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

BEFORE SHRI PRASHANT MAHARISHI, AM AND
MS. KAVITHA RAJAGOPAL, JM

ITA No.6232/Mum/2014
(Assessment Year: 2005-06)

CLSA India Pvt. Ltd. Formerly Known as CLSA India Ltd. 8/f Dalamal House, Nariman Point, Mumbai-400 021	Vs.	Asst. CIT LTU 29th Floor, Centre 1 World Trade Centre, Cuff Parade, Mumbai
PAN/GIR No. AAACC 2262 K		
(**Assessee**)	:	(**Respondent**)

Assessee by	:	Shri Mukesh Bhutani, Ms. Karishma Phatarpekar, Shri Paras Savla
Respondent by	:	Shri Akhtar H. Ansari, Sr. AR & Shri A. K. Ambastha, Sr. AR

Date of Hearing	:	23.02.2024
Date of Pronouncement	:	22.05.2024

O R D E R

Per Kavitha Rajagopal, J M:

This appeal has been filed by the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A) for short), National Faceless Appeal Centre ('NFAC' for short) passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2005-06.

2. The assessee has raised various grounds of appeal which are reproduced hereunder:

1. *On the facts and circumstances of the case and in law, the learned Transfer Pricing Officer (TPO) / the learned Assessing Officer ('AO') / learned CIT(A) erred in assessing the total income of the Appellant at INR 1,235,972,140.*
2. *On the facts and circumstances of the case and in law, the learned TPO / learned AO/learned CIT(A) erred in rejecting the Transfer Pricing (TP') analysis undertaken by the Appellant.*

Receipt of brokerage commission

3. *On the facts and circumstances of the case and in law, the learned TPO / learned AO /learned CIT(A) failed to discharge the burden of proof to establish that Transactional Net Margin Method (TNMM") is not the Most Appropriate Method ('MAM') for the determination of the arm's length price ('ALP') in respect of the transaction pertaining to provision of broking services to associated enterprises (AEs').*

4. *On the facts and circumstances of the case and in law, the learned TPO / learned AO /learned CIT(A) erred in rejecting TNMM as the MAM for the determination of the ALP of the international transaction of brokerage commission received by the Appellant from its AEs.*

5. *On the facts and circumstances of the case and in law, the learned TPO / learned Assessing Officer ('A.O.' for short) learned CIT(A) has erred in applying the Comparable Uncontrolled Price (CUP') method as the MAM for benchmarking the international transaction of brokerage commission received by the Appellant from its AEs, failing to appreciate the following:*

    a. *There are key differences between the Functions Performed, Assets Employed and Risk Assumed ('FAR') in respect of transactions executed by the Appellant with AEs vis-à-vis non-AEs:*
    b. *Brokerage rates differ inter alia based on clients, volume of transactions, geographical differences, nature of services offered to each client and client relationships;*

6. *On the facts and circumstances of the case and in law, the learned TPO erred in concluding that there should have been a separate charge for the additional services provided by the Appellant to the non-AEs, thereby failing to appreciate that higher rate of brokerage charged to such non-AEs includes a charge for such additional services*

7. *Without prejudice, the learned TPO / learned AO / learned CIT(A) failed to appreciate that the broking services provided by the Appellant to non-AE Domestic Institutional Investors ('DIIs') has a higher degree of comparability with the broking services provided to AEs as compared to the broking services provided to non-AE Flls for the purpose of application of an internal CUP.*

8. *Without prejudice, the learned TPO / learned AO/ learned CIT(A) erred in not applying an appropriate turnover filter and granting volume discount for the purposes of applying the internal CUP for benchmarking the international transaction relating to brokerage commission received by the Appellant from its AEs.*

9. *Without prejudice, , the learned TPO, while computing the transfer pricing adjustment, has erred by comparing the internal CUP (as arrived at by the learned TPO), to the average brokerage rate charged by the Appellant to its AEs.*

10. *Without prejudice, the learned TPO/ learned AO / learned CIT(A) erred in not appreciating the evidence filed before the Appellant, which demonstrates the difference in the functions undertaken for serving Non- AE FIl's and thereby failed to grant an adjustment*

Payment of Royalty/Branding fees

11. *On the facts and circumstances of the case and in law, the learned TPO/ learned AO /learned CIT(A) failed to appreciate that under the provisions of Section 92CA(3) of the Act, the learned TPO is required to determine the arm's length price in relation to the international transaction in accordance with Section 92C(3) of the Act, following any of the prescribed methods.*

12. *On the facts and circumstances of the case and in law, the learned TPO/ learned AO / learned CIT(A) erred by failing to discharge the burden of proof while rejecting the CUP analysis /*

corroborative TNMM analysis undertaken by the Appellant for the determination of the ALP in respect of the transaction pertaining to payment of royalty/ Branding fess.

13. *On the facts and circumstances of the case and in law, the learned TPO / learned AO /learned CIT(A) erred in rejecting the CUP analysis / corroborative TNMM analysis undertaker by the Appellant, for the determination of the ALP of the international transaction of payment of royalty/ Branding fees.*

14. *On the facts and circumstance of the case and in law, the learned TPO / learned AO / learned CIT(A) failed to appreciate that sufficient data was available to demonstrate external Comparable in the form of royalty rates published by the Secretariat of Industrial Assistance.*

15. *On the facts and circumstances of the case and in law. the learned TPO/ learned AO/learned CIT(A) erred in applying data pertaining to related entities, being a controlled transaction, as the internal CUP, not appreciating that for benchmarking international transactions, the comparable data should be pertaining to uncontrolled transactions or for uncontrolled comparable companies.*

16. *On the facts and circumstances of the case and in law, the learned TPO/ learned AO/ learned CIT(A) failed to appreciate the fact that the payment of brand fees is allowed by the Reserve Bank of India, is permissible under Exchange Control Regulations and hence there was no warrant to make the adjustment of INR 14,552,584.*

17. *On the facts and circumstances of the case and in law, the learned TPO/ learned AO/learned CIT(A) erred in not appreciating the FAR profile of the Appellant vis-à-vis the AEs.*

18. *On the facts and circumstances of the case and in law, the learned TPO/ learned AO /learned CIT(A) erred by failing to discharge the burden of proof while concluding that TNMM is not the MAM for the determination of the ALP in respect of the international transaction pertaining to payment of indirect costs.*

19. *On the facts and circumstances of the case and in law, the learned TPO/ learned AO /learned CIT(A) erred in rejecting TNMM as the MAM for the determination of the ALP of the international transaction of payment of indirect costs.*

20. *On the facts and circumstances of the case and in law, the learned TPO/ learned AO/learned CIT(A) erred in holding the arm's length price of international transactions relating to the indirect cost allocation to be Nil as against INR 66,060,930, without applying any of the prescribed methods.*

21. *On the facts and circumstances of the case and in law, learned CIT(A) failed to appreciate the documentation provided by the Appellant during the course of the proceedings justifying the indirect costs paid.*

22. *On the facts and circumstances of the case and in law, the learned TPO/ learned AO /learned CIT(A) erred in not appreciating the evidence filed by the Appellant, which demonstrates the difference in the FAR profile of the Appellant vis-à-vis the AEs.*

Outstanding Securities Transaction Tax ('STT')

23. *On the facts and circumstances of the case and in law. the learned AO/ CIT (A) erred in adding the outstanding Securities Transaction Tax ('STT) of Rs 4,42,545 to the total income of the Appellant disregarding the fact that the Appellant (i) did not claim deduction for such STT in*

computing its taxable income, and (i) merely acts as a stock-broker for its Client dealings resulting in STT and such STT is a liability of the clients of the Appellant.

Disallowance of transaction charges under section 40(a)(ia) of the Act

24. *On the facts and circumstances of the case and in law, the learned AO / CIT (A) erred in disallowing transaction charges of Rs 2,06,75,227 paid to Bombay Stock Exchange (BSE') and National Stock Exchange ('NSE') under section 40(a)(ia) of the Act for not withholding taxes under section 194J of the Act.*

25. *Without prejudice to above, the learned AO / CIT (A) erred in disallowing transaction charges without acknowledging the fact that historicaly both, the Revenue and the Appellant, were under the bona fide belief that the transaction charges paid to the stock exchanges are not subjected to tax withholding.*

Disallowance of OASYS Global STP charges under section 40(a)(ia) of the Act

26. *On the facts and circumstances of the case and in law, the learned AO / CIT (A) erred in disallowing Straight through processing (STP') charges of Rs 4,01,314 paid to NSDL under section 40(a)(ia) of the Act for not withholding taxes under section 194J of the Act.*

27. *On the facts and circumstances of the case and in law, the learned AO / CIT (A) erred in disallowing OASYS Global STP charges of Rs 12,84,492 paid to a Singapore entity under section 40(a)(ia) of the Act disregarding the fact that the appropriated taxes, were actually deducted at source on such payments under section 195 of the Act.*

Levy of interest under section 234B and 234D of the Act

28. *On the facts and circumstances of the case and in law, the learned AO / CIT (A) erred in levying interest under sections 234B and 234D of the Act of Rs.2,29,19,337 and Rs.14,65,607 respectively.*

3. The assessee has also raised the following additional ground :

Additional Ground:

29. *On the facts and circumstances of the case and in law, the learned Assessing Officer be directed to compute the tax payable by the assessee under section 115-O of the Income Tax Act, 1961 ("the Act") in accordance with the DTAA between India and Netherlands in respect of dividend paid by the assessee to the non-resident shareholder i.e., CLSA B.V., a tax resident of Netherlands.*

4. The brief facts are that the assessee company is a group company of CLSA which headquarters is based in HongKong and has its subsidiaries in various countries including India, which is the assessee in the present appeal. The assessee is engaged in the activities of equity research, equity brokerage and advisory services. The assessee is a registered stock broker with SEBI and is a trading and owner member of National Stock Exchange of India Ltd. and Bombay Stock Exchange and National Securities Depositary Ltd.

(NSDL) and Central Depository Services (India) Ltd. and also holds a merchant banker and under licenses from SEBI. The assessee renders service to its AE's and non AE's which are based in India and also overseas. The assessee is involved in two segments of broking activities such as DVP trades and clearing house trades. The assessee filed its return of income dated 29.10.2005, declaring total income at Rs.106,44,57,407/- and the same was processed u/s. 143(1) of the Act. The assessee's case was selected for scrutiny and notice u/s. 143(2) and 142(1) were duly issued and served upon the assessee.

5. The learned Assessing Officer (ld. A.O. for short) observed that the assessee has entered into various international transactions which are reported in Form No. 10CEB for which the ld. A.O. made a reference to the learned Transfer Pricing Officer (ld. TPO for short) u/s. 92CA(1) of the Act for the purpose of determining whether the International transaction entered into with the AE's are at arm's length price (ALP for short). The ld. A.O. passed the final assessment order dated 29.12.2008 u/s. 143(3) of the Act, determining the total income at Rs.123,59,72,135/- by making various additions/disallowances on corporate grounds and transfer pricing additions, after duly considering the ld. TPO's recommendation vide order dated 29.10.2008. The additions/disallowances made by the ld.A.O. are tabulated hereunder:

Additions/disallowances	***Amount (Rs.)***
Disallowance on account of non-deduction of tax under section 40(a)(ia)	*2,23,61,033*
Transfer pricing adjustments	
- *Brokerage*	*6,80,97,636*
- *Payment of brand fees*	*1,45,52,584*
- *Indirect overhead allocation*	*6,60,60,930*
	14,87,11,150
Addition of Securities Transaction Tax received from clients under section 43B	*4,42,545*

6. The assessee was in appeal before the first appellate authority, challenging the addition/disallowance made by the ld. AO.

7. The ld. CIT(A) vide order dated 24.03.2014 upheld the order of the ld.A.O.

8. The assessee has preferred the present appeal, challenging the impugned order of the ld. CIT(A).

9. Before adjudicating the regular grounds raised by the assessee, it is pertinent to decide the additional ground raised by the assessee, where the assessee has prayed for computing the tax payable u/s. 115O of the Act in accordance with DTAA between India and Netherlands with respect to the dividends paid by the assessee to the non-resident share holder i.e., CLSA B.V., which is a tax resident of Netherlands. As the additional ground raised by the assessee is on the legal proposition, which requires no further verification by the lower authorities, we deem it fit to admit the additional ground in the light of the decision of the Hon'ble Apex Court in the case of *National Thermal Power Coal Ltd. vs. CIT* [1998] 229 ITR 383 (SC). The ld. AR for the assessee contended that in case of dividend distribution tax, the maximum rate of tax to be charged on the assessee being a domestic resident company should be as per the DTAA of India Netherlands treaty and not as per section 115O of the Act.

10. On perusal of the rival contentions, it is observed that the said issue has been decided against the assessee by the Special Bench decision in the case of *Dy. CIT vs. Total Oil India (P.) Ltd.* [2023] 149 taxmann.com 332 (Mum)(Trib)(SB) and also the decision of the Hon'ble Apex Court in the case of *Assessing Officer (International Taxation) vs. Nestle SA* [2023] 155 taxmann.com 384 (SC). We, therefore, are inclined to

dismiss the additional ground raised by the assessee by respectfully following the aforementioned decisions.

11. Ground Nos. 1 & 2 are general in nature and requires no separate adjudication.

12. Ground Nos. 3 to 10 pertains to the transfer pricing adjustment on brokerage commission received by the assessee from its AE's. It is observed that the assessee being a broker of both BSE and NSE is into DVP trades and clearing house trades for which the assessee has charged a total brokerage of Rs.9,25,40,615/-, i.e., (Rs.9,14,44,240/- + Rs.11,96,375/-) from its AE's. The assessee has worked out the rate of commission to be 0.13% of the turnover in the case of clearing house transaction and 0.04% in case of futures transaction and had bench marked the said transaction using TNMM. The ld. TPO observed that the assessee has charged 0.2326% to the overseas non AE's for clearing house trade segment and 0.06% on future segment and concluded that the assessee has charged higher rate of commission from overseas non AE's compared to that of its AE's for both the services. The ld. TPO proposed CUP method for bench marking the said transaction. The assessee contended that the nature of service rendered to each clients varied depending upon the corporate access, analyst access, research, regularity of business, sales and trading coverage, client's creditworthiness, etc. for which the rates charged would vary from one client to another. The assessee further contended that the services rendered to independent party cannot be compared with that of the AE's as there will always be a change in volume and the nature of service and, therefore, the charges on unrelated parties cannot be compared with that of the related parties. The assessee reiterated that TNMM is the most appropriate method for bench marking the said

transaction. The ld. TPO not convinced with the assessee's reply made an upward adjustment of Rs.6,80,97,636/- on the brokerage income of the assessee which is tabulated as under:

Sr. No.	***Nature of Trade***	***Volume in Rs.***	***Rate Charged by assessee***	***ALP rate of brokerage***	***Amount of adjustment in Rs.***
	A	*B*	*C*	*D*	*(D-C) * B*
1	*CH Trade*	*65,85,32,98,096*	*0.13%*	*0.2326%*	*6,75,65,484*
2	*Futures*	*2,67,22,59,113*	*0.04%*	*0.06%*	*5,34,452*
		Total			***6,80,97,636***

13. The ld. A.O. made an addition on the basis of the recommendation of the ld.TPO. The first appellate authority upheld the TP adjustment made by the ld. A.O./TPO. The assessee has challenged the said addition on the following grounds:

1. *TNMM is the most appropriate method for determining the ALP of the said transaction.*

2. *CUP method cannot be applied for the said transaction, for the reason that the difference in the far analysis and the nature of the services would depend on the requirement of the clients.*

3. *Without prejudice only non AE Domestic Institutional Investors (Dlls) has to be compared with the AE's and not non AE Foreign Institutional Investors (FIIs).*

4. *Non application of appropriate turnover filter and the volume discount for application of internal CUP and has applied average brokerage rate charged to the AE's.*

5. *The non consideration of the functional difference in the service rendered to non AE FIIs.*

On the basis of the above grounds raised by the assessee, we heard the rival submissions and perused the materials available on record.

14. The learned Authorised Representative (ld. AR for short) for the assessee contended that the assessee has been bench marking the brokerage transaction with its AE as per the TNMM method, which is the most appropriate method considering all the

parameters and the availability of the data. The ld. AR further stated that the ld. AO/TPO has failed to justify why CUP method was preferred than TNMM and has also stated that this issue has been covered by the Tribunal's order in AY 2006-07, 2008-09 and 2011-12 in the assessee's own case where the Tribunal held the TNMM method to be the most appropriate method. It was, therefore, prayed that a consistent view is to be taken for the impugned year also.

15. The learned Departmental Representative (ld. DR for short), on the other hand, controverted the said facts and stated that the assessee has failed to substantiate why the brokerage/commission rate of non AE's are over and above that of the AE's and has also failed to establish why the cost of services, the nature of services, etc. are different from the non AE's. The ld. DR further stated that CUP method is more appropriate than TNMM as per the OECD guidelines and had further contended that the assessee itself has followed CUP method as MAM for A.Y. 2004-05. The ld. DR relied on the orders of the lower authorities.

16. We have heard the rival submissions and perused the materials available on record. The issue pertaining to this ground is the charging of higher rate of brokerage commission levied on overseas non AE's has to be the arm's length price for the AE's for similar services rendered by the assessee and also the method to be adopted for determination of the ALP for the said brokerage receipt, i.e., whether TNMM or CUP method to be the most appropriate method. The assessee's contention is that the nature of service varies from client to client depending upon various parameters and requirements and that TNMM method is the most appropriate method for bench marking the said

transaction. The Revenue's contention is that the assessee has failed to establish why there has been a difference in the rates charged to AE's and overseas non AE's and that the internal CUP method is to be adopted for bench marking the said transaction of the assessee.

17. It is pertinent to point out that the issue on brokerage commission received by the assessee for the services rendered towards AE's has been decided in assessee's case for earlier years and subsequent years. The assessee is said to have charged a lesser rate of commission to the AE's in comparison with that of non AE FIIs. The assessee has also consistently followed TNMM method for benchmarking this transaction for all these years except the allegation of the revenue that in AY 2004–05, the assessee has followed CUP method to benchmark this transaction.The tribunal in AYs. 2006–07, 2008–09 and 2011–12 have applied the most appropriate method for benchmarking to be TNMM. The Tribunal has held that the assessee has rendered the services to the AEs and non AEs through the resources of CLSA group, without which the assessee could not have rendered the said services for which brokerage commission was earned by the assessee. The tribunal has also distinguished the facts of assessee's case in AY 2013–14 where the tribunal had set aside this issue to the ld.AO/TPO. It is to mention that coordinate bench in assessee's case for A.Y. 2008-09 has also placed reliance on the Tribunal's decision in assessee's case for AYs 2006–07 and 2011–12.

18. It is also pertinent to point out that the ld. TPO whose recommendation has been followed by the ld. A.O. in passing the assessment order, has not specified as to how CUP method is the most appropriate method except for the fact that in A.Y. 2004-05, the

assessee has bench marked the transaction using CUP method. The ld. A.O./TPO has also not specified as to what were the comparables that was relied upon for determining the ALP of the said transaction and has also not given a specific finding as to what is the similarity in the services rendered to the AEs and non AEs provided by the assessee pertaining to the brokerage commission received by the assessee though the ld. TPO has stated in his order that TNMM method cannot be adopted in this case where the difference in product and services relate to unrelated parties are identifiable based on the documentation available with the assessee, the TPO has not given a detailed finding as to how he has arrived at the said contention. We, therefore, are of the considered opinion that as this issue is a recurring one, which has been dealt with by the Tribunal in assessee's case for various years, we do not find any change in the circumstances or the nature of transaction entered into by the assessee with its AE during the year under consideration. We, therefore, deem it fit to allow these grounds of appeal raised by the assessee by holding the said transaction to be at arm's length and TNMM to be the most appropriate method for determining the arm's length price (ALP for short). Hence, ground nos. 3 to 10 raised by the assessee is allowed.

19. Ground nos. 11 to 16 raised by the assessee pertains to the payment of royalty/branding fee. The facts are that the assessee had paid royalty of Rs.1,45,52,584/- for the use of brand name to Credit Lyonnais Securities Asia B.V., the Netherlands (CLSA BV) as per the branding agreement entered into by the assessee with its CLSA BV with effect from 19.02.2002 and subsequently renewed in February, 2005. It is observed that as CLSA BV being a reputed company in brokerage and securities market

has permitted the assessee company to use its brand name along with company logos, corporate identity, corporate style, etc. subject to the terms and conditions of the agreement for which the assessee company has calculated the brand fee to be 1% of the brokerage income earned during the year under consideration and had determined the ALP for the said transaction as per the operating profit margin of the assessee company with the comparable companies which is worked out to be 8.29% of the operating profit margin of the comparable company as against 70.37% of the operating profit margin of the assessee company. The assessee contended that the assessee company has been benefited by the usage of the brand name since its incorporation dated 21.11.1994 and no royalty was charged by CLSA BV as the same was not allowed under the erstwhile Foreign Exchange Regulation Act, 1973 ('FERA' for short) and as per the OECD Guidelines. The assessee further stated that post Foreign Exchange Management Act, 1999 ('FEMA' for short) the said policy was reviewed where payment of royalty for use of brand name was allowed and, subsequently, an agreement was entered into between CLSA BV and the assessee for payment of royalty for use of brand name at the rate of 1% which was also approved by the RBI. The assessee had relied on the Exchange Control Regulation, as per which 1% of the domestic sales and 2% for the export sales was to be charged as payment of royalty under the automatic rule for use of trade mark and brand name of a foreign collaborator without any technology transfer. The assessee has bench marked the said transaction by using TNMM method.

20. The assessee's contention was not accepted by the ld. TPO/AO for the reason that the assessee has failed to substantiate that the ownership of CLSA belongs to the

Netherland entity when the said company is based in Hongkong and merely producing the brand registration letter to prove the ownership of CLSA BV is per se not sufficient. It was further argued that mere RBI's approval does not determine whether or not the said transaction is at arm's length and the same is to be determined as per the provisions of the Act. The RBI's approval also does not specify to which entity i.e., CLSA Hongkong HA and CLSA BV, the payment is to be made by the assessee for the ownership of the brand. It is also observed that the assessee has paid the brand fee w.e.f 19.02.2002 whereas the application to RBI was made on 29.02.2002 which negates the contention of the assessee. The ld. TPO has also specified that inspite of the fact that CLSA has various group entities in Hong Kong, India, Indonesia, Japan, Korea, Philipenes, Shanghai (China), Shenzhen (China), Singapore, Taiwan and Thailand and except for the assessee company no one else has paid royalty to CLSA BV for use of its brand and neither has the group entities in Australia, Malaysia, New Zealand, Pakistan and Sri Lanka has paid any royalty. The ld. TPO held that the comparable uncontrolled transaction method is the most appropriate method to determine the ALP of the said transaction and that the TNMM method of comparing net profit margin of the company at entity level does not hold good in the present case. The ld. A.O./TPO made an upward adjustment of Rs.1,45,52,584/- to be the ALP of the international transaction pertaining to the payment of the brand fee by using the comparable uncontrolled price method to be the most appropriate method.

21. The ld. CIT(A) in an appeal preferred by the assessee against the said order confirmed the adjustment made by the TPO/AO.

22. Before us, the ld. AR for the assessee contended that this issue was covered by the Tribunal's order in assessee's case for A.Y. 2002-03, 2003-04, 2004-05 where the Tribunal has upheld the TNMM method to be the most appropriate method for determination of the ALP for the said international transaction. It is observed that the Tribunal in the earlier years has held that CLSA BV owned the brand CLSA which had facilitated the assessee to establish and promote business in the Indian industry. It was also held that the other group entities were not making payment on royalty for the reason that different entity have different arrangements in different jurisdiction and the assessee was not in commission sharing arrangement and, therefore, was entitled to payment of royalty. It was also observed that the other entities were engaged in market contributions with CLSA BV and, therefore, there was no necessity of payment of royalty in those cases. The Tribunal further observed that the expenditure incurred by the assessee on royalty was only 1% when compared to other comparable companies where it worked out to be more than that of the assessee and, therefore, held that the royalty paid by the assessee was not excessive. The Tribunal in assessee's case has held that the TNMM was the most appropriate method for bench marking the said transaction and not the internal CUP method where the transaction is not with the unrelated party but with its AE's. The Tribunal further held that the external CUP also could not be applied for the reason that there was no material on record, pertaining to royalty made by any independent party for the brand name and due to non availability of such transactions, the said method could not be considered as the most appropriate method. As the Tribunal in other years has also followed the finding of the Tribunal in earlier years, with no change in facts and circumstances for the impugned year, we find no justification in deviating ourselves from

the finding of the tribunal in assessee's case for other years. Therefore, ground nos. 11 to 16 raised by the assessee is hereby allowed.

23. Ground Nos. 17 to 22 raised by the assessee pertains to the payment of indirect cost. The facts of these grounds are that the assessee and CLSA HongKong had entered into an indirect expenses reimbursement agreement dated 01.04.2003 for the purpose of reimbursement of indirect expenditure incurred at group level, which pertains to remuneration and travel and entertainment cost of sales team stationed in London and Newyork who are engaged exclusively for the assessee's business. The breakup of reimbursement of expenses is tabulated hereunder for ease of reference:

For the period from April 1 2004 to March 31 2005					
				(Amount in USD'000s)	
		Allocation key	*London office*	*New York Office*	*Total*
1	*Sales staff expenses*	*Actual*	*489*	*535*	*1024*
2	*Travel & Entertainment*	*Allocated per headcounts*	*40*	*118*	*158*
3	*Office premises cost*	*Actual*	*21*	*117*	*38*
4	*Telecommunications*	*Actual*	*7*	*13*	*20*
5	*Professional fee*	*Actual*	*0*	*15*	*15*
6	*Depreciation*	*Actual*	*0*	*1*	*1*
7	*Market Data Services*	*Actual*	*15*	*17*	*32*
8	*IT Services*	*Actual*	*0*	*3*	*3*
9	*Courier, postage & exchange fee*	*Actual*	*0*	*2*	*2*
10	*Clearing & postage exchange fee*	*Actual*	*1*	*1*	*2*
11	*Other expenditure*	*Actual*	*1*	*0*	*1*
12	*Allocated costs from CL offices*	*Allocated per headcounts*	*44*	*159*	*203*
	Total		***618***	***881***	***1499***
			Allocation received in INR 6,060,930		

24. The above mentioned cost shall be contributed by the assessee towards portion of the overhead expenses incurred in the performance of functions performed by CLSA groups which is to be paid to CLSA BV or to such entity specified therein incurred by all

members of CLSA group which is attributable to the operations of the assessee. The quantum of expenses is allocated on the basis of number of staff employed by CLSA using the User Defined Accounting Key system 'UDAK' code which is mainly for remuneration and travel and entertainment cost of the sales team which are into marketing and sales. The expenditure also includes other office and general costs incurred by the sales team. It is also observed that there was a mismatch in the revenue of the assessee and the cost incurred by CLSA for generating the revenue were the entire commission income has been shown as income by the assessee and the corresponding costs for earning the same is incurred by CLSA. It was further contended that the total indirect expenses amounting to Rs.6,60,60,930/- claimed by the assessee does not have any markup or charge and are merely stated as the overhead expenses incurred by CLSA. The assessee had bench marked the said transaction by applying TNMM method were the net profit margin of comparable independent enterprise was 8.29% as compared to the margin of the assessee at 70.37% which according to the assessee is at arm's length.

25. Per contra, the ld.AO/TPO, rejected the assessee's contention for the reason that the assessee has failed to furnish details of the services and the cost incurred for such services to establish that it pertains to the business of the assessee. The assessee is said to have merely furnished debit note issued by the AE in favour of the assessee, mentioned as 'indirect cost' where the ld. A.O./TPO determined the cost to be Nil. The ld. CIT(A) confirmed the addition/adjustment made by the ld.TPO/A.O.

26. In the above factual matrix of the said issue, it is observed that the ld. A.O./TPO has not applied any of the prescribed methods mentioned in the provisions to determine

the ALP of the said transactions and had rejected the ALP determined by the assessee by holding that the assessee has failed to substantiate its claim by any documentary evidences.

27. The ld. AR for the assessee stated that the issue of payment on indirect cost has been decided by the Tribunal in assessee's case for A.Y. 2003-04 and 2004-05 where it has been held that the assessee has bench marked the transaction by using TNMM method as one of the prescribed method u/s. 92C of the Act, whereas the ld. TPO/A.O. has merely made an adhoc addition without prescribing to any of the methods as per the provisions of the Act and had thereby deleted the impugned addition. The facts of this ground is identical to that of earlier years where the Tribunal has decided this issue in favour of the assessee with no change in facts and circumstances during the year under consideration. Hence, we deem it fit to direct the ld. A.O. to delete the impugned addition made on account of reimbursement of indirect overhead expenses. Therefore, ground nos. 17 to 22 raised by the assessee is allowed.

28. Ground No. 23 pertains to the addition made on outstanding securities tax Rs.4,42,545/-. The facts of this ground is that the assessee during the year under consideration had received Rs.4,42,545/- from October 2004 to March, 2005 as security transaction tax from its clients, which is payable to the stock exchange and the same has been declared as liability in the books as on 31.03.2005. The ld. A.O. observed that the assessee has not paid the STT to the stock exchange neither has it settled to the clients pursuant to a settlement of disputes of levy of STT. The ld. A.O. held the same to be the part of trading/business receipts and added the same as business income of the assessee.

The ld. A.O. had relied on the decision of *Chowringhee Sales Bureau (P.) Ltd. vs. CIT* [1973] 87 ITR 542 (SC), *Deccan Hides and Skins Co. vs. CIT* [1983] 142 ITR 175 (Bom) and *CWT vs. Shri Bagpatia Food Industries* [1944] 207 ITR 1045 (Rajasthan), where it was held that sales tax/cess received by the assessee on account of sales but not paid to the exchequer neither refunded to the buyers will be trading receipts liable to be taxed as the business income of the assessee.

29. In an appeal preferred by the assessee against the said addition, the ld. CIT(A) upheld the order of the ld. A.O. The ld. AR for the assessee contended that this issue has been decided by the tribunal in assessee's case for A.Y. 2006-07 in favour of the assessee in ITA No. 8431/Mum/2010 vide order dated 14.12.2020. The relevant extract of the said decisions is cited hereunder for ease of reference:

> *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.*

30. By respectfully following the above said decision, we hereby allow ground no. 23 raised by the assessee and, therefore, direct the ld. A.O. to delete the disallowance made u/s. 43B(a) of the Act.

31. Ground nos. 24 to 26 raised by the assessee relates to the disallowance of transaction charges and straight through processing (STP) charges u/s. 40(a)(ia) of the Act amounting to Rs.2,06,75,227/- and Rs.4,01,314/- respectively for the reason that the assessee has not deducted TDS for the same as per the provisions of section 40(a)(ia) of the Act. The ld. AR for the assessee had relied on the decision of the Hon'ble Apex Court in the case of *CIT vs. Kotak Securities Ltd.* [2016] 383 ITR 001 (SC) which has been followed by the Tribunal in assessee's case for A.Y. 2006-07, where the said issue had been decided in favour of the assessee that no TDS shall be deducted u/s. 194J of the Act for the transaction charges. The relevant extract of the decision in *Kotak Securities Ltd.* (supra) is cited hereunder for ease of reference:

> *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.*
>
> *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.

32. As this issue is no longer resintegra, we deem it fit to hold that the assessee was not entitled to deduct TDS u/s.194J of the Act for the transactional charges and STP charges paid to stock exchange and NDSL respectively. We, therefore, delete the disallowance made u/s.40(a)(ia) of the Act and allow ground nos. 24 to 26 raised by the assessee.

33. Ground No. 27 pertains to the disallowance of STP charges paid to Singapore entity u/s. 40(a)(ia) of the Act. The assessee contends that it has paid STP charges of Rs.12,84,492/- to the Singapore entity u/s. 40(a)(ia) of the Act for which the assessee has deducted tax at source as per section 195 of the Act and had deposited the same to the Central Government. The ld. A.O. vide rectification order dated 02.03.2009 has allowed the said amount. Since the issue has already been resolved, we deem it fit to delete the disallowance after duly verifying the facts of this ground. Therefore, ground no. 27 raised by the assessee is allowed.

34. Ground no. 28 raised by the assessee pertains to levy of interest u/s. 234B and 234D of the Act. As this ground is consequential in nature, the same requires no adjudication. Therefore, ground no. 28 is dismissed as infructuous.

35. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 22.05.2024

Sd/-	Sd/-
(Prashant Maharishi) Accountant Member	(Kavitha Rajagopal) Judicial Member

Mumbai; Dated: 22.05.2024
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai