IN THE INCOME TAX APPELLATE TRIBUNAL

"K" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT AND

SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA no.8431/Mum./2010
(Assessment Year : 2006–07)

CLSA India Ltd.
8/F, Dalamal House
Nariman Point, Mumbai 400 021
PAN – AAACC2262K

……. Appellant

v/s

Addl. Commissioner of Income Tax
Transfer Pricing–I(2), Mumbai

……. Respondent

Assessee by : Shri Porus Kaka a/w
Shri Divesh Chawla
Revenue by : Shri Anand Mohan

Date of Hearing – 03.12.2020	Date of Order – 14.12.2020

O R D E R

PER SAKTIJIT DEY. J.M.

Captioned appeal has been filed by the assessee challenging the assessment order dated 1st October 2010, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (for short *"the Act"*) for the assessment year 2006–07 in pursuance to the directions of the Dispute Resolution Panel–I (DRP), Mumbai.

2. In ground no.1, the assessee has challenged disallowance of deduction claimed towards payment made to National Stock Exchange (NSE) and Bombay Stock Exchange (BSE) for lease line charges/V–SAT and transaction charges.

3. Brief facts are, the assessee, a resident company, is engaged in the business of shares and stock broking, merchant banking and providing financial and advisory services. In the course of assessment proceedings, the Assessing Officer noticed that the assessee had claimed deduction of ₹ 4,20,98,353, towards lease line/V–SAT and transaction charges. Being of the view that the aforesaid payment made to NSE and BSE is in the nature of fee for technical and managerial services requiring deduction of tax at source under section 194J of the Act, the Assessing Officer called upon the assessee to explain why the deduction claimed should not be disallowed under section 40(a)(ia) of the Act for non–deduction of tax at source. Though, the assessee objected to the proposed disallowance by stating that the payment made is not for availing technical or managerial services, however, the Assessing Officer was not convinced with the submissions of the assessee. He observed, the stock exchanges are providing screen based trading service which is carried out on computer terminal connected to a common server of NSE and BSE. The access to the server is provided through V–SAT link or through a

dedicated lease line to the brokers. He observed, the stock exchanges make available all the data relating to the scrips traded at the Stock Exchanges. Thus, he concluded that the payment made for lease line/V–SAT and transaction charges is in the nature of fee for technical services requiring deduction of tax under section 194J of the Act. Alleging that the assessee has failed to deduct tax on the payment made, the Assessing Officer disallowed the deduction claimed by invoking the provisions of section 40(a)(ia) of the Act. While disposing of assessee's objection on the issue, learned DRP concurred with the view expressed by the Assessing Officer.

4. Shri Porus Kaka, the learned Sr. Counsel appearing for the assessee submitted, the issue is now covered in favour of the assessee by the decision of the Hon'ble Supreme Court in CIT v/s Kotak Securities Ltd., [2016] 383 ITR 001 (SC).

5. Shri Anand Mohan, the learned Departmental Representative relied upon the observations of the Assessing Officer.

6. We have considered rival submissions in the light of decision relied upon and perused the material on record. The issue before us is, whether the payment made by the assessee towards online trading service made available by NSE and BSE is in the nature of technical services. As we find, the aforesaid issue came up for consideration

before the Hon'ble Supreme Court in case of CIT Vs. Kotak Securities Ltd. (supra). After deliberating on the issue and interpreting the provisions of section 194J of the Act as well as provisions of section 9(1)(vii) of the Act, the Hon'ble Supreme Court held as under:–

> *"8. A reading of the very elaborate order of the Assessing Officer containing a lengthy discourse on the services made available by the Stock Exchange would go to show that apart from facilities of a faceless screen based transaction, a constant upgradation of the services made available and surveillance of the essential parameters connected with the trade including those of a particular/single transaction that would lead credence to its authenticity is provided for by the Stock Exchange. All such services, fully automated, are available to all members of the stock exchange in respect of every transaction that is entered into. There is nothing special, exclusive or customised service that is rendered by the Stock Exchange. "Technical services" like "Managerial and Consultancy service" would denote seeking of services to cater to the special needs of the consumer/user as may be felt necessary and the making of the same available by the service provider. It is the above feature that would distinguish/identify a service provided from a facility offered. While the former is special and exclusive to the seeker of the service, the latter, even if termed as a service, is available to all and would therefore stand out in distinction to the former. The service provided by the Stock Exchange for which transaction charges are paid fails to satisfy the aforesaid test of specialized, exclusive and individual requirement of the user or consumer who may approach the service provider for such assistance/service. It is only service of the above kind that, according to us, should come within the ambit of the expression "technical services" appearing in Explanation 2 of Section 9(1)(vii) of the Act. In the absence of the above distinguishing feature, service, though rendered, would be mere in the nature of a facility offered or available which would not be covered by the aforesaid provision of the Act.*
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> *9. There is yet another aspect of the matter which, in our considered view, would require a specific notice. The service made available by the Bombay Stock Exchange [BSE Online Trading (BOLT) System] for which the charges in question had been paid by the appellant-assessee are common services that every member of the Stock Exchange is necessarily required to avail of*

to carry out trading in securities in the Stock Exchange. The view taken by the High Court that a member of the Stock Exchange has an option of trading through an alternative mode is not correct. A member who wants to conduct his daily business in the Stock Exchange has no option but to avail of such services. Each and every transaction by a member involves the use of the services provided by the Stock Exchange for which a member is compulsorily required to pay an additional charge (based on the transaction value) over and above the charges for the membership in the Stock Exchange. The above features of the services provided by the Stock Exchange would make the same a kind of a facility provided by the Stock Exchange for transacting business rather than a technical service provided to one or a section of the members of the Stock Exchange to deal with special situations faced by such a member(s) or the special needs of such member(s) in the conduct of business in the Stock Exchange. In other words, there is no exclusivity to the services rendered by the Stock Exchange and each and every member has to necessarily avail of such services in the normal course of trading in securities in the Stock Exchange. Such services, therefore, would undoubtedly be appropriate to be termed as facilities provided by the Stock Exchange on payment and does not amount to "technical services" provided by the Stock Exchange, not being services specifically sought for by the user or the consumer. It is the aforesaid latter feature of a service rendered which is the essential hallmark of the expression "technical services" as appearing in Explanation 2 to Section 9(1)(vii) of the Act.

10. For the aforesaid reasons, we hold that the view taken by the Bombay High Court that the transaction charges paid to the Bombay Stock Exchange by its members are for 'technical services' rendered is not an appropriate view. Such charges, really, are in the nature of payments made for facilities provided by the Stock Exchange. No TDS on such payments would, therefore, be deductible under Section 194J of the Act."

7. In view of the ratio laid down by the Hon'ble Supreme Court as referred to above, we hold that the payment made by the assessee towards lease line/V–SAT and transaction charges not being in the nature of fee for technical services will not be amenable to section 194J of the Act. Accordingly, we delete the disallowance made under

section 40(a)(ia) of the Act. Ground no.1, raised by the assessee is allowed.

8. In grounds no.2 and 3, the assessee has challenged disallowance of Security Transaction Tax (STT) under section 43B(a) of the Act.

9. Brief facts are, in the course of assessment proceedings, the Assessing Officer noticed that the assessee had shown an amount of ₹ 40,84,513, as liability in the Balance Sheet. On further verification, he found that the said amount represented STT collected from the clients but not paid during the financial year relevant to the assessment year under dispute or even till the date of filing of return of income in terms of section 139(1) of the Act. Observing that the assessee has not actually paid STT during the year under consideration, the Assessing Officer invoked the provisions of section 43B(a) of the Act and disallowed the deduction claimed.

10. The learned DRP sustained the disallowance made by the Assessing Officer.

11. The leaned Sr. Counsel for the assessee submitted, as per the statutory provisions, the Stock Exchanges are required to pay STT on the purchase and sale of shares by any person. He submitted, the assessee merely acts as an agent of Stock Exchanges to collect STT

from buyers and sellers of shares and hands them over to the Stock Exchanges. In this connection, he drew our attention to the relevant statutory provisions governing the payment of STT. Further, he submitted, the assessee has not claimed it as expenditure by debiting in the Profit & Loss Account and has only shown it as liability in the Balance Sheet. Therefore, there is no question of making any disallowance under section 43B(a) of the Act. In support of his contention, the leaned Sr. Counsel relied upon the following decisions:–

i) Kerala State Electricity Board v/s DCIT, 329 ITR 91 (Ker.) and
ii) CIT v/s Noble and Hewitt India Pvt. Ltd., 305 ITR 324 (Del.).

12. The learned Departmental Representative relied upon the observations of the Assessing Officer.

13. We have considered rival submissions in the light of decisions relied upon and perused the material on record. On going through Chapter–VII of Finance (No.2) Act, 2004, which provides for STT, we find that as per section 98, STT is leviable either on the purchaser or seller of equity share as specified therein. As per section 100, the liability to collect STT from a purchaser or seller of shares is on the Stock Exchanges wherein such transaction takes place. Of–course, it also fastens the liability of collection of STT on mutual fund on sale of

units of mutual fund. Further, section 101 r/w rule 6 and 7, requires ever recognized Stock Exchange and mutual fund to furnish prescribed return to pay STT to the credit of Central Government. Thus, on a conjoint reading of the aforesaid provisions, it is very much clear that the liability to pay STT is on the Stock Exchanges. The assessee is merely acting as an agent of the Stock Exchanges for collecting STT from the buyers and sellers of the shares while facilitating those transactions as a broker. Thus, it is very much clear that the liability to pay STT is not on the assessee. Moreover, it is evident, the assessee has not debited the STT to the Profit & Loss Account. Rather, he has shown it as a Balance Sheet item under the head Liability. That being the case, the liability of STT which the assessee is merely a custodian of, cannot be treated as liability of the nature coming within the ambit of section 43B(a) of the Act. The decisions relied upon by the leaned Sr. Counsel for the assessee also supports this view. Accordingly, we direct the deletion of disallowance made under section 43B(a) of the Act. These grounds are allowed.

14. In grounds no.4 to 8, the assessee has challenged the addition made on account of transfer pricing adjustment on brokerage commission.

15. Brief facts are, as stated by the Transfer Pricing Officer, the assessee provides share broking services being registered with BSE/NSE. While undertaking such activity, the assessee has provided such broking services to its overseas associated enterprises (AE) as well as independent third parties. The Transfer Pricing Officer found that the assessee provides such services in two segments viz. cash and future & Option (F&O). From the details furnished, he found that the assessee has charged commission for broking service provided to the AE @ 0.13% in cash segment and 0.06% in F&O segment. While benchmarking such transaction by applying transactional net margin method (TNMM), the assessee had claimed them to be at arm's length. The Transfer Pricing Officer observed, while rendering similar services to the overseas non–A.E., the brokerage commission charged by the assessee works out to 0.28% in cash segment. Whereas, in F&O segment it works out to 0.05%. Stating that the rate of commission charged by the assessee to overseas non–AEs is more than the commission charged to the AE, the Assessing Officer treated commission charged to non–AEs as a comparable uncontrolled price (CUP) and proposed adjustment of ₹ 27,89,68,070. The adjustment proposed by the Transfer Pricing Officer was added to the income of the assessee in the draft assessment order. Though, the assessee

objected to the adjustment made to brokerage commission, however, learned DRP agreed with the decision of the Transfer Pricing Officer.

16. The leaned Sr. Counsel for the assessee submitted, the issue is squarely covered by the decision of the Tribunal in assessee's own case for the assessment year 2011–12. In this context, he drew our attention to the relevant observations of the Tribunal.

17. The learned Departmental Representative submitted, while dealing with the identical issue in assessee's own case in assessment year 2013–14, in ITA no.6748/Mum./2017, dated 20th August 2020, the Tribunal has restored the issue to the Assessing Officer/Transfer Pricing Officer.

18. In rejoinder, the leaned Sr. Counsel for the assessee submitted, the issue dealt with by the Tribunal in assessment year 2013–14 is not similar to the issue in dispute in the present appeal. Therefore, there is no need for restoring the issue to the Assessing Officer.

19. We have considered rival submissions and perused the material on record. As discussed earlier, the adjustment relates to brokerage commission charged to the AE for providing broking services. It is evident, the Transfer Pricing Officer has made the disputed adjustment by applying the commission charged to non–AE @ 0.28% as CUP.

While dealing with identical issue in assessee's own case for the assessment year 2011–12, the Tribunal in ITA no.920/Mum./ 2016, dated 3rd February 2020, has held as under:–

> *"16. We have heard the parties and perused material on record. We observed that the assessee being an institutional brokerage house has earned significant brokerage commission from FlI clients, which included AE and Non AE enterprises. The transactions from Non-AE FlI clients, the assessee is required to provide broader range of services viz-a-viz services to AE FIt clients did not include marketing and international sales support. We find that the assessee is dependent on the overall CLSA group resources without which the brokerage from Eli clients could not have materialized. The assessee also filed submission dated 27.10.2014 before the TPO providing detailed explanation with regard to the differences in services provided to the AE and Non-AEs and explanation in support that TNMM was the most appropriate method to determine the ALP of brokerage earned from AEs. We find merit in the submission that TNMM is the correct method and internal CUP would entail adhoc adjustment to price in so far as braking commission from AE and Non AEs are concerned. We also find merit in the contention of the AR that if the decision in the case of J P Morgan India Pvt. Ltd. (supra), is to be followed, then adjustments to the cost structure should be allowed to iron out the differences between the AE and Non-AE transactions, Under these circumstances, we are of the view that operating model of J P Morgan India Pvt. Ltd. is not comparable to that of the assessee as majority of the income in the case of J.P Morgan India Pvt. Ltd was from related parties, whereas in the case of the assessee significant revenue is from third party Fit clients. We also noted that assessee could not have generated business from Eli clients without the support of CLSA group resources, for which it is paying intra group service charges. Hence, in such a case, TNMM could be used as the most appropriate method. In view of these facts and circumstances, we are of the view that assessee has rightly followed the TNMM as the most appropriate method and the decision of the Co–ordinate Bench in the case of J.P. Morgan India Pvt. Ltd. (supra) is not applicable to the present set of facts and the assessee. Accordingly, we are inclined to set aside the order of the DRP and direct the TPO/AO to delete the adjustment of brokerage income of ₹ 21,73,90,712. Ground no.5 is allowed."*

20. It is worth mentioning, learned Departmental Representative has submitted for restoring the issue relying upon the decision of the Tribunal in assessee's own case for the assessment year 2013–14. However, on a perusal of the decision of the Tribunal in assessment year 2013–14, in ITA no.6748/Mum./2017, dated 20th August 2020, we find that the disputed issue on which the Tribunal has restored back the issue to the Assessing Officer/Transfer Pricing Officer relating to arm's length price adjustment of intra group services. It is very much clear from the reading of the said order, wherein, it has been discussed that while the assessee had determined the arm's length price of intra group service applying TNMM, the Transfer Pricing Officer, though, had applied CUP, however, ultimately he had determined the arm's length price by estimating the cost of employee on man–hour basis. Therefore, it is very much clear that the issue dealt with and decided by the Tribunal in assessment year 2013–14 is not similar to the issue with which we are presently concerned. Rather, on appreciation of relevant facts, we are of the view that the issue arising in these grounds is squarely covered by the decision of the Tribunal in assessment year 2011–12 as reproduced above. In view of the aforesaid, we delete the addition made by the Assessing Officer. The grounds raised are allowed.

21. In ground no.9, the assessee has challenged the addition made on account of transfer pricing adjustment on the brand fee.

22. Brief facts are, on verifying the audit report, the Transfer Pricing Officer noticed that the assessee has paid royalty of ₹ 1,13,36,547, for use of a brand name to Credit Lyonnais Securities Asia B.V., Netherlands. The brand fee is calculated @ 1% of the brokerage income earned during the period. He further noticed that the assessee had determined the arm's length price by comparing the rate of royalty with an external CUP in the form of royalty rights published by Secretariat of Industrial Assistance. Further, the arm's length price computed under CUP was also corroborated by benchmarking done under TNMM. The Transfer Pricing Officer, however, did not find the benchmarking done by the assessee acceptable and proposed an adjustment of ₹ 1,13,36,547. While doing so, he computed arm's length price of the brand fee at nil.

23. Learned DRP also sustained the adjustment proposed by the Transfer Pricing Officer.

24. The learned Sr. Counsel for the assessee submitted, the issue is covered by the decision of the Tribunal in assessee’s own case in assessment year 2002–03. In this context, he referred to DCIT–LTU v/s CLSA India Ltd., [2013] 33 taxmann.com 260 (Mum.).

25. Learned Departmental Representative relied upon the observations of the Assessing Officer.

26. We have considered rival submissions and perused the material on record. As could be seen, identical dispute arising in assessee's own case came up for consideration before the Tribunal in assessment year 2002–03. While deciding the issue, the Tribunal held as under:–

> *"8. We have perused the records and considered the rival contentions carefully. The dispute raised in this ground is regarding transfer pricing adjustment made by AO in respect of royalty paid by the assessee to CLSA BV of which the assessee is a subsidiary. The royalty amounting to Rs.7,11,466/- @ 1% of net receipt has been paid by the assessee during the year from 19.2.2002 to 31.2.2002. The assessee had not paid any royalty earlier as the same was not permitted by the erstwhile Foreign Exchange Regulation Act (FERA). However, later when FERA was replaced by FEMA, government allowed payment of royalty and therefore assessee started making payment of royalty to the parent company which is incorporated in Netherlands, after taking approval from RBI. Since the assessee had entered into an international transaction with an associate enterprise, the matter was referred to TPO who has made transfer pricing adjustment using CUP method. The TPO noted that no other subsidiary of CLSA BV anywhere in the world had paid any royalty. Therefore, he had treated this as internal CUP of royalty payment. Further, since the assessee could not give any information regarding similar payment of royalty by any broking company, the TPO treated the same as external CUP of no payment of royalty. Accordingly, he has considered the entire payment as excessive and made adjustment on this account which was followed by the AO.*
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> *8.1 In our view the approach adopted by TPO/AO is not correct. International transaction in case of the assessee has to be compared with uncontrolled transactions. There can be an internal CUP provided, the transaction is with an unrelated party. But comparing the transaction in case of the assessee with transactions of CLSA BV with another associate enterprise cannot be considered as internal CUP. Moreover, lack of transaction cannot be considered as a transaction. Regarding external CUP also, TPO has not placed*

any material on record to show that no payment of royalty has been made by any independent party for using brand name/trade name. Non availability of a comparable transaction can not be considered as transaction and cannot be the basis of selection of comparable transaction. Further, CUP method can not be applied if the relevant information is not available. This view is also supported by the decision of Mumbai Bench of the Tribunal in Cabot India Ltd. v. Dy. CIT [2011] 46 SOT 402/17 taxmann.com 70 on which the ld. Sr. Counsel has placed reliance. We, therefore agree with the finding of CIT(A) that CUP method on the facts of the case could not be applied. We are unable to accede to the request of the ld. CIT-DR, the matter may be restored to AO/TPO to find out a comparable transaction for application of CUP method. No such comparable transaction has been brought on record even by AO or by DRP, though the assessee had clearly stated that no such information was available. No such comparable case has been placed by the ld. CIT-DR even before us. The issue, therefore, cannot be restored for making roving inquiries.

8.2 The ld. CIT-DR has placed reliance on the decision of the Tribunal in the case of Knorr Bremse India (P.) Ltd. (supra), has argued that in case the assessee does not show that transaction by transaction approach was not possible and there has been no real or tangible benefit for carrying on international transactions with the AEs. CUP method can be adopted with preference to TNMM. It has been pointed out that in that case it was also held that TPO was justified in taking ALP at nil. We have perused the said judgment. There cannot be any dispute about applicability of CUP method when transaction by transaction approach was possible but the method can be applied only when information is available for application of CUP method. In the cited case, the Tribunal had upheld the order of TPO determining ALP at nil on the basis of CUP method as in that case there was material to show that no real or tangible benefit had been derived by the assessee from the transaction with the AEs and benefit if any was only incidental. The present case is different. In this case, though the AO observed that the trade name/brand name CLSA was not protected in any country including India and the assessee could not give any document to prove ownership of the brand by CLSA BV, CIT(A) on detailed examination of the matter has given a finding that the CLSA brand was owned by CLSA BV and the same was also registered in India. CIT(A) has also given a finding that CLSA strongly strived to maintain as well as enhance its brand value which had earned recognition in India and Asian markets. There is no material produced before us to controvert the said finding. In the broking business, brand does promote the business and as rightly observed by CIT(A) it is one of the profit drivers within the industry. Thus it cannot be said that the assessee had not derived any benefit from

use of brand. The decision of the Tribunal relied upon by the ld. CIT-DR, therefore, cannot be applied to the facts of the present case.

8.3 We also find that the AO without any detailed examination as to why other CLSA entities were not making any payment of royalty, rushed to apply the CUP method which as we have held could not be applied for the lack of proper information. CIT(A) has examined the matter in detail as to why other CLSS entities were not paying royalty which was because of the fact that CLSA had different arrangement in different jurisdictions. CLSA was present in 13 markets out of which India, Korea and Taiwan had capital market regulation which required FIIs to contract directly with a domestic CLSA entity. In other jurisdictions, a single contract model was followed as per which client in particular country willing to buy securities in other countries has to place order in CLSA entity in the home country which shares commission with CLSA unit of the other country. In Korea, there was commission sharing arrangement whereas CLSA Taiwan operated as a branch which books the commission and it is charged an allocation of certain head office expenses. In India there was no commission sharing arrangement and payment of royalty was therefore permitted. CIT(A) on examination of the arrangement/system followed by CLSA BV has also given a finding that in other jurisdictions, CLSA entities were making market contributions. Therefore only on the ground that other CLSA units did not pay any royalty, it could not be held that payment of royalty by the assessee was not justified.
8.4 CIT(A) has also examined the business development system followed by other comparable companies in India and has given a finding that these companies on average were incurring business development expenditure which was 6.4% of brokerage turnover whereas similar expenditure incurred by the assessee was only 1.28% including royalty of 1% paid by the assessee . Therefore expenditure incurred by the assessee on royalty and business development could not be considered as excessive compared to the comparable parties. CIT(A) has also applied the TNMM method for benchmarking international transactions. There are 29 comparables selected details of which have already been given earlier which gave an average margin of -5.5% and, in case, loss making companies were excluded, the average margin came to 16.06% whereas in case of the assessee the margin declared was 57.58%. CIT(A) has therefore held that no TP adjustment is required to be made in case of the assessee with which, on the facts of case, we fully agree. We, therefore, see no infirmity in the order of CIT(A) in deleting the addition made and the same is therefore, upheld."

27. Facts being identical, respectfully following the aforesaid decision of the Co–ordinate Bench, we delete the addition made on account of transfer pricing adjustment. This ground is allowed.

28. In ground no.10, the assessee has raised the issue of non–grant of credit of TDS.

29. After considering the submissions of the parties, we direct the Assessing Officer to consider the claim of the assessee by verifying the material on record and allow credit for TDS as per law.

30. In ground no.11, the assessee has challenged the levy of dividend distribution tax (DDT).

31. We have considered rival submissions and perused the material on record. It is the submission of leaned Sr. Counsel for the assessee that the Assessing Officer does not have any jurisdiction to determine DDT while completing the assessment under section 143(3) r/w section 144C(1) of the Act. He submitted, the Assessing Officer can only exercise such jurisdiction under section 115Q of the Act. In any case of the matter, he submitted, the assessee has already paid the DDT which can be verified by the Assessing Officer.

32. The learned Departmental Representative submitted, the Assessing Officer may be directed to verify assessee’s claim.

33. Having considered rival submissions and particularly, the submission of leaned Sr. Counsel for the assessee that the assessee has already paid the DDT, we direct the Assessing Officer to verify assessee's claim of payment of DTT and decide the issue accordingly. The ground raised by the assessee is allowed for statistical purposes.

34. In the result, appeal is partly allowed.

Order pronounced in the open court on 14.12.2020

PRAMOD KUMAR
VICE PRESIDENT

SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 14.12.2020

Copy of the order forwarded to:

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

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai