

आयकर अपीलीय अधिकरण, मुंबई "के" खंडपीठ
Income-tax Appellate Tribunal - "K" Bench Mumbai

सर्वश्री राजेन्द्र, लेखा सदस्य एवं सी. एन. प्रसाद, न्यायिक सदस्य

Before S/Sh.Rajendra, Accountant Member and C.N. Prasad, Judicial Member

आयकर अपील सं./ITA/4757/Mum/2015, निर्धारण वर्ष /Assessment Year: 2010-11

AGM India Advisors Private Limited The Grand Hyatt Complex Suite F-11, Santacruz (E), Mumbai-55. PAN: AAFCM 3354 D	Vs.	DCIT, 10-(1), Aayakar Bhavan, M.K. Road, Mumbai-20.
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आयकर अपील सं./ITA/4801/Mum/2015, निर्धारण वर्ष /Assessment Year: 2010-11

DCIT, 14(1)(1), 460, Aayakar Bhavan, M.K. Road, Mumbai-400 020.	Vs.	AGM India Advisors Private Limited. Mumbai-400 055.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

Revenue by: Shri N.K. Chand

Appellant by: Shri Nishant Thakkar

सुनवाई की तारीख / Date of Hearing: 27.04.2016

घोषणा की तारीख / Date of Pronouncement: 18.05.2016

आयकर अधिनियम, 1961 की धारा 254(1) के अन्तर्गत आदेश

Order u/s.254(1) of the Income-tax Act, 1961 (Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order, dtd. 15.06.2015 of the CIT(A)-55, Mumbai, the assessee and the Assessing Officer (AO) have filed cross appeals for the year under appeal.

ITA/4757/Mum/2015:

The assessee is engaged in providing non-binding investment advisory services to its Associated Enterprise (AE)-Apollo Management L.P. It filed its return of income, declaring income of Rs. 2.89 Crores. He completed the assessment u/s. 143 (3) r.w.s. 144C of the Act, on 26.05.2014, determining the income of the assessee at Rs. 5.71 Crores. During the assessment proceedings, the AO found that the assessee had entered into International Transaction (IT.s) with its Associate Enterprise (AE). He made a reference to the Transfer Pricing Officer (TPO) to determine the Arm's Length Price (ALP) of such transactions.

2. During the Transfer Pricing (TP) proceedings, the TPO found that the assessee had earned a cost plus margin of 20% and had benchmarked the said transaction using Transactional Net Margin Method (TNMM) as the most appropriate method. The

single year margin of the four comparable companies selected by the assessee for the provision of non-binding investment advisory services were as follows:

- i. ICRA Management Consulting Services Limited(ICRA@)0.41%),
- ii. IDC(India) Limited(IDCL@13%),
- iii. Future Capital Holdings Limited(FCHL@16.37%),
- iv. Mecklai Financial & Commercial Services Limited(MFCSL@20.43%).

The Arithmetic Mean of the comparables was arrived at 12.55%. It was claimed that the transactions were at Arm's Length. However, the TPO was not convinced with the selection of the comparables of the assessee. He selected following seven comparables and the margin of those comparables was calculated as under:

SN.	Comparable	margin
1.	Future Capital Investment Advisors Ltd.(FCIAL)	15.71%
2.	Future Capital Holdings Ltd.-Segment-Investment advisory	31.68%
3.	IDFC Investment Advisors Ltd.(IDFC)	36.62%
4.	ICRA Online Ltd. (ICRA-O)	41.77%
5.	Kshitij Investment Advisory Co.Ltd.(KIACL)	32.33%
6.	Motilal Ostwal Investment Advisors Pvt.Ltd.(MOIAPL)	97.87%
	MFCSL	20.43%
	Arithmetic Mean	39.49

He suggested an adjustment of Rs.2,81,89,114/-. The AO, on receipt of the order of the TPO, made an addition of the said amount.

3. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA). After considering the submissions of the assessee and the orders of the TPO/ AO, he deliberated upon the various comparables.

3.a.With regard to ICRA,he held that the TPO had rejected the comparable based on the fact that the services rendered in case of the top 10 clients of the company were not in the financial field and that average salary of Rs.8.00 lakhs paid by ICRA was not comparable to the average salary(Rs.2crores) paid by the assessee. Before him,the assessee argued that main source of income of ICRA was consultancy fee,that the assessee and ICRA offered consulting services in areas of strategy,risk management etc.,that the Tribunal in the case of Tamasek Holdings Advisors(I) P.Ltd.(Tamasek) had considered ICRA as a comparable for investment advisory services,(ITA/4203-6504/Mum/2012),that the P&L A/c.and the annual report of ICRA revealed that the main source of its income was consultancy fees. Referring to the order of Tamasek(supra), he directed the AO to include ICRA as a comparable in final sets of comparables.

3.b.With regard to IDCL,he observed that the TPO had rejected the comparable, that he had held that company was engaged in the business of market research and management consultancy and that it was functionally different from the assessee, that the function of IDCL were not exactly similar to the business of investment advisory.The assessee argued that IDCLwas engaged primarily in the business of research and survey service and products that the function of both the companies were similar.The FAA further mentioned that the assessee had relied upon the cases of Sandstone Capital Advisors Pvt.Ltd.(ITA/ 6315/ Mum/2012)and Tamasek (supra).Relying upon the order of Sandstone Capital Advisors(supra)and Tamasek (supra),he held that there was sufficient degree of comparability in the characteristics of the services provided by the assessee viz-a-viz IDCL.

3.c.The assessee had objected the inclusion of KIA CL as a comparable at the time of TP proceedings.But,the TPO held that KIA CL had earned income from invest -

ment advisory activities, that the argument of the assessee with regard to business realignment impacting the performance of the company was not correct.

Before the FAA, the assessee argued that annual report of KIA CL suggested that it had realigned its investment advisory business to Everstone Investment Advisors Pvt.Ltd., that the P&L Account of the company for AY 2011-12 indicated that it had earned no revenue from Investment Advisory services, that pursuant to realignment no further revenue were earned from investment advisory services, that it had earned 93.16% of its advisory fee from its controlled entities. After considering the available material, the FAA held that KIA CL earned income from investment advisory fee, that it was the only reportable segment. He further referred to the notes on accounts on KIA CL and held that it was a functionally comparable company.

3.d. In case of ICRA-O, the TPO considered the outsource service segment for comparability purpose, as it dealt with investment research analysis and advisory services. He observed that ICRA-O had earned an amount of Rs.12.80 crores towards service fee which formed 70% of the total revenue earned by it during the year.

The assessee contended, before the FAA, the annual report as well as the website of ICRA-O highlighted the three lines of business namely, outsource service, information service and software products and services, that the website further stated that it had two strategic lines of business-i.e. knowledge process out-sourcing and information services and technology solution, that ICRA-O was engaged in data extraction, electronic conversion of financial statements, accounting and finance etc., that these activities were not functionally comparable to the non-binding investment advisory. The FAA held that ICRA-O's knowledge process outsourcing division provided financial and analytical services and support to clients, that it was

not engaged in investment advisory/consultancy services.He directed the AO to exclude ICRA-O from final sets of comparables.

3.e.During the TP proceedings,the assessee had objected to inclusion MOIAPL in the final sets of comparables.It was argued before the FAA that annual report of MOIAPL for the AY.2010-11 indicated that income of the company was from investment banking/merchant banking, that as per the Directors report MOIAPL derived its business income from 4 different business verticals namely equity capital markets,mergers and acquisitions, private equity syndication and structured debt, that the information about top 10 clients revealed that MOIAPL was mainly engaged in merchant banking and /investment banking.The assessee relied upon the case of Carlyle India Advisors Pvt.Ltd.(ITA/2200/M/2014-AY-9-10) and stated that Tribunal had rejected MOIAPL as a comparable to investment advisory services.

The FAA held that MOIAPL provided strategic and financial advisory services to its top 10 clients,that same was comparable to the investment advisory services rendered by the assessee.Rejecting the claim of the assessee, he held that it should be accepted as a valid comparable .

3.f.The assessee had objected to the inclusion of IDFC as a comparable in the final set of comparable companies,during the TP proceedings.Before the FAA, it submitted that IDFC was registered as a portfolio manager with SEBI to carryout portfolio management services,that during the year ended on 31.3.2010 IDFC had earned 50.26% of its income(Rs.13.56crores)from PMS,40.13%from Performance fee(Rs.10.82 crores) and 9.60% from advisory fees(Rs.2.59crores),that no segmental information was published in the annual report.The FAA held that IDFC was engaged into portfolio management services which were distinct from

provision of investment advisory support.he directed the AO to exclude it from the list of the comparables.Accordingly, the FAA prepared a final set of comparable with the revised margin for the year under consideration and same read as under :-

S.No.	Name of comparable	F.Y.2009-10 OP/TC (%)
1.	Future Capital Investment Advisors Ltd.	15.71
2.	Future Capital Holdings Ltd.(Segment-Investment advisory)	31.68
3.	ICRA Management Consulting Services Limited	0.41
4.	IDC (India) Limited	13.00
5.	Kshitij Investment Advisory Co. Ltd.	32.33
6.	MotilalOstwal Investment Advisors Pvt. Ltd.	97.87
7.	Mecklai Financial & Commercial Services Limited	20.43
	Arithmetic Mean	30.20

He recomputed the TP adjustment at Rs.1.47crores as below:

Operating cost	Rs.14,46,12,507/-
Arm's Length Mean Margin	30.20% of the operating cost
Arm's Length Price @ 130.20% of operating cost(A)	Rs.18,82,85,484/-
Price charged (B)	Rs.17,35,30,872/-
Shortfall being adjustment u/s.92CA(A-B)	Rs.1,47,54,612/-

4.During the course of hearing before us,the Authorised Representative(AR) argued that the FAA had upheld the inclusion of MOIAPL and KIACL in the final list of comparable,that MOIAPLwas engaged in rendering services in the nature of investment banking services,that it was earning super normal profits,that KIACL had entered into significant controlled transaction during the year under consideration,that he had wrongly upheld the inclusion of additional companies which were selected by the TPO without following a scientific search process,that in the case of Carlyle India Advisors Pvt.Ltd.(ITA/1040/Mum/2015-AY 2010-11)KIACL was rejected as a comparable for investment advisory services, that MOIAPL was rejected as a valid comparable for investment advisory services in a series of cases namely Temasek Holding advisors India Pvt. Ltd.(AY.2010-11),Carlyle India

Advisors Pvt. Ltd.(supra),Wells Fargo Real Estate Advisors Pvt.Ltd.(ITA/1093/Mum/2014 (AY.2009 -10).

4.a.We find that KIACL was rejected as a comparable for investment advisory services in the case of Carlyle India Advisors Pvt. Ltd.for the AY 2010-11 (supra). We would like to reproduce the relevant portion of the order and same reads as under :

“22.We have carefully considered the rival stands on the issue of exclusion of Kshitij Investment Advisory Company Ltd. from the final set of comparables.The first and the foremost resistance articulated by the Revenue to oppose the exclusion of the said concern from the final set of comparables is the fact that such concern was included by the assessee itself as a comparable in its Transfer Pricing Study. As per the Revenue, since the said concern has been adopted by the assessee as a comparable, it is impermissible for the assessee to raise a plea asking for its exclusion in the process of determination of average margins under the TNM method. In our considered opinion, the proposition being canvassed by the Revenue is not absolute; but it has to be considered in the facts and circumstances of each case, No doubt in a situation of the type before us, the burden lies on the assessee to justify exclusion of Kshitij Investment Advisory Co. Ltd, considering the fact that initially assessee had-taken it as a good comparable; Our aforesaid approach is founded on a well accepted proposition that in the course of determination of correct tax liability, it is impermissible for the Revenue to take advantage of an ignorance or mistake of the assessee in offering certain amount as income, which is more than the legally due amount. Notably, there cannot be a estoppel against the statute and it is a trite law that no tax can be levied or collected from a subject except by an authority of law. We may hasten to add here that we are not saying that on each and every aspect of the assessment declared in the return of income, an assessee is entitled to turn around and argue differently before the income tax authorities; rather, there has to be justifiable reasons shown by the assessee, duly supported by law or facts, whereby the change in stand is merited.

In the present case,what the assessee is claiming is that there has been a restructuring / realignment of investment advisory business being carried out by Kshitij Investment

Advisory Co.Ltd which has impacted the financial results thereby rendering the said concern as an unfit comparable. The proposition is being canvassed by the assessee is supported by the decision of Hyderabad Bench of the Tribunal in the case of Capital IQ Information System(India)Pvt.Ltd.(supra).In fact,it is quite well understood that in a year where realign -ment/ restructuring of business takes place, such year is often a peculiar economic year in the history of a concern and in such a situation, it would be in- the interest of justice and fair play that such a concern is not treated as a comparable. In fact, in principle, we do not find any disagreement on the part of the TPO also on this aspect, However,what the TPO has stated is that in the present case, the realignment /restructuring is in the same line of business and, therefore, such restructuring/ realignment' does not result in any change' in the activity of business.Therefore according to the Revenue there would be no impact on the financial results so as to make it incomparable with the tested transactions.

We have carefully considered the aforesaid plea set up by the Revenue and in this context we may briefly refer to the "Business Review" outlined in the Directors Report of the said concern, placed at page 536 of the Paper Book. It is stated therein that the investment advisory business has been realigned and an the employees have been transferred to Everstone Investment Advisors Pvt. Ltd. during the year under considera - tion w.e.f 1.1.2010. The note also suggests that the said concern did not enter into any non-compete agreement with Everstone Investment Advisors Pvt. Ltd. but as free to pursue any activity, including the activity in relation to investment advisory services. The aforesaid aspect has been highlighted by the Revenue to say that the said concern continues to be in the business of rendering investment advisory services and, therefore, the restructuring does not impact the comparability of the concern. In our considered opinion,the approach of the Revenue in this context is quite flawed. Firstly, it is not disputed that the activity of investment advisory services has been realigned which included the transfer of all employees to Everstone Investment Advisory Pvt. Ltd. The averments in the Directors Report suggest that post-realignment, the concern is only evaluating its options to commence business operations either in some other line or .in the similar line of investment advisory services. What we are trying to emphasize is that there is no averment in the Directors Report to suggest that the said concern has actually carried out any investment advisory services post-realignment w.e.f. 1.1.2010. In fact, in

the course of hearing' before-us, the Ld. Representative for the assessee pointed out that a perusal of the Annual Report for subsequent financial year of 2010-11 showed no 'such operations by the said concern. Therefore, considering the aforesaid fact situation, the instant financial year of the said-concern is containing peculiar economic circumstances and the same has to be taken into consideration while evaluating the rationale for its inclusion as a comparable. Before us, the Representative also pointed out that the said restructuring/realignment which has taken place w.e.f 1.1.2010, did impact the financial results inasmuch as the income from operations of the said concern for the year under consideration reduced to Rs.17,23,10,815/- from Rs. 26,47,96,102/- in the immediately preceding year. Considering the entire conspectus facts and circumstances, in our view, the assessee company is justified asserting that Kshitij Investment Advisory Co.,Ltd. deserves to be excluded from the final set of comparables on account peculiar economic circumstances during the year under consideration. Thus, on this aspect also, assessee succeeds."

4.b.In the case of Tamasek(supra)for the AY.2010-11,the Tribunal has held that MOIAPL cannot be considered a valid comparable,as far as investment advisory services are concerned. Para 25 of the order reads as follow:

25. This comparable has been included by the TPO and while including the said comparable he has observed that its income is only from Advisory fees during the year and it is performing advisory services in that field of investment like assessee. Before us, Ld. CIT DR arguing for its inclusion submitted that, if the ICRA Management services can be included for having revenue from advisory services then on same analogy this company should also be given the same treatment. From the perusal of the directors' report, it is seen that this company derives its business income from four different business verticals, i.e. Equity capital markets, merger and acquisitions, profit equity syndications and structured debt. It also give advises on cross border acquisition. Its core competence is in the field of merchant banking. It also provides comprehensive investment banking solutions and transaction expertise covering private placement of equity, debt and convertible instruments in international and domestic capital markets, monitoring mergers and acquisitions and advising M&A as professional and restructuring advisory and implementations. It is also involved in various professional activities of the merchant banking. A Merchant Banker provides capital to companies in the form of share

ownership instead of loans. It also provides advisory on corporate matters to the companies in which they invest. The focus is on negotiated private equity investment. The wide range of activities include portfolio management, credit syndication, counseling on M&A, etc. This whole range of functions and activities carried out by Motilal Oswal is definitely are far wider and much different from investment advisory services where core functions is to give advices for making the investments in diversified fields. A company which is engaged in merger and acquisitions, private equity syndication, loan/credit syndication and performing most of the function of a Merchant Banker, then the entire functions and transactions affects the generation of revenue and margins. Such functions are entirely different from investment advisory services. Mere classification of revenue as ‘advisory fees’ will not put the company in a comparable basket sans functional similarity and transactional analysis. In case of Carlyle India Advisors Pvt. Ltd (supra), it has been held that, the merchant banking functions are entirely different from investment advisory services and this decision of the Tribunal has been upheld by the Hon’ble Bombay High Court. Thus, in view of plethora of judicial decisions as referred to by Ld. Counsel and in view of functional differences as discussed as above, we hold that Motilal Oswal cannot be put into the comparability list and is directed to be excluded.”

In the case of Wells Fargo Real Estate Advisors Pvt.Ltd.(supra)similar view was taken as under:

“6. We have heard the rival submissions and perused the material before us. We find that on 07.12.2012 the assessee had submitted its profile and analysis of the functions performed, assets utilised and risks assumed. As per the FAR the assessee would identify opportunity for parent company to participate in equity security particularly relating to commercially physical projects in the real estate sector, that it was sharing business intelligence, market research, compliance of regional regulatory requirement so as to assist its AE, that it would not conclude any contract on behalf of the AE nor was it facilitating external commercial borrowings in real estate business . We find that the TPO had rejected the comparable selected by the assessee and had adopted three new comparables. As far as MOIAPL is concerned, there is no doubt that the job profile of both the companies are different. The assessee is engaged in investment advisory services, whereas MOIAPL was carrying on business of mergers and acquisitions and other related activities. The assessee is not a merchant banker like MOIAPL. In the case of Carlyle India Advisors Private Limited (supra),

the Tribunal has held that MOIAPL cannot be taken as a valid comparable in cases, where the assessee is rendering advisory services. In that matter the Tribunal held as under :

“8. We have heard both the parties and perused the orders of the Revenue Authorities as well as the relevant material placed before us. It is an undisputed fact that the assessee is engaged in the business of rendering investment advisory and related services to its principal Carlyle Hong Kong. The dispute raised in ground no.4 relates to whether (i) KLG Capital Services Ltd (KLG);(ii) KJMC Corporate Advisors (India) Limited (KJMC) and(iii) Motilal Oswal Investment Advisors Pvt Ltd(MOIAPL) are functionally comparable cases or not considering the decision of the Tribunal as well as the judgment of the Bombay High Court relied upon by the assessee. Regarding MOIAPL, assessee relied heavily on the order of the Tribunal in its own case for the AY 2008-2009, a copy of which is placed at page 282 of the paper book. On perusal of the said order of the Tribunal, we find that it is decided in favour of the assessee vide ITA No.7367/Mum/ 2012(AY 2008-2009), dated 7.2.2014. On perusal of para 12 of the said order of the Tribunal, which contains the operational part, we find the same is relevant and the Tribunal has given its finding under the facts which are similar to that of the AY under consideration. The MOIAPL, which has engaged in the business of merchant banking is not a good comparable for determining the ALP. Relevant contents of the said para 12 are reproduced here for the sake of completeness of this order which read as under:

"12..... .The only dispute is whether Motilal Oswal Investment Advisors Pvt Ltd can be considered as a comparable for determination of ALP. A perusal of three comparables considered by the TPO shows that M/s. Future Capital Investment Advisors Ltd., has operating profit at 21.79% whereas OPM of Motilal Oswal Investment Advisors Pvt Ltd is 72.33%. The comparables used by the TPO themselves are showing extreme OPM. A perusal of the Directors report of Motilal Oswal Investment Advisors Pvt Ltd shows that during the year under consideration, the said company has completed 23 assignments successfully as against 14 completed in the immediately preceding year. A close look at the financial statements of the said company show that the income from operations have been shown only as advisory fees whereas it is admittedly an undisputed fact that the said company is engaged in diversified activities. Segmental reporting is not available.

Profit and loss account appears to be only of consolidated accounts. The said company is registered with SEBI as a merchant banker and the Directors report show that it is into takeover, acquisitions, disinvestments etc. In the absence of specific data it is not possible to make comparison. It can therefore, be safely said that the said company being into merchant banking and cannot be considered as a comparable. We, accordingly, direct the AO not to consider Mottial Oswal Investment Advisors Pvt Ltd as a comparable for determination of ALP..... "

9. Considering the above, we direct the AO to exclude the MOIAPL from the list of the comparables for determination of ALP of the said transaction."

The Hon'ble Jurisdictional High Court has dismissed the appeal filed by the Department in the case of Carlyle India Advisors Private Limited (IT Appeal 1286 of 2012, dated 22.02.2013).

Here, we would also like to refer to the order of NVP Venture Capital India Private Ltd. (supra), where in a case of investment advisory the comparable of MOIAPL was rejected by the Tribunal. In that matter the Tribunal had held as under :-

"7. We have carefully considered the rival submissions. We find that the assessee has been consistently canvassing before the lower authorities that Motilal Oswal Investment Advisors Private limited be excluded from the final set of comparables on the ground that its activities are functionally incomparable to the activity of Provision of investment advisory services being rendered by the assessee to its Associated Enterprises. In fact, before the TPO, assessee pointed out that the said concern was engaged in providing comprehensive investment banking solutions and that it was rendering services across various products, viz. Equity Capital Markets, Mergers & Acquisitions, Private Equity Syndications and Structured Debt, etc. The appellant relied upon the decision of the Tribunal in the case of Carlyle India Advisors Private Limited (214 Taxmann 492), to support its plea for exclusion of the said concern from the final set of comparables. The TPO rejected the aforesaid plea on the ground that the Profit and Loss account of the said concern for the year under consideration showed that the only stream of income was from advisory services and not from any activity of merchant banking and, therefore, the said concern was carrying out only advisory services and, according to him, the said concern was includible in the final set of comparables. The DRP also accepted the position that

the said concern was engaged in advisory services which are broadly comparable to the assessee's activities under test.

8. We have perused the relevant material on record. It is starkly evident that the said concern M/s. Motilal Oswal Investment Advisors Private limited is engaged in qualitatively different and diversified business activities, whereas the activities of the assessee are confined to rendering non-binding investment advisory for its Associated Enterprises. No doubt, both the concerns may be in the business of rendering advisory services, so, however, it would also be necessary to evaluate the manner and the specific sectors, in which such services are being rendered by the two concerns. It is revealed from the Annual Financial Statement of Motilal Oswal Investment Advisors Private limited that the said concern is engaged in rendering services in diversified fields, viz. Equity Capital Markets, Mergers & Acquisitions, Private Equity Syndications and Structured Debt, etc. In the case of Carlyle India Advisors Private Limited (supra) for A.Y. 2008-09, the Tribunal concluded that though the said concern was declaring a solitary stream of operating income under the head 'advisory fee', but undisputedly it was engaged in diversified fields and the financial results for each segment were not available. The Tribunal also found that the said concern was registered with SEBI as a Merchant Banker, and that it was carrying on merchant banking activities. In our considered opinion, the afore-said features with respect to the activities of the M/s. Motilal Oswal Investment Advisors Private limited (supra) noted by the Tribunal in the case of Carlyle India Advisors Private Limited (supra) for assessment year 2008-09, are clearly emerging in the instant year too and, therefore, it cannot be said to be a concern which is comparable to an entity which is rendering non-binding advisory investment services alone. Thus, in our considered opinion, the assessee is justified in seeking the exclusion of the said concern from the final set of comparables on account of functional dissimilarities. In fact, in other precedents cited by the ld. Representative for the assessee, the said concern has also been excluded from the set of comparables under similar circumstances.

9. In conclusion, on the basis of the afore-said discussion and having regard to the precedents noted above, we hold that M/s. Motilal Oswal Investment Advisors Private Limited (supra) is liable to be excluded from the final set of comparables."

Following the above orders, we hold that job profile of MOIAPL was different as compared to the activities undertaken by the assessee. It was rendering investment

advisory services, specifically related with real estate business whereas MOIPAL is a merchant banker. So, we hold that MOIAPL is liable to be excluded from the final set of comparables.”

Respectfully, following the above, we hold that KIA CL and MOIAPL were wrongly included in the list of valid comparables. Both are functionally different from the assessee. Activities carried out by the assessee for the year under appeal are distinct and quite separate from the activities of those companies. So, reversing the order of the FAA, we decide the first effective ground of appeal in favour of the assessee.

5. Remaining two grounds dealing with 234B interest and concealment penalty are consequential in nature.

ITA/4801/Mum/2015:

6. Now, we would like to take up the appeal of the AO, who has objected the inclusion and exclusion of the comparables in the final list. He has challenged the inclusion of ICRA and IDCL and exclusion of ICRA-O and IDFCL.

6.a. First we would take up the matter of ICRA. In that regard, the DR argued that page 437, 438 and 462 of the PB showed that ICRA was engaged in rendering consultancy services to companies other than in financial sector i.e. urban development, water sector etc., that it was also engaged in cross border mergers and acquisitions transactions (Pg. 493 of the PB), that the annual report of ICRA (Pg. 432-461 of the PB) did not provide for any segmental information, that if MOIAPL was rejected as a comparable on that ground ICRA should also be rejected, that the Tribunal order of Temasek (supra) relied upon by the FAA pertained to AY. 2007-08 and 2008-09, that same should not be applied to the year under consideration. He placed reliance on the Kerala High Court decision of Kalpetta Estates Ltd. (211 ITR 635) to say that res-judicata did not apply to income-tax proceedings.

The AR argued that the issue is directly covered by the order of the Tribunal delivered in the case of Temasek(ITA/7761Mum/2015-AY.2010-11),that ICRA's comparability to companies engaged in Investment Advisory was no longer res-integra,that it had been re-confirmed by the ITAT in the case of Temasek (supra),that the very arguments of the DR narrated above were urged before the ITAT in that matter, that although the assessee was operating under financial services sector it would provide investment advisory services which involved undertaking research,analysis to its AE in diverse field such as chemicals, commodities and retail, distribution and transportation, financial and business services, manufacturing and industrial, media, etc.which includes financial services sector,that the underlying functions/activities performed with respect to management consultancy services involved the analysis of the business and operations of a company, its profitability,operational efficiencies,future outlook, etc.based on which consultancy or advise would given to the management of a company which were functionally similar to the activities performed by the assessee for rendering investment advisory services,that Note 12 of the annual report of ICRA clearly mentioned that it had only one business segment i.e. consulting services and had no other primary reportable segment (pg.460 of the PB).Moreover,the product description provided in the annual report specifies Management Consultancy Services as the only product offered by the company (Pg.461 of the PB).

With regard to the Pg.439 of the PB,the AR stated that ICRA had only rendered advisory services in case of Asia's leading company in the Metals and Energy sector cross border M&A transaction.He further argued that MOIAPL had been rejected on the ground that it was engaged in merchant banking investment banking services which were functionally not comparable to the investment advisory services rendered by the assessee,that despite such dissimilarity the

Accounts it did not give break-up of results from the said two activities separately, that it could not be treated as a valid comparable, that ICRA did not have separate segmentals, that it rendered only advisory services in varied fields, that hence the argument that because ICRA had no segmentals it must be rejected as MOIAPL is liable to be rejected was devoid of merits, that the DR, during his argument, failed to mention that the Tribunal had upheld the acceptance of ICRA as a comparable in the case of Temasek for AY.2010-11 as well, which had been argued by the DR himself, that the Tribunal had taken a note of the fact that ICRA was rendering consultancy/advisory services in various sectors and after considering these facts, it adjudged ICRA to be a good comparable, that ICRA should be accepted as a functionally comparable company to the non-binding investment advisory services provided by the assessee. He referred to the cases of Temasek Holdings Advisors Private Limited (ITA/4203/Mum/2012 & 6504/SSMum/2012-AY.s.2007-08&2008-09), M/s Blackstone Advisors Private Ltd. (ITA/1581/Mum/2016-AY.2008-09).

6.a.i. We have heard the rival submissions and perused the material before us. Before proceeding further, we would like to mention that the assessee is engaged in providing non-binding investment advisory services to its AE. As per the Agreement dated 08.06.2009 the assessee was to provide reports on a timely basis containing news and information on investment areas including industries and/or other specified areas that may interest the Investment Manager, to provide non-binding advisory services to the Investment Manager in respect of potential investment and divestment opportunities in India or elsewhere, including advice on the structuring of such opportunities to carry out research and analyse and identify investment opportunities and to conduct due diligence of such opportunities and provide reports, to provide the Investment Manager the necessary reports, information and feedback in connection with the performance of investments in India, that

The FAA had, after considering the activities performed it and following the order of the ITAT in the cases of Temasek, held that the company is a valid comparable. We find that while deciding the appeal of Tamasek for the AY.2010-11 (supra), the Tribunal had dealt with all the arguments that were advanced by the DR before us. We would like to reproduce the relevant portion of the said order and same reads as under:

"ICRA MANAGEMENT CONSULTANCY SERVICES LTD.

10. Ld. DR submitted this comparable was chosen by the appellant and rejected by the TPO. Merely because the revenue of this company is from consulting fee that does not mean, it is functionally comparable also. The TPO had carried out detailed comparability analysis on FAR basis with this company vis-a-vis the appellant. Such a comparison had been given in tabular form in Para 11.1 of the TPO's order. Thus on the basis of such an analysis, it is amply clear that, functions performed by ICRA are different from that of the assessee and so also the assets employed to perform the functions as well as the risk involved. If a criterion of the revenue from consultancy fee is to be taken into consideration, then on same logic, Motilal Oswal should also be included in the list as it had also shown the income from consultancy and so also in other cases also. Thus, this comparable cannot be included on account of single segment of revenue alone, that is, from consultancy fee but had to be analysed on FAR analysis which the TPO had done in a very elaborate manner at pages 9 to 11 of the order. Thus, this comparable had rightly been rejected by the TPO. Thereafter, he pointed out various other aspects as given in the Directors report of ICRA from pages 162 to 164 and submitted that the fields in which it is operating is very diverse and had also advised in cross border M&A. Further, if the skill set of the employees of the appellant is taken into consideration, then it would be seen that the average salary is very high which is evident from the fact that 22 to 25 employees salary paid was more than Rs.20 crores as compared to the average salary cost of ICRA. Thus, going by the qualitative human asset, then there is a huge variation, which fails the comparability tests. Accordingly, this company should not be included.

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"20. At the outset, this comparable was subject matter of consideration before the Tribunal in AY 2008-09 & 2009-10, wherein this company was held to be good comparable both on the ground of functional similarity and in view of principles of consistency as it was held to be a good comparable by the TPO in the earlier years. From the perusal of the annual report, which is appearing from pages 156 to 187 of the paper book, we find that it is essentially providing consultancy services in diversified areas, like in government sectors, infrastructure, energy, corporate advisory, banking and financial services, etc. It focuses on consultancy and advisory which is its core area and competency. The revenue generation is purely from consultancy fees which is evident from profit and loss account as on 31st March 2010 (appearing at page 176 of the paper book). The TPO in his order had noted that its consultation or advisory operations ranges in various fields which have been tabulated by him at pages 9 to 11 of the order, which according to him appellant is not performing. On the perusal of the directors' report and also the remarks of the TPO, we find that the ICRA Management is providing consultancy services in a myriad areas ranging from development, transportation, urban infrastructure, energy sector, banking and financial services and advising cross border M&A transaction etc. Some other observation made by the TPO is that ICRA had participated in various international forums, partnered with foreign company in multiple projects and had a very big client base unlike appellant. However all these facts do not affect the core competency and functions of the said company, which is advisory, because in all the fields it is rendering only advisory and consultancy services. The whole revenue is again from consultancy/advisory fees. In the instant case also the appellant is providing Investment Advisory Services to its AE in diverse industries like, infrastructure, telecom, media, banking etc. to enable the AE to take decision for making investments. The functions of consultancy/advisory have to be seen as its core competence area and not in the field in which such consultancy is given. Under the TNMM, one had to see the transaction undertaken are comparable or not and whether any adjustment is required to obtain a reliable result, because under TNMM the net margin are less affected by transactional differences and is more tolerant to some minor functional differences between controlled and uncontrolled transactions. However, if any unique function or property significantly affects the operating costs or net margin or had a bearing in the generation of revenue itself, then it cannot be considered to be a fit

comparable for benchmarking the net margins. Here it is not the case where there is any unique functions materially affecting the revenue or net margins vis-a-vis the functions performed by ICRA. Hence on functional level it is a good comparable. As stated earlier, in the earlier years, the TPO had accepted ICRA to be a comparable and in later years the Tribunal in AY 2008-09 & 2009-10 had held ICRA Management to be good comparable qua the functions of the appellant and there being no material change on facts, functional profile or any other factor in this year, then as matter of consistency, we do not want do deviate from our findings given in the earlier years. There cannot be a pick and choose of comparables every year unless there are some material difference in facts and circumstances compelling to take a different conclusion. Thus, we hold that ICRA Management is a good comparable and should be included in the list of final comparables. "

It is further pertinent to note here that it is not in dispute that the functional profile of Temasek(supra)was comparable with the assessee.We have compared the functional profiles of both the companies for the AY.2010-11 and have found them almost same,that ICRA was accepted as a comparable in the assessee 's own case in subsequent years i.e.in the AY.s.2012-13 and 2013-14,that the Tribunal had consistently accepted ICRA a valid comparable in other Investment Advisory cases.While deciding the appeals of Tamasek for the AY.s.2007-08 and 2008-09,the Tribunal has held as under:

"51(i)..... This company is engaged in operations of advisory services and is offering consultation service in the area of strategy, risk management, operations, improvement regulatory economics and transactions advisory. From the various fields of activities as seen from the directors' report, it is seen that this company is providing management and advisory services for various types of industries. All its revenue is generated from consultation fees. Thus, this company is giving consultation in various types of industries through investment advisors. Thus, this company is a good comparable more so when it had been accepted by the TPO in the earlier year as well as in the succeeding year; "

In the case of M/s Blackstone Advisors Private Limited (supra),the Tribunal has held as follow:

"c)This company is providing consultancy services in diverse areas like, government, infrastructure, energy, banking and financial services etc. Its core competence is mainly advisory services in various industries. Its revenue generation is from consultancy fees. Thus,a company which had provided management, consultancy services in diverse fields can be held as comparable to investment advisory companies as the appellant while giving investment advisory services too analyses the various sectors of industries while recommending for investment. At a functional level this company can be very well said to be a good comparable as it is purely on advisory services rendering company. Moreover, this company had been held to be to the Investment Advisor Ltd in the Temasek Holdings Advisors (India) Pvt Ltd (supra) "

We further find that the very argument of the DR that were advanced before us, were considered and rejected by the ITAT in the case of Temasek for AY.2010-11.

We find that the ITAT records the DR's submission as under:

"If a criterion of the revenue from consultancy fee is to be taken into consideration, then on same logic, Motilal Oswal should also be included in the list as it had also shown the income from consultancy and so also in other cases also. "

The reference made by the DR to the Kerala High Court decision of Kalpetta Estates Ltd.[211 ITR 635] to say that res judicata does not apply to income-tax proceedings is not relevant in the said proceedings as there are no new material placed on records by the DR with regards to the change in functional profile of ICRA or Temasek Holdings Advisors (India) Private Limited.

After considering the same arguments the Tribunal had held,as stated earlier,that ICRA was a valid comparable for investment advisory company and had emphasized on following the rule of consistency.We find that in the subsequent years ICRA has been accepted a valid comparable,that all the arguments raised by the DR in the matter of Tamasek for the AY.2010-11,have been dealt extensively by the Tribunal,that it had rejected the arguments raised by the DR.Respectfully following the orders of the Tribunal delivered in the cases mentioned in earlier

paragraphs,we hold that the order of the FAA does not suffer from any legal or factual infirmity.So,confirming his order we hold that he had rightly included ICRA in the list of valid comparables.

6.b.With regard to IDCL the DR argued that it was a product company,that it would follows AS-9 to recognise revenue,that the payment of copyright reflected that IDCL was buying copyrighted products and selling the same,that that it had income from business conventions, that that it dealt in products..He referred to the Pg. 469,475,481,484-486 of the paper book . He also referred to Website print outs titled "IDC's Go-to-Market Services..”.

In his reply,the AR argued that the FAA had considered the activities performed by the assessee,that he had followed the orders of the Tribunal delivered in the cases of Sandstone Capital Advisors Private Limited (ITA/6315/Mum/2012)and Temasek(supra)and had held that the company was a valid comparable.The AR stated that matter of ICDL was covered by the order of Temasek for the AY.2010-11,that IDCL's comparability to companies engaged in Investment Advisory was no longer res integra,that it had been re-confirmed by the ITAT in the case of Temasek(supra),that the functional profile of Temasek for the AY.2010-11was comparable with the assessee,that it was accepted as a comparable in the assessee's own case in subsequent years,that the Tribunal has accepted it a valid comparable in other Investment Advisory cases.He referred to the case of Sandstone Capital Advisors Private Limited(ITA/6315/Mum/2012-AY.2008-09),Temasek(supra-AY. s.2007-08,2008-09),that the activities and functions of IDCL from the AY.2008-09,have remained unchanged including the during the year under consideration.He referred to the annual report of IDCL for the year ending 31.03.2008 and stated that Page 469 of the PB showed that IDCL had income from sales and services,that because the Annual Accounts used the term sales it did not mean that IDCL sold

products as any trader or manufacturer would, that the Pg.482 clearly mentioned that the company was engaged in rendering market research and management consultancy services, that as a service provider is also required to follow AS-9, that it was incorrect to say that following AS would show that IDCL was a trader or manufacturer of products, that expenses incurred towards the copyright were considered to be operating in nature and formed only 6.17% of the total expenditure incurred during the year, that payment for copyright would only show that IDCL uses certain copyrighted material while rendering services, that Pg.486 of the PB made it clear that the word products used by IDCL in its Annual Accounts referred to nothing but the areas in which it provides research/advisory viz. Infrastructure Technology Segment (Global IT), Finance (Investment Research Advisory), Marketing (CMO Advisory), that the sale income referred to by the DR related to the sale of various research reports which are prepared by IDCL on the basis of the research, analysis and survey undertaken by them, that IDCL could not be concluded to be a product company, that the three page hand-out titled "About IDC Go-to-Market Services", submitted by the DR pertained to and provided information in connection with IDC Inc. and not IDCL, that the Web site print outs titled "IDC's Go-to-Market Services include" were prints of a web site taken on 16.12.2015, that the information did not relate to the year under consideration and hence could not be relied upon, that there was nothing in the printouts which suggested that IDCL was a product company or that it was not a valid comparable to the assessee.

6.b.i. We have heard the rival submissions and perused the material before us. We find that while adjudicating the appeal of Tamasek for the AY.2010-11 the Tribunal had held as under :

"This comparable though accepted by the TPO as a good comparable, however, the DRP has additionally rejected this comparable. In assessment year 2008-09, the Tribunal had

held to be a good comparable, on the ground that this company is also engaged in the advisory and consultancy services for the purpose of investment made in various sectors and secondly, it has been found to be good comparable by the TPO in the assessment year 2007-08 and 2009-10. Once company has been held to be good comparable consistently for three years then without any change in the material facts, it cannot be held that this comparable could be rejected in this year. Moreover, in the case of Carlyle Advisory India Ltd., ITAT Mumbai Bench, reported in 43 taxman. com.184, the Tribunal held that this company is a good comparable with the companies rendering investment advisory services. This decision of the Carlyle Advisors has also been upheld by the Hon 'ble Bombay High Court. Moreover, we have already discussed the functions performed by the IDC India Ltd while dealing with Ld. Counsel's argument that functions of advisory services are quite similar to the functions of the appellant and, therefore, we accept the appellant's contention that this comparable cannot be rejected. Accordingly, same is directed to be included in the comparability list. "

We find that IDCL had been accepted by the TPO as a valid comparable to the assessee for the AY.s. 2012-13 and 2013-14. It is found that the very arguments of the DR narrated above were urged before the ITAT in the case of Sandstone Capital Advisors Private Limited (supra) as under:

"7.1.1 Per contra, Shri Ajeet Kumar Jain, Ld. CIT DR had submitted that in the case of IDC India Ltd., the income had been shown in the P&L account under the head 'sales and services' income. The description of sales had not been given in the records. He had further pointed out that as per the Schedule to the Balance Sheet; the general business profile of [DC India Ltd is given as (conversion income and management consultancy) conduct of research and survey, business functions and management consultancy; therefore, this company is functionally different from the business profile of the appellant.

We further find that the Tribunal has decided the matter as follows:

"8. Having considered the rival submissions as well as the relevant material on record, we find that the main business of the assessee from which it had derived its income is conducting research and survey, business conversion and management consultancy. Though the separate results in respect of each activity are not provided; however, prima facie, it appears that the company is in the business of marketing research and

management consultancy. Therefore, as far as the functions of IDC India Ltd are concerned, the same are similar to the activity of the appellant. Therefore, in our considered view, IDC India Ltd can be considered as a good comparable for the purpose of determination of ALP. "

It is found that the annual report of IDCL (at Note 13 on page 482 of the PB), mentions the following:

"The Company is engaged in the business of 'Market research and Management Consultancy which is identified as the only and primary business segment of the company' Further all the operating facilities located in (India) "

6.b.ii. We are of the opinion that IDCL was not a product company, that had it been a trader of products it would have "stock" appearing in its Balance Sheet, that it was a fact that no such opening or closing stock was appearing in the Balance Sheet, that the said fact clearly demonstrated that IDCL was not a product company as suggested by the DR. Analysis of page 469 of the PB reveal that it was clear that there is no income from business convention earned by IDCL during the year. In these circumstances, by using the word Products IDCL would not become a trader or a manufacturer of products. The underlying functions/activities performed with respect to research and survey services involves the analysis of the business and operations of a company/sector. IDCL's profitability, operational efficiencies, future outlook, etc. which were similar to that of the functions and activities performed by the assessee for rendering investment advisory services. The AR also referred to the note (ii) to the annexure to the auditor's report, in support of his argument that IDCL was not a product company (Pg. 466 of the PB.). The note reads as under:

"The Company is a research Company, primarily dealing in research and survey services and products. It does not have any physical inventories".

In our opinion, the note clearly proves that IDCL was not a product company.

We find that papers A-1 to A-5, submitted by the DR are not legible and it is also not known that when the printouts were taken. Therefore, in our opinion they have no evidentiary value for deciding the issues arising for the year under appeal.

Document A-5, is a newspaper article dated 10.03.2011 and hence has no relevance to the year under consideration. In any event it only conveys that IDCL's name was changed to Cyber Media Research Ltd. In our opinion, this fact would have no effects on IDCL's comparability with the assessee.

Considering the above, we hold that the FAA was justified in holding that IDCL should be accepted as a functionally comparable company to the non-binding investment advisory services provided by the assessee.

6.c. With regard to ICR-O, the DR submitted that the activities performed by it were analytical in nature which helped in taking financial decisions and therefore were akin to investment advisory services. He referred to page 489 of the paper book for the purpose of demonstrating the scope of outsourced services rendered by it. He also referred to page 500 of the paper book which showed that the income earned by ICRA-O was from fee based services and hence it could be considered as comparable to the investment advisory services. The AR contended that ICRA-O did not provide any advisory or consultancy services at all, that it was engaged in three business lines namely Outsourced services, information services and software products and services, that ICRA-Online did not provide any advisory/consultancy services, that the services provided by it only such services and hence could not be considered a valid comparable, that as a company providing medical transcription services cannot be compared to a company running hospitals, that ICRA-O providing analytical support could not be compared with the assessee which rendered advisory/consultancy services, that the KPO business segment consisted of various activities other than research and analytics like Data Extraction, Aggregation, Electronic Conversion of Financial Statements, Validation and Analysis, Accounting and Finance which were functionally not comparable to the assessee's activity of rendering non-binding investment advisory services, that the

annual report of the company did not provide any segmentation or bifurcation of the KPO segment into research and analytics services vis-a-vis any other services, that page 489 of the PB did not provide any description of activities performed under the caption "Outsourced Services",that on that count alone the company deserved to be rejected,He referred to the web site of ICRA-O which reads as under:

"Knowledge Process Outsourcing (KPO):The Knowledge Process Outsourcing (KPO) Division at ICRON provides financial and analytical services and support to clients in the areas of Data Extraction, Aggregation, Electronic Conversion of Financial Statements, Validation and Analysis, Accounting and Finance, Research and Analytics. This forms a vital input for the Decision Support System for our clients and complements their customer- delivery capabilities.

Information Services and Technology Solutions: Information Services and Technology Solutions division had been a leading service provider for investment and advisory industry through its innovative technology solutions powered by its proprietary research and a comprehensive industry data. Our technology solution includes research applications,portfolio tracking solutions and transaction management & back office solutions which cater to diverse industry participants ranging from fund managers, product managers, research analysts to Font end sales team, wealth managers, financial planners and IF As. Our analysts help distributors, banks and AMCs formulate and deliver various analytical reports on fund performance, event updates and economic outlook"

6.d.With regard to IDFC,the DR placed reliance on the order of the TPO and stated that the functions performed by IDFC were similar to the functions of the assessee.The AR contended that the non-comparability of IDFC to companies engaged in Investment Advisory was no longer a dispute,that it had been re-confirmed by the ITAT in the cases Carlyle(India)Advisors Private Limited (supra),Bain Capital Advisors (India) Private Limited (ITA/413/Mum/ 2015) Sparkles Dhandho Advisors Private Limited (ITA/1047/M/2015for AY.2010-11),

that the FAA had rejected IDFC as comparable to investment advisory services rendered by the assessee and had stated that IDFC was registered as a Portfolio Manager with SEBI, that the DR did not make any submission as to why and how the order of the FAA was incorrect.

6.d.1. After hearing the rival submissions we would like to refer to the order of Carlyle (India) Advisors Private Limited (*supra*) and it reads as under:

"We have carefully considered the rival submissions on this aspect. A perusal of the Director's report of IDFC Investment Advisors Ltd for the instant year reveals that it is registered as a Portfolio manager with SEBI whereby it is carrying out Portfolio Management Services envisaged under the SEBI [Portfolio Managers Regulations, 1993. The detailed activities enumerated in the Directors Report show that it was offering Portfolio Management Services for the domestic retail investors in different fields. The aforesaid clearly establishes that it is engaged in managing offunds in its portfolio management platform. In fact, in notes to the accounts, annexed to the Annual Financial Statements, the narration about the nature of operations being carried out is quite significant..... however, it is also noticed that said concern receives 'advisory fee' computed on the basis of net assets of the fund plus a performance fee. The narration of business operations contained in the notes to accounts clearly establishes a distinction between the business model being pursued by the said concern and the appellant for rendering investment advisory related support services to its associate enterprise. The earnings of IDFC investment Advisers Limited, though titled as 'advisory fee', are indeed computed on the basis of amount of fund deployed by the investee fund plus a performance fee whereas the assessee is being compensated on cost plus fixed mark-up basis. On account of this difference in the business 'model of IDFC Investment Advisers Limited, it would not be appropriate to compare appellant's international transaction of Provision of investment related support services to its associate enterprise with that of the IDFC Investment Advisers Limited. Before us, the Ld. Representative for the appellant had also relied upon the decision of Mumbai Bench of Tribunal in the case of Bain Capital Advisers [(India)] Private Ltd. Vs. DCIT in ITA No. 4131Mum/2015 order dated 15.5.2015, wherein for the instant assessment year itself, IDFC investment

Advisors Limited had been held to be incomparable with an appellant who is engaged in providing non-binding investment advisory related support services only. In our considered opinion, the decision of the Tribunal in the case of Bain Capital Advisers [(India) Private Ltd (supra)] also supports the plea of the appellant for exclusion of IDFC Investment Advisers Limited from the final set of comparables. In view of the aforesaid discussion: in our view, IDFC Investment Advisers Limited deserves to be excluded from the final set of comparables for the purpose of computing the arm's length price of the appellant's international transaction of the provision of investment advisory related support services to the associated enterprise. Thus, in this case also, appellant succeeds".

We further find that in the matter of Bain Capital Advisers (India) Private Limited (supra), the Tribunal has held as under:

"IDFC rendered portfolio management services for hybrid infrastructure portfolio, agriculture opportunities portfolio and farm fork portfolio. IDFC is registered as portfolio manager with SEBL. Thus, IDFC is functionally different from the assessee which is engaged merely in non-binding investment advisory support services. Since, IDFC is functionally different, we direct the AO to exclude the IDFC from the list of comparables for computing arms' length adjustment."

It is found that while deciding the appeal of Sparkles Dhandho Advisors Private Limited (supra), the Tribunal has observed as follow:

"Regarding IDFC, it is demonstrated before us that the said company is engaged in rendering of services as Portfolio Manager, whose functions are intimately different from that of the functions of non-binding advisory services rendered by the assessee to its AEs. The fact of rejection of the same as a good comparable to a case of similar services as in the case of the appellant,

After hearing both the parties and on perusal of the said decision of the Tribunal in the case of Bain Capital Advisers (India) Private Limited (supra), order dated 15.5.2015, we find the para 8 is relevant in this regard and for the sake of completeness of this order the same is extracted as under:

In view of the above, we direct the AO to re-compute the arm's length adjustment after excluding IDFC from the list of comparables. "

7. We find that the assessee objected to the inclusion of ICRA-O and IDFC on the ground that the TPO had applied no scientific method in arriving at the said two companies, that the companies had been cherry-picked by the TPO and he had not furnished the process applied by which he had come to select the said two companies, that such an approach to select comparables was impermissible in law and on that count alone the said two companies should be rejected, that the FAA had rejected ICRA-O as comparable to investment advisory services rendered by the assessee and had stated assessee's knowledge process outsourcing division provided financial and analytical services and support to clients in the areas of Data Extraction, Aggregation, Electronic Conversion of Financial Statements, Validation and Analysis, Accounting and Finance, Research and Analytics, that the company was not engaged in investment advisory or consultancy services, that the AO was directed to exclude ICRA-O from the final set of comparable companies, that he had held that it was functionally not comparable to the assessee. Charging of fees by ICRA-O did not mean that it was a valid comparable to the assessee. As per the settled principles of TP for a company to be treated as a valid comparable the Functions performed, Assets employed and Risks assumed have to be comparable and not nomenclatures in the Annual Accounts. We would like to refer to Pg.507 of the PB in case of ICRA-O and it reads as under:

"ICRA Online Limited is a leading information services, outsourcing and technology solutions provider and caters for some of the biggest names in the financial services sector in (India) and abroad, which is a testimony to its product quality, commitment and credibility".

From the above description it is clear that ICRA-O operated in two strategic lines of business, i.e. knowledge Process Outsourcing and information Services and Technology Solutions, with a list of reputed global and domestic clients. Note c(iii) on Pg.507 of the PB also proves that the activities performed by the Company under the business line "Outsourced Services" were in the nature of "maintenance

and management of data" and therefore cannot be compared with the assessee. As far as IDFC is concerned, we would like to mention that a portfolio manager is a body corporate who pursuant to a contract or arrangement with a client would advise or direct or undertake on behalf of the client-whether as a discretionary portfolio manager or otherwise. FAR analysis of a Portfolio Manager cannot be compared with an assessee engaged in the business of providing investment advisory services. The Tribunal has in the cases discussed at paragraph 6.d.a. held that IDFC was not a valid comparable. Considering the above discussion, we are of the opinion that the order of the FAA to exclude both the comparables does not suffer from any legal or factual infirmity. So, confirming his order we decide the issue against the AO.

As a result appeal filed by the assessee stands allowed and the appeal of the AO is dismissed.
फलतः निर्धारिती द्वारा दाखिल अपील मंजूर की जाती है और निर्धारिती अधिकारी की अपील नामंजूर की जाती है.

Order pronounced in the open court on 18th May, 2016.
आदेश की घोषणा खुले न्यायालय में दिनांक 18 मई, 2016 को की गई।

Sd/-

(सी. एन. प्रसाद / C.N. Prasad)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 18.05.2016.

Jv. Sr. PS.

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

1. Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3. The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4. The concerned CIT /संबद्ध आयकर आयुक्त

5. DR "K" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, के खंडपीठ, आ.अ.न्याया.मुंबई

6. Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

Sd/-

(राजेन्द्र /Rajendra)

लेखा सदस्य / ACCOUNTANT MEMBER

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.