

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

BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER
AND RAVISH SOOD, JUDICIAL MEMBER

ITA. No. 7594/Mum/2014

(Assessment Year:2009-10)

TPG Capital India Private Limited 1004, The Capital, Plot No. C-70, G-Block, Bandra Kurla Complex, Bandra (East), Mumbai 400051.	Vs.	DCIT, Circle 3(3), Mumbai.
PAN. AABCN6660K		
(Appellant)		(Respondent)

Appellant by : Shri Porus Kaka & Shri Manish Kanth
Respondent by : Shri N.K. Chand & Shri Vikram Batra.

Date of Hearing : 20.01.2017
Date of Pronouncement : 08.02.2017

ORDER

PER RAVISH SOOD, J.M:

The present appeal is directed against the order passed by the Commissioner of Income-tax (Appeal), dated 28.08.2014, which in itself has arisen from the assessment order passed under section 143(3) of the Income Tax Act, 1961 (in short 'Act'), dated 22.04.2013. The assessee assailing the order of the CIT(A) had raised the following grounds of appeal before us:-

(1) The Commissioner of Income-tax (Appeals) - 15, Mumbai [hereinafter to be referred as 'the CIT(A)'] erred on facts and in law in upholding the action of the Deputy Commissioner of Income-tax - 3(3) [AO] and the Transfer Pricing Officer -II(5), Mumbai [TPO] in making an addition of Rs. 7,17,85,793/- by way of transfer pricing adjustment, to the Appellant's total income, in respect of non-binding investment advisory services transaction of the Appellant alleging the same to be not at arm's length in terms of the provisions of

Sections 92C(1) and 92C(2) of the Income -tax Act, 1961 ['the Act'] read with Rule 10B of the Income-tax Rules, 1962 ['the Rules'].

(2) The CIT(A) erred on facts and circumstances of the case and in law in upholding the action of the AO, in not accepting the arm's length price determined by the Appellant, and in choosing to determine the arm's length price by making reference to the TPO even though none of the conditions laid down under section 92C(3) of the Act, were satisfied.

(3). The CIT(A)/ AO/ TPO erred on facts and circumstances of the case and in law in disregarding the methodically prepared Transfer Pricing documentation submitted by the Appellant and in not appreciating that the arm's length price of the international transactions in relation to non-binding investment advisory services was appropriately determined in the Transfer Pricing documentation applying Transactional Net Margin Method.

(4). The CIT(A)/AO/TPO erred on facts and circumstances of the case and in law by not taking cognisance of the functions performed, assets employed and risk assumed by the Appellant as outlined in the Transfer Pricing documentation and as submitted during the course of the proceedings.

(5). The CIT(A)/AO/TPO erred on facts and circumstances of the case and in law by rejecting the search process carried out by the Appellant, without giving adequate and reasonable reasons for the rejection and further replacing the same by his own alleged search process without even giving the search process to the Appellant herein.

(6). The CIT(A)/AO/TPO erred on facts and circumstances of the case and in law in rejecting 4 comparables out of total 7 comparables, identified by the Appellant by way of detailed and methodical search process as forming part of the transfer pricing documentation prepared by the Appellant required under the Act and the Rules, despite all of them being functionally comparable to the functions of the Appellant herein.

(7). The CIT(A) erred in upholding the action of the TPO / AO in arbitrarily rejecting 2 out of 4 comparables without giving hearing to the Appellant and such rejection by the TPO/AO ought to be held invalid as contrary to the principles of natural justice.

(8). The CIT(A) erred on facts and circumstances of the case and in law in upholding the action of TPO/AO by adding 5 companies as allegedly being comparable to the Appellant despite none of them being functionally comparable to the Appellant herein.

(9). Without prejudice to the above, the CIT(A)/AO/TPO erred on facts and circumstances of the case in not allowing proper adjustments under the

provisions of Rule 10B(1)(e)(e)(iii) of the Rules, to account for differences between the risk profile of the Appellant and the alleged comparables selected by the AO/TPO.

(10). The CIT(A)/ AO/ TPO erred on facts and circumstances of the case in levying interest under Section 234B and Section 234C of the Act. The Appellant prays that suitable direction to be given to delete / reduce the interest.

(11). The CIT(A)/AO/ TPO erred on facts and circumstances of the case and in law in initiating penalty proceedings under Section 271(1)(c) of the Act.

The Appellant crave leave to add, amend, delete, rectify, substitute and / or modify any of the aforesaid grounds of appeal herein provided and / or add a new ground or grounds of appeal at any time before or at the time of hearing of the appeal.”

2. That the present appeal filed by the assessee involves a delay of 38 days. The assessee had filed an application seeking condonation of delay, which is supported by an ‘Affidavit’ of the director of the assessee company therein deposing the facts leading to delay in filing of the appeal. It is claimed by the assessee that the order of the CIT(A) was received on 13th September 2014 and the ‘Memorandum of appeal’ was duly signed by the director of the assessee company, viz. Shri Puneet Bhatia as on 07.11.2014. It is stated that though the assessee had sent the office boy for filing of the appeal with the Income-tax Appellate Tribunal on 10.11.2014, however the latter inadvertently filed the same with the office of the Ld. Departmental Representative of the Tribunal. The assessee in order to fortify the aforesaid factual position had therein enclosed the copy of the acknowledgement of receipt of the aforesaid appeal given by the office of the Departmental representative on 10.11.2014. It is stated by the director of the assessee company that he was not aware about the said mistake involved in filing of the appeal. It is further claimed by the assessee that it was only when he received a call from the office of the CIT, Departmental Representative, Income-tax Appellate Tribunal, ‘K’ Bench (for short ‘Tribunal’) therein enquiring as to whether an appeal had been filed by the assessee company against the impugned order for A.Y. 2009-10, it was only then that in the course of his enquiry from the the registrar of the Tribunal as regards the status of the same, therein to his utter surprise was

informed that no such appeal had been filed with the Tribunal. It is stated by the assessee that the registrar of the Tribunal on perusing the acknowledgment of the appeal available with the assessee, therein informed him that the same had been filed with the office of the Departmental Representative, and not with the office of the Tribunal. The assessee immediately on learning of the aforesaid inadvertent mistake on the part of his office, therein involving no further loss of time filed the appeal with the Tribunal, which by the time involved a delay of 38 days. That at the very outset of the hearing of the appeal it was submitted by the Ld. Authorized representative (for short 'A.R') for the assessee that as the delay of 38 days involved in filing of the appeal was on account of a *bonafide* mistake on the part of the office of the assessee, the delay involved therein may be condoned.

2.1 We have duly considered the aforesaid facts as averred by the assessee, which are duly supported by an affidavit, and have also perused the copy of the acknowledgment given by the office of the CIT, DR, ITAT, Mumbai, dated 10.11.2014. We are of the considered view that the delay of 38 days in filing of the appeal is prompted purely on account of a bonafide mistake, and the assessee on learning about the same had immediately filed the appeal with the Tribunal. We thus after giving a thoughtful consideration to the facts leading to the delay in filing of the appeal, are persuaded to be in agreement with the Ld. A.R that the delay of 38 days involved in filing of the same was prompted by a bonafide mistake on the part of the office of the assessee, and not on account of any lapses or laches on the part of the assessee. We thus are of the considered view that the delay of 38 days involved in the filing of the present appeal deserves to be condoned. The application filed by the assessee seeking condonation of delay of 38 days in filing the present appeal is thus allowed.

BRIEF BACKGROUND:

3. The brief facts of the case are that the assessee company which is engaged in the business of providing Sub-investment advisory services, Market research and Statistical data to its holding company ,viz. TPG Capital LLP had filed its return of

income for A.Y.2009-10 on 30.09.2009 declaring total income of Rs.2,77,02,075/-. That during the year the assessee had entered into various international transactions with its Associate Enterprise (AE) and had furnished 'Form 3CEB' in support of such transactions.

BEFORE THE A.O AND TPO :

4. The case of the assessee was taken up for scrutiny proceeding u/s. 143(2) and a reference was made by the A.O under Sec. 92CA(1) to the Transfer Pricing Officer ('TPO') for determination of the Arm's Length Price ('ALP') in respect of the International transactions carried out by the assessee with its AE. The assessee submitted before the TPO that for determination of the ALP as regards the 'Investment Advisory Services' rendered to its AE, it had selected TNMM as the most appropriate method. The assessee had selected itself as a tested party and the PLI selected for bench marking the ALP was OP/OC. In the TP study report the assessee had used 7 comparables to benchmark the ALP of the international transactions relating to investment advisory services rendered to the AE, as under:-

Sr. No.	Name of the Comparable	Weighted Avg (OP/OT) (%)
1.	Future Capital Holdings Limited	-2.23
2.	ICRA Management Consulting Services Limited	5.02
3.	ICRA Online Limited	27.45
4.	ICRA Techno Analytics Limited	8.56
5.	IDC (India) Ltd.,	15.66
6.	Informed Technologies India Ltd.,	20.39
7.	KPIT Cummins Global Business Solutions Ltd.,	-4.43
	Average	10.06
	Assessee's average	10.86

That the TPO however rejected 4 of the comparables selected by the assessee for the reason that either they had a dissimilar business profiles or were found to be loss making entities, by observing as under :-

S.No	Name of the comparable	Reasons for non-acceptance
1.	IDC India Ltd.	The company had a strategic tie-up with IDC Inc., one of the world's largest market data research and consulting organization focusing on the ICT industry. This company is engaged in the business of research and survey service and products. The company provides user research, verticals research, go-to market services and consulting services which enable IT professionals, business executives and the investment committee make fast-based decisions on technology purchases and business strategy. Thus, IDC India Ltd., is engaged primarily in business of research & Survey service & products. The thrust of its business is quite dissimilar from the focus of assessee's business and it does not offer the investment advisory services.
2.	ICRA Management Consulting Services Ltd.,	This company has significant related party transactions during the year and also is a loss making entity. In the business of rendering investment advisory services, incurring operating loss is an exception, which can happen due to abnormal operational problems. Therefore, this company cannot be considered as a good comparable in this sector. Hence rejected.
3.	Future Capital Holdings Limited.	The company has suffered huge operating loss of (-) 25.04%. The business of investment advisory is purely a professional service based activity which always gets adequately compensated over and above the cost of service by the recipient of the advisories. The nature of business is such that it is neither labour intensive nor asset intensive and is purely run on the strength of professional war force, who charge sufficient mark ups on the professional services rendered by them. Loss notices in such business is certainly due to some abnormal situation/factors which has to be

		taken into account before accepting a loss making entity in this segment, as a comparable. The assessee has not offered any valid reasons with supporting data for the operating loss incurred by the company. Hence, such a comparable is liable to be rejected.
4.	KPIT Cummins Global Business Solutions Ltd.	As in the case of Future Capital Holdings Ltd., this company has incurred substantial operating loss of (-) 16.98% during the FY 2008-09. For the reasons elaborated above, such a loss making entity cannot be selected as a comparable.

The TPO thus concluded that only 3 comparables given by the assessee in its TPSR could feasibly be accepted for benchmarking, as under:-

Sr. No.	Name of the comparable	Weighted Avg. (OP/OC) (%)
1.	ICRA Online Ltd.	41.42
2.	Informed Technologies Ltd.	23.13
3.	ICRA Techno Analytics Limited	10.01
	Average	24.85

5. The TPO further not finding himself as being in agreement with the search process selected by the assessee as narrated in the TP study report, thus carried out further searches in the database available in public domain and adopted 5 additional comparables for benchmarking the international transactions of the assessee, as under:-

Sr. No.	Name of the Comparable	Weighted Avg. (OP/OC) (%)
1.	Crisil Limited (segmental)	62.1
2.	SBI Fund Management Pvt. Ltd.,	83.5
3.	Sundaram Asset Management Co. Ltd.,	24.02
4.	ICRA Ltd.,	50.57

5.	Deutsche Asset Management India Ltd.,	48.8
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The TPO thus on the basis of the 3 comparables selected by the assessee and 5 comparables adopted by him during the course of the proceedings, therein concluded the benchmarking of the ALP of the international transactions of the assessee with its AE, as under:-

Sr. No.	Name of the comparable	Weighted Avg. (OP/OC)(%)
1.	ICRA Online Ltd.,	41.42
2.	Informed Technologies Ltd.,	23.13
3.	ICRA Techno Analytics Limited	10.01
4.	Crisil Limited (segmental)	62.1
5.	SBI Fund Management Pvt. Ltd.,	83.5
6.	Sundaram Asset Management Co. Ltd.,	24.02
7.	ICRA Ltd.,	50.57
8.	Deutsche Asset Management India Ltd.,	48.94
	Average	42.94

The TPO thus adopted a broad based representative sample of 8 uncontrolled comparables whose average profit margin (OP/OC) during the subject year was 42.94%, for benchmarking the ALP of the international transactions of the assessee with its AE pertaining to Investment Advisory Services, as under:-

1.	Total Operating Income (OI)	Rs. 24,80,31,374/-
2.	Total Operating Cost (OC)	Rs. 22,37,42,246/-
3.	Operating Profit (OP)	Rs. 2,42,89,127/-
4.	Assessee's PLI	10.87%
5.	PLI (OP/OC) % of the comparables	42.94%
6.	Arm's Length Price (ALP @ 42.94% of OC)	Rs. 9,60,74,920/-
7.	Difference between ALP & OP (Adjustment)	Rs. 7,17,85,793/-

, and vide his order passed under Section 92CA(3) suggested an adjustment of Rs. 7,17,85,793/- to the ALP determined by the assessee.

6. The A.O passed a Draft Assessment Order on 22.02.2013, therein incorporating the proposed adjustments suggested by the TPO. The A.O on being informed by the assessee that it wanted to exercise its option to appeal to the CIT(Appeal) against the variations/additions to its income and does not wish to proceed before the Dispute Resolution Panel (DRP) for dispute resolution, therefore carried out an adjustment of Rs.7,17,85,793/- as suggested by the TPO and assessed the income of the assessee at Rs.9,94,87,870/-.

BEFORE CIT(A) :

7. The assessee assailed the assessment order before the CIT(Appeal). The CIT(A) after deliberating on the contentions of the assessee, therein observed as under:-

(i). The CIT(A) did not find favor with the contention of the assessee that it had followed a methodical search process in Transfer Pricing documentation and observed that the TPO had not disturbed the TNMM followed by the assessee, but due to its faulty search process had only rejected few comparables and added few more comparables in order to make the comparability more effective.

(ii). The CIT(A) being of the view that the case of the assessee was covered by the provisions of Section 92C(3)(a)/(c) of the 'Act', therefore no inappropriateness or deficiency did emerge from the action of the TPO who had acted well within his powers. The CIT(A) thus rejected the contention of the assessee that the data used in the computation of the ALP was not reliable.

(iii). The CIT(A) further observed that the entire exercise carried out by the TPO while excluding some of the companies relied upon by the assessee as comparables and rather supplementing the same by fresh comparables which were selected by him, was duly backed by detailed discussion on the part of the TPO who had dealt with in

detail about the fresh comparables selected by him as well as had duly taken cognizance of the objections raised by the assessee before him, therefore no infirmity could be attributed to the said process of selection/rejection of the comparables so carried out by the TPO. The CIT(A) further observed that the reliance placed by the assessee on the order of the Tribunal in the case of Temasek Holding Advisors India (P) Ltd.(ITA NO. 6504/Mum/2012) and Sandstone Capital Advisors Pvt. Ltd. (ITA No. 6315/Mum/2012), which was pressed into service by the assessee to support its contention were also found to be misconceived and distinguishable on facts.

(iv). The CIT(A) further adverting to the contention of the assessee who had assailed the rejection of the 4 comparables which were selected by it for computing the ALP, therein upheld the observations of the TPO for the reason that either the comparables selected by the assessee were not functionally comparable, or for the reason that they were either found to be loss making entities, or had significant related party transactions (for short 'RPT').

(v). The CIT(A) further observed that as the TPO had provided sufficient opportunity to the assessee with reference to the search process and fresh comparables selected from the data base available in the public domain, therefore the claim of the assessee that the TPO had not provided search process and hence had acted in violation of the principles of natural justice, was devoid of any force and could not be accepted.

(vi). The CIT(A) further dealing with the contention of the assessee that the data to be used should be contemporaneous and data available at the time of analysis when the international transaction had been entered into, therein referring to Rule 10B(4) of Income Tax Act Rules, 1962, which regulates the use of data for the purpose of analysis, thus held that the contention of the assessee was misconceived and could not be accepted.

(vi). The CIT(A) further rejected the claim of the assessee that as the companies selected by the TPO were exposed to significant business and market risks for which

reasonable adjustment should have been allowed, therein observing that the assessee except for making the aforesaid statement had however failed to demonstrate as to how there was any difference in business and market risks of the comparables selected by the TPO, as in comparison to the assessee. It was further observed by the CIT(A) that when most appropriate method adopted by the assessee is TNMM, then the adjustment had to be in terms with Rule 10B(1)(e).

(vii). The CIT(A) further relied on the order of the ITAT, Delhi in the case of : Techbooks International (P) Ltd. Vs. ACIT (2014) 45 taxmann.com 528, wherein it has been held that the AO at the time of making a reference to the TPO is not required to record detailed satisfaction that price charged/paid in an international transaction is not at ALP. The CIT(A) rejected the claim of the assessee that before making a reference to the TPO the assessee was supposed to be afforded an opportunity, and therein observed that the only conditionality for making a reference was to obtain the previous approval of the CIT. The CIT(A) thus being of the considered view that the reference made by the A.O to the TPO u/s 92CA (1) was as per the mandate of law, therefore the contention of the assessee challenging the very making of a reference to the TPO was liable to be rejected.

7.1 The CIT(A) on the basis of his aforesaid observations, therein upheld the order of the TPO/AO and dismissed the appeal of the assessee.

8. The assessee being aggrieved with the order of the CIT(A) had therein carried the matter in appeal before us. That the Ld. Authorized Representative (for short 'A.R.') for the assessee had at the very outset of the hearing of the appeal assailed the 5 comparables selected by the TPO for benchmarking the ALP of the international transactions carried out by the assessee with its AE, as under:-

(1). **Crisil Ltd., (segment Research Service):-**

The Ld. A.R at the very outset submitted that the co-ordinate bench of the Tribunal while disposing of the appeal of the revenue so filed in the case of DCIT, Mumbai Vs. M/s Temasek Holdings Advisors (I) Private Ltd. (ITA No.968/Mum 2014, dated

27/06/2014), had therein upheld the order of the DRP who had excluded Crisil Ltd. (supra) as a comparable, for the reason that it had RPT of 44.51%. The Ld. A.R further drew our attention to the segment reporting of the aforesaid comparable (Page 649 of the APB), which therein revealed that the advisory segment comprising international advisory and risk management practice had been transferred to a wholly owned subsidiary with effect from 01.04.2004. Thus, on the basis of the aforesaid facts it was averred by the Ld. A.R that the aforesaid comparable so adopted by the TPO was even otherwise functionally different. The Ld. A.R in support of his contention therein relied on the order of the ITAT, Delhi in the case of: Avenue Asia Advisors Private Ltd. Vs. DCIT Delhi (ITA No. 6638/Delhi/2013 - AY 2009-10, dated 22.01.2016), and therein averred that in the case of the aforesaid assessee which too was engaged in the business on investment advisory services, the aforesaid comparable, viz M/s Crisil Ltd. (supra) which was taken by the assessee as one of the comparable, was however excluded by the TPO for the reason that the RPT in the case of the said comparable was more than 25%. The Ld. A.R further relied on the order of the ITAT, Mumbai in the case of: IIML Asset Advisors Ltd. Vs. ACIT (ITA No. 5173/Mum/2012, dated 22.02.2013- AY 2008-09), wherein the tribunal observing that the aforesaid comparable, viz Crisil Ltd. (supra) had substantial revenue from research, i.e revenue of Rs. 116.4 crore from research, as compared to advisory revenue of only 8.76 crore. It was further submitted by the Ld. A.R that the 'Annual report' of Crisil Ltd. (supra) for the year 2007 revealed that it was India's leading independent and integrated research house which meets the requirement of more than 600 domestic and integrated clients, having unparalleled width and breadth spanning the entire economy. Thus in the backdrop of the aforesaid facts, it was submitted by the Ld. A.R that no feasible comparison could be arrived at by adopting the aforesaid comparable, viz Crisil Ltd. (supra), which as such was liable to be excluded. That on the other hand the Ld. D.R relied on the orders of the lower authorities and therein averred that the said comparable was functionally comparable and after thorough vetting of the various aspects, had rightly been selected by the TPO for benchmarking the ALP of the international transactions of the assessee with its AE as regards its Investment Advisory Services.

We have considered the submissions of Ld. Representatives of both the parties, perused the orders of the lower authorities and the record available before us, and find substantial force in the contention of the Ld. A.R who had at length demonstrated before us that the aforesaid comparable, viz. Crisil Ltd (supra) was not only functionally different, but had RPT of more than 25%. We are of the considered view that in light of the fact that the advisory segment comprising international advisory and risk management practice of the aforesaid comparable, viz M/s Crisil Ltd. (supra) had been transferred to its wholly owned subsidiary, coupled with the fact that a coordinate benches of the Tribunal in the case of : M/s Temasek Holdings Advisors (I) Private Ltd. (ITA No.968/Mum 2014, dated 27/06/2014 – A.Y. 2009-10) and M/s Avenue Asia Advisors Private Ltd. Vs. DCIT Delhi (ITA No. 6638/Delhi/2013 – A.Y 2009-10, dated 22.01.2016), taking cognizance of the RPT of more than 25% in the case of the said comparable had upheld the exclusion of the said comparable, viz M/s Crisil Ltd. (supra), as well as the observations of another coordinate bench of the Tribunal in the case of: IIML Asset Advisors Ltd. (ITA No. 5173/Mum/2012, dated 22.02.2013- AY 2008-09) therein observing that the aforesaid comparable was functionally incomparable, we are persuaded to be in agreement with the contention of the Ld. A.R that the TPO had wrongly selected the aforesaid comparable. We thus in light of our aforesaid observations are thus of the considered view that the aforesaid party, viz M/s Crisil Ltd. (supra) has to be excluded from the list of the comparables selected by the TPO, and thus direct accordingly.

(2). **ICRA Limited.**- That it was submitted by the Ld. A.R that the TPO had carried out company level comparison, and on the said basis no feasible results could have safely been arrived at. The Ld. A.R had drawn our attention to the relevant extract of the ‘Annual report’ of the aforesaid comparable (Page 780 of the APB), and submitted that as the said comparable was into a host of services, namely credit rating services, grading services, software development etc., over and above information advisory services, therefore, a feasible company level comparison with the said comparable could not be carried out. The Ld. A.R further taking us to the relevant extract of the ‘Annual report’ of the aforesaid comparable (Page 825 of APB), therein

substantiated his contention that the main source of income of the aforesaid comparable was from 'Rating services' (including 'credit service'), and not advisory services. The Ld. A.R further took us through the 'Segment breakup' which duly substantiated his aforesaid contention. The Ld. A.R further relied on the order of ITAT 'K' Bench, Mumbai, in the case of DCIT, Mumbai Vs. Temasek Holdings Advisors Pvt. Ltd., Mumbai (ITA 968/mum/2014, dated 27.06.2014- AY 2009-10). Thus in light of the aforesaid observations so recorded by the Tribunal in the abovementioned case, it was submitted by the Ld. A.R that the aforesaid comparable so adopted by the TPO, viz ICRA Limited. (supra) could safely be held to be functionally incomparable. The Ld. A.R further in support of his aforesaid contention relied on the order of ITAT 'K' bench, Mumbai, in the case of : Temasek Holding Advisors (India) Pvt. Ltd., Vs DCIT, Mum (ITA No. 4203/mum/2012 - AY 2007-08 and ITA No. 6504/mum/2012 - 2008-09, dated 30.08.2013), and therein submitted that the Tribunal while disposing of the aforesaid appeals had categorically held that as the aforesaid comparable, viz ICRA Limited (supra) was a credit rating agency in India, the same therefore could not be held to be functionally comparable with the assessee company which was rendering investment advisory services to its holding company. The Ld. A.R further referred to similar observations arrived at by the ITAT 'K' bench, Mumbai in the case of : Sandstone Capital Advisors Pvt. Ltd. Vs. ACIT, Mum (ITA No. 6315/Mum/2012, dated 06,02.2013 - AY 2008-09), wherein the Tribunal had observed that as ICRA Limited. (supra) was mainly into the business of providing rating services, therefore the same was functionally incomparable with the case of the assessee before the Tribunal, which too was mainly in the business of investment advisory. That on the other hand the Ld. D.R relied on the orders of the lower authorities and therein averred that the said comparable was functionally comparable and had rightly been selected by the TPO for benchmarking the ALP of the international transactions of the assessee with its AE as regards its Investment Advisory Services.

We have considered the submissions of the Ld. Representatives of both the parties, perused the orders of the lower authorities and the record available before us. We are

persuaded to be in agreement with the Ld. A.R who had demonstrated before us that the aforesaid comparable, viz ICRA Limited (supra) was functionally incomparable with the assessee. We have given a thoughtful consideration to the facts of the case and the orders of the coordinate benches of the Tribunal to which our attention was drawn by the Ld. A.R during the course of hearing of the appeal. We find that in the backdrop of the observations of the coordinate benches of the Tribunal in the case of : Temasek Holdings Advisors Pvt. Ltd., Mumbai (ITA 968/mum/2014, dated 27.06.2014- AY 2009-10) and Sandstone Capital Advisors Pvt. Ltd. (ITA No. 6315/Mum/2012, dated 06.02.2013 - AY 2008-09), it can safely be concluded that the aforesaid comparable, viz M/s ICRA Limited (supra) is functionally incomparable to the business of the assessee. Thus finding no reason to take a different view, we herein find ourselves to be in agreement with the contention of the Ld. A.R that the aforesaid comparable, viz ICRA Limited being functionally incomparable has to be excluded from the list of the comparables selected by the TPO, and thus direct accordingly.

(3). **SBI Fund Management Ltd.**- That the Ld. A.R submitted that the aforesaid comparable, viz SBI Fund Management Ltd. was an 'Asset manager' and unlike the assessee was not into investment advisory business. The Ld. A.R in order to fortify his contention therein took us through the relevant extracts of 'Annual report' of the aforesaid comparable (Page 695- 696 of APB). The Ld. A.R in order to further support his contention that the main source of income of the aforesaid comparable, viz SBI Fund Management Pvt. Ltd. (supra) was by way of 'management fees', therein took us to its 'Profit and loss account' for the Financial Year: 2008-09 (Page 704 of APB), which on a bare perusal substantiated beyond any scope of doubt the aforesaid claim of the Ld. A.R. Thus in the backdrop of the aforesaid averments it was submitted by the Ld. A.R that the aforesaid comparable selected by the TPO was functionally incomparable and hence was liable to be excluded. The Ld. A.R further relying on the order of the ITAT, Mumbai 'K' bench in the case of : Sandstone Capital Advisors Pvt. Ltd. (ITA No. 6315/Mum/2012, dated 06.02.2013 - AY 2008-09), therein submitted that the Tribunal while disposing of the aforesaid appeal had categorically observed that the receipts of the said comparable, viz SBI Fund Management Ltd.(supra) was from

management fees, while for the advisory fees which was very negligible was also found to be relatable to the portfolio advice business. It was thus submitted by the Ld. A.R that the Tribunal in the aforementioned appeal, therein referring to the investment advisory business of the assessee before it, had therein observed that the said comparable was functionally different as in comparison to the assessee before it. That on the other hand the Ld. D.R relied on the orders of the lower authorities and therein submitted that the aforesaid comparable was functionally comparable and had rightly been selected by the TPO for benchmarking the ALP of the international transactions of the assessee with its AE as regards its Investment Advisory Services.

We have given a thoughtful consideration to the contentions of the Ld. Representatives of both the parties in the backdrop of the records before us. We are of the considered view that the aforesaid comparable, viz SBI Fund Management Ltd.(supra), as stands gathered from its 'Annual report' and the 'Financial statements', was an 'Asset manager' whose main source of income was by way of management fees, while for the advisory fees which too is from the portfolio advice sector is found to be very negligible. We find that the fact that the aforesaid comparable was functionally incomparable finds support from the order of the coordinate bench of the Tribunal in the Sandstone Capital Advisors Pvt. Ltd. (ITA No. 6315/Mum/2012, dated 06.02.2013 - AY 2008-09). Thus in the backdrop of the aforesaid facts as stands gathered from the records and finding no reason to take a different view as against that arrived at by the coordinate bench of the Tribunal, we are of the considered view that it can safely be held that the aforesaid comparable, viz SBI Fund Management Ltd.(supra) being functionally incomparable has to be excluded from the list of the comparables selected by the TPO, and thus direct accordingly.

(4). **Sundaram Asset Management Ltd.** : That it was submitted by the Ld. A.R that the aforesaid comparable selected by the TPO, unlike the assessee, was an asset management company. The Ld. A.R in order to fortify his aforesaid contention therein took us to the relevant extracts of the 'Annual report' of the aforesaid comparable (Page 757 & 763), wherein a glance over the 'Profit and loss a/c' of the said comparable for the year under consideration therein revealed that the main source of income of the

aforesaid comparable, viz Sundaram Asset Management Ltd. (supra) was 'Investment management fees', while for the advisory fees was substantially on the lower side. That still further the Ld. A.R took us to Page 677 and Page 770 of the APB, which further substantiated the fact that the said comparable was primarily into asset management, investment advisory services and portfolio management services. The Ld. A.R in order to support his claim that the aforesaid comparable could not be adopted as a feasible comparable in the case of an assessee which was rendering investment advisory services to its holding company, therein relied on the order of ITAT 'K' bench, Mumbai, in the case of : DCIT Vs. Temasek Holding Advisors Pvt. Ltd. (ITA No.968/Mum/2014, dated 27.06.2014 AY 2009-10), wherein the Tribunal relying on the order passed in the case of the aforementioned assessee for the immediately two preceding years had therein concluded that the aforesaid comparable, viz Sundaram Asset Management Company (supra), being functionally incomparable, was thus liable to be excluded from the list of the comparable so adopted by the TPO. The Ld. A.R further relied on the order passed by the ITAT in the case of : Temasek Holding Advisors Pvt. Ltd. Vs. DCIT (ITA No. 4203/Mum/2012 AY 2007-08 and ITA No. 6504/Mum/2012 AY 2008-09), dated 30.08.2013, wherein the Tribunal had observed that M/s Sundaram Asset Management Ltd. (supra) could not be adopted as a feasible comparable in the case of an assessee which was in the business of providing investment advisory services to its holding company. The Ld. A.R in order to substantiate his aforesaid contention, therein placed reliance on the judgments of the **Hon'ble High Court of Bombay** so passed in the case of :-

- (i). CIT Vs. General Atlantic Pvt. Ltd., (ITA No.1993 of 2013, dated 08.3.2016).
- (ii). CIT Vs. M/s Carlyle India Advisors (P) Ltd. (ITA No. 1286 of 2012, Dt. 22.02.2013).

, wherein the Hon'ble High Court had upheld the respective orders of the Tribunal which had concluded that the comparables adopted by the TPO which were not in the business of investment advisory services, could not be selected as comparables for benchmarking the ALP of an assessee which is in the business of Investment advisory services. That the Ld. D.R on the other hand placed heavy reliance on the orders of the lower authorities and therein averred that the aforesaid comparable was functionally

comparable and had rightly been selected by the TPO for benchmarking the ALP of the international transactions of the assessee with its AE as regards its Investment Advisory Services.

We have heard the Ld. Representatives and perused the orders of the lower authorities and the records available before us. We are of the considered view that on a perusal of the relevant extracts of the 'Annual report' and 'Profit and loss a/c' of the aforesaid comparable, to which our attention was drawn by the Ld. A.R, therein reveals that the said comparable, viz Sundaram Asset Management Ltd. (supra) was an asset management company with its main source of income being by way of 'Investment management fees', which renders it as functionally incomparable. The fact that no feasible comparison could be effected between the assessee company which is in the business as that of Investment advisory, as against the aforesaid comparable, had been appreciated in the host of orders passed by the coordinate benches of the Tribunal to which our attention was drawn by the Ld. A.R during the course of hearing of the appeal. We are of the considered view that in the backdrop of the aforesaid facts as stands emerged from the records and loudly fortifies the fact that the aforesaid comparable viz SBI Fund Management Ltd.(supra) is functionally incomparable with the assessee, and finding no reason to take a different view as against that arrived at by the coordinate benches of the Tribunal in the case of : DCIT Vs. Temasek Holding Advisors Pvt. Ltd. (ITA No.968/Mum/2014, dated 27.06.2014 AY 2009-10) and Temasek Holding Advisors Pvt. Ltd. Vs. DCIT (ITA No. 4203/Mum/2012 - AY 2007-08 and ITA No. 6504/Mum/2012 - AY 2008-09, dated 30.08.2013) and the judgments of the Hon'ble High Court in the case of : CIT Vs. General Atlantic Pvt. Ltd., (ITA No.1993 of 2013, dated 08.3.2016) and CIT Vs. M/s Carlyle India Advisors (P) Ltd. (ITA No. 1286 of 2012, Dt. 22.02.2013), we are of the considered view that it can safely be held that the aforesaid comparable, viz SBI Fund Management Ltd.(supra) being functionally incomparable to the assessee has to be excluded from the list of the comparables selected by the TPO, and thus direct accordingly.

5. **Deutsche Asset Management India Ltd:-** That it was submitted by the Ld. A.R that the aforesaid comparable selected by the TPO was engaged in providing asset

management services, and thus being functionally incomparable had wrongly been included by the TPO in the list of comparables. The Ld. A.R in order to support his contention took us to the ‘qualitative review non-segmental’ pertaining to the aforesaid comparable, which fortified the aforesaid claim. The Ld. A.R further referring to the ‘Financial statements’ of the aforesaid comparable, therein took us to Page 898 of the APB which revealed that the comparable, viz Deutsche Asset Management India Ltd. (supra) had obtained registration from the SEBI to function as an asset management company for the ‘Deuteshe mutual fund’ with effect from 29.10.2002. The Ld. A.R further taking support from the segment reporting of the aforesaid comparable, therein referred to Page 912 of the APB, which revealed that the said comparable was mainly engaged in the business of asset management services. That alternatively it was averred by the Ld. A.R that the RPT disclosure of the aforesaid comparable revealed that the same was 125%. The Ld. A.R further taking support of the order of the coordinate bench of the Tribunal in the case of DCIT Vs. M/s Temasek Holding Advisors Pvt. Ltd., (ITA No. 968/Mum/2014, dated 27.06.2014 AY 2009-10), therein submitted that the Tribunal had clearly held that the aforesaid comparable was an Asset Management company, which was licensed by SEBI. It was thus submitted by the Ld. A.R that the aforesaid comparable, viz Deutsche Asset Management India Ltd (supra) was wrongly selected by the TPO. The Ld. A.R took further support from the order of the ITAT, Mumbai ‘K’ bench in the case of : Sandstone Capital Advisors Pvt. Ltd. Vs. ACIT (ITA No. 6315/Mum/2012, dated 06.02,2013 AY 2008-09), wherein the Tribunal had observed that as majority of the revenue of the aforesaid comparable was from investment fee, therefore there was no similarity between the business profile of the said company and the assessee which was engaged in investment advisory business. The Ld. AR further took support from the order of the ITAT, Mumbai ‘K’ bench in the case of : IIM Asset Advisors Ltd. Vs ACIT (ITA No.5173/Mum/2012, dated 22.02.2013-AY 2008-09), wherein the Tribunal taking cognizance of the fact that the aforesaid comparable had RPT of 88.49%, had therein proceeded with and found favor with the contention of the assessee that the aforesaid comparable so included by the TPO was liable to be excluded. That the Ld. D.R on the other hand placed heavy reliance on the orders of the lower authorities and therein averred that the aforesaid comparable was

functionally comparable and had rightly been selected by the TPO for benchmarking the ALP of the international transactions of the assessee with its AE as regards its Investment Advisory Services.

We have heard the Ld. Representatives, perused the orders of the lower authorities and the records available before us and are of the considered view that in light of the functional incomparability as well as substantial RPT involved in the case of the said comparable, as had been so observed by the coordinate benches of the Tribunal in the case of : DCIT Vs. M/s Temasek Holding Advisors Pvt. Ltd., (ITA No. 968/Mum/2014, dated 27.06.2014-A.Y 2009-10), Sandstone Capital Advisors Pvt. Ltd. Vs. ACIT (ITA No. 6315/Mum/2012, dated 06.02,2013 – A.Y 2008-09) and IIM Asset Advisors Ltd. Vs ACIT (ITA No.5173/Mum/2012, dated 22.02.2013 – A.Y 2008-09), we find no reason to arrive at a different view and are persuaded to exclude the aforesaid comparable so included by the TPO. Thus in light of our aforesaid observations we herein exclude the aforesaid comparable, viz Deuteshe Asset Management India Ltd.(supra) from the list of the comparables selected by the TPO, and direct accordingly.

9. That the Ld. A.R further adverting to the comparables which were included by the assessee in its TP study report, but had been excluded by the TPO, therein assailed the said action of the TPO which was upheld by the CIT(A), as under:-

(1). **Future Capital Holding**:- That it was submitted by the Ld. A.R that the aforesaid comparable, viz Future Capital Holding (supra) had been **included** in the case of the assessee itself for all the earlier years, and thus in absence of any facts which could go to prove that during the year under consideration the said comparable was rendered functionally incomparable, the exclusion of the same on the part of the TPO was not called for and was thus unjustified. It was submitted by the Ld. A.R that the TPO had excluded the aforesaid comparable for the reason that the same was found to be a loss making company. However, in this regard it was submitted by the Ld. A.R that though the aforesaid comparable had suffered a loss during the year under consideration, but in the preceding years the latter had duly reflected profits, which fact could be gathered

from a bare perusal of the order of the ITAT, Mumbai bench 'K' so passed in the case of : IIM Asset Advisors Ltd. Vs ACIT (ITA No.5173/Mum/2012, dated 22.02.2013 AY 2008-09), wherein for the immediately preceding year i.e. AY 2008-09, the OP/OC of the aforesaid comparable stood reflected at 23.31. Thus, in the backdrop of the aforesaid submissions, it was averred by the Ld. A.R that in light of the observations of the ITAT, Pune bench 'A' in the case of : Bobst India (P) Ltd. Vs. DCIT (2015) 63 taxmann.com 339(Pune), a persistent loss making means continuous loss making for more than 3 years, and had held that as the comparable before it had earned a margin of 2.39% in comparable segment in the preceding year, the same could not be considered as a loss making company. That it was thus submitted by the Ld. A.R that now when the aforesaid comparable was not into continuous loss making for more than 3 years, which was a fact borne from record, therefore, it could not be excluded as a feasible comparable on the ground that it was a loss making company. That on the other hand the Ld. D.R relied on the order of the lower authorities and therein submitted that the TPO had rightly excluded the aforesaid comparable, which thereafter had rightly been upheld by the CIT(A).

We have given a thoughtful consideration to the submissions of the Ld. representatives and after perusing the records to which our attention was drawn during the course of the appellate proceedings, we are of the considered view that though it is a fact that the aforesaid comparable, viz Future Capital Holding Ltd., for the year under consideration had reflected a loss and its OP/OC was -25.04%, but then as stands gathered from the records, it remains as a matter of fact that in the immediately preceding year the said comparable had made profits and its OP/OC was 23.31%. Thus going by the observations of the ITAT, Pune bench in the case of : Bobst India (P) Ltd. Vs. DCIT (2015) 63 taxmann.com 339 (Pune), it can safely be held that the said comparable was not a persistent loss making company, and thus the same could not have been excluded by the TPO for the reason that the latter during the year under consideration had suffered an operating loss. Thus, in light of our aforesaid observations we are unable to persuade ourselves to subscribe to the aforesaid findings of the TPO, which thereafter had been upheld by the CIT(A). We thus set aside the observations of the lower

authorities therein excluding the aforesaid comparable from the list of the comparables provided by the assessee. Thus the order of the CIT(A) to the extent sustaining the exclusion of the aforesaid comparable is herein set aside.

(2). **ICRA Management Consulting Services Ltd.** :- The Ld. A.R submitted that the aforesaid comparable had been excluded by the TPO from the list of comparables provided by the assessee for the reason that as per the TPO the said comparable had significant related party transactions during the year and was also a loss making entity. The Ld. A.R adverting to the aforesaid observations of the TPO which therein had been upheld by the CIT(A), therein averred that as the RPT of the aforesaid comparable was 14%, and as such less than the minimum 25% which could go to justify exclusion of the said comparable, the aforesaid observations of the lower authorities on the said count thus could not be sustained as such. It was further submitted by the Ld. A.R that as the aforesaid comparable had suffered a loss only during the year under consideration and its OP/OC stood reflected at -1.84%, therefore merely on the said count and bypassing the very fact that it was not a persistent loss making company in the preceding years, no adverse inference as regards the feasibility of adopting the aforesaid comparable by the assessee was thus liable to be drawn. The Ld. A.R further submitted that the aforesaid comparable had duly been held by the Tribunal as being functionally comparable in the case of similarly placed assesseees who were engaged in Investment Advisory Services, and in support thereof relied on the following orders of the coordinate benches of the Tribunal:-

- (i) DCIT Vs. Temasek Holdings Advisors Pvt. Ltd., (ITA No.968/Mum/2014, dated 27.06.2014 – A.Y 2009-10).
- (ii) Temasek Holdings Advisors India Pvt. Ltd., Vs. DCIT (ITA No. 776/Mum/2015, dated 25.02.2016 – A.Y. 2010-11).
- (iii) M/s General Atlantic Pvt. Ltd., Vs. DCIT (ITA No. 199/Mum/2014, dated 06.11.2015 – A.Y 2009-10).
- (iv) Avenue Asia Advisors Pvt. Ltd. Vs. DCIT (ITA No. 6638/Den/2013, dated 22.01.2016 – A.Y 2009-10).

- (v) AGM India Advisors Pvt. Ltd. Vs. DCIT (ITA No. 4456/Mum/2015, dated 18.05.2016 AY 2010-11).

The Ld. AR further drawing support from the fact that the aforesaid order of the Tribunal so passed in the case of General Atlantic Pvt. Ltd. (supra) had thereafter been upheld by the Hon'ble High Court of Bombay in the case of : CIT Vs. General Atlantic Pvt. Ltd. (ITA No. 8914 of 2010, dated 08.03.2016 – A.Y 2006-07), therein submitted that now when pursuant to the aforesaid judgment of the Hon'ble High Court the functional comparability of the aforesaid comparable was no more *res-integra* therefore the adverse inferences so drawn by the lower authorities were liable to be set aside. That on the other hand the Ld. D.R though conceded to the fact that the RPT in the case of the aforesaid comparable was 14%, but however drawing support from the director's report for the year under consideration, therein submitted that the focus area of the said comparable, viz ICRA Management Consulting Services Ltd. (supra) was not merely investment advisory functions, but rather the same was substantially functionally different. It was further averred by the Ld. D.R that a perusal of the 'Profit and loss account' of the aforesaid comparable, which formed part of the APB revealed that the said comparable unlike the assessee was not merely into providing services, but was also into sales, and as such no feasible comparison could be carried out as against the business of the assessee company. Thus, in the backdrop of the aforesaid submissions it was submitted by the Ld. D.R that the aforesaid comparable, viz ICRA Management Consulting Services Ltd. (supra) had rightly been excluded by the TPO, which thereafter had been sustained by the CIT(A).

We have heard the Ld. Representatives, perused the record and are unable to persuade ourselves to be in agreement with the observations of the lower authorities which had excluded the aforesaid comparable selected by the assessee company. We are unable to subscribe to the averments made before us by the Ld. D.R that as the aforesaid comparable was functionally incomparable, therefore the same had rightly been excluded by the TPO. We find that the TPO had never drawn adverse inferences as regards selection of the said comparable by the assessee on the ground of functional incomparability, but as observed by us hereinabove, had excluded the same for the

reason that there were significant RPT and also because the said comparable was a loss making entity. We are of the considered view that now when as observed by us hereinabove, the aforesaid comparable cannot be held to be a persistent loss making company, coupled with the conceded fact that the RPT of the said company was 14%, that is much less than 25% which had consistently been adopted as a yardstick for justifying the inclusion or not of a comparable, therefore now when neither of the aforesaid observations/findings of the TPO can be sustained, we thus find no justification in upholding the order of the TPO, which thereafter had been sustained by the CIT(A). Thus in light of aforesaid observations, we herein set aside the order of the lower authorities which had excluded the aforesaid comparable, viz ICRA Management Consulting Services Ltd., (supra) from the list of the comparables selected by the assessee, and direct accordingly.

(3). **KPIT Cummins Global Business Solution Ltd:-** That it was submitted by the Ld. A.R that the aforesaid comparable was excluded by the TPO for the reason that the latter had incurred operating loss of -16.98% during the year under consideration, and as the same was a loss making company, therefore it could not be selected as a comparable. The Ld. A.R in context of the aforesaid observations of the lower authorities, therein averred that as the aforesaid comparable was not a persistent loss making company, therefore drawing of adverse inferences for the reason that the latter had incurred operating loss during the year under consideration would not justify the exclusion of the same from the list of the comparables selected by the assessee. In this regard the Ld. A.R fortified his contention by relying on the order of the ITAT, Pune Bench in the following cases:-

- (i) Bobst India (P) Ltd. Vs. DCIT (2015) 63 taxmann.com 339 (Pune).
- (ii) Tibco Software India Pvt. Ltd. Vs. DCIT (2015) 50 taxmann.com 91 (Pune)

,wherein in the aforesaid cases the coordinate benches of the Tribunal had consistently held that a functionally comparable company cannot be excluded merely because of incurrance of loss in the relevant year. It was submitted by the Ld. A.R that in the case of Bobst India Pvt. Ltd. (supra), the Tribunal had categorically

observed that a comparable could be held to be into persistent loss making where it had suffered continuous loss for more than 3 years. Thus in the backdrop of the aforesaid facts, it was submitted by the Ld. A.R that the aforesaid comparable which had incurred operating loss only during the year under consideration, thus could not be excluded on the said ground. The Ld. D.R on the other hand relied on the order of the lower authorities and therein submitted that as the aforesaid comparable had incurred operating loss during the year under consideration, therefore the TPO had rightly excluded the same from the list of the comparables selected by the assessee, and the same had thereafter rightly been upheld by the CIT(A). We have heard the Ld. Representatives of both the parties, perused the record available before us and are of the considered view that as the aforesaid comparable, viz. KPIT Cummins Global Business Solution Ltd.(supra) though had incurred operating loss of -16.98% during the year under consideration, but the same solely on the said ground cannot be held to be persistent loss making company. The aforesaid view so arrived at by us is fortified by the order of the ITAT, Pune Bench as had been so relied upon by the Ld. A.R in the case of Bobst India (P) Ltd.(supra) and Tibco Software India (P) Ltd. (supra). Thus, in light of the aforesaid observations, we are unable to subscribe to the findings of the lower authorities, who as observed by us hereinabove had excluded the aforesaid comparable company solely for the reason that the latter was found to have incurred operating loss during the year under consideration. Thus, in the backdrop of aforesaid observations, we herein set aside the order of the CIT(A) who had sustained the exclusion of the above mentioned comparable from the list of the comparables selected by the assessee, and direct accordingly.

(4). IDC India Ltd:- That it was submitted by the Ld. A.R that the aforesaid comparable selected by the assessee was excluded by the TPO for the reason that the said company was primarily engaged in the business of research and survey service and products, and thus as per the TPO it could safely be concluded that the business of the said comparable was quite dissimilar from the focus of assessee's business, as it was not into offering investment advisory services. The Ld. A.R referring to the aforesaid observations of the TPO which thereafter had been upheld by the CIT(A),

therein submitted that the TPO had accepted the said comparable in the immediately preceding years, and to support his contention therein drew our attention to the order of the Tribunal passed in the case of the assessee for A.Y 2008-09, titled as : TPG Capital India Pvt. Ltd. Vs. ACIT (ITA No. 880/Mumbai/ 2013, dated 29.10.2014). The Ld. A.R further relying on the order of the Tribunal in case of : Temasek Holdings Advisors (India) Pvt. Ltd., (ITA No. 4203 & 6504/Mum/ 2012) for A.Y's 2007-08 and 2008-09, therein submitted that the aforesaid comparable was held by the Tribunal to be engaged in advisory and consultancy services for the purpose of investment made in various sectors. The Ld. A.R lastly relied on the order of the Tribunal so passed in the case of : AGM India Advisors Pvt. Ltd. Vs. DCIT (ITA No. 4757/Mum/2015, dated 18.05.2016 - A.Y. 2010-11), wherein the Tribunal referring to the nature of business of the aforesaid comparable had categorically observed that IDC India Ltd. (supra) was not a product company as suggested by the D.R, and rather the functions and activities so performed by it were similar to that of the functions and activities performed by the assessee for rendering investment advisory services. That on the other hand the Ld. D.R relying on the 'Profit and loss account' of the aforesaid comparable, therein submitted that the same was not only rendering services, but rather was also into sale activities. The Ld. D.R in order to fortify his aforesaid contention, therein drew our attention to the 'Schedule 18' which was an abstract of the latter's 'Balance sheet' and revealed the general business profile of the aforesaid comparable, as per which the latter was into conducting research and survey. The Ld. D.R thus submitted that as the aforesaid comparable was also into sales and not merely into rendering services, therefore the same was functionally incomparable with the assessee company which was in the investment advisory business. It was thus averred by the Ld. D.R that as the business of the aforesaid comparable was substantially different from the focus of the business of the assessee and it did not offer the investment advisory services, therefore the TPO had rightly excluded it from the list of the comparables selected by the assessee, which order of the TPO had rightly been upheld by the CIT(A). The Ld. D.R in order to drive home his contention that the aforesaid comparable, viz IDC India Ltd being functionally different was thus liable to be rejected as a comparable, therein placed heavy reliance on the order of the

ITAT, Delhi in the case of : **Actis Advisers Private Limited Vs. ACIT, Circle 1(1) [(2015) 55 taxmann.com 485 (Delhi-Trib)** and the order of ITAT, Mumbai Bench 'E' in the case of: **Tevapharm Private Limited Vs. Addl. CIT-10(3),Mumbai [(2012) 18 taxmann.com 148 (Mum)]**. The Ld. D.R relying on the order of the Tribunal in the case of Actis Advisers Private Limited (supra) therein submitted that the Tribunal while rejecting the claim of the assessee had categorically observed that the functions performed by the aforesaid comparable, viz. IDC India Limited and properties held by it therein revealed that its functional profile was totally different from the functional profile of the assessee which was in the activity of providing investment advisory services to it's A.E. It was further submitted by the Ld. D.R that the coordinate bench of the Tribunal in the case of Tevapharm Private Limited (supra) had therein concluded that IDC India Limited was engaged in providing market research and survey services which was not comparable to the functional profile of the assessee, therefore could not be considered as a comparable. The Ld. D.R in the backdrop of the observations of the coordinate benches of the Tribunal therein submitted that the aforesaid comparable, viz. IDC India Limited being functionally different had thus rightly been rejected by the TPO as a comparable. The Ld. A.R rebutting the aforesaid contentions, therein submitted that the ITAT Delhi in the case of Actis Advisers Private Limited (supra) had erred by summarily adopting the observations of the DRP, who had wrongly relied on the information as available on the website relating to Cyber Media (India) Limited, viz <http://www.cybermedia.co.in/static/produts>, which was not the website link for IDC India Limited, but that of its holding company, viz Cyber Media (India) Limited. The Ld. A.R in order to fortify his contention that IDC India Limited was a subsidiary of Cyber Media (India) Limited, had relied on the latter's 'Annual report'. Thus in nutshell it was submitted by the Ld. A.R that the Tribunal while disposing of the appeal of Actis Advisers Private Limited (supra) had erred in erroneously considering the facts pertaining to Cyber Media (India) Limited for rejecting IDC India Limited as a comparable company. The Ld. A.R further referring to the order of the ITAT, Mumbai in the case of Tevapharm Private Limited (supra), therein submitted that the reliance placed by the Ld. D.R on the said order of the Tribunal was misplaced. It was

submitted by the Ld. A.R that Tevapharm Private Limited (supra) was engaged in the business of providing contract research, business development, pharma and technical services and contract testing services, and it was in the backdrop of the said functional profile of the assessee that the Tribunal had in the said case concluded that IDC India Limited could not be considered as a comparable. That interestingly it was averred by the Ld. A.R that as the Tribunal in the case of Tevapharm Private Limited (supra) had held that the comparable, viz. IDC India Limited was “*providing market research and survey services*”, therefore the said order of the Tribunal rather fortified his contention that IDC (India) Limited had rightly been selected by the assessee as a comparable.

We have heard the Ld. Representatives, perused the records and the orders of the lower authorities and therein find that the aforesaid comparable had been accepted by the TPO in the case of the present assessee itself in the immediately preceding year, viz A.Y. 2008-09, which thereafter have been accepted by the Tribunal in the case of the assessee in ITA No. 880/Mum/2013 (supra). We have further given a thoughtful consideration to the averments of the Ld. Representatives of both the parties in context of the order of the ITAT, Delhi in the case of : **Actis Advisers Private Limited Vs. ACIT, Circle 1(1) [(2015) 55 taxmann.com 485 (Delhi-Trib)** and the order of ITAT, Mumbai Bench ‘E’ in the case of: **Tevapharm Private Limited Vs. Addl. CIT-10(3),Mumbai [(2012) 18 taxmann.com 148 (Mum)]**. That after perusing the aforesaid respective orders of the Tribunal, we are persuaded to be in agreement with the Ld. A.R. We find that in the case of Actis Advisers Private Limited (supra) the comparable IDC India Limited had been rejected by relying on the information available on the website relating to Cyber Media (India) Limited, viz <http://www.cybermedia.co.in/static/produts>, which was not the website link for IDC India Limited, but for its holding company , i.e Cyber Media (India) Limited. Thus in the backdrop of the aforesaid facts, it can safely be concluded that no adverse inference as regards selection of the comparable, viz IDC India Limited can be drawn by relying on the order of the ITAT, Delhi bench in the case of : Actis Advisers Private Limited (supra). That we are further persuaded to subscribe to the contention of the Ld. A.R that the reliance placed on the order of the ITAT, Mumbai in the case

of Tevapharm Private Limited (supra) was misplaced. We have perused the order of the Tribunal and find that the observations as regards the comparable, viz. IDC India Limited were rendered in context of the assessee before the Tribunal, viz Tevapharm Private Limited (supra), which we find is functionally different from the present assessee before us. We further find ourselves to be in agreement with the contention of the Ld. A.R that the findings of the Tribunal in the aforesaid case in context of IDC India Limited (supra), rather goes to assist the claim of the assessee that the said concern had rightly been selected as a comparable. That in light of the aforesaid facts and no material having been placed on record by the Ld. D.R, on the basis of which we could be persuaded to observe that there had been a shift in the nature of business of the assessee during the year under consideration, as against that of the immediately preceding year, coupled with the fact that the Tribunal had consistently in host of decisions as had been so relied upon by the Ld. A.R therein concluded that the aforesaid comparable, viz IDC India Ltd (supra) was into investment advisory business, therefore do not find any reason to take a different view. Thus, in light of our aforesaid observations we are of the considered view that the TPO had wrongly excluded the aforesaid comparable from the list of the comparables selected by the assessee company, and therefore set aside the order of the CIT(A) who had upheld the said findings of the TPO.

10. That during the course of the hearing of the appeal it was submitted by the Ld. A.R that he was assailing the order of the CIT(A) to the extent the latter had upheld the rejection of the 4 comparables selected by the assessee and addition of the 5 new comparables by the TPO, on merits. Thus in light of the aforesaid concession of the Ld. A.R , the Grounds of appeal No. 2 to 5 and Grounds of appeal No. 7 and 9, are dismissed as not pressed. That the Ground of appeal No. 10 is consequential. The Ground of appeal No. 11 wherein the assessee had assailed the initiation of the penalty proceedings u/s 271(1)(c) in the body of the assessment order is premature and does not arise from the impugned order, is thus dismissed. The Grounds of appeal No. 1, 6 and 8 are allowed in terms of our aforesaid observations, and the AO/TPO is herein

directed to give the consequential effect and determine the ALP in the hands of the assessee.

11. The appeal of the assessee is partly allowed in terms of our observations recorded hereinabove.

Order pronounced in the open court on 08/02/2017

Sd/-
(G.S Pannu)

लेखा सदस्य / Accountant Member
मुंबई Mumbai; दिनांक Dated :_08.02.2017

Sd/-
(Ravish Sood)

न्यायिक सदस्य / Judicial Member

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / D.R, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt.
Registrar)**

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai

