES.1.3. 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.

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

5. Briefly stated facts of the case are that the assessee company is a financial services company with a leading market position in Indian stock broking business with several large investors as its major clients. It is also engaged in providing institutional equity sales and trading services to both domestic and overseas institutional clients. As the assessee has entered into an international transaction as submitted in form no. 3CEB, reference made to the learned Transfer Pricing Officer-I(2), Mumbai, (the learned TPO) to examine the Arm's Length Price of the international transaction. The assessee has earned the broking derivatives clearing services in cash segment in equity of Rs. 6074,19,839 and in futures and option segment of Rs. 56,11,35,866/-. It also received support services income relating to the equity business amounting to Rs. 2,04,39,148/- and also investment banking services income of Rs. 64,53,37,040/-. The provision of broking and derivatives income and support services were benchmarked using Transactional Net Margin Method as the most appropriate method and investment banking services was benchmarked using

profit split method and also Transactional Net Margin Method. The learned Transfer Pricing Officer noted that there is an adjustment history in the earlier assessment years wherein Transactional Net Margin Method adopted by the assessee is rejected and Comparable Uncontrolled Price is adopted. The Transfer Pricing Officer benchmarked the transaction on the basis of cut of all brokerage and cut off of contract basis after granting adjustment on marketing. For A.Y. 2009-10, the learned Dispute Resolution Panel directed to apply the weighted average rate in respect of clearing house trades and delivery versus payment trades. No further adjustment was allowed. The learned Assessing Officer is in appeal against such direction of the learned Dispute Resolution Panel for earlier years. Therefore, the learned Transfer Pricing Officer issued a show cause notice that why Transfer Pricing adjustment should not be made in this year following the adjustment made in earlier years. The learned Transfer Pricing Officer was replied that Transactional Net Margin Method is the most appropriate method, however, it was stated that for A.Y. 2009-10, Dispute Resolution Panel has directed to take weighted average of all the trades for the purpose of benchmarking. The learned Transfer Pricing Officer rejected the contention of the assessee and applied CUP method. The learned Transfer Pricing Officer noted that assessee executed 79,624 clearing house trades during the year and on that basis applying the arithmetic mean found that 0.22% is the brokerage at arm's length. He also carried out further adjustment as per the submission of the assessee and arrived at the CUP brokerage rate of 0.17%. Similarly, he worked out the brokerage rate for delivery versus payment. He granted 29.50% of arithmetic mean brokerage as an adjustment for sales and marketing of clearing house and DVP trades. He refused to give any adjustment on volumes. Thus, he computed the Arm's Length Price for CH trade considering arithmetic mean of CUP brokerage at 0.22% granting adjustment on account of marketing cost at 29.50% and therefore, reaching at adjusted Arm's Length Price brokerage rate of 0.1551% of the contract value. Accordingly, he computed the transfer pricing adjustment of Rs. 2,05,39,673/-. On the DVP trades, he computed the CUP rate of brokerage at 0.2167%, granted adjustment for selling and marketing cost of 29.50% and rejected the adjusted Arm's Length Price mean brokerage rate of 0.1527% and accordingly, made an adjustment on DVP trade of Rs. 57,621/-. Thus, total TP adjustment was proposed by the order under section 92CA(3) of the Act dated 27th January, 2015 of Rs. 2,05,97,294/-.

6. The learned Assessing Officer noted that the assessee has received dividend income of Rs. 5,20,000/- and assessee has made a Suo moto disallowance under section 14A of the Act of Rs. 4,29,944/-. The learned Assessing Officer examined the correctness of the same and worked out disallowance under rule 8D under section 14A of the Act of Rs. 2,30,15,500/- and made the balance disallowance of Rs. 2,25,85,556/-.

7. Based on this the returned income of the assessee of Rs. 328,69,20,549/- is determined at Rs. 330,01,03,399/-by passing a draft assessment order on 30th March, 2015.

8. Against the above order, assessee preferred the objection before the learned Dispute Resolution Panel-3, Mumbai who passed direction under section 144C(5) of the Act on 28th December, 2015. The learned Dispute Resolution Panel on the issue of transfer pricing adjustment held that objection of the assessee with respect to the most appropriate method as Transactional Net Margin Method is not acceptable and upheld the CUP as the most appropriate method as accepted in earlier years. The objection of the assessee with respect to the deduction of marketing cost

research support and volume adjustment the learned Dispute Resolution Panel held that the learned Transfer Pricing Officer has already allowed deduction of 29.5% and therefore, no further adjustment is required. The learned Dispute Resolution Panel further held that as in earlier years it has taken a view that weighted mean to take care of all these adjustments and consequently no further adjustment is required. With respect to the approach of the learned Transfer Pricing Officer it did not agree but agreed with the assessee's contention that the rate of brokerage charged is dependent on volume of the transaction executed so an adjustment for the same was warranted. Accordingly, it directed to compute weighted average brokerage rate in respect of the non-Associated Enterprises transactions for CH trades and DVP trades separately and to apply the same to the Associated Enterprises transactions to determine their Arm's Length Price. It directed that all the Associated Enterprises transactions involving brokerage rate less than the weighted average would suffer TP adjustment. The Dispute Resolution Panel expressed its view that whether weighted mean take care of any other adjustment related to volume and research cost adjustment. Thus Dispute Resolution Panel followed its direction for earlier years. With respect to the disallowance under section 14A of the Act it granted partial relief directing the learned Assessing Officer to verify and excludes investment which gives rise to taxable income for computing disallowance.

9. On the basis of the above direction, the learned Transfer Pricing Officer *vide* letter dated 19th January, 2016, furnished revised transfer pricing adjustment amounting to Rs. 17,34,651/-. Based on this, assessment order under section 144C read with section 143(3) of the Act was passed on 28th January, 2016, wherein transfer pricing adjustment of Rs. 17,34,561/- and disallowance under section 14A of the Act of Rs. 1,70,70,056/- was made and total income was assessed at Rs. 330,57,25,166/-.

10. Both the parties are aggrieved with the above order and therefore, are in the appeal and cross objection before us.

11. The learned Authorized Representative submitted the chart on both the appeals and its CO, a paper book containing 503 pages and 5 orders of the co-ordinate Bench in assessee's own case from A.Y. 2002-03, 4-05, 5-06, 6-07 and 10-11 contained in a 97 page paper book.

12. The learned Authorized Representative first came to the appeal no. 1715/Mum/2016. The ground no. 1 of the appeal is with respect to the disallowance under section 14A of the Act at Rs. 1,70,70,056/-. It was submitted that assessee has earned exempt income of Rs. 5,20,000/-, Suo moto made disallowance of Rs. 4,29,944/-. In A.Y. 2010-11 in assessee's own case the co-ordinate Bench has held that disallowance under section 14A of the Act cannot exceed the dividend income[exempt income] . Therefore, according to him if the disallowance is restricted to the exempt income no further arguments were pressed.

13. The learned Departmental Representative could not show us any reason against the above decision in assessee's own case.

14. On careful consideration, respectfully following the decision of ITAT in assessee's own case for A.Y. 2010-11, we direct the learned Assessing Officer to restrict the disallowance under section 14A of the Act to the extent of exempt income only. Accordingly, the ground no. 1 of the

appeal is partly allowed.

15. Assessee did not press ground no. 4 of the appeal regarding deduction under section 80G of the Act and therefore same is dismissed.

16. With respect to ground no. 2, the grievance is that credit for TDS amounting to Rs. 17,24,18,686/- was claimed but was allowed only to the extent of Rs. 17,09,87,738/-. Though, nothing is argued before us but we direct the learned Assessing Officer to verify the claim of the assessee, if substantiated before him and decide in accordance with the law.

17. Accordingly, ITA No. 1715/Mum/2016 for A.Y. 2011-12 filed by assessee is partly allowed.

18. Coming to the CO of the assessee in CO no. 145/Mum/2016, ground no. 1 relates to the adjustment of Arm's Length Price of the brokerage received by the assessee. Assessee has challenged the adjustment of Arm's Length Price on four counts.

19. As per ground no. 1.1.1, the assessee challenges that its international transaction are at Arm's Length Price since the assessee has charged higher brokerage rates than average brokerage rate charged to associated enterprises by third party brokers. The learned Authorized Representative submitted that this ground is covered against the assessee in ITAT's order in assessee's own case for A.Ys. 2005-06 and 2006-07.

20. As per ground no. 1.1.2, the claim of the assessee is that at least 50% of deduction should be granted to the assessee on account of research cost and volume cost if CUP method is applied. The learned Authorized Representative submitted that ITAT in A.Y. 2002-03, 2004-05, 2005-06 and 2006-07 has agreed with the contention of the assessee and granted allowance to the extent of 40% of the CUP price.

21. No other grounds on transfer pricing were pressed.

22. The learned Departmental Representative agreed that ITAT has granted 40% of the CUP rate on account of research cost and volume adjustment to the assessee.

23. On careful consideration of the rival contentions, respectfully following the decision of the co-ordinate benches in assessee's own case, where assessee is granted 40% deduction on account of research cost volume adjustment, we direct the learned Transfer Pricing Officer/ Assessing Officer to grant the deduction on this count at the rate of 40% instead of 29.50% allowed by him. The contention of the assessee with respect to ground no. 1.1.1 is rejected in view of the decision of the co-ordinate Bench in assessee's own case for earlier years.

24. In the result, Cross Objection filed by the assessee is partly allowed.

25. Now, we come to the appeal of the Revenue in ITA No. 1794/Mum/2016.

26. The learned Departmental Representative submitted that as per ground no. 1, the learned Assessing Officer has challenged the direction of the learned Dispute Resolution Panel to adopt a weighted average methodology in computing the arithmetic mean of non-Associated Enterprises transaction for arriving at Arm's Length Price of brokerage charged for clearing house and DVP trades. He submitted that this direction of the learned Dispute Resolution Panel is contrary to the

provision of Income-tax Act. He submitted that in paragraph no. 5.11, the learned Dispute Resolution Panel following its earlier years direction has directed the learned Transfer Pricing Officer to compute the weighted average brokerage rate which is not in accordance with the law. He referred to section 92C of the Act and submitted that where more than one price is determined by the most appropriate method, the Arm's Length Price shall be taken to be the arithmetic mean of such price. He therefore, submitted that where in the CUP method several price are determined then the mandate of law is only to take arithmetic mean of such prices. The learned Dispute Resolution Panel has directed the learned Transfer Pricing Officer to compute the weighted average mean of the several prices is not in accordance with the provisions of the law and therefore, the learned Assessing Officer is aggrieved and is in appeal. He submitted that the identical issue arose in the case of *RBS Equities (India) Ltd.* v. *Asstt. CIT* [2017] 79 taxmann.com 87 (Mum.- Trib.) wherein in paragraph no. 6.4, the co-ordinate Bench has categorically held that arithmetic mean should be adopted. It cannot be the arithmetic mean of weighted average. He further relied on the decision of co-ordinate Bench in case of *ADIT (International Taxation)* v. *ABB Lummus Heat Transfer BV* [2015] 64 taxmann.com 210/[2016] 156 ITD 168/177 ITD 177 TTJ 82 (Delhi -Trib.) referred to paragraph no. 8 of that order stating that only arithmetic mean of such prices is required to be adopted. He therefore submitted that the direction of the learned Dispute Resolution Panel is contrary to the provisions of the law. According to him, only arithmetic mean of the price is to be taken. Thus, the direction of the learned Dispute Resolution Panel is not in accordance with the law.

27. The learned Authorized Representative vehemently objected to the argument of the learned Departmental Representative. He submitted that in assessee's own case for earlier years the above issue has already been decided. He referred to the decision of the co-ordinate Bench in assessee's own case. He first referred to the decision in A.Y. 2002-03 wherein in paragraph no. 23 the argument of the learned Authorized Representative was recorded. He further, referred to three different decisions also incorporated therein. He also referred to paragraph no. 28 of that order where the order of the learned CIT (A) is extracted and at page no. 9 of that order, CIT (A) has upheld the weighted average holding that it is a well-established commercial principle. He referred to paragraph no. 29 of the said order and submitted that the co-ordinate Bench upheld the order of the learned CIT (A) accepting the weighted average rate. Therefore, now revenue cannot question the same. He further submitted that in all other subsequent decision of the co-ordinate Bench in assessee's own case accepted the above methodology and therefore, same should be accepted based on principle of consistency and binding nature of judicial precedence. He further referred to the authoritative commentary of Kanga & Palkhivalaon the Income-tax and submitted that judicial precedent should be followed unless it falls in 7 conditions/situations where precedent loses all or some of its binding force. He submitted that in the present case none of these conditions are fulfilled and hence, the binding precedent of assessee's own case decided by the co-ordinate Bench should be followed. He heavily argued the principle of consistency also. He further referred to the decision of the Hon'ble Bombay High Court in case of *CIT* v. *J P Morgan India (P.) Ltd* in [IT Appeal No. 599 of 2014, dated 7-7-2017] stating that identical transactions were before Hon'ble High Court. He further referred to the decision of the co-ordinate Bench in case of *ITO* v. *Saunay Jewels (P.) Ltd.* [2010] 42 SOT 4 (Mum.) (URO), wherein the co-ordinate Bench in paragraph no. 20, the weighted average was adopted as against simple arithmetic

average adopted by the learned Assessing Officer. It was further stated that in paragraph no. 18, the provision of section 92C(2) was also considered. He further referred to order under section 92CA(3) of the Income-tax Act for A.Y. 2006-07 wherein the learned Transfer Pricing Officer himself has accepted the weighted average commission income. He further referred to the appeal filed by the learned Assessing Officer for A.Y. 2003-04, wherein the learned Assessing Officer himself did not challenge the weighted average method but as per ground no. 6, where the learned Transfer Pricing Officer himself has taken a weighted average of brokerage charged. He referred to ground no. 6 and submitted that in that assessment year the situation was reversed. The learned CIT (A) directed the learned Assessing Officer to take simple arithmetic mean of brokerage transaction whereas the learned Transfer Pricing Officer was advocating weighted average of brokerage charged.

28. The learned Departmental Representative vehemently submitted that the decision of RBS Equity Limited rendered on 14thDecember 2016 is not correct as it has not considered the judicial precedents referred to in order of the ITAT in assessee's own case for A.Y. 2002-03 at para no. 23. According to him, if such decision would have been brought to the notice of the ITAT, the decision of the RBS Securities would not have been the same. Therefore, the decision of RBS securities should not be applied. He further submitted that decision of the RBS securities cannot be applied in case of the assessee where Tribunal has decided the issue in assessee's own case in several years. He submitted that law of consistency, law of binding precedents clearly suggests that basically the assessee's own case should be followed.

29. Countering the argument of the learned Authorized Representative, the learned Departmental Representative vehemently submitted that any decision which is contrary to the law *i.e.* the express provision of the law laying down the rule in unambiguous terms should be followed. All these decisions are did not consider the first proviso to section 92C(1) of the Act, does not have any binding value. He submitted that none of the decision cited by the learned Authorized Representative deals with the proviso. None of the decision have expressed or considered the unambiguous provisions of the law. He therefore submitted that if the provision of the law is clear and unambiguous, it should be incorporated independently. Any contrary decision should be ignored. Therefore, according to him all the above decisions of the assessee by the ITAT should be ignored and simple provision of the law which does not have any possibility of any divergent view should be followed.

30. We have carefully considered the rival contentions and perused the orders of lower authorities.

31. According to section 92C (2) provides as under: -

> (2) the most appropriate method referred to in sub-section (1) shall be applied, for determination of arm's length price, in the manner as may be prescribed :

[**Provided** that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices:

32. 'Arithmetic mean' means add up all the values and divide the sum by the number of values. It does not have any scope for any weight to any value. To interpret it in any other manner is violence to plain meaning of the section. It has no reason to include weighted average. The plain

meaning rule dictates those statutes are to be interpreted using the ordinary meaning of the language of the statute.

33. In *A.N. Roy Commissioner of Police* v. *Suresh Sham Singh* AIR 2006 SC 2677, the Hon'ble Apex Court held that, "It is now well settled principle of law that, the Court cannot change the scope of legislation or intention, when the language of the statute is plain and unambiguous. Narrow and pedantic construction may not always be given effect to. Courts should avoid a construction, which would reduce the legislation to futility. It is also well settled that every statute is to be interpreted without any violence to its language. It is also trite that when an expression is capable of more than one meaning, the Court would attempt to resolve the ambiguity in a manner consistent with the purpose of the provision, having regard to the great consequences of the alternative constructions.

34. In *Adamji Lookmanji & Co.* v. *State of Maharashtra* AIR 2007 Bom. 56, the Bombay High Court held that, when the words of status are clear, plain or unambiguous, and reasonably susceptible to only meaning, Courts are bound to give effect to that meaning irrespective of the consequences. The intention of the legislature is primarily to be gathered from the language used. Attention should be paid to what has been said in the statute, as also to what has not been said.

35. In *State of Haryana* v. *Suresh* 2007 (3) KLT 213, the Hon'ble Supreme Court held that, "One of the basic principles of Interpretation of Statutes is to construe them according to plain, literal and grammatical meaning of the words. If that is contrary, to or inconsistent with any express intention or declared purpose of the Statute, or if it would involve any absurdity, repugnancy or inconsistency, the grammatical sense must then be modified, extended or abridged, so far as to avoid such an inconvenience, but no further. The onus of showing that the words do not mean what they say lies heavily on the party who alleges it must advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity."

36. In *Visitor Amu* v. *K.S.Misra* [2007] 8 SCC 594, the Hon'ble Supreme Court held that, "It is well settled principle of interpretation of the statute that it is incumbent upon the Court to avoid a construction, if reasonably permissible on the language, which will render a part of the statute devoid of any meaning or application. The Courts always presume that the legislature inserted every part thereof for a purpose and the legislative intent is that every of the statute should have effect. The legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature will not be accepted except for compelling reasons. It is not a sound principle of construction to brush aside words in a statute as being in apposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute."

37. In *Phool Patti* v. *Ram Singh* [2009] 13 SCC 22, the Hon'ble Supreme Court held that, "9. It is a well-settled principle of interpretation that the court cannot add words to the statute or change its language, particularly when on a plain reading the meaning seems to be clear."

38. It is also to be noted that in none of the decisions cited by the LD AR, [including the decisions in case of the assessee itself] the provision of proviso of section 92C(2) were noted at all.

Therefore all these decision losses or weaken the binding force of those decisions. This is also mentioned in the commentary kanga & Palkhivala in "The Law and Practice of Income-tax (Eleventh edition) Page 50 at Para no 46 (*vii*).

39. On the issues that there are decision of ITAT in case of the assessee in AY 2002-03, allowing weighted average , Ld. DRP allowing the weighted average of the prices and Ld. TPO himself taking it as weighted average in subsequent years are not in accordance with law. To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. Justice Bronson in *Pierce* v. *Delameter* AIR 2011 SC 1989 (AMY at p.18) said that a judge ought to be wise enough to know that he is fallible and, therefore, ever ready to learn: great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead : and courageous enough to acknowledge his errors [*Distributors (Baroda) (P.) Ltd.* v. *Union of India* [1985] 22 Taxman 49/155 ITR 120/47 CTR 349 (SC)]

40. Accordingly, we hold that only arithmetic mean of the prices of brokerage should be taken and not weighted average of such prices todetermine Arm's length price of the International Transaction. Directions of the LD DRP are unsustainable in law.

41. The Appeal of the LD AO is allowed.

42. Accordingly both the appeal and CO for AY 2011-12 are disposed of accordingly.

JASPREET

*In favour of revenue.