

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

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI S RIFAUH RAHMAN, ACCOUNTANT MEMBER**

**ITA No.5416/Mum/2010
(Assessment Year :2002-03)**

**ITA No.5864/Mum/2010
(Assessment Year :2003-04)**

M/s. Bofa Securities India Limited (Formerly known as DSP Merrill Lynch Limited) Ground Floor A Wing, One BKC G Block, Bandra Kurla Complex, Bandra (E) S.O. Mumbai-400 051	Vs.	Assistant Commissioner of Income Tax, Mumbai- 4(1)
PAN/GIR No.AAACD0535G		
(Appellant)	..	(Respondent)

**ITA No.5425/Mum/2010
(Assessment Year :2002-03)**

**ITA No.6175/Mum/2010
(Assessment Year :2003-04)**

Assistant Commissioner of Income Tax, Mumbai- 4(1)	Vs.	M/s. Bofa Securities India Limited (Formerly known as DSP Merrill Lynch Limited) Ground Floor A Wing, One BKC G Block, Bandra Kurla Complex, Bandra (E) S.O. Mumbai-400 051
PAN/GIR No.AAACD0535G		
(Appellant)	..	(Respondent)

Assessee by	Shri Percy J. Pardiwalla
Revenue by	Shri H.M. Bhatt
Date of Hearing	22/03/2024
Date of Pronouncement	10/06/2024

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid cross appeals have been filed by the assessee as well as by the department against order dated 30/04/2010 for the A.Y.2002-03; and order dated 03/06/2010, for the A.Y.2003-04, passed by CIT (Appeals)-15, Mumbai for the quantum of assessment passed u/s.143(3).

2. Since issues involved in both the appeals are common arising out of identical set of facts, therefore, same were heard together and have been disposed of by way of its consolidated order.

3. Ground No.1 relates to validity of reference made by the ld. AO to the ld. TPO for computation of ALP, however, same has been stated to be general ground and has not been pressed for the reason that the issue has been raised in other substantive grounds, therefore, the same is not pressed.

4. In ground No. 2, the assessee has challenged that ld. CIT(A) has failed to appreciate that assessee is a joint venture between Kothari family (58%) and Merrill Lynch having minority stake of

40% and the pricing of further transactions is dependent on the approval also of the unrelated JV, therefore, there is in built mechanism to meet the arm's length price and therefore, no TP adjustment should have been made. This ground too is not adjudicated as same has not been argued in view of the fact that grounds on merits were argued and is being discussed herein this order as agreed by the parties. Accordingly, ground No.1 & 2 are dismissed as infructuous.

5. In so far as issue relating to ground No. 3 & 4 relates to TP adjustment on account of equity broking services (Non-DVP segment / CH settlement). Under these grounds assessee had raised following issues:-

(a) The TPO/ CIT(A) erred in rejecting the application of the TNMM method for benchmarking these transactions.

(b) The TPO/ CIT(A) ought to have held that, assuming without admitting that CUP is the most appropriate method:

(i) The comparables adopted for the purpose of benchmarking ought to have been the weighted average brokerage charged for Top 10 all third party institutions or alternatively such average brokerage charged from Top 10 FIIs.

(ii) An appropriate volume adjustment ought to have been allowed, and

(iii) The transactions with Merrill Lynch International UK and Merrill Lynch Capital Markets Spain ought to have been aggregated for the purposes of benchmarking.

6. The brief facts are that the assessee was a joint venture company of DSP Financial Consultancy Pvt. Ltd., India and Merrill Lynch. The main activity of the company is in the business of investment banking, equity broking, primary dealership, distinction of securities, trading in shares and is also depository participant. We will take up the appeal for the A.Y.2002-03 first.

7. The aggregate book value of international transaction under consideration for the A.Y. 2002-03 and the ALP has been computed by the assessee is as under:-

Description	Nature transaction for assessee	As per books Rs.	ALP as computed by the assessee Rs.
Equity broking services	Income	24,04,63,477	24,04,63,477
Port fee charges	Expense	46,28,008	40,14,825
Administrative support services	Income	1,78,24,857	2,02,55,519

8. To justify the arm's length price, assessee had obtained transfer pricing documentation from two independent consultants, viz., Bharat S. Raut & Co. and Deloitte Haskins & Sells. In the transfer pricing documentation issued by both the

consultants, the Transaction Net Margin Method (TNMM) was applied for the purpose of benchmarking the transaction. For the FY 2001-02, the Net Profit Margin earned by Assessee from the Equity Broking Segment was 69.30%. In comparability analysis, the arithmetic mean of the Net Profit Margin of transfer pricing documentation obtained from the comparables was 19.15% and 17.78% as per rule reespectively by the two independent consultants. Based on such documentation, the transaction of provision of equity broking services by Assessee, was stated to be at arm's length.

9. However, the ld. TPO rejected TNMM as MAM adopted in TP study report on the ground that assessee company has used net margin earned by independent enterprises but whether they are working in comparable circumstances or not was not established. The assessee company had not worked out the net margin earned by it in the controlled transaction but the net margin earned in the whole equity broking business which has been used in analysis. Thereafter, he has pointed out many defects in the working of the TNMM by the assessee which has been highlighted in detailed at page 8 & 9 of the TPO's order. He required the assessee to furnish the details of volume of transactions, commission earned, average rate of broking and DVP rates and clearing house rates for the associated as well as independent enterprises and after getting the details and information, he asked assessee as to why the average broking rates charged to non-AE foreign clients may not be considered at

arm's length price while computing the arm's length price of international transaction relating to brokerage for both DVP and clearing house rates. Based on the information he has worked out analysis of client-wise information in the following manner:-

“10 In case of FIIs Clients (Non-AEs), the average rate of commission earned for DVP Trades and Non-DVP Trades Is 0.55% and 0.42% respectively, whereas in case of AEs, for these trades, the average rate of commission earned is 0.52% and 0.36% respectively. For deemed AEs, the figures are 0.31% and 0.10%.

(ii) For DVP Trades, in respect of deemed AEs, the average rates earned are as low as 0.02%/0.03% / 0.05%, whereas in case of non-AEs, the average rates in no case are less than 0.24%. The average rates are as high as 0.96%.

iii) In case of clearing house trades, the brokerage rate received from deemed AEs are as low as 0.10% and for AEs are 0.27%, in comparison to average of 0.42% in case of foreign clients (FIIs).

10. Thereafter, Id. TPO had made transfer pricing adjustment after analyzing the AE and non-AE business in the following manner:-

“Considering the above, the contention of the company that, the Comparable Uncontrolled Price Method is not the most appropriate method, is not acceptable and, accordingly rejected. In this case, the internal comparables are available and the data maintained by the company for such uncontrolled transactions would be more complete and reliable than the data of independent enterprises, which are selected by the company to be the comparables.

In the analysis using the Comparable Uncontrolled Price Method, the comparable uncontrolled transactions considered are the transactions with Foreign Institutional Investors (FIIs) and not the domestic clients, for the following reasons:

(1) The domestic clients, because of their presence in the country, are having access to market information Instantly. They have their full fledged set up for dealing in Indian markets only. They can negotiate the prices with various brokers. Their payments are in Indian Rupees. The costs incurred for such clients to the brokers are less, because of lesser communication expenses incurred. The mutual funds and financial institutions are the big investors in Indian Market and they most of the time decides the market.

(ii) The AEs and the Other Foreign Institutional Investors are on same footing, as far as their dealings with DSPML are concerned.

Considering the above, the average brokerage rates, In case of foreign clients (FIIs) are considered as Arm's Length Rates and the same are 0.55% for DVP Trades and 0.42% for Non-DVP Trades. The rates for Non-DVP Trades are less because of no funding costs. The Arm's Length Price of the brokerage earned in respect of various associated entities are computed as below:

(a) DVP Trades Associated Enterprises:

The average rate of commission earned is 0.52%, on a total volume of Rs.1,883,332,792/- for 12 AEs. The volume of Rs.62,738,219,349/- in case of Non-AEs, is in respect of 315 clients. The average per client volume for Non-AEs comes to Rs.199,168,950/-. For the corresponding 12 AEs, the volume would be Rs.2,390,027,403/-, which is more than the volume of Rs.1,833,332,792/-. Therefore, the volume in case of AEs, is less than the per client volume of Non-AEs. Therefore, no adjustment, on account of volume difference, is required to be made. By considering the Arm's Length Rate of 0.55%, the Arm's Length Price of commission would be Rs.10,083,330/-. 95% of this price, by considering the provisions of section 92C(2) would be Rs.9,579,163/- which is less than the commission of Rs.9,589,679/- earned by the company from the AEs, therefore, for this transaction, no adjustment is required to be made.

(b) Deemed AEs (Program Trades):

In this transaction, for 30 deemed AEs, the volume is Rs.4,419,333,913/. The average volume per client works out to Rs.147,311,130/-, which is less than Rs.199,168,950/- per client in case of Non-AEs, as computed in (a) above. Therefore, the volume per client in case of deemed AEs being less than per client volume of Non-AEs, no adjustment is required to be made on account of volume difference and the Arm's Length Rate of commission is adopted at 0.55%. Considering this rate, the Arm's Length Price of the commission is works out to Rs.24,306,336/- (0.55% of Rs.4,419,333,913/-), the 95% of the price works out to Rs.23,091,019/-, which is more than the commission received of Rs. 13,775,128/- by the assessee from such trades. Accordingly, due to this, the Arm's Length Price Is worked out at Rs 24,306,336/-, as against the transaction value of Rs.13,775,128/-. This will result into an addition of Rs. 10,531,208/- to the income of the assessee.

(c) Non-DVP Trades:

In respect of 102 Non-AE clients, the total volume is Rs.27,743,440,942/-. The average rate is 0.42%. The details of transactions of associated enterprise are given below:

<i>Sr. No.</i>	<i>Name of A.E.</i>	<i>Total Volume (Rs.)</i>	<i>Brokerage Received (Rs.)</i>	<i>Average Rate of Brokerage</i>
<i>1</i>	<i>Merrill Lynch International, U.K.</i>	<i>26,531,829,262</i>	<i>71,122,376</i>	<i>0.27%</i>
<i>2</i>	<i>Merrill Lynch Capital Espana S.A. SVB, Spain.</i>	<i>33,621,813,815</i>	<i>145,950,353</i>	<i>0.43%</i>
<i>3</i>	<i>ABN AMRO Investment Management Funds, Netherlands</i>	<i>27,215,582</i>	<i>25,941</i>	<i>0.10%</i>

From the above details, it is seen that the average brokerage rate in comparable uncontrolled transactions is 0.42%. The rate in respect of Merrill Lynch, Spain is 0.43%, which is comparable to the rates in comparable uncontrolled transactions and accordingly the same complies with the principles of Arm's Length. In respect of Merrill Lynch International, U.K., the average brokerage rate received is 0.27%, for a volume of Rs.26,531,829,262/-. The company earned an average brokerage rate of 0.43%, from another AE, whose volume was more than the Merrill Lynch, U.K. Therefore, all the arguments of the assessee that, volumes have affected the brokerage rate, falls flat. Considering this, the Arm's Length Rate of brokerage in case of Merrill Lynch, U.K. is adopted at 0.42%. Considering this rate, the Arm's Length Price of commission received/receivable is worked out at Rs.111,433,682/-, as against the commission received/receivable of Rs. 71,122,376/-. Due to this, an adjustment of Rs.40,311,306/- to the income of the assessee.

L In respect of the remaining International transactions of ABN AMRO funds, the volume of trade being very low of Rs.27,215,582/-, considering the smallness of amount, no adjustment is made.

The adjustments in the equity broking business are summarised as below:

<i>(1) For DVP Trades</i>	<i>Rs. 10,531,208/-</i>
<i>(ii) Non-DVP Trades</i>	<u><i>Rs.40,311,306/-</i></u>
<i>Total</i>	<u><i>Rs.50,842,514/-</i></u> <i>=====</i>

The Arm's Length Price of each international transaction, AE wise, is not computed separately, as the same is not available in Form No.3CEB for DVP and Non-DVP Trades. Otherwise also, it is not required to be computed separately, as all the similar transactions, are aggregated, by the company for the analysis.

11. Ld. CIT(A) has upheld the approach of benchmarking adopted by the ld. TPO, but thereafter he allowed a sales/marketing adjustment of 0.06% for the difference in the sales/ marketing function performed by Assessee for its AEs vis-à-vis third party clients based on the salary cost of the identified employees of Assessee engaged in providing the sales/ marketing services. Names of the sales/ marketing team employees in respect of whom salary costs have been identified and considered for sales/ marketing adjustment. He has rejected the assessee's contention for volume adjustment. Ld. CIT(A) has adjusted rate of brokerage of 0.31% and the ALP on which worked out Rs.8,22,40,670/- whereas brokerage charged by the assessee was 11,22,376/- as against ALP worked out by the ld. TPO. Thus, part relief was given by the ld. CIT(A).

12. We have heard rival submissions and perused the relevant finding given in the impugned order as well as material referred to before us. Succinctly put the relevant facts qua the issue involved are that, during the year assessee has rendered broking services of two AEs viz., Merrill Lynch International U.K (MLI) at Merrill Lynch Capital Market Espana (MLCME). The ld. TPO has rejected the TNMM method and applied CUP method after comparing the weighted average brokerage commission rates charged by assessee to its AE, i.e., Merrill Lynch International UK with the weighted brokerage rate charged by assessee to all third party Foreign Institutional Investors (FIIs) in the CH/non-DVP segment. This has resulted into adjustment amounting to

Rs.4,03,11,306/-. Since the average brokerage rate charged to other AE i.e. MLCME was higher than the weighted brokerage commission rates charged by the assessee to all third party FII clients in the CH/ Non-DVP Segment, no adjustment has been made.

13. In the summary manner adjustment made by the Id. TPO is as follows:

Particulars for Non-DVP/ CH segment	Volume (INR)	Commission amount (INR)	Commission Rate
Weighted average commission rate for third Party FIIs (ALP as per TPO)	27,74,34,40,942	11,77,63,938	42bps
Average commission rate for MLI	26,531,829,262	71,122,376	27bps
Average commission rate for MLCME	33,621,813,815	1,459,508,353	43 bps

14. Before us, one of the contentions raised was TNMM should be the most appropriate method because the margin earned by the assessee was 69.30% from the entire broking segment which was higher than the arithmetic mean of the margins earned by comparable companies as per the two independent benchmarking reports which were 19.15% and 17.78% and therefore, it was stated that the same should be considered at

arm's length. The reasons for not applying CUP as highlighted before us were as under:-

- Brokerage commission rates are negotiated by the broker with its clients such negotiation could vary from client to client.
- Equity Broking business operates in a competitive environment with an ongoing pressure on competitive brokerage rates to be charged to the clients.
- Because of new international players as well as local brokers, clients always demand fine/competitive pricing, and the rates are negotiated and agreed with each client on an individual basis.
- Volume of business also plays a major role in influencing the brokerage rates (AEs comprise of -37.5% of the total institutional volume of business).
- Therefore, several factors are considered in negotiation, e.g. volumes, rate charged by competitors, market perception to determine the price to be offered to a client, it is not possible to translate such intangible factors to mechanical adjustments to arrive at an internal CUP.

15. However, at the time of hearing, we asked the Ld. Sr. Counsel, Mr. Pardiwala for the assessee that, if CUP is to be considered as MAM looking to the nature of broking business where comparable price can be benchmarked with similar transaction with third parties both FIIs and domestic institutions, which will be best way to benchmark the ALP, because functions

performed by assessee for all institutional clients i.e. AEs and non-AEs are the same. There is no difference in the functions performed by the assessee for foreign and domestic institutional clients. In response, Ld. Sr. Counsel, contended that if CUP is to be considered as most appropriate method, then the approach of TPO in benchmarking the brokerage is incorrect, because the Ld. TPO has not considered the brokerage rates charged by Assessee to its third party FII clients, which according to him cannot be compared because the geography of the service recipient is relevant while determining comparability. However, given that the functions performed by Assessee are the same for foreign as well as domestic institutional clients then location of service recipient is not relevant, because assessee is providing same services from India. He submitted that the rates charged to the category of all institutional third party clients should be considered to benchmark from comparable uncontrolled transaction be considered. Further, use of pricing charged to third party institutional clients as comparable to the services provided by an assessee to its AE which is an institutional client has also been upheld by the Mumbai Tribunal in the case of Morgan Stanley India Company Private Limited (ITA No-266/Mum/2006) for the AY 2002-03. Before us Ld. Counsel had also submitted that the volume of business of assessee with its AEs only comprise of 37.5% of the total institutional volume of business. In fact, in the Non-DVP/ CH segment, the AE volume is INR 6,015 crores as against a volume of INR 2,7774 crores with non-

AEs FIIs, i.e. AE volume is more than 2 times the volume with all Non-AE FIIs. Thus, there is internal CUP available.

16. At the time of hearing, we had asked the Ld. Sr. Counsel, if CUP method is to be applied for benchmarking the transaction then why not weighted average of rates charged at Top 10 third party institutional clients should be used as comparable. In response data has been provided by the assessee before us which is as under:-

No.	Name of the Client	Turnover	Commission excl. Service Tax	Average Rate
1	Government Of Singapore Investment Corpn. Pvt. Ltd. A/C. Government of Singapore	5,78,30,87,646	2,74,66,587	0.47%
2	HSBC Global Investment Funds A/C HSBC Global Investment Funds - Mauritius Ltd	5,02,05,51,160	1,90,58,932	0.38%
3	B T Funds Management Ltd. As Trustee of B T Pacific Basin Fund	2,10,02,52,268	99,89,524	0.48%
4	Government Of Singapore Investment Corporation A/C Monetary Authority of Singapore - J	1,79,26,21,096	69,54,919	0.39%

5	Government Of Singapore Investment Corporation Pvt. Ltd. A/C. Monetary Authority of Singapore - H	1,37,67,95,841	49,79,078	0.36%
6	Unit Trust of India	1,10,28,54,106	16,06,287	0.15%
7	Abu Dhabi Investment Authority	1,05,34,66,573	45,30,363	0.43%
8	Advantage Advisers Inc. A/C The India Fund Inc.	92,87,77,571	44,28,967	0.48%
9	Franklin India Bluechip Fund	89,87,27,703	21,16,461	0.24%
10	UTI Bank Ltd.	60,04,01,453	16,62,544	0.28%
	Arithmetic Mean			0.40%

17. Thereafter we insisted the ld. Counsel to submit that if only third party FIIs is taken as comparable, the rates charged to the Top 10 third party FIIs and companies thereof. The assessee has filed the details of rates charged to the top 10 third party FIIs which are as under:-

No.	Name of the Client	Turnover	Commission excl. Service Tax	Average Rate
1	Government Of Singapore Investment	5,78,30,87,646	2,74,66,587	0.47%

	Corpn. Pvt. Ltd. A/C. Government of Singapore.			
2	HSBC Global Investment Funds A/C HSBC Global Investment Funds- Mauritius Ltd.	5,02,05,51,160	1,90,58,932	0.38%
3	B T Funds Management Ltd. As Trustee of B T Pacific Basin Fund	2,10,02,52,268	99,89,524	0.48%
4	Government Of Singapore Investment Corporation A/C Monetary Authority of Singapore -J	1,79,26,21,096	69,54,919	0.39%
5	Government Of Singapore Investment Corporation Pvt. Ltd. A/C. Monetary Authority of Singapore- H	1,37,67,95,841	49,79,078	0.36%
6	Abu Dhabi Investment Authority	1,05,34,66,573	45,30,363	0.43%

7	Advantage Advisers Inc. A/C The India Fund Inc.	92,87,77,571	44,28,967	0.48%
8	Oai Mauritius Limited - Savers India Fund	59,43,16,054	22,45,764	0.38%
9	Bbl (L) Invest India	58,17,89,241	27,68,430	0.48%
10	Government Of Singapore - E	55,64,29,100	25,07,610	0.45%
	Total/ Arithmetic mean			0.43%

18. This exercise was done only to simplify the matter and issue involved without going into other controversies as what should be the appropriate method and also to make proper comparability analysis under CUP, which TPO has also held that should be the MAM. Thus, in the top 10 third party institutional clients, the average rate was 0.40% and the top 10 third party FIIs worked out to 0.43% whereas for similar broking services for Merrill Lynch Capital Market Espana was 0.36% which was as under:-

Name of the Client	Turnover	Commission excl. Service Tax	Average Rate
MERRILL LYNCH INTERNATIONAL	26,53,18,29,262	7,11,22,376	0.27%
MERRILL LYNCH CAPITAL MKT ESPANA S.A. SV	33,62,18,13,815	14,59,50,353	0.43%
Total AE Trades	60,15,36,43,078	21,70,72,729	0.36%

19. Further, it has been submitted that there are significant differences in the volume trades done with the AE and third party clients in Non-DVP/ CH segment, the AE volume is Rs.6,015 crores as against a volume of Rs.2,774 crores with non-AEs FIIs i.e. AE volume is more than 2 times the volume with all Non-AE/ FIIs. It has been submitted that certain adjustments should be made on this account also. Further, Ld. Sr. Counsel stated that in case of the Non DVP/ CH segment, the TPO has made similar comparison of the average brokerage commission earned from MLI with the weighted average brokerage commission earned from third party FIIs clients and made an adjustment for the difference. However, in assessee's own case in AY 2002-03, under the DVP segment, the brokerage commission received from all AEs (on an aggregated basis) was compared with the brokerage commission received from third party FII clients. Basis such comparison, since the weighted average brokerage commission rate earned from AEs was higher than the

weighted average brokerage commission earned from third party FIIs, the transaction was considered to be at arm's length by the Id. TPO. The aforesaid approach of benchmarking on an aggregate basis has also been followed by the Id. TPO in the assessee's own case in the subsequent years, viz., (AY 2004-05 to AY 2011-12). Thus, he submitted that comparison should be done on aggregate basis where the weighted average brokerage rate earned by assessee from AEs (i.e. MLI and MLCME) is compared with the weighted average brokerage rates earned from third party FIIs, post factoring sales cost adjustment as granted by the CIT (A), the transaction shall be at arm's length and the entire adjustment would stand deleted.

20. Since at the time of hearing we made it clear that we are not going to the controversy of whether TNMM is most appropriate method or CUP and both the parties agreed that CUP should be applied after taking into consideration, proper comparability analysis because the functions performed by the assessee for the AEs are non-AEs were the same. If we compare the average rate of 0.36% from the brokerage earned from AE and the CH/Non-DVP, it is seen that it comes around to 0.36%, whereas if we compare with the same way with top 10 third party institutional clients, the average rate was 0.40% and the top 10 third party FIIs worked out to 0.43%. We find that the Id. TPO also under the DVP segment has taken the brokerage commission received from all AEs on an aggregate basis which was compared with the brokerage commission received from

third party FIIs. Since the weighted average brokerage commission rate earned from AEs was higher than the weighted average brokerage commission earned from third party FIIs, the ld. TPO has treated it to be at ALP. Therefore, if the same yardstick is adopted and the same benchmarking of aggregate basis as been upheld by the ld. TPO in assessee's own case in the subsequent years right from A.Y.2004-05 to 2011-12 is taken into consideration, then weighted average brokerage rate earned by assessee from AEs if compared with rate earned by third party FIIs, the difference is 0.07%. Further, we find that ld. CIT(A) has given adjustment of sales cost of 0.6%, which we find is most reasonable basis for benchmarking the sale cost adjustment, because assessee has to incur extra sales cost in the case of third party FIIS which may not be the case with the AEs. This adjustment has been also demonstrated with figures by the Ld. CIT (A), which we uphld. Thus, the working of ALP is as under:-

(i)	Weighted average rate of brokerage of all third party FIIs	- 43 Bps (0.43%)
(ii)	Less Marketing adjustment as allowed By the ld. CIT(A)	- 6 Bps (0.06%)
(iii)	Adjusted weighted average brokerage for all third party FIIs	- 37 Bps (0.37%)
(iv)	Weighted average rate of brokerage Charged to MLI & MLCME	- 36 Bps (0.36%)
(v)	ALP determination	- 1 Bps (0.01%)

21. Thus, at the most adjustment would be of 0.01% if at all which is too miniscule to apply to make adjustment and therefore, we hold that no adjustment is required to be made.

22. The next ground relates to **Port Fee charges paid** by assessee which is the issue also raised in Revenue's appeal ground No.2. Both the grounds of the assessee as well as Revenue reads as under:-

Ground 5-Port Fee Charges paid by BofASIL

(a) The learned CIT(A) erred in applying the markup to cost at 15% as against 25% applied by the AE for determining the ALP in respect of the port fee charges paid by the appellant and thereby confirming addition to the extent of a sum of Rs. 3,20,794/- made by the Assessing officer under 92CA(3) of the Act.

Department Appeal Ground - 2

On the facts and in the circumstances of the case and in law, the CIT(A) has erred in directing the AO to allow deduction of Rs.36,94,031/- holding that a mark-up of 15% is reasonable as against the amount of Rs. 40,14,825/- of ALP worked out by the TPO in respect of Port Fee Charges paid by the assessee to its AE.

23. The brief facts stated before us are that during the year under consideration Assessee paid port fees charges to its AE for running and maintaining the centralized infrastructure required for operating the MS Exchange E-mail system which was essential for Assessee, as a broker. This system would result in communication in a secure environment for Assessee, which is also more efficient in terms of transmission speed and vital to Assessee's business keeping in mind the business sensitivities

and volume of email flow. The costs incurred along with an appropriated mark-up were allocated to each mailbox on the basis of the total number of mailboxes over a period of 12 months.

24. It has been stated that Merrill Lynch does not have any other minority JV apart from DSML (now renamed as BofASIL) Hence, while Merrill Lynch Holding (Mauritius) is not the direct service provider of the services to DSPML (now renamed as BofASIL), these charges are recovered by Merrill Lynch Holding (Mauritius) (a minority JV partner and a shareholder in the company) from the company for administrative and operational ease. Such port fee charges paid by Assessee were essential for its business and alternatively Assessee would have had to obtain these services from a third party at a higher cost as it would not have the same negotiation strength with international third parties & economies of scale as that of its AE. Per user cost was US\$18.09 from April 2001 to December2001 and US\$ 20.68 from January 2002 to March 2002 and a mark-up of 25% was charged thereon.

25. Since most of the charges formed part of the costs towards the broking and investment banking divisions, which were concluded to be at arm's length as per Assessee under the TNMM method and charges across all divisions (equity broking, investment banking and others) was consistent, the transaction was considered to be arm's length.

26. However, the ld. TPO has treated it to be 'Nil' on the ground that no benefit was availed by assessee in respect of such charges. The ld. CIT (A) accepted the assessee's contention partly if the benefit upheld in respect of services and determined 15% as appropriate mark-up basis in respect of the administrative support services transaction of assessee. Such mark-up was applied merely on the basis of a theory applying a lower mark-up on costs involving direct and indirect costs as compared to a mark-up only on direct costs.

Assessee	TPO	CIT(A)
Total Cost +25%	Nil	Total Cost +15%
Rs.40,14,825/-	Nil	Rs.36,94,031/-

27. Thus, the mark-up of 15% applied by the ld. CIT (A) is purely on adhoc basis. After considering the facts finding given in the impugned order, we find that assessee had paid Port Fee Charges amounting to Rs.46,28,008/- to its AE, however, in the transfer pricing study report ALP was worked out at Rs.40,14,825/- and the said amount was claimed. The ld. TPO worked out ALP at 'Nil' on the ground that Merrill Lynch Holding (Mauritius) was itself is not a service provider and further since assessee had not furnished the details of allocation received by Merrill Lynch Holding (Mauritius) from the ML entity which is providing services, whereas the case of the assessee is that these parties represent recovery towards on-going cost incurred across the global to run, maintain and provide MS Exchange E-mail

System services with an appropriate mark-up. As per the agreement it was agreed that the charges were to be at cost +25% which were applied to previous relevant assessment year under question before us. The assessee had submitted the break-up of the cost per user ID per month certified and provided by ML and the relevant agreements. These charges were allocated to AEs on the basis of total no. of mailboxes used over a period of 12 months. Thus, the proper allocation and proper work has been given for allocation and cost plus mark-up. Based on these details, we do not find any reason for adhoc mark-up of 15% applied by the ld. CIT (A) and moreover ld. TPO has not given any basis for taking it 'Nil'. Accordingly, we accept the cost plus mark-up of 25%. Accordingly, ground No.5 of the assessee is allowed and ground No.2 raised by the Revenue is dismissed.

28. Lastly, the issue of administrative support services as raised in ground No.6 by the assessee and ground No. 3 by the department reads as under:-

“a) The learned CIT(A) erred in upholding the action of the Assessing officer in making the addition to the extent of Sum of Rs. 28,08,511/- under section 92CA(3) of the Act in respect of administrative support services provided by the appellant to the AE

Department appeal ground-3

On the facts and the circumstances of the case and in law, the learned CIT(A) has erred in considering the ALP mark up at 15% as against 25% worked out by TPO, on account of Administrative Support Services amounting to Rs. 1.18.78.143/- provided by the assessee to its AE stating that the TPO has not given a rationale

reason for rejecting the Direct and Indirect costs worked out by the assessee while determining the markup at 25%.”

29. The brief facts as stated before us are that assessee was engaged to carry out co-ordination and administrative support services (ADC) to monitor the functioning of a third party engaged in development of securities related systems including the software for the AE from time-to-time. The provision of such services was steered by a 2 member team with administrative support from 1-2 people (major part of the year only 1 support member was involved). Further, the administrative support was functioning only out of Chennai office and other members operated from the vendors office and did not utilize any office space and infrastructure of Assessee. For the provision of such services, Assessee charged its AE on the basis of the direct costs incurred plus a mark-Up of 10%. While determining the ALP of the transaction, Assessee considered the mark up at 25% on direct cost and offered the shortfall in its return of income. Based on the computation of the Assessee, the margin earned by the assessee works out to be 17.2 percent which was higher than the arm's length margin of comparable companies of 13.67% and accordingly, the transaction was concluded to be at arm's length. The learned TPO in para 4.3 of his order, considered direct and indirect cost using employee cost as an allocation key for allocating the indirect cost and applied it to the total administrative, other expenses and depreciation cost for the year and made an adjustment of Rs 1,04,06,386/- Further, the learned TPO imputed interest on delayed receivables at an

interest rate of 12% for an average period of 6 months. The ld CIT(A) reduced the costs that were attributable to other business activities from the cost base used by the TPO as no rationale was provided for the same and changed the allocation key from employee cost to employee count. Further, the learned CIT(A) reduced the mark-up from 25% to 15%. Accordingly, the learned CIT(A) granted relief of Rs. 75,97,875/-. The observation and finding of the ld. CIT (A) reads as under:-

“8.7. I have considered the order of the TPO as well as the submissions of the appellant. In my view, the TPO has not given a rationale reason for rejecting the Direct and Indirect costs worked out by appellant other than stating at page 20 of his order that "the entitlement for assets and facilities in any office depends upon the grade/ level of the employee in organization". I agree with the appellant that TPO while working out the total Costs which included direct and indirect costs should not to have noted the mark of 25%, which per the arrangement was only Direct Costs.

8.8. Having regard to the facts, I accept the revised (without prejudice) working of the appellant which is based on headcount. The average mark-up per the transfer pricing study was worked out at 13.67%. Considering the TP study and the assessment recently concluded in the hands of the Indian subsidiary rendering the same services, I hold that a mark-up at 15% as against 25% (which was taken by the appellant on a different cost level indicator viz direct costs) is reasonable. The ALP would worked out as under:-

	<u>Rs.</u>
<i>Employee costs</i>	<i>1,49,50,099</i>
<i>Travel, Telephone and other costs (as returned by the appellant)</i>	<i>12,458</i>

Allocation out of "Administrative & Other Expenses & Depreciation" (Total Rs 40.79 crores) 38,51,000 on the basis of head count)

<i>Total</i>	<i>2,00,553,27</i>
<i>Mark up at 15%</i>	<i>3,008,313</i>
<i>Arms length Price as determined by this office</i>	<i>2,30,63,730</i>

8.9. The appellant has contended that benefit of +/- 5% be considered while determining the arm's length price for adjustments made to the international transactions. For reasons aforesaid, I have already decided that the contention of the appellant is not acceptable. and this submission is rejected.

8.10. The ALP per the appellant was Rs. 2,02,55,521/-. The AO has reworked the ALP at Rs.3,06,61,605. The ALP as worked out by this office is Rs.2,30,63,730/- The appellant gets a relief of Rs.75,97,875/-

30. After considering the aforesaid finding and arguments placed by both the parties, we find that it is not in dispute that ML entity had engaged software companies to develop security market related software systems for use and rendering its security related services as a measure of quality and standard control it had engaged the assessee to provide coordination and administrative support services to manpower development of security related system including software from time to time. The provision of such services was by two member team with administrative support which functioning only with the administrative support from one or two persons. One of the employee working from Chennai office of the assessee while other

party from division office. The assessee charged direct cost plus 10% for these services and this was arranged to reduce direct cost plus 25% effective from 01/04/2002. Assessee had made adjustment in its computation of income for assessment year under consideration on the basis of direct cost plus 25% and use TNMM for comparison purpose. The net margin of comparable companies in the TP study was 13.67% whereas assessee made interest margin of 17.20%. The Id. CIT (A) has considered the cost computation considering the cost related activity and using employee headcount as allocation key and after considering the cost pertaining to the activity. The computation of ALP as per assessee, TPO and CIT (A) is summarized as under:-

Particulars	Assessee	TPO	CIT (A)
Cost Base	Direct cost consisting of employee cost, travel and telephone and other costs	Direct cost Indirect cost - Total admin, other expense & Depreciation	Direct cost Indirect cost - Total admin, other expense and depreciation as reduced by costs not attributable to these services.
Method of allocation of Administrative & Other expenses & Depreciation	N.A	Based on employee cost	Based on employee count
Mark-up	25%	25%	15%

31. Once in the TP study report the arm's length mark-up under the comparison with comparable uncontrolled transaction worked out at 13.67% which has not been rejected by the Id. TPO and assessee had shown the margin of 17.2% in the TP study report and it is also that even the 15% mark-up adopted by the Id. CIT(A) is greater than the arm's length price determined by the assessee in TPSR. Therefore, assessee's margin has to be reckoned at arm's length and therefore, no adjustment is required. Accordingly, this adjustment is deleted. Accordingly, ground No.6 of the assessee is allowed and ground No.3 of the Revenue is dismissed.

32. In Revenue's appeal ground No.1 grounds reads as under:-

“On the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting the addition of Rs. 1,05,31,208/- made by the AO in respect of brokerage for program trades stating that the nature of transaction is distinct from regular broking transaction and it is nota case for different countries or that ML, charges a higher rate and gives a lower rate to the assessee.”

33. The brief background qua the nature of 'programme trades' also called as Basket Trades or Portfolio Trades are used to describe a single transaction of a series of transactions executed by institutions when acquiring or disposing of an entire portfolio or a material part of the portfolio or a basket with a minimum number of stocks/ a minimum value. These trades are executed for a particular sector or across regions comprising of multiple markets. The brokerage rates are influenced by the volume as well as competitive market place. In the case of a Program trade

it is usually the client who initiates the order with Merrill Lynch (ML). A program trade typically involves no sales effort/research advice. It involves mainly execution services. Normally the client would approach a single broker or multiple brokers with a basket of trades it would like them to execute across regions/markets and request for a rate /bid. Depending on various parameters such as the client, total trade value etc. ML would bid for the order at a competitive rate If ML and client agree on the terms such as rate, execution timing, etc., the business would be awarded to ML who would in turn execute the trades across countries/regions. The trades relating to India, part of the basket, will be executed by Assessee upon intimation by ML. Assessee issues contracts directly to the clients and settles the same also directly with clients Such transactions are executed through program desks, in order to reap the volume benefit for pricing. Some of the clients (mainly index funds) deal only through program desks.

34. It has been stated that despite low rate of brokerage in respect of program trades, brokers find it compelling to execute such trades for retaining their clients as well as the market share. Further, some of these clients also give business other than program trades which are executed at normal brokerage rates resulting in substantial brokerage revenue. Refusal to execute program trades could result into potential loss of normal brokerage income or the client. However, at times, if it is not an important client relationship or the order value is not large

enough for the trade to qualify as a program trade and consequential volume discounts, ML would not be keen to execute the trades at low brokerage rates. Accordingly, it may either bid at non-competitive rates for program trades or may refer the client to come through the normal mechanism.

35. The TPO had made adjustment in respect of brokerage commission earned by assessee from programme trades by comparing the rate charged to the client for programme trades for brokerage commission rate charged by assessee with third party FIIS for the DVP rates. The manner in which the relevant observation of the ld. TPO reads as under:-

“In this transaction, for 30 deemed AEs, the volume is Rs.4,419,333,913/-. The average volume per client works out to Rs.147,311,130/-, which is less than Rs.199,168,950/- per client in case of Non-AEs, as computed in (a) above. Therefore, the volume per client in case of deemed AEs being less than per client volume of Non-AEs, no adjustment is required to be made on account of volume difference and the Arm's Length Rate of commission is adopted at 0.55%. Considering this rate, the Arm's Length Price of the commission is works out to Rs.24,306,336/- (0.55% of Rs.4,419,333,913/-), the 95% of the price works out to Rs.23,091,019/-, which is more than the commission received of Rs. 13,775,128/- by the assessee from such trades. Accordingly, due to this, the Arm's Length Price is worked out at Rs.24,306,336/-, as against the transaction value of Rs. 13,775,128/-. This will result into an addition of Rs.10,531,208/- to the income of the assessee.”

36. The ld. CIT (A) has deleted the addition in the following manner:-

6.10. I have considered the TPOs order as well as the submissions of the appellant. The nature of transaction is distinct from the regular broking transaction. The transaction itself is with third parties. The program trades are classified as International Transaction only because the rates are negotiated by Merrill Lyn. However, it cannot be disputed that these are third party Independent transactions where the appellant gets its negotiated brokerage from these parties directly and no other benefit is passed on to ML entities from the business transacted by the appellant with these third parties. Further, it is not a case that different rates are negotiated for different countries or that ML charges a higher rate and gives a lower rate to the appellant. The contract note is raised direct on the client by DSML and amount received directly by DSPML from the third party client. The TPO has conjectured and surmised that indirect benefits may have been obtained off shore which is not based on any material evidence. Considering the aforesaid, I hold that the AO was not justified in making any adjustment in respect of brokerage charged for such program trades by the appellant. Accordingly, the addition made by the AO amounting to Rs. 1,05,31,208/- in respect of brokerage for program trades is deleted.

37. After hearing both the parties and on perusal of the order as noted above programme trades are third party trades entered into by the assessee where rates are negotiated by AE. Since the contract note and brokerage income is settled directly between third party and assessee which has been reported as a deemed international transaction in terms of 92B (2). Nonetheless these are third party independent transactions where assessee got its negotiated brokerage from these parties directly and no benefit is cost on to ML entities from the business transacted by the assessee in these third parties. The certificate from Merill Lynch to the effect that brokerage in respect of premium rate is received directly by the clients of DSPML has been placed in the paper

book also before us. Further, in subsequent years, i.e., from A.Y.2006-07 onwards, the ld. TPO himself has accepted the transaction to its arm's length in assessee's own case. Thus, we do not find any reason to tinker with the order of the ld. CIT(A) and same is confirmed and consequently the Revenue's grounds are dismissed.

38. Now coming the corporate tax grounds, the Revenue's appeal being ground No.4 and assessee's appeal being ground No.7 relates to disallowance u/s.14A. The Revenue's appeal on the ground that ld. CIT(A) has erred in giving relief of Rs.4,60,37,774/- whereas assessee is in appeal in upholding the disallowance of Rs.24,591/- over and above the suomoto disallowance made by the assessee at Rs.37,00,000/-.

39. The brief facts are that during the year under consideration the assessee had earned dividend income of Rs. INR 9,52,47,305 (INR 9.52 Cr) which was claimed exempt under section 10(33) of the Act. The assessee had suo moto made a disallowance under section 14A of the Act of INR 37,00,000 (INR 0.37 Cr). As on 31 March 2002, the assessee had net owned funds of INR 2,89,31,15,000 (INR 289.31 Cr) comprising of share capital of INR 22,50,00,000 (INR 22.5 Cr) and Reserves & surplus of INR 2,66,81,15,000 (INR 266.81 Cr) The borrowed funds/ owed funds as on 31 March 2002 were INR 3,33,16,18,000 (INR 333 16 Cr). Further, the investments of the Appellant as on 31 March 2002 were INR 98,96,61,000 (INR 98.97 Cr).

40. However, the ld. AO made a disallowance of INR 4,97,62,365 (INR 4.98 Cr) on the following basis:-

- Proportionate interest expense to the extent of INR 4,50,00,000 (-INR 4.5 Cr) which was computed by applying the average rate of interest to the total investments and multiplying the same with the ratio of the total borrowings to the total funds of the Appellant. While doing so the learned AO considered that the interest expenditure incurred on the borrowings is attributable to the investments made by the Appellant.
- 5% of the dividend income of INR 9,52,47,305 ie., INR 47,62,365 (~INR 0.48 Cr) being administrative expenses such as staff salary, rent, Demat charges, etc. by placing reliance on the decision of the Hon'ble Bombay High Court in the case of M/s. Sind National Sugar Mills P. Ltd. Vs CIT (121 ITR 742)

41. Before the ld. CIT(A) assessee was required to furnish the disallowance as per Rule 8D. In response to which assessee filed working wherein the disallowance worked out to Rs.37,24,591/-. The ld. CIT(A) based on the working of Rule 8D has disallowed further amount of Rs. 24,591/- over and above the suomoto disallowance of Rs.37,00,000/-.

42. We have considered the aforesaid finding of the ld. AO and ld. CIT (A). The ld. AO has made disallowance by taking proportionate interest expenses to the extent of Rs.4.5 Crores

which was computed by applying the average rate of interest to the total investment and multiplying with the same with the total borrowing to the total fund of the assessee 5% of the dividend income towards administrative expenses. First of all, it is a well established law that Rule 8D is not applicable in the A.Y.2002-03 and the basis of which ld. AO has made the disallowance cannot be sustained, *firstly*, that no interest expenses can be attributed as noted above assessee had more surplus interest free funds by sixth investment made by the assessee. Thus, in such a case no disallowance can be made. *Secondly*, in so far as Revenue expenses are concerned, the ld. AO has taken 5% of dividend income. The ld. CIT (A) has reduced the addition after applying Rule 8D(2), the disallowance upheld by the ld. CIT(A), which is almost to the extent of suomoto disallowance offered by the assessee which under the facts and circumstances and looking to the fact that Rule 8D is not applicable is far more sufficient. Thus, suomoto disallowance offered by the assessee is accepted. Consequently, assessee's appeal is allowed and Revenue's appeal is dismissed.

43. Accordingly, assessee's appeal is allowed and Revenue's appeal is dismissed.

A.Y. 2003-04

44. Now coming to the appeal for A.Y.2003-04 ground No. 1 & 2 are general in nature as held above in the appeal for A.Y.2002-03. The same is dismissed as infructuous.

45. Ground No.3 & 4 relates to TP adjustment of equity broking services (non-DVP / CH segment). Here in this case, ld. TPO has made the adjustment by applying CUP method and comparing weighted average commission rate charged by assessee to all AEs and brokerage commission rates charged by the assessee to all third party FII clients in the CH/ Non-DVP Segment. This has resulted into adjustment of Rs.5,04,21,817/-. The summary of adjustment reads as under:-

Particulars for DVP segment	Volume (INR)	Commission amount (INR)	Comm ission Rate
Weighted average commission rate for third Party FIIs (ALP as per TPO)	43,328,094,918	217,660,852	50bps
Weighted average commission rate for 12 AEs	22,534,674,952	62,782,249	28 bps

46. In the segment of Clearing House (CH) / Non-Delivery versus Payment (Non-DVP) Segment, assessee has rendered broking services of two AEs viz. Merrill Lynch International U.K. (MLI) at Merrill Lynch Capital Market Espana (MLCME). The ld. TPO applying CUP method compared the average brokerage commission rates charged by Assessee to its AE, i.e., Merrill Lynch International, U.K (MLI) with the weighted brokerage commission rates charged by Assessee to all third party Foreign

Institutional Investor (Fill clients in the CH/ Non-DVP Segment. This resulted into an adjustment amounting to INR 12,956,231/-

47. Since the average brokerage rate charged to other AE, i.e., Merrill Lynch Capital Market Espana (MLCME) was higher than the weighted brokerage commission rates charged by Assessee to all third party FII clients in the CH/ Non-DVP Segment, no adjustment was made in respect of the same. A summary of the adjustment made by the learned TPO is as follows:

Particulars for Non-DVP/ CH segment	Volume (INR)	Commission amount (INR)	Commission Rate
Weighted average commission rate for third Party Flls (ALP as per TPO)	19,161,782,723	817,55,961	43 bps
Average commission rate for MLI	14,685,966,094	497,03,141	34bps
Average commission rate for MLCME	46,438,199,826	229,895,141	50 bps SA

48. The ld. CIT (A) has upheld the approach of benchmarking adopted by the ld. TPO but, thereafter, allowed a sales/marketing adjustment of 0.08% for the difference in the sales/ marketing function performed by assessee for its AEs vis-a-vis third party clients based on the salary cost of the identified employees of assessee engaged in providing the sales/ marketing services. Based on such adjustment, since the rate was within the +/-5% variation, the transaction was concluded to be at

arm's length and the adjustment was deleted. The ld. CIT(A) noted that the average brokerage rate for non-AE FIIs was 0.43% and after sales and marketing adjustment of 0.08% which he has worked out by taking the employee cost involved in sales and marketing, the ALP of non-DVP rates was worked out to 0.35%. Since average brokerage rate charged to AE on non-DVP rates was 0.34%, he held that same falls within the tolerance range of +/-5% and accordingly, in respect of non-DVP segment, adjustment made by the ld. AO was deleted.

49. In DVP segment in the appeal for A.Y.2002-03, ld. AO had asked the assessee to furnish the details of average rates charged for Top 10 third party institutional clients can use as comparable in the DVP segment. These details are as under:-

No.	Name of the Client	Turnover	Commission excl. Service Tax	Average Rate
1	SCHRODER INVESTMENT MANAGEMENT NORTH AMERICA INC. A/C SCMCT INDIA (MAURITIUS) LTD.	2,256,938,841	1,07,18,780	0.47%
2	GOLDMAN SACHS INVESTMENT MAURITIUS 1 LTD. - LONGTERM.	1,672,325,932	99,93,098	0.60%
3	STICHTING SHELL PENSIOENFONDS	1,39,116,6609	69,88,730	0.50%

4	EMERGING MARKETS MANAGEMENT LLC A/C EMSAF - MAURITIUS	1,309,856,847	62,36,445	0.48%
5	ABU DHABI INVESTMENT AUTHORITY	1,233,839,544	58,56,687	0.47%
6	SCHRODER INVESTMENT MANAGEMENT (GUERNSEY) LTD. A/C SCHRODER INDIA MAURITIUS LTD .	1,157,423,423	54,75,620	0.47%
7	DB INVESTMENT MANAGEMENT S.A. A/C TOP50ASIEN	1,137,630,602	54,09,037	0.48%
8	DB MANDARIN FONDS	994,048,768	47,30,438	0.48%
9	SCHRODER INVESTMENT MANAGEMENT NORTH AMERICA LTD A/C SCHRODER EMERGING MARKETS FUND	993,847,785	47,27,654	0.48%
10	M & G INVESTMENT MANAGEMENT LIMITED A/C. THE PRUDENTIAL ASSURANCE COMPANY LTD.	805,877,753	34,02,019	0.42%
	Arithmetic Mean			0.49%

50. We had also required the assessee to furnish third party FIIs as comparable, the rates charged to the Top 10 third party FIIs which were given as under:-

No.	Name of the Client	Turnover	Commission excl. Service Tax	Average Rate
1	SCHRODER INVESTMENT MANAGEMENT NORTH AMERICA INC. A/C SCMCT INDIA (MAURITIUS) LTD.	2,25,69,38,841	1,07,18,780	0.47%
2	GOLDMAN SACHS INVESTMENT MAURITIUS 1 LTD. - LONGTERM	1,67,23,25,932	99,93,098	0.60%
3	STICHTING SHELL PENSIOENFONDS	1,39,11,66,609	69,88,730	0.50%
4	EMERGING MARKETS MANAGEMENT LLC A/C EMSAF - MAURITIUS	1,30,98,56,847	62,36,445	0.48%
5	ABU DHABI INVESTMENT AUTHORITY	1,23,38,39,544	58,56,687	0.47%
6	SCHRODER INVESTMENT MANAGEMENT (GUERNSEY) LTD. A/C SCHRODER INDIA MAURITIUS LTD.	1,15,74,23,423	54,75,620	0.47%
7	DB INVESTMENT MANAGEMENT S.A. A/C TOP 50 ASIEN	1,13,76,30,602	54,09,037	0.48%

8	DB MANDARIN FONDS	99,40,48,768	47,30,438	0.48%
9	SCHRODER INVESTMENT MANAGEMENT NORTH AMERICA LTD A/C SCHRODER EMERGING MARKETS FUND	99,38,47,785	47,27,654	0.48%
10	M & G INVESTMENT MANAGEMENT LIMITED A/C. THE PRUDENTIAL ASSURANCE COMPANY LTD.	80,58,77,753	34,02,019	0.42%
	Total Arithmetic mean			0.49%

51. Thus, the average rate comes to 0.49% if the adjustment is given by the ld. CIT (A) on account of sales of marketing function performed by the assessee from its AE vis-à-vis third party client is given which we have upheld in the earlier year. Thus, out of average rate of 0.49%, adjustment of 0.08% towards sales and marketing function is to be released. Thus, ALP brokerage rate comes to 0.41%. Accordingly, adjustment shall be made under the DVP segment by taking the ALP of 0.41% and accordingly, ld TPO is directed to make suitable adjustment. Accordingly, ground No.3 & 4 of assessee's appeal is partly allowed and ground No.1 of Revenue's appeal is dismissed.

52. Ground No.5 of the assessee and ground No.3 of Revenue's appeal relates to Port Fee Charges. This issue is similar to the ground No.2 in A.Y.2002-03. In view of the finding given therein,

the adjustment is deleted and consequently, the Revenue's appeal is dismissed and assessee's appeal is allowed.

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53. In ground No.4 of Revenue's appeal relates to administrative support services. The Revenue has raised following grounds:-

On the facts and the circumstances of the case and in law, the CIT(A) has erred in considering the ALP mark up at 15% as against 25% worked out by TPO, and deleting the addition made on account of Administrative Support Services amounting to Rs. 79,79,893/- provided by the assessee to its AE stating that the TPO has not given a rationale reason for rejecting the Direct and Indirect costs worked out by the assessee while determining the markup at 25%.

54. This issue is similar to the issue raised in A.Y.2002-03, therefore, in view of the finding given hereinabove, the Revenue's appeal is dismissed.

55. Ground No.2 in department's appeal, reads as under:-

"On the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting the addition of Rs. 30,167,41 II- made by the AO in respect of brokerage for program trades stating that the nature of transaction is distinct from regular broking transaction and it is nota case that different rates are negotiated for different countries or that ML charges a higher rate and gives a lower rate to the assessee."

56. This issue has been discussed in appeal A.Y.2002-03 and therefore, in view of the finding given hereinabove, the Revenue's appeal is dismissed.

57. Lastly, with regard to Revenue's appeal in ground No.5 with regard to disallowance of interest expenses, same ground reads as under:-

“On the facts and in the circumstances of the case and in law, the CIT(A) has erred in allowing relief of INR 76,86,000 as against the disallowance made by the AO on account of interest expenses.”

58. The brief facts are that during the year under consideration the assessee had earned dividend income of INR 56,50,510 (INR 0.57 Cr) which was offered to tax as income from other sources. As on 31 March 2003, the assessee had net own funds of INR 3,17,84,12,000 (-INR 317.84 Cr) comprising of share capital of INR 22,50,00,000 (INR 22.50 Cr) and Reserves & surplus of INR 2,95,34,12,000 (INR 295.34 Cr). The borrowed funds/owed funds as on 31 March 2003 were INR 6,85,23,25,000 (INR 685.24 Cr). Further, the total investments of the assessee as on 31 March 2003 were INR 171,14,74,000 (INR 171.15 Cr), out of which the long term investments as on 31 March 2003 were INR 20,75,77,000 (INR 20.76 Cr). Further, the assessee had claimed deduction of INR 5,27,311 (INR 0.05 Cr) under section 80M of the Act for the year under consideration. Given that no exemption was claimed under section 10(33) of the Act, no suomoto disallowance was made by the Appellant under section 14A of the Act. However, the Id. AO made a disallowance of proportionate interest expense to the extent of INR 76,85,000 (INR 0.77 Cr) which was computed by applying the average rate of interest to the total investments and multiplying the same with the ratio of the borrowings to the total funds of the assessee.

While doing so the learned AO considered that the interest expenditure incurred on the borrowings is attributable to the investments made by the assessee.

59. Here in this year, only disallowance made by the ld. AO with on account of interest expenses. As noted above, assessee's own surplus funds were far more than investment made and therefore, no disallowance of interest can be made in view of the decision of the **Hon'ble Supreme Court** in the case of **South Indian Bank Ltd. vs. CIT reported in 438 ITR 221**, wherein it has been held that in case there are mixed funds available with the assessee i.e. owned funds as well as owed funds, the investments made by the assessee ought to be considered to be made out of the interest-free funds and the assessee has the right of appropriation of the funds, where 'sufficient interest-free funds are available. Thus, the grounds raised by the Revenue are dismissed.

60. In the result appeals of the assessee are allowed and appeals of the Revenue are dismissed.

Order pronounced on 10th June, 2024.

Sd/-
(S RIFAUH RAHMAN)
ACCOUNTANT MEMBER

Mumbai; Dated 10/06/2024
KARUNA, *sr.ps*

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai