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

SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 8354/MUM/2011
(Assessment Year: 2005-06)

Deutsche Equities India Private Limited,
Ground Floor, D.B. House,
Hazarimal Somani Marg, Fort,
Mumbai - 400001
[PAN: AABCD7551M] ..... **Assessee**

The Additional Commissioner of Income Tax, Range – 4(1), Mumbai,
Aayakar Bhavan, M.K. Marg,
Mumbai - 400020 ..... **Respondent**

Vs

ITA No. 8033/MUM/2011
(Assessment Year: 2005-06)

Deputy Commissioner of Income Tax, 4(1), Mumbai,
6th Floor, Room No. 640,
Aayakar Bhavan, Mumbai – 400020 ..... **Assessee**

Vs

Deutsche Equities India Private Limited,
Ground Floor, D.B. House,
Hazarimal Somani Marg, Fort,
Mumbai - 400001
[PAN: AABCD7551M] ..... **Respondent**

&

CO No. 227/MUM/2012
(Arising out of ITA No. 8033/Mum/2011)
(Assessment Year: 2005-06)

Deutsche Equities India Private Limited,
222, Kodak House, 3rd Floor, D.N. Road,
Fort, Mumbai - 400001
[PAN: AABCD7551M] ..... **Assessee**

Deputy Commissioner of Income Tax, 4(1), Mumbai,
Aayakar Bhavan, Mumbai – 400020 ..... **Respondent**

Vs

Appearance

For the Assessee/Department	:	Shri P.J. Pardiwala Shri Niraj Sheth
For the Respondent/Assessee	:	Shri Anil Sant

Date

Conclusion of hearing	:	10.04.2024
Pronouncement of order	:	08.07.2024

O R D E R

Per Bench:

1. This batch of Cross-appeals and Cross Objection pertain to Assessment Year 2005–06, and arise from the order of the Learned Commissioner of Income Tax (Appeals)-15, Mumbai [hereinafter referred to as 'the CIT(A)'] passed on 29/09/2011 which in turn arose from the Assessment Order, dated 29/12/2008, passed under Section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'].

2. The Assessee has raised following grounds of appeal in ITA No. 8354/Mum/2011:

> *"1. The CIT(A) erred in upholding the AO's action and disallowing an aggregate amount of Rs.502,967 under section 14A of the Act as being an expenditure incurred for earning exempt dividend income.*
>
> *(a) The CIT(A) erred in enhancing the disallowance under section 14A made by AO by Rs. 1,65,517 and thereby holding that a disallowance of Rs. 502,967 is required to be made.*
>
> *(b) The CIT(A) having held that the provisions of rule 8D are not applicable to the year under appeal erred in adopting a method for computing disallowance under section 14A, which, in principle, resembles the method prescribed under rule 8D of Income Tax Rules, 1962.*
>
> *(c) The CIT(A) erred in adopting an adhoc method for computing the disallowance under section 14A, which was based on Rule 8D, thereby ignoring the appellants*

facts and submissions in the matter.

(d) The appellants submit that the method adopted by CIT(A) for computing disallowance under section 14A, by using the monthly weighted average of the investments is unreasonable.

(e) Without prejudice, the appellants submit that disallowance computed by CIT(A) is highly excessive.

The appellants pray that the disallowance of Rs. 502,967 under section 14A should be deleted.

2. *The CIT(A) erred in upholding the action of the AO of disallowing an amount of Rs. 10,27,625 under section 40(a)(ia) being payments made to M/s Team Lease for providing secretarial and clerical staff on contractual basis.*

   The appellants pray that the disallowance under section 40(a)(ia) of Rs. 10,27,625 should be deleted.

3. *The CIT(A) erred in upholding the action of the AO in disallowing Rs. 1,31,15,947 under section 40(a)(i), as tax was not withheld on global overhead charges paid / payable to M/s. Deutsche Securities Inc., New York having failed to appreciate that the services received from M/s. Deutsche Securities Inc., New York were not in the nature of 'fees for included services' as per clause 12(4)(b) of the Double Taxation Avoidance Agreement between India and USA.*

   The appellants pray that the disallowance under section 40(a)(ia) on account of global overhead charges of Rs. 1,31,15,947 should be deleted.

4. *The CIT(A) has erred in confirming the addition of Rs. 12,56,43,551 made by learned Assessing Officer (AO)/ Transfer Pricing Officer (IPO) and further erred in enhancing the addition by Rs. 4,19,89,484 based on the provisions of Chapter X of the Income-tax Act, 1961 ('the Act').*

5. *The CIT(A) has erred in upholding/confirming the action of the AO/TPO in disregarding the benchmarking analysis made by the Assessee and comparable transactions (ie. rate charged by unrelated brokers to associated enterprise) selected by the Assessee in respect of equity broking services rendered to associated enterprises in respect of Clearing House(CH) trades in the transfer pricing study report maintained as per section 92D of the Act read with Rule 10D of the Income- tax Rules, 1962 ('the Rules") and the various submissions made by the Assessee.*

6. *The CIT(A) has erred in upholding/confirming the action of the TPO of selecting Assessee's transactions with the top ten Foreign Institutional Investors ('FIIs) as comparable to the controlled transactions for the purpose bose of benchmarking, without appreciating the difference in functions, assets and risks involved and the difference in factors influencing the brokerage rates of the controlled and uncontrolled transactions.*

7. *The CIT(A) has erred in confirming the action of the TPO in not allowing the adjustment in accordance with the provisions of Rule 10B of the Rules, on account of significant differences in the volume of the transactions entered by the Assessee with the associated enterprises vis-a-vis top ten FIIs.*

8. *The CIT(A) has erred in not allowing the adjustment in accordance with the provisions of Rule 10B of the Rules, on account of differential research cost incurred by the Assessee in transactions entered with associated enterprises and top ten FIIs client.*

9. *The CIT(A) has erred in withdrawing the adjustment allowed by the learned TPO in accordance with the provisions of Rule 10B of the Rules, for the marketing function performed by the Assessee in transactions entered with top ten FIIs, without assigning any basis for such withdrawal and without proving how the action of the AO in allowing such adjustment was incorrect or in the absence of any new fact or additional evidence supporting such withdrawal and without informing the appellant of the reasons for such withdrawal despite the Assessee's repeated requests in this regard.*

10. *The CIT(A) has erred in upholding / confirming the action of the TPO in not stating any reasons to show that either of the conditions mentioned in clauses (a) to (d) of Section 92C(3) of the Act were satisfied before making an adjustment to the income of the Assessee."*

2.1. The Assessee has raised following Additional Grounds of appeal vide letter dated 19/03/2021 in ITA No. 8354/Mum/2011:

"11. The appellant submit that the AO be directed to allow deduction on account of Education Cess paid by the appellants for the assessment year 2005-06"

2.2. The Assessee has also raised following Additional Grounds of appeal vide letter dated 22/08/2022 in ITA No. 8354/Mum/2011:

"12. In the event a view is taken that it is not possible to quantify with complete accuracy the adjustment claimed by the Assessee in accordance with the provisions of Rule 10B of the Income Tax Rules, 1962 (on account of significant differences in the transactions entered by the Assessee with associated enterprises and top 10 FIIs), the most appropriate method ('MAM') should be regarded as Transactional Net Margin Method ('TNMM')."

2.3. The Revenue has raised following grounds of appeal in ITA No. 8033/Mum/2011:

"1. (i) On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the disallowance of Rs.96,66,784/- made u/s.40(a)(ia) in respect of Transaction charges paid to Stock Exchange, without appreciating the facts that these were composite charges for professional and technical services rendered by the Stock Exchange to its members and the assessee has failed to deduct TDS thereon.

(ii) On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in ignoring the fact that these services are essential in nature as they can only be availed by members of Stock Exchange.

(iii) On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in ignoring the facts that use of technology and algorithmic based programs have converted an erstwhile physical market into a digitally operated market.

(iv) On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in ignoring the fact that the services rendered by the brokers are not standard services but services that has been developed to cater to the needs of the broker community to facilitate trading.

(v) On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has overlooked the fact that the brokers have in subsequent years themselves started deducting the TDS on such payments and that there is no reason to give a different treatment in this year.

2. On the facts and in the circumstances of the case and in law, the Ld.CIT(A)) erred in allowing the disallowance being benefit of variation / reduction of 5% from the arithmetic

mean as per provisions of section 92C(2) of the Act.

3. On the facts and in the circumstances of the case, the impugned order of the ld. CIT(A) is contrary to law and consequently merits to be set aside and that of the Assessing Officer be restored"

2.4. The Assessee has raised following grounds by way of Cross Objection No. 227/Mum/2012 filed in ITA No. 8033/Mum/2011:

"1. On the facts and in the circumstances of the case and in law, the benefit/reduction of 5 per cent from the arithmetic mean as provided in proviso to Section 92C(2) of the Act, ought to be allowed while computing the adjustment to the total income of the Assessee."

3. The relevant facts, in brief, as emerging from record are that the Assessee is engaged, inter alia, in the stock broking business and holds corporate membership of stock exchanges. The Assessee is also registered with Securities & Exchange Board of India and has obtained license to act as a merchant banker and underwriter.

3.1 For the Assessment Year 2005–06, the Assessee filed return of income on 30/10/2005 declaring total income of INR 21,45,54,130/-. The case of the Assessee was selected for regular scrutiny. During the assessment proceedings, the Assessing Officer noted that the Assessee had entered into International Transactions with its Associated Enterprises (AEs) and therefore, a reference was made to the Transfer Pricing Officer for determination of Arm's Length Price (ALP) of the International Transactions undertaken by the Assessee with its AEs. Vide order dated, 31/10/2008, the Transfer Pricing Officer proposed Transfer Pricing Adjustment of INR 12,56,43,551/- in respect of Clearing House Trades (for short '**CH Trades**') undertaken by the Assessee with its AEs. No transfer pricing adjustment was proposed in relation to the International Transaction. The Assessing Officer frame assessment of the Assessee under Section 143(3) of the Act

vide assessment order, dated 29/12/2008, after making the following addition/disallowance

(a) Transfer Pricing Addition of INR 12,56,43,551/-,

(b) Disallowance of INR 3,36,450/- under Section 14A of the Act,

(c) Disallowance of INR.98,30,093/- under Section 40(a)(ia) of the Act in respect of VSAT Expenses/Line Charges of INR.1,63,309] and Transaction Charges of INR 96,65,784/-,

(d) Disallowance of INR.10,27,625/- under Section 40(a)(i) of the Act in respect of payments made to Term Lease for provisions of technical and clerical staff on contractual basis.

(e) Disallowance of INR.1,31,15,947/- under Section 40(a)(ia) of the Act on account of global overhead charges

3.2 Being aggrieved, the Assessee preferred appeal before the CIT(A) against the above addition/disallowances. The CIT(A) vide order dated 29/09/2011, partly allowed the aforesaid appeal. The CIT(A) confirmed the transfer pricing adjustment and declined to grant any relief in relation to disallowances made in Section 40(a)(i) of the Act in respect of Global Overhead Charges of INR.1,31,15,947/- and payments of INR.10,27,625/- to Team Lease. Further, the CIT(A) also enhance the disallowance under Section 14A of the Act by INR 1,65,517/- to INR 5,02,967/-. However, the CIT(A) granted relief to the Assessee by deleting disallowance of INR.98,30,093/- made under Section 40(a)(ia) of the Act in respect of VSAT Expenses/Line Charges and Transaction Charges.

3.3 Being aggrieved by the above order of the CIT(A), both, the Assessee as well as the Revenue are in appeal before the Tribunal. Further, the Assessee has also filed Cross Objections to the appeal

by the Revenue. The issues raised in the appeals/cross-objections, to the extent the same are connected, are taken up together hereinafter.

ITA No. 8354/Mum/2011

4 We would first take up appeal preferred by the Assessee. The Assessee has raised 10 grounds of appeal and two additional grounds of appeal.

Ground No. 1 to 1(e)

5 Ground No. 1 to 1(e) pertain to disallowance made under Section 14A of the Act.

5.1. During the Assessment proceedings the Assessing Officer observed that the Assessee has made investment in shares/mutual funds and had earned tax free dividend of INR.30,68,000/- during the relevant previous year. However, the Appellant has not allocated any expenditure incurred towards earning of the tax exempt dividend as required under Section 14A of the Act. The Assessing Officer rejected the contention of the Assessee that no expenditure has been incurred for earning the aforesaid tax free income. According to the Assessing Officer the Assessee was required to maintained separate accounts of funds and administrative expenses for different activities like brokerage, share trading, investment etc. The Assessing Officer also noted that no separate accounts were maintained for utilisation of borrowed funds and its utilisation, and therefore, the contention of the Assessee that borrowed funds were not utilised for making investments cannot be accepted. The Assessing Officer invoked provisions of Section 14A of the Act made a disallowance of INR 3,36,450/- by applying the provision contained in Rule 8D of the Income Tax Rules, 1962 (for short 'the IT Rules').

5.2. The Assessee challenged the above disallowance before the CIT(A). The Assessee, inter alia, submitted that the provisions contained the Rule 8D of the IT Rules were not applicable to the Assessment Year 2005-06. The CIT(A) accepted the aforesaid contention of the Assessee. However, by applying a method of computation similar to the one contained in Rule 8D of the IT Rules quantified the amount of disallowance under Section 14A of the Act at INR.5,02,967/-. Thus, the CIT(A) enhanced the disallowance of INR.3,36,450/- made by the Assessing Officer by INR.1,65,517/-.

5.3. Being aggrieved the Assessee has now preferred appeal before us in this issue.

5.4. Before us, the primary contention of the Assessee was that the CIT(A) had, indirectly, applied Rule 8D of the IT Rules and had enhanced the disallowance in clear violation of the judgment of the Hon'ble Bombay High Court in the case of Godrej Boyce Mfg. Co. Ltd (328 ITR 81). It was submitted that the disallowance be restricted to 2% of the dividend income which has been accepted as a reasonable basis the Hon'ble Bombay High Court and the Tribunal in a number of cases. Per contra the Learned Departmntal Repesenative submitted that the CIT(A) had not adopted Rule 8D of the IT Rules and had adopted a reasoable basis.

5.5. We have considered the rival submission and perused the material on record. As per the judgment of the Hon'ble Bombay High Court in the case of Godrej Boyce Mfg Co Ltd (supra) the provisions of Rule 8D of the IT Rules are not applicable to Assessment Year 2005-06. Accordingly, the Assessing Officer was not correct in applying provisions of Rule 8D of the IT Rules. Despite observing

as aforesaid, the CIT(A) adopted a method similar to provisions contained in Rule 8D of the IT Rules to compute disallowance at INR 5,02,967/-, thus, enhancing the disallowance by INR.1,65,517/-. We note that in the case of Godrej and Boyce Manufacturing Limited (Supra), the Hon'ble Bombay High Court had held that for prior years *(to which provision cotnained in Rule 8D of the IT Rules did not apply)*, it is duty of the Assessing Officer to determine the quantum of disallowance on a reasonable basis. In the case of Oracle Finance Services Software Limited Vs Additional Commission of Income Tax – Range 8(2), Mumbai [ITA No. 1473/Mum/2018, AY 2006-07], following the judgment of the Hon'ble Bombay High Court in the case of Godrej Agrovet Limited (ITA No.934/2011), the Mumbai Bench of the the Tribunal had adopted 2% of the exempt income as a reasonable basis of quantifying disallowance under Section 14A of the Act for the Assessment Year 2006-07. Similar view has been taken by the Tribunal in the case of Deputy Director of Income Tax, Circle 6(3), Mumbai Vs. Greaves Cotton Ltd., Mumbai [ITA No. 2482 & 2575/Mum/2015, Assessment Years 2005-06 & 2006-07, common order dated 15/03/2019]. In view of the same, disallowance under Section 14A of the Act made by the authorities below is restricted to 2% of the exempt income. In terms of the aforesaid, Ground No. 1(a) to 1(e) raised by the Assessee are partly-allowed.

Ground No. 2

6 Ground Nos. 2 pertain to disallowance made under Section 40(a)(ia) of the Act on account of failure to withhold tax payments of INR.10,27,625/-.

6.1. During the assessment proceedings, the Assessing Officer noted that the Assessee had made payment of INR.10,58,156/- to M/s Team Lease for providing secretarial and clerical staff on

contractual basis. Accordingly the Assessing Officer the payments made to M/s Team Lease were subject to withholding of tax under Section 194C of the Act and since the Assessee had failed to deduct tax from the payment of INR.10,27,625/- made to M/s Team Lease, the same was disallowed as per the provision of section 40(a)(ia) of the Act. The CIT(A) confirmed the action of the Assessing Officer.

6.2. In appeal before the Tribunal it was submitted that the M/s Team Lease had obtained a certificate under Section 197(1) of the Act for receiving income from various parties without deduction of tax at source for the relevant assessment year. On account of a procedural lapse the name of the Assessee was not included in the certificate obtained under Section 197 of the Act for the relevant assessment year. The aforesaid lapse was corrected subsequently and the name of the Assessee was included in the tax withholding certificate under Section 197 of the Act for the Assessment Year 2006-07. A copy of the certificate issued under Section 197 of the Act. It is not disputed by the Revenue that the aforesaid certificate covers payments of similar nature and the name of the Assessee is included at S.No. 139 in list of payees. Per contra while, the Learned Departmental Representative could not controvert the aforesaid submissions, it was submitted that for the relevant assessment year the Assessee was under obligation to deduct tax at source under Section 194C of the Act as admittedly there the certificate issued did not contain the name of the Assessee.

6.3. We find merit in the contention advanced in behalf of the Revenue. In absence of a valid/proper 'Nil' tax withholding certificate (containing the name of the Assessee) having been issued under Section 197(1) of the Act for the relevant previous year, the Assessee was under obligation to deduct tax at source

from payments made to Team Lease as per provisions of Section 194C of the Act. Therefore, We concur with the following findings returned by the CIT(A):

> *"31. I have considered the facts of the case and submissions of the appellant. It is the fact of the case on the payment of Rs. 10,27,625/- to M/s Team Lease no TDS has been done by the appellant. Further it is facts of the case that there is no certificate from the AO u/s 197 for the year under consideration for the payment so made by the appellant to M/s Team Lease. The appellant has not disputed that the payment is covered u/s 194C of the Act. The submission of the appellant that the so called error has been rectified in the subsequent year and that for the year under consideration, it was only the procedural error, cannot itself mitigate the legal encumbrance/compliance by the appellant for the year under consideration. Accordingly the action of the AO in disallowing the payment so made u/s 40(a)(ia) of the Act is justified and accordingly the action of the AO is upheld." (Emphasis Supplied)*

6.4. In view of the above, we decline to interfere with the order passed by the CIT(A) confirming disallowance of INR.10,27,625/- made under Section 40(a)(ia) of the Act. Accordingly, Ground No. 2 raised by the Assessee is dismissed.

Ground Nos. 3

7 Ground No. 3 raised by the Assessee pertains to disallowance of INR 1,37,15,947/- made under Section 40(a)(i)/(ia) of the Act on account of failure to withhold tax from the payments of Global Overhead Charges to Deutsche Securities Inc., New York, USA.

7.1. The relevant facts in brief are that the Assessee had paid an amount of INR.1,31,15,947/- to its Associated Enterprise (namely, M/s Deutsche Securities Inc. New York, USA) as global overhead costs mainly incurred for management leadership charges which included the cost incurred by the group on management personnel who are monitoring and overseeing the Global Market Equities and

Global Banking business hosted in Deutsche Equities India Pvt. Ltd. In response to the show cause notice issued by the Assessing Officer during the assessment proceedings, it was submitted on behalf of the Assessee that the aforesaid payments were not covered by the expression 'Fee for Included Services' as defined in Article 12 of the Double Taxation Avoidance Agreement between India and USA [for Short '**DTAA'**] since the services under consideration did not 'make available' any technology, skill etc. It was further submitted that, the same were in the nature of business income and since the payee did not have a permanent establishment in India in terms of Article 5 of DTAA, such business income was not be taxable in India as per the Article 7 of the DTAA. However, the Assessing Officer was not convinced. The Assessing Officer noted that the Assessee had also made payments to other AE's like Deutsche Bank AG, APHO Singapore & Deutsche Bank AG, London on account of Global Overhead Charges which have been disallowed under Section 40(a)(i) of the Act, but no such disallowance has been made in respect of the identical payments towards Global Overhead Charges to Deutsche Securities Inc. New York, USA. The Assessing Officer concluded that the services rendered by Deutsche Securities Inc. New York, USA were in the nature of 'Fee for Included Services' taxable as per the provisions of the Act as well as Article 12(4)(b) of the DTAA. The Assessing Officer observed that the functions/heads contained in Schedule II of the Cost Contribution Agreement between the Assessee and its AEs in terms of which Global Overhead Charges were paid, covered functions/sub-heads which made available technical knowledge. experience, skill, know-how of process etc. to the Assessee.

7.2. Bring aggrieved, the Assessee carried the issue in appeal before the CIT(A). The CIT(A) confirmed the disallowance reiterating the

findings of the Assessing Officer and in addition made following observation in relation to the 'make available' Clause contained in Article 12(4)(b) of the DTAA and the explanation contained in the Memorandum of Understanding concerning 'Fees for Included Services' executed between India and USA forming part of the DTAA:

(a) Word 'Make available' as used in treaty never meant that the other party should be trained or made expert in such technical knowledge etc. It will be absurd on part of a person to make other person expert of its own core competency, which will result in situation that the recipients of service will not look again to him when these services are again needed in future.

(b) In the present case, service provider has provided or made accessible the services of its technical knowledge/experience - 'enabled to apply' phrase used in the protocol/memorandum of understanding does not mean that service provider also has to teach technology embedded in the service provided.

7.3. Being aggrieved, the Assessee in now in appeal before the Tribunal.

7.4. Both sides reiterated the stand taken in the assessment and first appellate proceedings.

7.5. We have considered the rival submission and perused the material on record.

7.6. The contention of the Assessee before the authorities below was that Global Overhead Charges were paid/payable for

management, leadership and co-ordination functions which were provided centrally. The same constituted 'managerial services' which were excluded from the definition of expression 'fees for included services' used in Article 12(4)(b) of the DTAA. Further, the same and did not 'make available' any technical knowledge, skill, know-how etc. Hence the global overhead charges paid/payable did not constitute 'fees for included services' in terms of Article 12 of the DTAA.

7.7. In support of the above contentions, reliance was placed on behalf of the Assessee on the Memorandum of Understanding concerning 'Fees for Included Services' executed between India and USA. On perusal of the same we find that it was agreed position that the consultancy services which are not technical in nature do not fall within the ambit of Clause 4(b) of Article 12 of the DTAA. The relevant extract of the aforesaid memorandum of understanding reads as under:

> *"Paragraph 4(b)*
>
> *Paragraph 4(b) of Article 12 refers to technical or consultancy services that make available to the person acquiring the services, technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design to such person. (For this purpose, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person). This category is narrower than the category described in paragraph 4(a) because it excludes any service that does not make technology available to the person acquiring the service. Generally speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc.,*

are made available to the person purchasing the service, within the meaning of paragraph 4(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available." (Emphasis Supplied)

7.8. The CIT(A) has rejected the contention of the Assessee on the ground that mere provisions of services (without making available any technical skill, know how etc.) was sufficient for attracting provisions of Article 12(4)(b) of the DTAA. The aforesaid conclusion drawn by the CIT(A) is contrary to the above memorandum of understanding.

7.9. We note that it was contended by the Assessee that the global overhead charges were payable in respect of managerial or business support services and the same did not make available any technical skill, know how etc to the Assessee. We find that as per the Transfer Pricing Review Report *[placed at page 117 to 146 of the paper-book]* the global overhead charges were paid as per Cost Contribution Agreement which provided primarily for the allocation of the management leadership charges incurred for overseeing and monitoring equities business of the group amongst the group entities. In paragraph 10.5 of the Assessment Order, after referring to the overhead functions specified in Schedule II of the Cost Allocation Agreement *[placed before the Assessing Officer vide letter dated 16/12/2008]*, the Assessing Officer has concluded that some of services *'may fall under the heading make-available technical knowledge, experience, skill, know how or process'*. In our view the Assessing Officer had failed to bring on record any facts to show that technical skill, knowledge etc. was made available to the Assessee. There is no factual basis of the finding returned by the Assessing Officer.

7.10. Further, we note that the Assessing Officer and the CIT(A) had

observed that the Assessee had made similar payments towards global overhead charges to other AE's like Deutsche Bank AG, APHO Singapore and Deutsche Bank AG, London after deducting tax from the same. However, no tax was deducted from payment of global overhead charges to Deutsche Securities Inc., New York, USA. In this regard, it was explained by the Assessee that Deutsche Bank AG, APHO Singapore and Deutsche Bank A.G, London were branches of Deutsche Bank A.G., a tax resident of Germany. The DTAA between India and Germany did not contain the 'make available' clause in the definition of 'Fees for Technical Services' as contained in Article 12(4) of the said DTAA. Therefore, disallowance was reported/made under Section 40(a)(i) in the Tax Audit Report and the computation of total income. Thus, the aforesaid payments of global overhead charges stood on a different footing as compared to the payments for global overhead charges to Deutsche Securities Inc. New York, USA, a tax resident of USA entitled to claim benefit of Article 12(4)(b) of the DTAA containing 'make available' clause.

7.11. In view of the above, we hold that the global overhead charges were not liable to tax in India as 'Fee for Included Services' in terms of the provisions contained in Article 12(4)(b) of the DTAA; the Assessee was not under obligation to deduct tax from the same; and therefore, the provisions of Section 40(a)(i) of the Act were incorrectly invoked in respect of the same. Therefore, the order passed by the Assessing Officer as well as CIT(A) on this issue are set aside. The disallowance of INR 1,37,15,947/- made under Section 40(a)(i) of the Act is deleted and Ground No.3 rasied by the Assessee is allowed.

Ground Nos. 4 to 10 & Ground No. 12 (Additional Ground)

8 Ground Nos. 4 to 10 and Ground No. 12 pertain to the transfer

pricing additions.

8.1. The relevant facts in brief are that during the assessment proceedings reference was made to the Transfer Pricing Officer (TPO) for determination of APL of the International Transactions between the Assessee and its AEs. The TPO noted that the Assessee was engaged in the equity broking business and had undertaken various international transactions relating to the equity broking service – Clearing House Trade [for short '**CH Trades'**], Delivery Versus Payment/Delivery Based Trades (DVP) Trade and Programme Trade. TPO noted that for benchmarking the International Transaction relating to CH Trades, the Assessee had adopted Comparable Uncontrolled Price Method [for short 'CUP Method'] as the Most Appropriate Method. Even though the Assessee had undertaken CH Trades with non-AEs/third parties, the Assessee rejected the aforesaid transactions citing differences in the nature of services and other factors and failure to make suitable adjustments for the same. Since the AE of the Assessee had availed services from other Indian brokers, the Assessee considered the same as comparable uncontrolled transaction for benchmarking the brokerage the CH Trades with AEs. According to the Transfer Pricing Study Report (**TPSR**) of the Assessee, the brokerage rates charged by the Assessee to AEs for CH Trades were higher than the brokerage rates charged by the unrelated Indian broker to the respective AEs. Therefore, the Assessee treated the brokerage charged by the Assessee from AEs at arm's length requiring no transfer pricing adjustment. However, the TPO was not convinced as according to the TPO there was difference in the contractual terms entered by the AEs with the Assessee and AEs with unrelated Indian brokers for equity broking services. Therefore, the TPO selected the brokerage rates charged by the Assessee to its top 10 Foreign Institutional Investors (FIIs) as

comparable uncontrolled transactions for benchmarking the brokerage rates charged by the Assessee to the AEs in respect of CH Trades. A show cause notice was issued to the Assessee, and in response to the same, the Assessee filed objections to comparable uncontrolled transactions selected by the TPO and in alternative, sought adjustments for the differences of volume, marketing cost and research cost. The TPO only accepted Assessee's contention relating to the adjustment for marketing cost and allowed Marketing Cost Adjustment to the extent of 5 basis points. Thus, TPO proposed upwards transfer pricing adjustment of INR.12,56,43,551/- and the same was incorporated in the assessment order.

8.2. In appeal, the CIT(A) declined to grant any relief and withdrew that marketing adjustment granted by the TPO.

8.3. The Assessee is now in appeal before the Tribunal challenging the transfer pricing adjustment.

8.4. We have head both the sides and perused the material on record.

8.5. The transfer pricing adjustment made is limited to the brokerage rates charged by the Assessee to AEs in respect of CH Trades. In case of CH Trades the settlement obligation is transferred from stock broker to the client custodian. Hence, the stock broker does not take the onus of funding or settling the trade.

8.6. In the Transfer Pricing Study Report (TPSR), the Assessee had adopted CUP Method as the Most Appropriate Method, inter alia, stating that the Assessee and its AEs had undertaken comparable transactions with unrelated enterprises. The comparable transactions undertaken by the Assessee with unrelated parties were not considered by the Assessee on the ground that it was

not possible to quantify the impact of the various factors influencing the brokerage rate in case of CH Trades for making suitable adjustments. However, we note that during the assessment proceedings that Assessee had quantified and had sought adjustment for volume, marketing, research. Further, in our view, the Assessee had also failed to show how the transactions entered by the AEs with unrelated party would not require adjustments for the factors (other than the scope of services) affecting the rate of brokerage in case of CH Trades identified by the Assessee itself in the TPSR. Therefore, we do not find any infirmity in the approach adopted by the TPO to determine the ALP of the International Transaction under consideration taking comparable uncontrolled transactions undertaken by the Assessee with Non-AEs. However, given the facts and circumstances of the present case, we find merit in the contention advanced on behalf of the Assessee that suitable adjustment are required to be made to accommodate for difference in brokerage rates on account of difference in volume and research/marketing functions. Our aforesaid view draws support from the decision of the Tribunal in the case of Morgan Stanley India Company Private Ltd. Vs. Income Tax Officer Ward - 4(3)(4), Mumbai [ITA No. 1164/Mum/2011, Assessment Year : 2004-05, Dated 05/10/2021], ACIT Vs. Morgan Stanley India Company Private Ltd. [ITA No. 266/Mum/2006, Dated 25/02/2006], and other decision contained in submission, dated 18/04/2024, filed by the Assessee during the course of hearing which read as under:

> *"In this connection, the Assessee submits below the working of the resultant arm's length price if volume and marketing cost adjustment are allowed as well as a brief description of the adjustments:*

Particulars	*Basis Point*	*Reference*
Average Brokerage Rate Charged to Top 10 FII Clients	*26bps*	*Page 8 of TP Order*
Less: Volume Adjustment	*12 bps*	*Page 173 & 174 of paper –book*
Less: Marketing Cost Adjustment	*5bps*	*Page 8 of TP order*

In view thereof, it is respectfully submitted that if the aforesaid adjustments are granted, the rate at which the brokerage is charged by the Assessee to Deutsche Securities Mauritius Limited ('DSML') (i.e., 10 bps) would be at arm's length and no transfer pricing adjustment will be required thereto.

Judicial Precedents to justify the Comparability Adjustments

It is respectfully submitted that the Hon'ble ITAT in various decisions has in principle upheld the grant of the aforesaid adjustments claimed by the Appellant. The quantum and quantification of the adjustment may vary from case to case depending on the facts, issues raised by lower authorities and claims made by the assessees, etc. In the case of Morgan Stanley India Company Private Limited (Formerly known as J.M. Morgan Stanley Securities Private Limited) Vs A.CL.T. - 4(3), Mumbai CO No. 215/Mum/2008 in ITA No. 266/Mum/2006 and ITA NO. 7057/Mum/2008 (AY 2002-03), the Hon'ble ITAT upheld Ld. CIT(A)'s order for granting discounting factor of 40% as adjustment towards marketing and research cost, volume and loyalty factor adjustment. The relevant findings of Ld. CIT (A)'s order (refer Para 28, Page 18-19 of the Order as well as caselaw paper book) as noted by Hon'ble ITAT are stated below:

> *".....If CUP method has to be applied, then appropriate adjustments need to be made for all the differences.*
>
> *".....The TPO has carried out adjustments for marketing functions by making an adjustment considering part of the marketing cost. The TPO has not made any adjustments for research activities on the premise that MSDW Mauritius would be getting research related services from the appellant. I am unable to agree with the TPO who has formed a view that no adjustments are required to be made for research activities based on certain assumptions and possibilities and not on actual facts."*

"The fact that 'as volume increases, the price decreases' is a well-established commercial principle and accordingly due weightage/ adjustment should be given for the huge volume of business given by MSDW Mauritius."

"Keeping the entire factual matrix in mind, I feel that the ends of justice would be met to both Judicial Precedents to justify the Comparability Adjustments"

Further, in the case of Morgan Stanley Indie Company Private Limited (Formerly known as J.M. Morgan Stanley Securities Private Limited) Vs Income Tax Officer, Ward-4(3)(4), Mumbai, ***ITA No. 1164/Mum/2011*** *(AY 2004-05), the Hon'ble ITAT once again granted the aforesaid adjustments in line with the earlier ruling dated 25th February 2020. Kindly refer page 7 of the Order enclosed herewith as Annexure-1.*

Furthermore, in the case of Morgan Stanley India Company Private Limited Vs Income-tax Officer, National e-Assessment Centre, Delhi, ***ITA No. 340 & 7550/Mum/2019****,* ***ITA No. 1009/Mum/2021*** *and* ***ITA Nos. 594 & 2435/Mum/2022*** *(AY 2014-15 to 2018-19) the Hon'ble ITAT has once again granted the aforesaid adjustment, following its earlier rulings. Kindly refer page 11-13 of the Order enclosed herewith as Annexure-2.*

Moreover, in the case of J. P. Morgan India Private Limited vs. The ACIT, Range 4(3), Mumbai ***ITA No. 670/MUM/2006*** *(AY 2002-03) the Hon'ble ITAT has allowed adjustment for difference in the costs incurred by the Assessee for rendering services to Associated Enterprises vis-a-vis unrelated entities. The Hon'ble ITAT relied on Ld. CIT(A)'s order for granting relief of 0.29% as adjustment towards additional cost incurred by the Assessee (in relation to credit risk, marketing and research cost). The relevant findings of Hon'ble ITAT (refer Para 3, Page 8 of the Order, Page 164 of the caselaw paper book) are stated below:*

".....Assessee should have been allowed the relief as per difference in the activities in the services rendered by it to related and unrelated parties."

".....Assessee had to incur additional cost to the tune of 0.29% in relation to services rendered by it to unrelated parties when the same is compared to the similar services rendered to the related parties"

> *"....In view of these facts, we are of the opinion that Ld. CIT(A) was right in granting relief to the assessee and we decline to interfere in his findings on this issue."*
>
> *Additionally, in the case of J. P. Morgan India Private Limited vs. The ACIT, Range 4(3), Mumbai* ***ITA No. 1502/MUM/2014*** *(AY 2009-10), the Hon'ble ITAT has granted various adjustments, relying on Hon'ble ITAT's Order dated 12th February 2014. Kindly refer page 17 of the Order enclosed herewith as Annexure-3.*
>
> *xx xx" (Emphasis Supplied)*

8.7. We also note that in the above submission it has been contended on behalf of the Assessee that, in case adjustments as claimed by the Assessee are granted, no transfer pricing adjustment would be required. Keeping in view the same, we direct the Assessing TPO/Officer to grant suitable Volume and Marketing Cost Adjustment after verifying the computation thereof placed on record by the Assessee. In terms of the aforesaid the TPO/Assessing Officer is directed to recomputed the ALP and determine the quantum of transfer pricing adjustment, if any.

8.8. In view of paragraph 8 to 8.7 above, Ground No. 5 & 6 raised by the Assessee is dismissed, and Ground No. 4, 7, 8, 9 and 10 raised by the Assessee are allowed for statistical purposes.

8.9. Vide letter, dated 22/08/2022, the Assessee had raised additional ground (Ground No. 12) containing alternative plea that in the event a view is taken that it is not possible to quantify the adjustment claimed by the Assessee, TNMM should be taken as Most Appropriate Method. We observe that the Transfer Pricing Study Report (TPSR) the Assessee had itself adopted CUP Method as the Most Appropriate Method. Further, the facts relevant for adjudication of this ground are also not on record. However, since we have concluded that marketing and volume adjustment should be granted to the Assessee, Ground No. 12 raised by the Assessee has been rendered infructuous and therefore, dismissed.

Ground No. 11

9 Vide letter, dated 19/03/2021, the Assessee had raised additional ground (Ground No. 11) claiming deduction for education cess.

9.1. We note that the claim for deduction for education cess raised has been raised for the first time before the Tribunal. In view of retrospective amendment in Section 40(a)(ii) of the Act and the judgment of Hon'ble Supreme Court in the case of Joint Commissioner of Income Tax Vs. Chambal Fertilisers & Chemicals Ltd. : [2023] 450 ITR 164 (SC) deduction for education cess cannot be allowed. Accordingly, Ground No. 11 raised by the Appellant is dismissed.

ITA No. 8033/Mum/2011
CO No. 277/Mum/2012

10 We would now take up cross-appeal preferred by the Revenue along with Cross Objection of the Assessee.

Ground No. 1(i) to 1(v)

11 Ground No. 1 raised by the Revenue pertains to expenditure of INR.1,63,309/- incurred on VSAT/Lease Line Charges and INR.96,66,784/- Transaction Charges which were disallowed by the Assessing Officer invoking provisions of Section 40(a)(ia) of the Act.

11.1. In appeal the CIT(A) deleted the both the above disallowances holding that the Assessee was not under obligation to deduct tax from the payments towards VSAT/Leased Line Charges and Transaction Charges paid to stock exchanges since the same were not in the nature of fee for technical services as defined in Explanation 2 to Section 9(1)(vii) of the Act. Therefore, disallowance under Section 40(a)(ia) of the Act was not

warranted.

11.2. The Revenue in now in appeal before the Tribunal.

11.3. We have heard the rival submission and perused the material on record.

11.4. The provisions contained in Section 40(a)(ia) of the Act are triggered in case of failure to deduct tax at source. The primary contention of the Revenue before us was that the payment for VSAT/Leased Line Charges as well as the Transaction Charges are not for standard facility as has been concluded by the CIT(A). According to the Revenue, the payments represent fee for services provides by the stock exchanges to its members which are technical in nature. Reliance in this regard was placed on behalf of the Revenue on paragraph 6.5, 6.6, 6.11 and 6.12 of the Assessment Order. The contention of the Revenue was that tax was required to be withheld from payments of VSAT/Leased Line and Transaction Charges as the same were in the nature of fee for technical services. Since, the Assessee had not deducted tax at source under Section 194J of the Act, the Assessing Officer correctly made disallowance under Section 40(a)(ia) of the Act.

11.5. Per Contra, the stand of the Assessee is that the VSAT/Leased Line Charges and Transaction Charges were paid in respect of standard facility provided by the stock exchanges to its members. The aforesaid charges are charges by the stock exchanges from members to recover the cost of providing infrastructure set-up and its day-to-day operations. Reliance was placed in judicial precedents to support the order passed by the CIT(A) on this issue.

11.6. We note that identical issue had come up for consideration before

the Hon'ble Supreme Court in the case of Commissioner of Income-tax-4, Mumbai Vs. Kotak Securities Limited : [2016] 239 Taxman 139 (SC). In that case, after examining the nature of transaction charges collected by the stock exchange, the Hon'ble Supreme Court held that payment of transaction charges not in the nature of fee for technical services as defined in Explanation 2 to Section 9(i)(vii) of the Act. The relevant extract of the decision of the aforesaid judgment of the Hon'ble Supreme Court reads as under:

> *"8. A reading of the very elaborate order of the Assessing Officer containing a lengthy discourse on the services made available by the Stock Exchange would go to show that apart from facilities of a faceless screen based transaction, a constant upgradation of the services made available and surveillance of the essential parameters connected with the trade including those of a particular/single transaction that would lead credence to its authenticity is provided for by the Stock Exchange. All such services, fully automated, are available to all members of the stock exchange in respect of every transaction that is entered into. There is nothing special, exclusive or customised service that is rendered by the Stock Exchange. "Technical services" like "Managerial and Consultancy service" would denote seeking of services to cater to the special needs of the consumer/user as may be felt necessary and the making of the same available by the service provider. It is the above feature that would distinguish/identify a service provided from a facility offered. While the former is special and exclusive to the seeker of the service, the latter, even if termed as a service, is available to all and would therefore stand out in distinction to the former. The service provided by the Stock Exchange for which transaction charges are paid fails to satisfy the aforesaid test of specialized, exclusive and individual requirement of the user or consumer who may approach the service provider for*

such assistance/service. It is only service of the above kind that, according to us, should come within the ambit of the expression "technical services" appearing in Explanation 2 of Section 9(1)(vii) of the Act. In the absence of the above distinguishing feature, service, though rendered, would be mere in the nature of a facility offered or available which would not be covered by the aforesaid provision of the Act.

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.*

11. *In view of above conclusions, it will not be necessary for us to examine the correctness of the view taken by the Bombay High Court with regard to the issue of the disallowance under Section 40(a)(ia) of the Act. All the appeals, therefore, shall stand disposed in the light of our views and observations as indicated above." (Emphasis Supplied)*

11.7. As regards VSAT/Leased line charges are concerned, the same are recovered by the stock exchanges from members for providing connectivity by way of VSAT/Leased Lines. In our view, as per the above judgment of the Hon'ble Supreme Court in the case of Kotak Securities Limited (supra), the VSAT/Leased Line Charges would also be regarded as payment for a facility provided by the stock exchanges and not 'fee for technical services'.

11.8. In view of the above, we do not find any infirmity in the conclusion drawn by the CIT(A) that VSAT/Leased Line Charges and Transaction Charges are not in the nature of fee for technical

services. Accordingly, we decline to interfere with the order passed by the CIT(A) deleting the disallowance under Section 40(a)(ia) of the Act in respect of VSAT/Lease Line Charges and Transaction Charges. Ground No. 1(i) to 1(v) raised by the Revenue are, therefore, dismissed.

Ground No. 2 & Cross Objection raised by the Assessee

12 Ground No. 2 raised by the Revenue and the Cross Objection of the Assessee pertain to the claim of benefit of variation/reduction of 5 percent in terms of the provisions contained in proviso(s) to Section 92C(2) of the Act.

12.1. While challenging the transfer pricing addition before the CIT(A), the Assessee had claimed deduction of 5% the ALP determined by the TPO/Assessing Officer which was granted by the CIT(A).

12.2. Being aggrieved the Revenue has carried the issue in appeal before the Tribunal while the Assessee has filed cross-objection supporting the order of the CIT(A) granting standard deduction of 5% of ALP.

12.3. In this regard, we note that the Special Bench of the Tribunal in the case of M/s IHG IT Services (India) Private Limited Vs. Income Tax Officer – Ward 11(3), Delhi: had, after taking into consideration the retrospective amendment to the second proviso to Section 92C(2) of the Act by the Finance Act, 2012, held that the benefit of tolerance margin of 5% would be available only if the variation is within the said tolerance margin. Once the variation exceeded the tolerance margin of 5%, then there would be no benefit even up to tolerance margin of 5%. Then, the ALP as worked out under Section 92C(1) would have to be taken as ALP without any benefit of tolerance margin. Accordingly, we overturn the decision of the CIT(A) and direct the TPO/Assessing

Officer to re-compute the transfer pricing addition, if any, after taking into consideration the aforesaid judgment of the Special Bench. In terms of the aforesaid, Ground No. 2 raised by the Revenue is allowed while Cross Objection raised by the Assessee is dismissed.

Ground No. 3

13 Ground No. 3 raised by the Revenue is general in nature and is, therefore, dismissed.

14 In result, appeal by the Asseseee [ITA No, 8354/Mum/2011] and Revenue [ITA No.8033/Mum/2011] is partly allowed while Cross-Objection [Co No. 277/Mum/2012] filed by the Assessee is dismissed.

Order pronounced on 08.07.2024.

Sd/-	***Sd/-***
(B.R. Baskaran)	**(Rahul Chaudhary)**
Accountant Member	**Judicial Member**

मुंबई Mumbai; दिनांक Dated : 08.07.2024

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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