[2023] 154 taxmann.com 176 (Mumbai - Trib.)[30-06-2023]

TRANSFER PRICING : Arithmetic mean of price of brokerage should be taken for determining ALP under CUP method

TRANSFER PRICING : When CUP method was applied for determining ALP of international transaction of brokerage commission earned by assessee, then downward adjustment to extent of 40 per cent was to be granted to assessee

TRANSFER PRICING : Where assessee overseas support services charges to its AE, TPO cannot substantiate disallowance of ALP of said transaction at nil without asking assessee to demonstrate rendition of such services and whether there was any duplicative service

[2023] 154 taxmann.com 176 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'J'

Morgan Stanley India Co. (P.) Ltd.

v.

Additional Commissioner of Income-tax*

AMIT SHUKLA, JUDICIAL MEMBER
AND MS. PADMAVATHY S, ACCOUNTANT MEMBER
IT APPEAL NOS. 7675 (MUM.) OF 2012 & 1952 (MUM.) OF 2014 & ORS.
CO. NO. 218 (MUM.) OF 2018
[ASSESSMENT YEARS 2003-04, 2007-08, 2008-09 AND 2009-10]
JUNE 30, 2023

I. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Methods for determination of - CUP method) - Assessment years 2003-04, 2007-08, 2008-09 and 2009-10 - Assessee, a financial services company, had 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 (MAM) and had taken weighted average of brokerage charged for Computing ALP - DRP, however, held that simple average of each FII should be taken into consideration for computing ALP - Tribunal in assessee's own case for subsequent assessment

year on similar issue had held that only arithmetic mean of price of brokerage should be taken and not weighted average for comparability purpose - Whether, following above decision of Tribunal, order of DRP was justified - Held, yes [Para 10] [In favour of assessee]

II. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Adjustments - Commission) - Assessment years 2003-04, 2007-08, 2008-09 and 2009-10 - Assessee earned brokerage commission from AEs and adopted TNMM as MAM - TPO, however, used CUP method for computing Arm's Length Price (ALP) and granted adjustment of 25 per cent while considering both overseas and domestic independent clients - Assessee claimed that if CUP method was applied for determining ALP of international transaction of brokerage commission earned, downward adjustment to extent of 50 per cent was required to be granted to assessee - It was found that for earlier years, Tribunal had granted adjustment to extent of 40 per cent, which had been upheld by co-ordinate benches - Whether therefore, Assessing Officer/TPO was to be directed to adjust and grant benefit of 40 per cent discount to assessee - Held, yes [Para 22] [Partly in favour of assessee]

III. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Adjustments - Support services fee) - Assessment years 2003-04 and 2007-08 - Assessee had entered into transaction of payment of overseas support services charges which included training of employees, overseas research in respect of Indian capital market, overseas support services and FA&O division etc. to its foreign AE - TPO determined Arm's Length Price (ALP) of this transaction at nil on ground that assessee had various employees and there was no requirement or need for such services - Whether since TPO determined ALP of aforesaid transaction at nil without asking assessee to demonstrate rendition of such services and whether there was any duplicative service, TPO could not substantiate disallowance of ALP at nil - Held, yes [Para 32] [In favour of assessee]

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

FACTS-I & II

- The assessee, a financial services company, had 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 weighted mean and, accordingly, made an adjustment.
- The DRP directed the TPO to compute ALP of said transaction by applying simple average of each Foreign Institutional Investors (FIIs).

- On the revenue's appeal to the Tribunal:

HELD-I & II

- The issue whether MAM will be CUP or TNMM in the instant case, by and large has been settled by the Tribunal that CUP should be the most appropriate method to be applied for benchmarking the transaction of brokerage charged from AE. The only issue left is, as how the transfer pricing adjustment should be made, whether the margins of the comparables have to be taken on simple arithmetic mean of uncontrolled transactions or weighted average. It is found that this issue had come-up for consideration before the Tribunal in assessment year 2011-12, wherein the Tribunal had held that only arithmetic mean of the price of the brokerage should be taken not weighted average for comparability purpose. In that year, the DRP had directed the Assessing Officer to adopt weighted average methodology in computing the arithmetic mean of non-AE transaction for arriving at ALP of brokerage cost of house trades and DVP trades. The Tribunal observed that the statute provides 'arithmatic mean' wherein all the values are added and divided by the same by the number of values and it does not give any scope for any weight to any value and any interpretation in other way would be violation of the provisions of the statute. The Tribunal in fact disagreed with the finding of the Tribunal in assessment year 2002-03 which upheld weighted average mean. Accordingly, following the decision of the Tribunal in assessment year 2011-12, it is to be held that, firstly CUP method is to be applied and secondly, simple average mean brokerage rate should be taken for the comparability purpose. [Para 10]

Marketing cost and research cost adjustment

- Insofar as the issue, whether comparability analysis should be undertaken by considering both overseas and domestic independent clients, *i.e.,* all non-AE transactions for determining the ALP while applying CUP and how much adjustment should be allowed on account of various factors as claimed by the assessee. The Tribunal has by and large accepted the stand of the assessee to give suitable adjustments on the price determined after CUP. The Tribunal for assessment year 2004-05 in *Morgan Stanley India Company (P.) Ltd.* v. *Addl. CIT* [2022] 145 taxmann.com 138 (Mum - Trib.) *vide* order dated 5-10-2021 also followed in assessment year 2005-06, held that adjustment of 40 per cent will be allowed on marketing cost adjustments and research cost. [Para 11]

- This has also been followed by the Tribunal in assessment year 2005-06 also. Accordingly, on similar line, the TPO is to be directed to give adjustment of 40 per cent to the assessee while determining the ALP of international transaction of brokerage and commission, as against 25 per cent given by the TPO while considering both overseas and domestic independent clients while applying CUP method. [Para 12]

FACTS-III

- The assessee had made certain payment on account of overseas support services to its overseas

AEs.

- The TPO observed that assessee itself had employed so many employees for carrying out its business requirements and held that assessee had not received any extraordinary benefit in necessitating the payment of such a huge amount and, accordingly, he treated the ALP of the transaction at *nil.*

- On appeal, the Commissioner (Appeals), in view of its earlier assessment year's order, held that no adjustment was required to be made.

- On the revenue's appeal to the Tribunal:

HELD-III

- The assessee is required to prepare the documents to *prima facie* to prove the above tests depending upon the nature of services, the manner of allocation of the cost, functional analysis etc. It is required to be proved in the TP study report itself the detailed business overview and the industry analysis of the group and the associated enterprises as well as the assessee. The onus is on the assessee to show with documentation with regard to functions, performance with regard to rendition of the service and at least *prima facie* require to establish benefit test. There has to be some objective analysis of each and every service which are required by the assessee and rendered by the AE resulting into some qualitative and quantitative benefit if it can be measured. Another important factor is to examine whether the services have not been resulted into duplicative services. Further, assessee is also required to show it was for the business purpose and is not carried out by the shareholder as its own activity. [Para 29]

- Not only that, the charging method, *i.e.,* direct or indirect charge should also be based on proper allocation key which should be commensurate in the nature of services and the impurity of such services and utilization thereof by the assessee. Here in the instant case from the record, it is not discernable whether any such documentation was prepared by the assessee or was ever asked by the TPO. [Para 30]

- The assessee submitted that in the subsequent year, the assessee had filed voluminous details before the Commissioner (Appeals) when asked by him. It has also been submitted that in the assessment year 2007-08, based on perusal of those documentation, the Commissioner (Appeals) has held that the payment for intra-group services is justified. [Para 31]

- From the perusal of the TPO's order as noted above, it is seen that, he has merely noted that assessee had various employees and therefore, there was no requirement or need for such services. Nowhere he is questioned or asked about the rendition of the services or to demonstrate whether there was any duplicative service. Once assessee has given the details, then the TPO should have at least asked for the documentation of proving the aforesaid tests and cannot simply determine ALP at nil. Since the TPO has not brought anything on record, therefore, the earlier year orders even though none of the orders of the Tribunal have considered this aspect is to be followed. Accordingly, it is to be held that the TPO cannot substantiate the disallowance of ALP at *nil*. [Para 32]

CASE REVIEW

Morgan Stanley India Company (P.) Ltd. v. *Addl. CIT* [2022] 145 taxmann.com 138 (Mum. - Trib.) (para 11) *followed.*

CASES REFERRED TO

Otis Elevator Co. (India) Ltd. v. *CIT* [1992] 60 Taxman 215/195 ITR 682 (Bom.) (para 19), *South India Bank Ltd.* v. *CIT* [2021] 130 taxmann.com 178/283 Taxman 178/438 ITR 1 (SC) (para 37.1), *CIT* v. *Kotak Securities Ltd.* [2016] 67 taxmann.com 356/239 Taxman 139/383 ITR 1 (SC) (para 39) and *Asea Brown Boveri Ltd.* v. *Industrial Finance Corpn. of India* [2006] 154 Taxman 512 (SC) (para 45).

Sunil M. Lala *for the Appellant.* **Alok Singh** *for the Respondent.*

ORDER

1. The aforesaid cross appeals have been filed by the assessee as well as by the Revenue against separate impugned orders passed by Ld. CIT(A) for the assessment years 2003-04, 2007-08 and 2008-09 and for A.Y.2009-10, the appeal has been filed against final assessment order passed in pursuance of directions given by the DRP dated 31/10/2013. In all the years the issues involved are identical arising out of identical set of facts and the reasoning given by the authorities below are also by and large similar.

2. We will first take up the cross appeal for A.Y.2003-04. In various grounds of appeal the assessee has challenged the following issues:-

GROUND NO.	*GROUND/ISSUE*
1.	Upward adjustment of INR 1,50,72,130 in determining the ALP of the international transaction pertaining to provision of equity broking services in CH segment to AEs
2.1.1	CUP method applied by incorrectly considering the simple average of the brokerage rates charged instead of considering the weighted average of brokerage rates charged
2.1.2	Comparability analysis should be undertaken by considering both overseas and domestic independent clients (*i.e.* all non-AES transactions) for determining ALP while applying CUP.
2.1.3	Not granting adjustment for marketing cost with regards to cost for trading support services and salary cost of Mr. Parag Gude while applying CUP
2.1.4	No Adjustment of research cost and 50% of volume while applying CUP
2.1.5	Assessee's transactions with its AES, are at ALP since the Assessee has charged higher brokerage rates than average brokerage rates charged to AES by third party brokers during FY 2004-05.

2.2	Applicability of TNMM
2.3	To grant benefit of +/-5 percent u/s. 92C(2)
3.	Not determining 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
4.	No adjustment since assessee is JV between JM Group and MS Group

3. In various grounds of appeal the Revenue has challenged the following issues:-

GROUND NO.	*GROUND/ISSUE*
1.	Depreciation on NSE membership card under section 32(1) of the Act.
2.	Disallowance of club membership fees of Rs. 24,000 paid by assessee
3.	Disallowance of remuneration paid to Mr. Ashith Kampani u/s 40A(2)
4.	Disallowance of interest u/s 40(A)(2)(*b*)
5.	Disallowance of interest on loss on IT&T shares
6.	The Ld. CIT(A) erred in directing the AO to make transfer pricing adjustment by taking simple arithmetical mean of the uncontrolled transactions on the brokerage transactions of the assessee company with the AEs when the TPO has rightly taken the weighted average of the brokerage charged for computing the ALP.
7.	The Ld. CIT(A) erred in directing the AO to delete the disallowance of INR 8,03,67,075 made by the AO as per the TPO's order with respect to transaction payment of overseas support services

4. At the outset, it has been submitted that all the issues which has been raised are covered by the decision of the Tribunal in assessee's own case, right from A.Y.2000-01 to A.Y 2006-07 and in subsequent years, for which separate compilation of all the orders have been filed separately before us.

5. The brief facts are that the assessee company Morgan Stanley India Co. Pvt. Ltd is a joint venture enterprise between Morgan Stanley Securities Pvt. Ltd holding 51% of its equity shares and JM Share Brokers Ltd holding the balance 49% equity. The joint venture agreement was entered for the purpose of establishing investment banking, institutional sales and trading organisations in India. For the purpose, their institutional equity shares and trading business was transferred to the assessee company w.e.f. 01/04/1999. In the relevant A.Y. 2003-04, the assessee company is engaged in financial services dealing in Indian stock broking business and also a broker at Bombay Stock Exchange and National Stock Exchange with institutional client both domestic and international. Its main source of income is commission and brokerage from trading in securities on behalf of its clients.

6. In so far as transfer pricing adjustments are concerned, the facts are that assessee had entered into international transactions for broking services for its AEs, *i.e.,* trade executed with the assessee for Morgan Stanley Dean Witter (Mauritius) Co. Ltd. as well as Morgan Stanley International Inc. and the payment made by the assessee on account of overseas support services in Morgan Stanley International Inc. One of the controversies was that, assessee in the Transfer Pricing Study Report had adopted TNMM at entity level as the Most Appropriate Method for determining ALP for the said transactions with AE and reported that same were at arm's length. However, the ld. TPO rejected TNMM on the ground that applying TNMM at entity level is inappropriate for determining the ALP on share broking transactions carried out on behalf of its AE. He also held that there is an internal CUP which is available in the form of share broking transaction carried out on behalf of other entities like FIIs and therefore, according to him CUP is the Most Appropriate Method. The assessee had submitted that if CUP is to be applied, then certain adjustments should be allowed on account of marketing, research costs and volume, adjustment or discount on the brokerage rates charged to independent third party clients. In so far as marketing costs are concerned, the ld. TPO accepted the contentions of the assessee company that the marketing efforts in local clients were required in the case of independent third party FIIs, but similar efforts will not be required in the case of AE. However, out of the total marketing expenditure of Rs. 14,48,46,535/- incurred by the assessee company, the ld. TPO found that an amount of Rs. 2,93,04,273/- was incurred for the purpose of trade support services availed by the assessee company for overseas entities of the Morgan Stanley group. To the extent that such cost was for trading support and trading in securities was carried out on behalf of both AEs and unrelated parties, no such discount from marketing cost would be available with reference to that part of the marketing cost incurred.

6.1 Similarly, he held that salary cost paid to one Mr. Parag Gude amounting to Rs. 4,02,75,894/- will not be available as an adjustment to the marketing cost, because he was a sales trader given the responsibility of ensuring the execution of the relevant transactions and this cost would be common to both the trading transactions carried out on behalf of the AEs as well as the unrelated overseas FIIs.

7. In so far as additional research cost incurred for unrelated parties and not for AEs, the same was also rejected on the ground that research infrastructure of the assessee company is common and it cannot be stated that such research are meant only for the unrelated clients and that the same are not shared with its AES. In so far as claim for an adjustment for the larger volume of transactions carried out for its AEs as compared to the unrelated FIIs which were proposed to be used by the ld. TPO, he rejected the claim of the assessee. After detailed analysis the ld. TPO making adjustment on account of lower commission charged from associated entities namely M/s. MSDW, Mauritius and M/s. MSIL, UK of Rs. 1,55,63,806. While doing so, the ld. TPO had adjusted rate of commission charged from uncontrolled overseas state which worked out at 0.2898% and 0.3473% as against 0.2335% and 0.2380% charged to MSW Mauritius; and as against 0.2382% and 0.2273% charged to MSIL for clearing house trades and delivery versus payment (DVP) trades signed respectively. The detailed working has been given by ld. TPO as annexure A & B in his order.

8.-9 The ld. CIT(A) had by and large agreed with the ld. TPO's contention. However, he directed

the ld. TPO to drop the brokerage rate charged to non-AEs for both house trades and DVP trades and also rejected the ld. TPO's basis for taking weighted average of the brokerage charge for computing the ALP and directed that simple average of each FII should be taken into consideration for computing the ALP.

10. The issue whether MAM will be CUP or TNMM in this case, by and large has been settled by the Tribunal that CUP should be the most appropriate method to be applied for bench marking the transaction of brokerage charged from AE. The only issue left is, as how the transfer pricing adjustment should be made, whether the margins of the comparables have to be taken on simple arithmetic mean of uncontrolled transactions or weighted average. We find that this issue had come up for consideration before the Tribunal in A.Y.2011-12, wherein the Tribunal had held that only arithmetic mean of the price of the brokerage should be taken not weighted average for comparability purpose. In that year, ld. DRP had directed the ld. AO to adopt weighted average methodology in computing the arithmetic mean of non- AE transaction for arriving at ALP of brokerage cost of house trades and DVP trades. The Tribunal observed that the statute provides "arithmatic mean" wherein all the values are added and divided by the same by the number of values and it does not give any scope for any weight to any value and any interpretation in other way would be violation of the provisions of the statute. The Tribunal in fact disagreed with the finding of the Tribunal in A.Y.2002-03 which upheld weighted average mean. Accordingly, following the decision of the Tribunal in A.Y.2011-12, we hold that, firstly CUP method is to be applied and secondly, simple average mean brokerage rate should be taken for the comparability purpose.

11. In so far as the issue, whether comparability analysis should be undertaken by considering both overseas and domestic independent clients, *i.e.,* all non-AE transactions for determining the ALP while applying CUP and how much adjustment should be allowed on account of various factors as claimed by the assessee. The Tribunal has by and large accepted the stand of the assessee to give suitable adjustments on the price determined after CUP. The Tribunal in A.Y.2004-05 *vide* order dated 05/10/2021 also followed in A.Y. 2005-06, held that adjustment of 40% will be allowed on marketing cost adjustments and research cost. The relevant observation of the Tribunal in this regard reads as under:-

> 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, *interalia*, 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.

21. We also find that rule 10B(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.

22. 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. This has also been followed by the Tribunal in A.Y.2005-06 also. Accordingly, on similar line we direct the TPO to give adjustment of 40% to the assessee while determining the arm's length price of international transaction of brokerage and commission, as against 25% given by the ld. TPO while considering both overseas and domestic independent clients while applying CUP method. Accordingly, the ground Nos. 2.1.1 and 2.1.2 are partly allowed.

13. In so far as not granting of adjustment of marketing cost with regards to cost for trading support services and salary cost of Mr. Parag Gude while applying the CUP, this Tribunal on similar lines had allowed total adjustment to the extent of 40% and accordingly, this issue is partly allowed. Similarly on account of research cost also and volume for 50%, same also has been restricted to 40%.

14. Thus, all the adjustments which has been claimed by the assessee has been restricted to 40% by the Tribunal and accordingly, in line with the past precedent, we direct the ld. TPO to make the adjustment of 40% while determining the arm's length price of international transaction of brokerage and commission. In so far as the contention of assessee that AE has charged higher brokerage rates than average brokerage rates charged by AE with the third parties, it has been admitted that same has been dismissed by the Tribunal. Accordingly, this ground is dismissed.

15. Ground No. 2.2 relates to applicability of TNMM, which has not been pressed and accordingly, the same is dismissed as not pressed.

16. In so far as ground No. 2.3 relating to grant of benefit of +/- 5% u/s. 92C(2), the same has been submitted that direction may be given to allow in accordance with law. Accordingly, the ld. TPO is directed to grant benefit in accordance with Section 92C(2) as in the statute at that point of time.

17. Ground No. 3 & 4 has not been pressed; therefore, same is dismissed as not pressed.

ITA No. 2637/Mum/2014 (A.Y.2003-04)

18. In so far as ground No. 1 is concerned, the depreciation of NSE membership card u/s. 32(1) of

the Act, the same has been submitted that, it is covered by the decision of the Tribunal as series of decisions of the Tribunal in A.Y.2000-01, 2001-02 and 2006-07 wherein the Tribunal has allowed the depreciation @25% of BSE and NSE membership after observing as under:-

> "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."

19. As far as issue relating to disallowance of club membership fees for Rs. 24,000/- paid by the assessee, the same has been held to allowable by the Tribunal relying upon the judgment of Hon'ble Bombay High Court in the case of *Otis Elevator Co. (India) Ltd.* v. *CIT* [1992] 60 Taxman 215/195 ITR 682 and other decisions of the Jurisdictional High Court. Hence, this ground raised by the Revenue is dismissed.

20. In so far as disallowance of remuneration paid to Mr. Ashith Kampani u/s. 40A(2), the same has been stated that it has been deleted by the Tribunal in A.Y.2003-04,2004-05, 2005-06 & 2006-07. The relevant observation of the Tribunal in A.Y.2006-07 reads as under:-

> "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.

21. Accordingly, the ground raised by the Revenue is dismissed.

22. Coming to the disallowance of interest u/s. 40A(2)(*b*), against this addition has been deleted by the Tribunal on the ground that same was notional interest on interest free security deposits. The relevant observation of the Tribunal for A.Y.2002-03 reads as under:-

"15. Ground 4 relate to deletion of disallowance of interest free deposit to sister concern The LA AR of the assessee submits that the assessee has not debited an amount of Rs. 300 lakhs to the P&L Account and accordingly There cannot be disallowance of notional interest as computed by AO in respect of interest free security deposit provided by assessee to its sister concern. Notional interest does not fall within the ambit of exception u/s 50A(2)(*b*) of the Act. The Ld AR submits that onus is on the AO to prove that the rent paid by the assessee should be considered as excess within the meaning of section 40A(2) The AO has not brought any material to substantiate the disallowance The Ld. AR submits that *vide* submission dated 22-12-2004, the assessee explained the complete fact before the AO. The Ld. AR subunits that the Ld. CIT(A) rightly appreciated the fact that no case for disallowance of notional interest on interest free deposit was made out by the AO. In support of his

submissions the Id AR for the assessee relied on the decision of Bombay High Court in Karma Energy [2015] 57 taxmann.com 235(Bom), Gujarat High Court in Ashok J Patil [2014] 43 taxmann.com 227 (Guj)

16. On the other hand, the Ld. DR for the revenue supported the order of AO.

17. We have considered the submissions of parties and perused the order of lower authorities. During the assessment, the AO noted that assessee has paid rent of Rs. 1.41 crores to its sister concern for occupying of 12,030 sq ft of office premises in Forbes building. The assessing officer further noted that assessee has paid deposit of Rs. 3.00 crore with its sister concern. The AO noted that no explanation was given for such deposit with sister concern. The AO calculated interest @10% amounting to Rs. 30 lakhs and made addition on account of interest free deposit. The AO concluded that even the rent paid is reasonable, the interest on deposits has to be considered as an excess within the meaning of section 40A(2) of the Act. On appeal before Id. CIT(A), Id. CIT(A) took his view that the AO has not made a case for disallowance of any expenditure and made addition for notional return of interest from deposit. It was further held that the AO made addition to the income of assessee which has not been earned and. therefore, deleted the addition. Before us, neither the Ld. DR brought any contrary law nor any comparable rate of rent in similarly situated property. Moreover, the AO has not made a case of disallowance on the basis of any comparable and simply made addition for notional return of interest free deposit The Hon'ble Bombay High Court in Karma Energy [2015] 57 taxmann.com 235(Bom) held that where assessee paid lease rent to a group company in respect of wind farm taken on lease, since lease rent was fixed ACIT VS Morgan Stanley de CoPLES in accordance with formula provided by Indian Renewable Energy Development, a Government of India Company, impugned disallowance made by Assessing Officer under section 40A(2)(*b*) was to be *set aside* Thus, keeping in view the decision of Bombay High Court (*supra*) and when no contrary fact or law is brought to our notice, we affirm the finding of Id CIT(A). In the result the Ground No. 4 is dismissed."

Thus, respectfully following the same, the addition is deleted. This ground is dismissed.

23. In so far as the issue of disallowance of interest on loss on IT & T shares, the Tribunal in A.Y.2002-03 had deleted the addition after observing as under:-

"20 We have considered the submissions of the parties and seen the orders of the lower authorities. For the year ended 31-3-2001, the assessee and JP Morgan Stanley Pvt Ltd were appointed as one of the joint lead merchant banker and the under writer for the IPO of IT & IT. Due to under subscription, the loss attributed to the undersubscribed shares were to be home by the assessee and JP Morgan Stanley Pvt. Ltd in 50: 50 shares each. JP Morgan Stanley Pvt. Ltd paid full consideration for development, which was on account of assessee and thus the assessee paid interest @12% amounting to Rs. 49.56,360 The AO disallowed interest of Rs. 49.56,360/-, by taking view that underwriting transaction of IT & T share was disallowed in the earlier assessment year being not related to the business. On appeal the Ld CIT(A) held that since the loss of transaction of IT & T of AY 2001-02 has been allowed as business loss by his predecessor and accordingly, the interest component is married to such loss also assumes the character of business expense and is accordingly allowable and

resultantly allowed relief to the assessee. We have further noted that the co-ordinate bench of Tribunal while considering the disallowance in AY 2001-02 in its order dated 25-1-2008 in ITA No. 7060 held that loss suffered by assessee out of its business of earning commission income and on the principle of matching concept of income and expenditure, the entire loss was allowed in AY 2001-02. We are further in agreement that allowance of interest of Rs. 49,56,360/- is merely consequential in the year under consideration. Therefore, we do not find any merit in the ground of appeal. The same is dismissed."

24. Thus, this ground is consequently disallowed.

25. In so far as ground No. 6 is concerned, the Tribunal had itself accepted the stand of the Revenue in A.Y 2011-12 to consider simple average brokerage rate for comparability purposes and accordingly, such a contradictory ground taken by the department in this year is dismissed.

25.1 In ground No. 7, the Revenue has challenged deletion of the disallowance of Rs. 8,03,67,075/- on account of overseas support services have been broadly classified under the head "finance' (controllers, treasury and tax, information technology, legal and compliance and HR). The Ld. TPO with regard to letter of undertaking dated 21/03/2003 signed on behalf of the assessee on 31/03/2003 referred to the existing agreement between assessee and M/s. Morgan Stanley International Inc. and other overseas entities, the content of the letter has been reproduced by the ld. TPO in his order. It mentions various kinds of support services to be rendered which include training of employees, overseas research in respect of Indian capital market, overseas support services and FA&O division, finance, operation, information technology, human resources etc. and sales and trading support for assisting of overseas support and Indian based trade support. In response to the show-cause notice to provide the details of services received, the assessee had submitted the following services:

(*i*) Finance

(*a*) Controllers: M/s MSI (provider of service) provides assistance to the assessee for maintaining the integrity of Financial Accounting. Reporting and Analysis Compliance with Local Regulatory and Other External Financial Requirements.

(*b*) Corporate Treasury: This includes provision of investor and bank relation services

(*c*) Tax: Provision of advice with respect to planning strategies to reduce effective costs of company provision of advice related to any new business initiative applying expertise gained in Non-Indian jurisdictions; review of tax advice received from Indian tax advisers

(*ii*) Information Technology

(*a*) The IT team in India is assisted by the IT team in Hong Kong which is the hub office for the Asia Pacific region;

(*b*) India IT team endeavors to ensure that global standards are maintained;

(*c*) Hong Kong IT teams support us for both ongoing maintenance as well special projects.

(*d*) The IT team in India undergoes technical training in Hong Kong.

(*e*) There is constant communication between the India IT team and Hong Kong IT team members regarding various issues, projects etc. through telephone a to emails and other electronic means well as Video Conference Calls, in addition to emails and other electronic means.

(*iii*) Legal and Compliance:

(*a*) Legal : Provision of advice with respect to implementation of policies and procedures to manage legal risk with counterparties advice on management of relationships with outside legal counsel:

(*b*) Compliance: This includes provision of advice relating to compliance with applicable local legal and statutory requirements and internal standards of conduct, ethics and business practices: review of research reports with respect to compliance with applicable local legal and statutory requirements and internal standards of conduct, ethics and business practices; advice with respect to regulatory audits provision of global standards for goal setting, evaluations, training and promotion competencies.

(*c*) Interpretation and understanding of business rules and changes thereto from time to time

In the event SEBL BSE, NSE, NSDL, RBI, DCA announce any change in the existing rule announces new rule, Law department in India keeps the overseas Law department informed. Subsequently both the offices discuss the contents of the announcement. Its impact on the company and identity departments/persons who would be responsible for implementing the rule. The entire process is handled jointly by India and overseas office.

(*d*) Coordinating with regulators to seek necessary guidance/clarification:

Upon discussions with overseas Law department, if any provisions of any announcement is not clear or there is a possible double interpretation, then the overseas Law department would advice the Indian office to approach the regulator for clarification.

(*e*) Formulating company policies on each such rule:

Once the provisions are clear, Compliance department of India works jointly with overseas Compliance department to draft necessary Compliance Notice detailing how the new rule should be Implemented. Compliance department also jointly decides departments who should be getting the Compliance Notice.

(*f*) Roll out of the policy to the employees of the company and training employees on the policy:

After drafting the Notice the policy is then "rolled out for the staff to implement.

(*g*) Regulator/Governmental relations/dealings and responding to queries :

It is a firm policy that all responses to regulatory queries have to be approved by overseas support office to ensure the quality of response as it affects Morgan Stanley franchise.

(*iv*) Human Resource

(*a*) This includes provision of guidance relating to both transactions and strategic human resource needs; implementation of compensation and benefits policies, provision of human resources information systems to be operated by the Company, advice with respect to training, development and recruiting, provision of support services for annual performance, appraisal of professional staff, etc.

(*b*) The assessee company consults Morgan Stanley for different subjects like:

Code of Conduct - adapted to Indian set up:

1. Dress Code:
2. Dignity at Work;

(*c*) Admin help for New Hires & Terminations such as:

(*a*) Generates employee Ids for all new employees;

(*b*) Generates e-mail Ids for all new employees;

(*c*) Termination of employee ids in case of resignations;

(*d*) Termination of e-mail Ids in case of resignations;

26. The ld. TPO noted that the working for arriving of such overseas support services have been provided by way of debit note which mentions the services and the amount charged. However, the ld. TPO noted that assessee has various list of employees, the details of the qualifications and designation have been given in his order and he came to the conclusion that since the assessee itself has employed so many employees for carrying out its business requirements, the ld. TPO held that assessee has not received any extraordinary benefit in necessitating the payment of such a huge amount and accordingly, he treated the arm's length price of the transaction at 'Nil'.

27. The ld. CIT(A) following the earlier orders of the ld. CIT(A) for A.Y.2000-01 to 2007-08 held that no TP adjustment was required to be made on account of overseas support services paid by the assessee company to its overseas entities and accordingly, following the same he has held the

assessee's appeal.

28. Before us it has been stated that the said adjustment has been consistently been deleted by the Tribunal from A.Y.2000-01 to 2006-07. The Tribunal in A.Y.2000-01 has deleted the disallowance. The Tribunal held that assessee has discharged its onus to prove the need of the services received by it from AE which was procured by the impugned service provider under the valid agreement and looking to the performance and growth achieved by the company in the initial years, the quantum of fee paid is fully justified. It was held that keeping in mind the comparable services have been received by the assessee company which has rightly benefitted the assessee company in its business as is evident from the performance in the initial year of the business held, that addition should be deleted.

29. We have heard both the parties at length and also gone through the earlier year orders of the Tribunal. However, we find that nowhere the nature of intra-group services and how the services has been rendered and utilised have been analysed by the Tribunal nor any of the tests for examining the arm's length price for such services has been discussed nor any of the tests for examining the arm's length principle have been looked into. The intra-group services needs to satisfy the following tests:-

(*i*) Need Test

(*ii*) Rendition Test

(*iii*) Benefit Test

(*iv*) Duplicative Services Test

(*v*) Shareholders Activity Test

The assessee is required to prepare the documents to *prima facie* to prove the above tests depending upon the nature of services, the manner of allocation of the cost, functional analysis etc. It is required to be proved in the TP study report itself the detailed business overview and the industry analysis of the group and the associated enterprises as well as the assessee. The onus is on the assessee to show with documentation with regard to functions, performance with regard to rendition of the service and at least *prima facie* require to establish benefit test. There has to be some objective analysis of each and every service which are required by the assessee and rendered by the AE resulting into some qualitative and quantitative benefit if it can be measured. Another important factor is to examine whether the services have not been resulted into duplicative services. Further, assessee is also required to show it was for the business purpose and is not carried out by the shareholder as its own activity.

30. Not only that, the charging method, *i.e.,* direct or indirect charge should also be based on proper allocation key which should be commensurate in the nature of services and the impurity of such services and utilization thereof by the assessee. Here in this case from the record, it is not discernable whether any such documentation was prepared by the assessee or was ever asked by the ld. TPO.

31. Before us, ld. Counsel for the assessee submitted that in the subsequent year, the assessee had

filed voluminous details before the ld. CIT(A) when asked by him. It has also been submitted that in the A.Y.2007-08, based on perusal of those documentation, the ld. CIT(A) has held that the payment for intra-group services is justified.

32. From the perusal of the ld. TPO's order as noted above, it is seen that, he has merely noted that assessee had various employees and therefore, there was no requirement or need for such services. Nowhere he is questioned or asked about the rendition of the services or to demonstrate whether there was any duplicative service. Once assessee has given the details, then ld. TPO should have at least asked for the documentation of proving the aforesaid tests and cannot simply determine arm's length price at 'Nil'. Since ld. TPO has not brought anything on record, therefore, we have no option but to follow the earlier year orders even though none of the orders of the Tribunal have considered this aspect. Accordingly, the Revenue cannot substantiate the disallowance of ALP at Nil and accordingly, the Revenue's appeal is dismissed.

33. In the result, appeal of the assessee is partly allowed and appeal of the Revenue is dismissed.

ITA No. 7675/Mum/2012 (A.Y.2007-08)

34. In various grounds of appeal, assessee has raised the following grounds:-

GROUND NO.	*GROUND/ISSUE*
1.	Confirming adjustment of Rs. 18,92,07,817 made by the Ld. AO/TPO on account of ALP of commission received on trades executed for the AEs and also enhancing the adjustment by Rs. 8,50,93,244
1.1	Assessee's transactions with its AES, are at ALP since the Assessee. has charged higher brokerage rates than average brokerage rates charged to AEs by third party brokers.
1.1.2.	Deleting the adjustment of marketing cost to CUP granted by the Ld. TPO
1.1.3.	No Adjustment of research cost while applying CUP
1.1.4	No Adjustment of 50% of volume while applying CUP
1.1.5	Not adopting transaction-wise approach while computing simple average *i.e.* comparability analysis should be undertaken by considering the arithmetic mean of both overseas and domestic independent clients 2 (*i.e.* all non-AEs transactions) for determining ALP while applying CUP.
1.2	Applicability of TNMM
1.3.	To grant benefit of +/- 5 percent u/s. 92C(2)
2	Disallowance under section 14A
3	Disallowance of lease line charges, VSAT charges paid to stock exchange and transaction charges paid to local depository under section 40(*a*)(*ia*)

34.1 In so far as issue raised in ground No. 1.1.1 to 1.1.5, as admitted by both the parties, this issue is common in A.Y.2003-04, wherein all these issues are covered by the decision of the Tribunal for earlier years wherein the Tribunal has held that while applying CUP, various adjustments is to be given while determining the arm's length price, which should be allowed to the extent of 40%. Accordingly, in line with the earlier years, we direct the ld. TPO that while applying the CUP, various adjustments as claimed by the assessee should be given to the extent of 40%. Accordingly, these grounds are treated as partly allowed.

35. Ground No. 1.2 with regard to applicability of TNMM has not been pressed, therefore, the same is dismissed as not pressed.

36. Ground No. 1.3 is with regard to grant benefit under proviso to Section 92C(2) of +/- 5%, like in the earlier year, we have directed the ld. AO to divide the issue in accordance with law and grant consequential relief.

37. In so far as disallowance u/s.14A is concerned, the ld. AO noted that assessee received dividend income of Rs. 1,49,18,622/-. The assessee has claimed that he has not incurred any expenditure with respect to earning of the exempt income and therefore, no disallowance is warranted. The ld. AO however, after applying Rule 8D(2) proceeded to make disallowance of Rs. 55,34,414/-. The ld. CIT(A) has dismissed the assessee's appeal on this issue, however, he has given directions with regard to computation errors in the computation made by the ld. AO.

37.1 Before us, it has been stated that this issue had come up for consideration before the Tribunal in A.Y.2005-06 and 2006-07 wherein disallowance has been restricted to Rs. 1,00,000/- on the ground that Rule 8D is not applicable prior to A.Y.2008-09. Thus, following the same precedence, we hold that disallowance u/s.14A is to be restricted to Rs. 1,00,000/- in absence of applicability of Rule 8D in A.Y.2007-08. One of the reasons is that in case of the assessee, disallowance of interest is unjustified because admittedly assessee had more interest free funds exceeding the investments yielding any tax free income and now this issue stands covered by the judgement of the Hon'ble Supreme Court in the case of *South India Bank Ltd.* v. *CIT* [2021] 130 taxmann.com 178/283 Taxman 178/438 ITR 1. Accordingly, ground No. 2 is partly allowed.

38. Lastly, with regard to disallowance of lease line charges, VSAT charges paid to stock exchange and transaction charges paid to local depository u/s.40a(*ia*) by the ld. AO. The ld. AO noted that assessee company has paid transaction charges to BSE/NSE as well as VSAT and lease line charges to Rs. 6,74,13,552/-. The assessee's case was that transaction charges as well as VSAT and lease line charges are merely charges for recovery of cost infrastructure support and no tax should be deducted u/s.194C/194J and therefore, no disallowance is warranted u/s.40(*a*)(*ia*). However, the ld. AO following the assessment order for A.Y.2006-07 has made the disallowance of Rs. 74,44,687/- holding that transaction charges, VSAT and lease line charges are nothing but technical services following within the purview of Section 194J. The ld. CIT(A) has confirmed the said addition.

39. It has been brought on record before us that the Tribunal in A.Y.2005-06 and 2006-07 has deleted the disallowance made u/s.40a(*ia*) and in respect of transaction charges, VSAT and lease line charges to stock exchange in view of the judgment of the Hon'ble Supreme Court in the case

of *CIT* v. *Kotak Securities Ltd.* [2016] 67 taxmann.com 356/239 Taxman 139/383 ITR 1. The relevant observation of the Tribunal in A.Y.2006-07 reads as under:-

> 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* v. *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* v. *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. Consequently, the ground raised by the assessee is allowed.

ITA No. 831/Mum/2007-08 (A.Y.2007-08)

41. The Revenue has raised the following grounds:-

GROUND NO.	*GROUND/ISSUE*
1.	Deletion of addition of INR 18,92,07,817 on account of ALP of brokerage received by the Assessee and directing the AO to make enhancement of INR 8,50,93,244 to total income.
2.	Transfer pricing adjustment w.r.t to availment of overseas support services

3.	Disallowance of remuneration to Mr. Ashith Kampani u/s 40A(2)
4.	Disallowance on account of lease rentals paid for use of vehicles

42. In so far as the first ground is concerned on account of ALP of brokerage received by the assessee. We find that, in fact ld. CIT(A) has not deleted addition of Rs. 18,92,07,817/- but has confirmed the same and in fact has made enhancement of Rs. 8,50,93,244/-. In any case this issue stands covered by the decision of the Tribunal wherein it has been held that CUP should be applied with certain adjustments and accordingly, in view of the finding given in assessee's appeal, the ground raised by the Revenue is dismissed.

43. In so far as the transfer pricing adjustment with respect to availment of overseas support services, we have already dealt this issue in A.Y.2003-04 in Revenue's appeal and finding given in the impugned order and following earlier order of the Tribunal, such adjustment made by the ld. TPO is directed to be deleted.

44. In so far as disallowance of remuneration to Mr. Ashith Kampani u/s. 40A(2) is again similar to ground No. 3 in A.Y.2003-04 in Revenue appeal, wherein following the earlier Tribunal order, this disallowance can be deleted. Accordingly, ground No. 3 is dismissed.

45. Lastly, in so far as disallowance on account of lease rentals paid for use of vehicles, the brief facts are that in the computation of income assessee had added back to the profits of business an amount of Rs. 97,334/- as 'Finance Charges for assets taken on lease' which was debited in profit & loss account and reduced the amount of Rs. 5,49,612/- claimed as 'Lease Rentals paid'. The assessee stated that vehicles were acquired under the 'Finance Lease' and the lease rent paid is broken in two parts. The principle amount is shown as liability and interest portion is debited to profit and loss account and also leased vehicles are recognised as 'asset'. However, in the computation of income the assessee has claimed the deduction of entire lease rentals paid including the principal amount. The ld. AO relying on the decision of the Hon'ble Supreme Court in the case of *M/s. Asea Brown Boveri Ltd.* v. *Industrial Finance Corpn. of India* [2006] 154 Taxmann 512 disallowed the deduction of Rs.5,49,612/- claimed as lease rentals paid. The ld. CIT(A) allowed the claim holding that assessee was at no point of time the owner of the vehicles and the vehicles were to be given back to the owner after a period of the lease and nowhere the ld. AO has brought on record that this was a loan transaction in disguise on loan transaction and therefore, case law relied upon by the ld. AO is not applicable. Further, upto A.Y.2005-06, lease rental paid by the assessee has been allowed as deduction.

46. We find that the Tribunal in A.Y.2016-17 following the order of the Tribunal in A.Y.2005-06 has deleted the said disallowance on the ground that nowhere it has been proved that assessee was the owner of the leased assets. Accordingly, following the earlier year precedents, the claim of the assessee is allowed and the ground raised by the Revenue is dismissed.

47. In the result, appeal of the assessee is partly allowed and appeal of the Revenue is dismissed.

ITA No. 1714/Mum/2016 (A.Y.2008-09)

48. In various grounds of appeal the assessee has challenged the following issues:-

GROUND NO.	*GROUND/ISSUE*
1	Upward adjustment of in determining the ALP of the international transaction pertaining to provision of equity broking services in CH segment to AES
2.1.1	Assessee's transactions with its AEs, are at ALP since the Assessee has charged higher brokerage rates than average brokerage rates charged to AEs by third party brokers.
2.1.2	No Adjustment of research cost and 50% of volume while applying CUP
2.2.	Applicability of TNMM
2.3.	To grant benefit of +/- 5 percent u/s. 92C(2)
3.	The Ld. AO erred in making reference to the Ld. TPO for computing the ALP in respect of international transaction pertaining to provision of equity broking services, since it was not in accordance with the provisions of section 92CA(1) of the Act
4.	Disallowance under section 14A

49. Ground Nos.2.1.1 to 2.3 are similar to the grounds raised in A.Y.2003-04 and 2007-08 wherein following the decisions of the Tribunal in earlier years. These grounds are treated as partly allowed. Firstly, the CUP should be applied and secondly, adjustment while returning the ALP should be to the extent of 40%.

50. Likewise in the earlier year, ground No. 2.2 regarding applicability of TNMM has not been pressed, therefore, the same is dismissed as not pressed.

51. Ground No. 2.3 is similar to ground raised in earlier years, accordingly, ld. AO is directed to grant benefit in accordance with the proviso to section 92C(2).

52. Ground No. 3 has not been pressed, therefore, the same is dismissed as not pressed.

53. In so far as disallowance u/s.14A is concerned, the brief facts are that the assessee had shown dividend income of Rs. 2,40,40,039/-. As noted by the ld. AO, assessee had made *suo moto* disallowance of Rs. 42,90,560/- as per Rule 8D in its computation of income, however, assessee *vide* letter dated 01/12/2011 submitted that no disallowance should be made after giving detailed reasons, however, the ld. AO has confirmed the *suomoto* disallowance of Rs. 42,90,560/-. This has been confirmed by the ld. CIT(A) also.

54. Before us, ld. Counsel submitted that, assessee pursuant to the introduction of Rule 8D had made disallowance of Rs. 42,90,560/-. However, the said disallowance was inadvertently made, but however it was pleaded before the ld. AO that assessee had not incurred any direct or indirect expenditure in relation of earning dividend income. As an alternative claim, it was submitted that disallowance can be made at Rs. 81,212/- which working was given before the ld. AO. He further submitted that before the ld. CIT(A), assessee had specifically made following submissions:-

- While calculating the average value of investments income from which does not or

shall not form part of the total income - the Appellant had inadvertently included value of certain investments, income from which is taxable and thus forms a part of the total Income

- While calculating the average of total assets - the Appellant had inadvertently added the value of deferred tax asset and reduced the value of current liabilities.
- Accordingly, it was submitted before the CIT(A) that where the disallowance under section 14A of the Act read with Rule 8D of the Rules is proposed not to be deleted, the learned AO should be directed to re-compute the disallowance under Rule BD of the Rules correctly amounting to INR 2,358,109/-
- However, the CIT(A) without considering/appreciating or dealing with the working provided by the Appellant, has upheld the order of the learned AO merely on the ground that similar disallowance has been made in the earlier years.

55. Before us, ld. Counsel submitted that, firstly, ld. AO has not recorded his satisfaction or reasons for not being satisfied with the correctness of the claim of the assessee. Therefore, disallowance u/s.14A cannot be made under rule 8D. In the absence of any proximate relationship established between the expenditure disallowed u/s.14A of the Act and the exempt income earned and as an alternative he submitted that later in the earlier year disallowance should be restricted to Rs. 1,00,000/-.

56. After considering the entire gamut of facts and the contentions raised by the assessee, we find that first of all assessee had itself made *suomoto* disallowance under Rule 8D and later on assessee claimed that no disallowance should be made. The ld. AO has rejected the explanation and has made the disallowance on the basis of working given by the assessee. Thus, when assessee itself has given the working for the disallowance, there was no reason for ld. AO to record his satisfaction. The assessee had to give reasons as to why disallowance is uncalled having regards to the books of accounts and then only ld. AO can record his satisfaction, whether to accept or reject the explanation given by the assessee. Here in this case, assessee at the very threshold has offered *suo-moto* disallowance which it rescinded from. Accordingly, the submissions made by the ld. Counsel cannot be accepted. However, interest disallowance is concerned, nothing has been brought on record as to whether the interest free funds exceeds the investments made in which had yielded exempt income. Accordingly, this issue is remanded back to the file of the ld. AO to examine the disallowance u/s.14A and assessee is directed to substantiate its claim as to why no disallowance should be made. With this direction, this ground is treated as allowed for statistical purposes.

ITA No. 2720/Mum/2016 (A.Y.2008-09)

57. The Revenue has raised the following grounds:-

GROUND NO.	*GROUND/ISSUE*
1.	The Ld. CIT(A) erred in directing the Assessing officer to adopt weighted average of all trades executed by the Assessee for the Non-AE transactions after allowing all

	adjustment for working cost.
2.	Disallowance under section 40(*a*)(*ia*) of the Act for non-deduction of TDS on transaction charges paid to local depository in respect of ADR/GDR
3.	Disallowance on account of lease rentals paid for use of vehicles

58. Admittedly all the aforesaid issues have been discussed in earlier year and all these issues are covered in favour of the assessee in the order of the Tribunal accordingly, following the earlier year precedents all the grounds are dismissed.

ITA No. 1018/Mum/2014 (A.Y.2009-10)

59. In various grounds of appeal, assessee has raised the following grounds:-

GROUND NO.	*GROUND/ISSUE*
1.	Upward adjustment of INR 8,77,99,967 in determining the ALP of the international transaction pertaining to provision of equity broking services in CH segment to AES
2.1.1	Assessee's transactions with its AES, are at ALP since the Assessee has charged higher brokerage rates than average brokerage rates charged to AEs by third party brokers.
2.1.2	No Adjustment of research cost and 50% of volume while applying CUP
2.2	Applicability of TNMM
2.3	To grant benefit of +/- 5 percent u/s. 92C(2)
3 &4	Disallowance under section 14A
5	Short grant of TDS
6	Assessment of incorrect amount of income under the head profits and gains from business, profession leading to the assessment of an incorrect amount of total income.

60. The ground Nos.2.1.1 to 2.1.2 are exactly same which has been discussed in the earlier years. Now, these issues are covered by the earlier decision of the Tribunal, accordingly, these grounds are partly allowed.

61. Ground No. 2.2 is dismissed as not pressed and ground No. 2.3, we have already given direction to the ld. AO to give benefit in accordance with law.

62. Ground Nos. 3 & 4 relate to disallowance u/s.14A. The assessee had earned dividend income of Rs. 86,88,529/- out of which assessee had made *suomoto* disallowance of Rs. 2,51,534/-, whereas ld. AO has made disallowance in Rule 8D at Rs. 41,25,431/-. The ld. AO had disregarded the working of the disallowance given by the assessee for which, following reasons have been given for rebutting the ld. AO's contention:

Sr. No.	*AO's Basis*	*Appellant's submission*
1	Appellant has failed to adduce (1) direct nexus between own funds and investments made and (*ii*) no loan funds were utilized in procuring investments	It is submitted that, Appellant has sufficient amount of own funds as on 1 April 2008 (*i.e.,* INR 453.93 Cr) when compared with the investments held as at 31 March 2009 (*i.e.,* INR 84.99 Cr). Further, the Appellant has not borrowed any sum by way of long- term loan etc. Therefore, it is submitted that all investments held by the Appellant have been made out of owned funds. Therefore, any disallowance of interest under Rule 8D(*ii*) would be totally unwarranted and unjustified
2	Decrease in current liability in during the year clearly establishes the fact that substantial expenditure or payment has been made towards earning exempt	This cannot be the basis to even presume least of all establish that substantial expenditure in relation to dividend income, has been claimed (other than what has been *suo moto* disallowed by the Appellant).
3.	Assessee himself has disallowed certain expenditure under section 14A of the Act clearly shows the fact that expenditure in relation to dividend income has been claimed in the profit and loss and arbitrary disallowance is without any basis.	This cannot be the basis to even presume least of all establish that substantial expenditure in relation to dividend income, has been claimed (other than what has been *suo moto* disallowed by the Appellant).
4.	There is a proximate and live nexus between expenditure and exempt income	Application of section 14A and Rule 8D is not automatic and it needs to be justified as to how expenditure incurred by assessee during relevant year is related to income not forming part of its total income. Expenditure must have a proximate relationship with exempted income and surmise or conjecture is no answer. Assessing Officer must give a clear finding with reference to assessee's accounts as to how other expenditure claimed by assessee out of non-exempt income was related to exempt income [*CIT* v. *Sociedade De Fomento Industrial (P.) Ltd.* [2021] 123 taxmann.com 38]

63. The ld. DRP has rejected the objection raised by the assessee and confirmed the disallowance made by the ld. AO. This issue like in A.Y.2008-09 is remanded back to the file of the ld. AO to decide the issue afresh in line of the direction given in earlier year. Accordingly, this ground is

also allowed for statistical purposes.

64. In so far as ground No. 5 is concerned regarding short grant of TDS, it has been informed that assessee has already filed rectification application. However, the same has not been disposed of. Accordingly, this matter is remanded back to the ld. AO to examine this issue and grant consequential relief for grant of TDS.

65. In ground No. 6 assessment of incorrect amount of income under the head ' profits and gains from business'. It has been noted that rectification application has been filed. Accordingly, we direct the ld. AO to examine this issue and decide the correct amount assessable under the head 'profits and gains'.

ITA No. 1235/Mum/2014 (A.Y.2009-10)

66. The Revenue has raised the following ground of appeal:-

GROUND NO.	*GROUND/ISSUE*
1.	DRP erred in adopting weighted average methodology in computing the arithmetic mean of Non-AE 2002-03 transactions for arriving at ALP of brokerage charged for CH and DVP trades.

67. Since, this issue is covered by the decision of the Tribunal in earlier years where Tribunal has accepted the stand of the Revenue to consider simple average brokerage rate for comparability purpose and that Tribunal has already accepted and directed the AO to consider the brokerage of non-AE for comparability purpose. Thus, in line with the earlier year's decisions, we hold that weighted average methodology in computing the arithmetic mean is not tenable. Accordingly, this ground is dismissed.

68. In the result, appeal of the assessee is partly allowed and ground of the Revenue is dismissed.

CO No. 218/Mum/2016 (A.Y.2008-09)

69. In the cross objection, assessee has challenged adjustment, marketing cost. Since, this issue has already been decided in assessee's appeal wherein adjustment has been restricted to 40% and accordingly, cross objection filed by the assessee is partly allowed.

70. In the result, appeals & Cross Objection of the assessee are partly allowed and appeals of the Revenue are dismissed.

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*Partly in favour of assessee.