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

BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA Nos. 340 & 7550/Mum/2019
ITA No. 1009/Mum/2021
ITA Nos. 594 & 2435/Mum/2022

(A.Ys. 2014-15 to 2018-19)

Morgan Stanley India Company Private Limited 18F, B Wing, Tower-2, Oneworld Centre, 841, Senapati Bapat Marg, Mumbai – 400 013	Vs.	Income-tax Officer, National e-Assessment Centre, Delhi
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACJ4998F		
Appellant	..	Respondent

Appellant by :	Sunil Motilala
Respondent by :	Manoj Kumar & Jancy Elizabeth Rani

Date of Hearing	27.09.2023
Date of Pronouncement	30.11.2023

आदेश / O R D E R

Per Amarjit Singh (AM):

All these 5 appeals filed by the assessee are pertained to different assessment years directed against the different order of the assessing officer based on the direction of DRP. Since, common issue on identical facts are involved in these different appeals of the assessee, therefore, for the sake of convenience all these appeals are adjudicated together by taking ITA No. 340/Mum/2019 as lead case and its finding will be applied to the other appeal wherever it is applicable.

ITA No. 340/Mum/2019

"Ground 1: Adjustment to the Arm's Length Price (ALP) of the broking commission earned by the Appellant

1. *On the facts and circumstances of the case, the learned AO, based on the directions of the Honourable DRP, erred in making an upward adjustment of Rs.19,77,31,456 in determining the ALP of the international transaction pertaining to provision of equity broking services in the clearing house (CH) and delivery versus payment (DVP) segment, to the Associated Enterprises (AEs) by the Appellant.*

2. *On the facts and circumstances of the case, the learned AO, based on the directions of the Honourable DRP, erred on the following grounds*

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

2.2 *In using Comparable Uncontrolled Price (CUP) method and while applying the CUP method, by not appreciating that during the previous year ended on 31 March 2014, the AEs had also entered into similar trades with third party brokers, who had charged brokerage to the AEs at rates lower than the brokerage rates charged by the Appellant in the said previous year, which establishes adherence to the arm's length principle of the trades entered into between the Appellant and the AEs*

2.3 *Applying CUP method incorrectly and determining ALP of the trades executed by AEs by comparing them with the brokerage rates charged to few cherry picked non-AEs located in the same geographical location in which AEs are located, without appreciating the fact that broking services were rendered by the Appellant to both the AEs and non-AEs in the same Indian market*

2.4 *Applying CUP method incorrectly by not computing ALP of the trades executed by AEs based on average brokerage rates charged to all Non-AEs*

2.5 *While applying the CUP method, by not granting an adjustment for marketing costs based on the comparability analysis. In this regard, the learned A based on the directions of the Honourable DRP, erred in not correctly appreciating the facts of the case with regard to the said adjustment sought by the Appellant, and in concluding without any basis that said expenses are not exclusively incurred for non- Associated Enterprises*

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

Research costs, and

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

3. *Without prejudice to the above, while computing the upward adjustment to the ALP of the broking commission earned by the Appellant, the learned AO, erred in considering amount of Rs.19,77,31,456 instead of Rs.19,75,81,188 which was suo moto reduced by the learned TPO vide its rectification order dated 21 February 2018 under section 154 of the Act.*

Ground 2. Disallowance of net loss on account of error trade transactions

1. *On the facts and circumstances of the case, the learned AO, based on the directions of Honourable DRP, erred in disallowing Rs.28,09,603 being net loss on account of error trade transactions.*

2. *On the facts and circumstances of the case, the learned AO, based on the directions of the Hon'ble DRP erred on the following grounds*

2.1 *In not considering and appreciating the fact that during the course of assessment proceedings. the Assessee had furnished internal emails in its pure/ original form in which it was retrieved without any forgery/ alterations which constitutes genuine evidence and are adequate to substantiate/ corroborate the genuineness of the error trades transactions undertaken by the*

2.2 *In not appreciating the fact that the loss arising on account of error trades is purely incidental to rendering broking services business and thereby, deductible as business loss under section 28 of the Act*

2.3 *in stating that the assessee failed to produce relevant documents like contract notes in respect of error trades.*

Ground 3: Disallowance under section 14A of the Act

1. *On the facts and circumstances of the case, the learned AO, based on the directions of Honourable DRP, erred in disallowing Rs.2,09,70,578 under section 14A of the Act*

2. *On the facts and circumstances of the case, the learned AO, based on the directions of the Hon'ble DRP erred on the following grounds.*

2.1 *In not appreciating the fact that no expenditure having direct and proximate connection with earning of exempt income has been incurred by the Assessee and thus, no disallowance (in addition to the suo-motu disallowance of Rs.3,51,604 by the Assessee) as expenditure incurred in relation to earning exempt income is warranted under the provisions of section 14A of the Act*

2.2 *Without prejudice to the above, in applying Rule BD of the Income-tax Rules, 1962 (Rules) for computing disallowance under section 14A of the Act without recording sufficient reasons for not being satisfied with the correctness of the claim of the Assessee in respect of the expenditure of Rs.3,51,604 suo-motu disallowed by the Assessee under section 14A of the Act in its return of income*

2.3 *Without prejudice to the above, in considering the investment made by the Assessee in the shares of subsidiary company and other group company and Bombay Stock Exchange Limited while computing the disallowance under Rule 8D(2) (iii) of the Rules*

Ground 4: Initiation of penalty proceedings under section 271(1)(c) of the Act

1. *On the facts and circumstances of the case, the learned AO erred in proposing to initiate penalty proceedings under section 271(1)(c) of the Act for the transfer pricing adjustments and disallowance of losses on account of error trade made in the assessment order.*

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

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

2. Fact in brief is that the assessee is primarily engaged in providing institutional equity sales and trading services to both domestic and overseas institutional clients. It is a member of the Bombay Stock Exchange, Mumbai as well as National Stock Exchange of India Delhi. The assessee is also registered as a merchant banker with SEBI. During the year under consideration the assessee filed return of income on 14.11.2014 declaring total income of Rs.313,92,38,170/-. The case was subject to scrutiny assessment and a notice u/s 143(2) of the Act was issued on 31.08.2015.

3. During the course of assessment on perusal of Form 3CEB filed by the assessee, the assessing officer noticed that assessee had shown international transactions aggregating to Rs.146,78,92,542/- with associates enterprises. Therefore, case was referred to TPO for determination of Arm's Length Price in respect of aforesaid international transactions with associate enterprises.

4. The TPO vide order u/s 92CA(3) of the Act dated 31.10.2017 recommended an adjustment of Rs.19,77,31,456/- on account of the computation of the arm's length price (ALP of brokerage received on clearing house trades and Delivery Versus Payment trades executed for the associated enterprises in respect of the international transactions. The assessing officer has passed draft assessment order u/s 143(3) r.w.s 144C of the Act on 29.12.2017 and proposed adjustment of Arm's Length price as suggested by the Transfer Pricing Officer.

5. Against the draft assessment order the assessee filed objection before the ld. DRP. The DRP vide order dated 27.09.2018 rejected the

objection filed by the assessee and upheld the adjustment as decided by the assessing officer/TPO. Thereafter the assessing officer has passed assessment order u/s 143(3) r.w.s 144C(13) of the Act on 29.12.2018 and added the adjustment suggested by the TPO to the amount of Rs.19,77,31,456/- to the total income of the assesse.

6. The assessing officer has also disallowed an amount of Rs.31,65,904/- being gross loss on account of error trade transactions. The AO has also made disallowance of Rs.209,70,578/- u/s 14A of the Act as expenditure incurred in relation to the earning of exempt income. The further facts of the case are discussed while adjudicating the ground of appeal.

7. Ground No.1: Upward adjustment of Rs.19,77,31,456/- in determining the ALP of the international transaction pertaining to provision of equity broking services in CH and DVP segment to AEs:

8. This generic ground was not pressed, therefore, the same stand dismissed as not pressed.

9. Ground No. 1-2.1: Regarding applicability of transactions net margin method as the most appropriate method for determining the arm's length price for the broking commission earned on trades executed on behalf of the associate enterprises:

10. The assessee has not pressed this ground therefore, the same stand dismissed.

Ground No. 1-2.2: (Assessee's Transactions with its AEs are at ALP)

11. The assesse has not pressed this ground therefore, the same stand dismissed.

12. Ground No. 2.3 & 2.4: (Considering brokerage rate of all Non-AEs for the comparability purposes).

13. The assessee has rendered broking services both to the associate enterprise and non-associate enterprises in different geographical locations. The assessee has used TNMM as most appropriate method for benchmarking the broking services. The TPO has rejected the TNMM method since the assesse has provided broking services to non-associate enterprise along with its associate enterprises, therefore, CUP method was selected to be the most appropriate method. The TPO mentioned that CUP method was considered as most direct method for determining the arm's length. Under this method the price at which controlled transactions is carried out is compared to the price obtained in comparable uncontrolled transactions. The TPO has relied on the decision in the case of J.P Morgan India Pvt. Ltd. for assessment year 2002-03 vide ITA No. 670/Mum/2006 dated 12.02.2014 wherein it has upheld the rejection of TNMM method and CUP has been accepted as most appropriate method for the purpose of benchmarking.

14. Before the TPO the assessee submitted that arithmetic mean of commission earned by the assessee from all clients combined should be considered. The TPO has not agreed with the submission of the assessee for considering the arithmetic mean of all clients on the ground that geographical differences plays an important role in the determination of arm's length price.

15. The DRP has rejected the objection filed by the assessee holding that geographical location is a very important factor as envisaged in Rule 10B(2)(d) and in the various judicial orders as cited by the TPO.

16. During the course of appellate proceedings before us at the outset the ld. Counsel submitted that ITAT Mumbai in the case of the assessee itself has accepted the stand of the assessee to consider the brokerage rate of all Non-AEs for comparability purpose in the assessment year 2002-03 to 2005-06 and A.Y. 2007-08. The ld. Counsel further

submitted that during the assessment year 2006-07, the TPO has accepted the aforesaid proposition for assessment year 2006-07 and during the assessment year 2008-09 to 2011-12 the ld. CIT(A) and DRP have also agreed with the decision of ITAT for considering the brokerage rate for all Non-AEs for comparability purpose.

17. Heard both the sides and perused the material on record. With the assistance of the ld. Representative we have perused the decision of ITAT for assessment year 2003-04 vide ITA No. 1235/Mum/2014 dated 30.06.2023 wherein the ITAT in the case of the assessee itself after following the decision of ITAT, Mumbai for assessment year 2005-06 held that to consider both overseas and domestic independent clients while applying CUP method in the case the assessee. The relevant extract of the decision of the order of the ITAT is reproduced as under:

> *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:-*
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> > *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 precedents 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.*
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> *021. We also find that rule 10 B (1) (a) (ii) of the income tax rules 1962 also allowed adjustment to the prices which could materially affect the price in the open market.*

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

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

12. 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."

Since, ground no. 2.3 & 2.4 are similar to the ground raised in the assessment year 2003-04 wherein after following the decision of ITAT of earlier years it is held to consider both overseas & independent clients while applying CUP method. Accordingly we direct the TPO to consider both overseas and domestic clients while applying CUP method as directed in the above referred decision in the case of the assesse itself. Therefore, this ground of appeal of the assessee is allowed for statistical purposes.

Ground No. 2.5 & 2.6: No adjustment of marketing cost while applying CUP method & not granting adjustment of research cost and 50% of volume while applying CUP method:

18. Before the TPO the assessee submitted that there were functional difference in the services provided by the assessee to AEs and non-AEs therefore the same was not comparable and requested for adjustments for marketing cost, Research support and volume. The assessee explained that the marketing cost was comprised of salary and related cost and that role of those employees was restricted to non-associate enterprise only. However, the TPO stated that assessee has not provided cogent evidence to prove that the marketing cost expenses claimed by the assessee has been used only by non-associate enterprises. The TPO also stated that assessee has not submitted that terms of engagement to establish that assessee has rendered such services to the non-associate enterprises client only. However, the assessee claimed that there was functional differences in the services provided by the assessee to associate enterprises and non-enterprises, therefore the same were not comparable. Before the TPO alternatively the assessee had also submitted that if CUP method is applied then the assessee should be given the following adjustment:

i. Marketing Cost

ii. Research support

iii. Volume

However, the TPO has rejected the contention of the assessee as stated above.

19. During the course of appellate proceeding before us the ld. Counsel submitted that the ITAT in the case of the assessee while adjudicating the appeal of the assessee in various assessment years from A.Y. 2002-03 to A.Y. 2011-12 has allowed the assessee's ground by allowing total adjustment to the extent of 40% of such cost.

20. Heard both the sides and perused the material on record. With the assistance of ld. Representative we have perused the decision of ITAT in the case of the assessee itself for assessment year 2003-04 vide ITA No. 1235/Mum/2014 dated 30.06.2023 wherein the ITAT in the case of the assessee itself after following the decision of ITAT, Mumbai for assessment year 2005-06 wherein held that adjustment of 40% will be allowed on marketing cost adjustments and research cost. The relevant extract of the decision of the order of the ITAT is reproduced as under:

> *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:-*
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> > *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 precedents 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.*
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> *021. We also find that rule 10 B (1) (a) (ii) of the income tax rules 1962 also allowed adjustment to the prices which could materially affect the price in the open market.*
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> *022. Further guidelines (2022) at paragraph number 2.17 also suggest that in considering whether controlled and uncontrolled transaction is comparable, regard should be held to the effect on price of broader business functions other than just product comparability. Where the differences exist between the controlled and uncontrolled transaction is on between the enterprises undertaking those transactions, it may be difficult to determine*

reasonably accurate adjustment to eliminate the effect on price. However such difficulties should in all fairness be adjusted reasonably but that should not preclude the application of cup method. In the present case for earlier years the learned and CIT - A has granted adjustment to the extent of 40%, which is been upheld by the coordinate benches in case of the assessee for earlier years, we also direct the learned assessing officer/transfer pricing officer to adjust and grant benefit of 40% discount to the assessee.

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

12. 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."

Following the decision of ITAT on similar grounds as referred above we direct TPO to give adjustment of 40% to the assessee while determining the arm's length of international transactions of brokerage and commission as directed in the finding of the ITAT referred supra, therefore these ground of appeal the assessee are partly allowed.

Ground No. 1.3: (Computing upward adjustment by considering addition as Rs.19,7,31,456 instead of rectified amount of RS.197,58,118/-.)

21. The assessee submitted that TPO had suo moto rectified the addition vide Rectification order dated 21.02.2018 therefore, we restore this issue to the file of the assessing officer for giving effect to the claim of the assessee after verification as per the Rectification order passed by the TPO. This ground of appeal of the assessee is allowed for statistical purposes.

Ground No. 2: Disallowance of net loss incurred on error trading transactions:

22. During the course of assessment the assessing officer noticed that assessee has claimed loss of Rs.28,09,603/- in the profit and loss account on account of error trades. On query, the assesse explained that it had incurred a net loss amounting to Rs.28,09,603/- on account of error trades which were purely incidental to the business and was incurred during the ordinary course of rendering broking services to its clients and the same has been reduced in computing the total income chargeable to tax for assessment year 2014-15. The assessee has also submitted a detailed break-up of error trade transactions undertaken by it as a broker along with details such as client name, reason for error trade, date of transactions, scrip name etc. However, the assessing officer has not agreed with the submission of the assesse and stated that assessee has not furnished any documentary evidences such as contract notes, correspondence with such clients to establish the genuineness of error trade loss.

Against the draft assessment order the assessee filed the objections before the DRP. The DRP has upheld the net disallowance of Rs.28,09,603/-.

23. During the course of appellate proceedings before us the ld. Counsel vehemently contended that the loss under the head error trading is only 0.09% of the turnover and submitted that it is insignificant amount which is incidental to the business of the assessee company. The ld. Counsel also referred page no. 642 to 649 of the paper book showing detail of error trade loss along with specific reasons.

On the other hand, the ld. D.R supported the order of lower authorities.

24. Heard both the sides and perused the material on record. During the course of assessment in support of its claim of net loss of Rs.28,09,603/- on account of error trades, the assessee had submitted the details like client name, reason for error trades, date of transactions, script name internal e-mail etc. The assessee also explained that error trades are the clerical & other errors of the assessee in execution of the transactions for the clients. The error trades are basically trades generated by the clients, however, due to error inter alia in punching of the trade, etc. these trades are not executed as per the trading order of the clients. The error could be in the name of wrong punching of quantity, rate, security, system error and error in punching the type of order etc. During the course of appellate proceedings before us the assessee has also placed reliance on the decision of ITAT, Mumbai in the case of CLSA India Pvt. Ltd. vs. ACIT (Range-4(1) vide ITA No. 4824/Mum/2015 A.Y. 2003-04 dated 14.12.2020. In the aforesaid decision the ITAT observed that certain client for whom the assessee was working as a broker had not owned up certain share transactions then the assessee had no other alternative but to accept those transactions as its own transactions because of its relation with the clients from whom it was accepting good earnings. After considering the volume of transactions undertaken by the assessee company as broker for various clients we observe that such marginal error in share trading is incidental to the business of the assessee, therefore, we don't find any reason to that assessee has wrongly claimed such loss, therefore, AO is directed to allow the claim of the assessee.

Ground No. 3: Disallowance u/s 14A:

25. During the course of assessment AO is noticed that assessee has received dividend of Rs.505,20,000/- and also had made investment of Rs.439,99,95,000/- which yielded exempt income. However, AO noticed that assessee has not computed disallowance as per provisions of Sec.

14A r.w.Rule 8D of the I.T. Rule 1962. During the course of assessment the AO has disallowed the amount of Rs.209,70,578/- u/s 14A of the Act as expenditure incurred in relation to earning of exempt income.

26. The ld. DRP has dismissed the objection filed by the assessee.

27. During the course of appellate proceedings before us the ld. Counsel submitted that the assessing officer has only made disallowance on account of administrative expenditure as 0.5% of the average value of the investment made by the assessee company. In this regard, the ld. Counsel submitted that ITAT in the case of the assessee itself for assessment year 2008-09 and 2009-10 has restored similar issue to the file of the assessing officer for deciding afresh after establishing the nexus of expenditure with the exempt income earned by the assessee.

On the other hand, the ld. D.R supported the order of lower authorities.

28. Heard both the sides and perused the material on record. With the assistance of ld. Representative we have perused the decision of ITAT, Mumbai in the case of the assessee itself for assessment year 2008-09 vide ITA No.1714/Mum/2016 wherein on identical issue and similar facts the issue was remanded back to the file of the assessing officer to examine the disallowance u/s 14A and assessee was also direct to substantiate its claim as to why no disallowance should be made. The relevant operating part of the decision of the ITAT in the above referred decision is reproduced as under:

> *"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."

Following the decision of ITAT as referred above we restored this issue to the file of the AO for deciding afresh as directed in the decision of ITAT, therefore, this ground of appeal of the assessee is allowed for statistical purposes.

ITA No. 7550/Mum/2019 (AY: 2015-16)

Ground No. 1: Upward adjustment of Rs.21,72,11,500/- in determining the ALP of the international transaction pertaining to provision of equity broking services in CH and DVP segment to AEs:

20. This generic ground was not pressed therefore, the same stand dismissed as not pressed

Ground No. 1-2.1: Regarding applicability of transactions net margin method as the most appropriate method for determining the arm's length price for the broking commission earned on trades executed on behalf of the associate enterprises:

21. The assessee has not pressed this ground of appeal therefore, the same stand dismissed.

Ground No. 1-2.2: (Assessee's Transactions with its AEs are at ALP)

22. The assesse has not pressed this ground therefore, the same stand dismissed.

23. Ground No. 2.3 & 2.4: (Considering brokerage rate of all Non-AEs for the comparability purposes).

24. Since the facts and the issue involved in this ground of appeal is similar to the facts and issue involved in ground no.2.3 & 24 of the appeal vide ITA No. 340/Mum/2019 as adjudicated supra in this order, therefore, applying the finding of ITA No. 340/Mum/2019 as mutatis mutandis this ground of appeal of the assessee is also allowed for statistical purposes.

25. Ground No. 2.5 & 2.6: No adjustment of marketing cost while applying CUP method & not granting adjustment of research cost and 50% of volume while applying CUP method:

26. Since the facts and the issue involved in this ground of appeal is similar to the facts and issue involved in ground no.2.5 & 2.6 of the appeal vide ITA No. 340/Mum/2019 as adjudicated supra in this order, therefore, applying the finding of ITA No. 340/Mum/2019 as mutatis mutandis this ground of appeal of the assessee is also allowed for statistical purposes.

27. Ground No. 2: Disallowance of net loss incurred on error trading transactions:

28. Since the facts and the issue involved in this ground of appeal is similar to the facts and issue involved in ground no.2 of the appeal vide ITA No. 340/Mum/2019 as adjudicated supra in this order, therefore, applying the finding of ITA No. 340/Mum/2019 as mutatis mutandis this ground of appeal of the assessee is also allowed.

ITA No. 1009/Mum/2021 (AY: 2016-17)

Ground No. 1: Upward adjustment of Rs.17,53,02,814/- in determining the ALP of the international transaction pertaining to provision of equity broking services in CH and DVP segment to AEs:

29. This generic ground was not pressed therefore, the same stand dismissed as not pressed

Ground No. 1-2.1: Regarding applicability of transactions net margin method as the most appropriate method for determining the arm's length price for the broking commission earned on trades executed on behalf of the associate enterprises:

30. The assessee has not pressed this ground of appeal therefore, the same stand dismissed.

Ground No. 1-2.2: (Assessee's Transactions with its AEs are at ALP)

31. The assesse has not pressed this ground therefore, the same stand dismissed.

32. Ground No. 2.3 & 2.4: (Considering brokerage rate of all Non-AEs for the comparability purposes).

33. Since the facts and the issue involved in this ground of appeal is similar to the facts and issue involved in ground no.2.3 & 24 of the appeal vide ITA No. 340/Mum/2019 as adjudicated supra in this order, therefore, applying the finding of ITA No. 340/Mum/2019 as mutatis mutandis this ground of appeal of the assessee is also allowed for statistical purposes.

34. Ground No. 2.5 & 2.6: No adjustment of marketing cost while applying CUP method & not granting adjustment of research cost and 50% of volume while applying CUP method:

35. Since the facts and the issue involved in this ground of appeal is similar to the facts and issue involved in ground no.2.5 & 2.6 of the appeal vide ITA No. 340/Mum/2019 as adjudicated supra in this order, therefore, applying the finding of ITA No. 340/Mum/2019 as mutatis mutandis this ground of appeal of the assessee is also allowed for statistical purposes.

36. Ground No. 2: Disallowance of net loss incurred on error trading transactions:

28. Since the facts and the issue involved in this ground of appeal is similar to the facts and issue involved in ground no.2 of the appeal vide ITA No. 340/Mum/2019 as adjudicated supra in this order, therefore, applying the finding of ITA No. 340/Mum/2019 as mutatis mutandis this ground of appeal of the assessee is also allowed.

Ground No. 3. (Allowance of deduction of education cess)

29. This ground is not pressed therefore the same stand dismissed.

ITA No.594/Mum/2022 (AY: 2017-18)

Ground No. 1: Upward adjustment of Rs.8,43,75,587/- in determining the ALP of the international transaction pertaining to provision of equity broking services in CH and DVP segment to AEs:

30. This generic ground was not pressed therefore, the same stand dismissed as not pressed

Ground No. 1-2.1: Regarding applicability of transactions net margin method as the most appropriate method for determining the arm's length price for the broking commission earned on trades executed on behalf of the associate enterprises:

31. The assessee has not pressed this ground of appeal therefore, the same stand dismissed.

Ground No. 1-2.2: (Assessee's Transactions with its AEs are at ALP)

32. The assesse has not pressed this ground therefore, the same stand dismissed.

33. Ground No. 2.3 & 2.4: (Considering brokerage rate of all Non-AEs for the comparability purposes).

34. Since the facts and the issue involved in this ground of appeal is similar to the facts and issue involved in ground no.2.3 & 24 of the appeal vide ITA No. 340/Mum/2019 as adjudicated supra in this order, therefore, applying the finding of ITA No. 340/Mum/2019 as mutatis mutandis this ground of appeal of the assessee is also allowed for statistical purposes.

35. Ground No. 2.5 & 2.6: No adjustment of marketing cost while applying CUP method & not granting adjustment of research cost and 50% of volume while applying CUP method:

36. Since the facts and the issue involved in this ground of appeal is similar to the facts and issue involved in ground no.2.5 & 2.6 of the appeal vide ITA No. 340/Mum/2019 as adjudicated supra in this order, therefore, applying the finding of ITA No. 340/Mum/2019 as mutatis mutandis this ground of appeal of the assessee is also allowed for statistical purposes.

ITA No.2435/Mum/2022 (AY: 2018-19)

Ground No. 1: Upward adjustment of Rs.3,73,04,429/- in determining the ALP of the international transaction pertaining to provision of equity broking services in CH and DVP segment to AEs:

37. This generic ground was not pressed therefore, the same stand dismissed as not pressed

Ground No. 1-2.1: Regarding applicability of transactions net margin method as the most appropriate method for determining the arm's length price for the broking commission earned on trades executed on behalf of the associate enterprises:

38. The assessee has not pressed this ground of appeal therefore, the same stand dismissed.

Ground No. 1-2.2: (Assessee's Transactions with its AEs are at ALP)

39. The assesse has not pressed this ground therefore, the same stand dismissed.

40. Ground No. 2.3 & 2.4: (Considering brokerage rate of all Non-AEs for the comparability purposes).

41. Since the facts and the issue involved in this ground of appeal is similar to the facts and issue involved in ground no.2.3 & 24 of the appeal vide ITA No. 340/Mum/2019 as adjudicated supra in this order, therefore, applying the finding of ITA No. 340/Mum/2019 as mutatis mutandis this ground of appeal of the assessee is also allowed for statistical purposes.

42. Ground No. 2.5 & 2.6: No adjustment of marketing cost while applying CUP method & not granting adjustment of research cost and 50% of volume while applying CUP method:

43. Since the facts and the issue involved in this ground of appeal is similar to the facts and issue involved in ground no.2.5 & 2.6 of the appeal vide ITA No. 340/Mum/2019 as adjudicated supra in this order, therefore, applying the finding of ITA No. 340/Mum/2019 as mutatis mutandis this ground of appeal of the assessee is also allowed for statistical purposes.

44. In the result, the appeals of the assessee are partly allowed.

Order pronounced in the open court on 30.11.2023

Sd/-	Sd/-
(Aby T Varkey)	(Amarjit Singh)
Judicial Member	Accountant Member

Place: Mumbai
Date 30.11.2023
Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.