

आयकर अपीलीय अधिकरण, मुंबई "के" खंडपीठ
Income-tax Appellate Tribunal -"K" Bench Mumbai
सर्वश्री राजेन्द्र,लेखा सदस्य एवं, शक्तिजीत डे, न्यायिक सदस्य
Before S/Shri Rajendra,Accountant Member and Saktijit Dey,Judicial Member
आयकर अपील सं/ ITA No.537/Mum/2016 : निर्धारण वर्ष/Assessment Year-2011-12

M/s. AGM India Advisors Private Limited.The Grand Hyatt Complex Suite F-11, Santacruz (E) Mumbai-400 055. PAN:AAFCD 3354 D	Vs.	DCIT-Range-14(1)(1) 460, 4 th Floor, Aayakar Bhavan M.K. Road, Mumbai.
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(Appellant)

(Respondent)

आयकर अपील सं/ IT(TP) No.199/Mum/2016 : निर्धारण वर्ष/Assessment Year-2011-12

DCIT-Range-14(1)(1) M.K. Road ,Mumbai.	Vs.	M/s. AGM India Advisors Private Limited Mumbai.
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(Appellant)

(Respondent)

Revenue by: Shri N.K. Chand –CIT

Assessee by: Shri Nishant Thakkar & Ms. Jasmin Amalsadvala

सुनवाई की तारीख / Date of Hearing: 17.10.2016

घोषणा की तारीख / Date of Pronouncement: 04.01.2017

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 A.M.-

Challenging the directions of the Dispute Resolution Panel(DRP),Mumbai the assessee and the Assessing Officer(AO)have filed cross appeals for the year under consideration.Assessee-company,engaged in providing non-binding investment advisory services to its Associated Enterprise(AE),filed its return of income,declaring income of Rs.4.23 Crores.During the assessment proceedings,the Assessing Officer(AO)made a reference to the Transfer Pricing Officer(TPO)to determine Arm's Length Price(ALP)of the International Transactions (IT.s). After receiving the order of the TPO the AO proposed addition of Rs.8,43,43,300/-in his draft order.The assessee filed objections before the DRP.However,the DRP upheld the orders of the AO/TPO.In pursuance of the directions of the DRP,the AO completed the assessment u/s.143(3)r.w.s. 144C of the Act,on 30.12.2015, determining the income of the assessee at Rs. 10.90 Crores.

2.Effective grounds of appeals,filed by the AO and the assessee are inclusion and exclusion of certain comparables.During the Transfer Pricing(TP) proceedings,the TPO found that the assessee had entered in to IT.s.worth Rs. 25.24 Crores with its AE,that net operating profit margin on cost(NCP)was adopted as PLI,that Transactional Net Margin Method(TNMM) was selected as the most appropriate method(MAM),that three years data of seven compa -

ables was considered by it for determining the ALP of the IT.s.,that NCP of the assessee was 20.56%,that arithmetic mean of the comparable was 13.30%,that it was claimed that transactions entered into by it were at Arm's length.Seven comparable companies selected by the assessee for the provision of non-binding investment advisory services were as follows:

- i. Access India Advisory Ltd. (AIAL)
- ii. Future Capital Investment Advisory Ltd. (FCIAL)
- iii. ICRA Management Consulting Services Limited (ICRA)
- iv. IDC (India) Limited (IDCL),
- v. Informed Technologies Ltd. (ITL)
- vi. Integrated Capital Services Ltd. (ICSL)
- vii. Kinetic Trust Ltd. (KTL)

However, the TPO was not convinced with the selection of the comparables of the assessee. He directed it to provide single year updated margin for the comparable selected and to submit details as to how the companies selected by it were functionally similar and as to why the same should not be rejected in the eventuality of difference. The assessee was also directed to provide the reconciliation of the comparables selected for the year under consideration with those selected for the earlier year. He provided following additional comparables to the assessee and asked it to show cause as to why the same should not be considered as valid comparables-

- i. Motilal Oswal Investment Advisory Private Limited (MOIAPL)
- ii. Ladder up Corporate Advisory Private Limited (LCAPL)
- iii. New Berry Advisers Ltd (NBAL)
- iv. CRISIL Risk and Infrastructure Solutions Ltd. (CRISIL)

Vide its letter, dated 17/12/2014, the assessee submitted single year updated margin for the comparable selected by it in the such process. The assessee rejected AIAL, FCIAL and KTL from the list of the comparables, as the data for the AY. 2011-12 was not available. The updated margin for the remaining set was 11.13%. It made further submissions on 23/ 12/ 2014 and provided the functional analysis of the remaining four companies selected by it. However, the TPO rejected all the four comparables selected by the assessee. The assessee objected to inclusion of comparables selected by the TPO i.e. MOIAPL, LCAPL, NBAL and CRISIL.

2.1. After considering the submissions of the assessee, the TPO excluded CRISIL from the list of the comparables. He arrived at the final set of comparables as tabulated below:

SN.	Name of the comparable	OP/OC (%)
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1.	MOIAPL	82.55%
2.	LCAPL	52.42%
3.	NBAL	47.55%
	Average	60.84%.

The TPO computed the ALP as under:

Operating Cost -	Rs. 20.93 crores
Arm's Length Mean Margin-	60.84% of the OC
ALP @ 60.84% of the OC-	Rs.33.67 crores
Price Charged-	Rs.25.24 crores
Shortfall,being adjustment u/s.92CA-	Rs.8,43,43, 070/-

3. During the course of hearing before the DRP, the assessee objected to rejection of four comparables and inclusion of three new comparables. After considering the submissions of the assessee and the orders of the AO/TPO, the DRP held that the assessee was not engaged in investment advisory activities, that it was offering advisory and consultation services in the areas of strategy, risk management, operations, improvement regulatory economic and transaction advisory. The DRP, after referring to the case of Temasek, held that it would not follow the order of the Tribunal delivered in the case of Sandstone Capital Advisors Private Ltd. (ITA/6315/Mum/2012, dated 06/02/2013-AY.2008-09). With regard to IDC, the DRP held that it was not engaged in the activities of providing investment advisory services, that its activities were functionally absolutely different from the functions carried out by the assessee, that the activities of IDC were in an absolutely different segment from the segment to which activities of the assessee belonged to, that the above facts were not available to the higher appellate authorities in the earlier AY.s. The DRP referred to the cases of Temasek and Carlyle India Advisors Private Ltd. (Carlyle) and held that order of the Tribunal in both the cases would not be applicable to the facts of the case under consideration. Referring to the annual report of ITL for the year 2010-11, the DRP held that company was not involved in investment advisory services and was not functionally comparable to the assessee. It upheld the order of the AO. About the ICSL, the DRP observed that the company was engaged in rendering advisory services in the field of business reconstruction which was functionally different from non-binding investment advisory and related services provided by the assessee, that same could not be taken as a comparable for benchmarking the IT.s.

3.1.As stated earlier,the assessee had objected to inclusion of MOIAPL,LCAPL and NBAL.The DRP noted that while deciding the appeal in the case of Carlyle, the Tribunal had rejected MOIAPL is comparable to investment advisory services, that in the case of Q-India Advisors Private Ltd (ITA/923/MUM/2015-AY.2010-11, dated 24/04/2015),the Tribunal had held that it was an investment advisor.The DRP directed the AO to exclude MOIAPL from the list of the comparables.About LCAPL,the DRP observed that the income of the company during the year from the financial and management consultancy fees was 11.18 crores, that there was no evidence that the income had been received from merchant banking, that merely being a SEBI registered merchant banker did not mean that company had earned income or any part of it from merchant banking, that objection of the assessee had to be rejected.With regard to NBAL,the DRP held that the activities of the company were functionally different from the activities of the assessee and that it was not a valid comparable.In the case of CRISIL,the DRP observed that it operated into infrastructure advisory services and risks resolution, undertaking feasibility study, managing project procurement, assisting with fiscal and public sector reform, integrated risk management solutions, advising the banks and corporate using information technology products, that the infrastructure advisory division of the company had several verticals including healthcare,transport and logistic in Africa and South East Asia,that it was into activities totally different from the assessee and was not functionally comparable.

4.Before us,the Authorised Representative (AR) made a preliminary submission and detailed submission.In his preliminary statement he argued that if ICRA and IDCL were accepted as valid comparables and if the directions of the DRP about exclusion of MOIAPL and NBAL from the final lists is approved the entire TP adjustment would be liable to be deleted and the remaining grounds would become academic,that as per the agreement between the assessee and its AE it was to be compensated at cost +20%, that the functions performed by the assessee in the earlier AY.s.had remained the same in the current AY.,that earning of the assessee at cost +20% was found to be at arm's length by the Tribunal vide its order dated 18/05/2016.

In the detailed submissions,he contended that items number 1,2 and 5 of the list of the comparables of the assessee were approved by the Tribunal as valid comparables while deciding the appeal for the earlier years,that MOIAPL was rejected by the Tribunal is a valid comparable,that there was no justification for including LCAPL in the final list,that CRISIL

was wrongly excluded from the final list of the comparable-companies, that DRP had not accepted the multiple year data relied upon by the assessee.

For inclusion of ICRA as a comparable to Investment Advisory services, the AR relied upon the cases of Temasek Holdings Advisors (India) Private Limited (ITA/776/Mum/2015 for AY.2010-11), Temasek Holdings Advisors Private Limited (ITA.4203/Mum/2012 and 6504/Mum/2012, AY.s.2007-08 and 2008-09), M/s Blackstone Advisors Private Limited (ITA/15811Mum/2016 AY.2008-09). He argued 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, that the functions performed by ICRA were functionally similar to the activities performed by the assessee for rendering investment advisory services, that ICRA did not have separate segmental details since it rendered only advisory services, albeit in varied fields, that during the year under consideration, ICRA had not entered into any transaction pertaining to provision of merchant banking/investment banking services, that to say that because ICRA had no segmentals or it was engaged in rendering merchant banking/investment banking services and it must be rejected as MOIAPL was not an acceptable argument, that there was no change with regards to the functional profile of the assessee or ICRA for the year under appeal.

The AR argued that that IDCL had been accepted by the TPO as a valid comparable for the AY.s.2012-13 and 2013-14, that IDCL was a comparable selected by the assessee for AY.2012-13 was borne out from the extract of the submissions dated 03.09.2015 filed before the TPO, that IDCL was a comparable selected by the assessee for AY.2013-14, that Transfer Pricing Study maintained by the assessee proved said fact, that the return of the assessee as filed was accepted, that assessee's margin of 20% earned from rendering of non-binding investment advisory services was also accepted during the AY.2014-15, that IDCL was engaged in rendering research advisory in the areas such as CMO Advisory research, Global IT Advisory, Investment research services, IT advisory tools and other research programmes and that same were functionally comparable to the research functions performed by the assessee for the purpose of providing non-binding investment advisory services, that the direct expenses pertaining to AY.2011-12 amounting to Rs.5,68,92,754 related to expenses which were routine in nature and were incurred year-on-year basis, that similar expenses had been incurred in the previous year as well, that IDCL could not be rejected citing that the break-up of these direct expenses was not available, that the annual report of IDCL [page 332 of the

paperbook], mentioned 'Market research and Management Consultancy' as the only and primary reportable business segment of the company, that merely because the Annual Accounts used the term products it would not mean that IDCL sold products, that the 'sales' mentioned in page 326 of the PB did not pertain to sale of products by IDCL as a trader or manufacturer, that based on the market research and analysis conducted by it would prepare research reports for its clients for the purpose of providing consultancy services, that accordingly, 'sales' as mentioned in the annual report of IDCL pertained to sale of research reports by it and that same was functionally comparable to the research reports prepared by the assessee for the purpose of rendering investment advisory to its AE, that no income from business convention was earned by IDCL during the year. He referred to pages 300, 340 and 342 of the paper book in that regard.

4.1. The Departmental Representative (DR) argued that there was no history of accepting Tamasek as comparable, that in the case of Temasek the TPO must have committed mistake, that Temasek was based on particular circumstances, that ICRA was carrying out numerous activities which was distinct and no segmentals were available, that the profit and loss account at pages 264 and 283 of the PB did not provide for details schedule of consultancy fees and by ICRA, that even though pays to 95 of the paper book mentioned the product description is management consultancy services ICRA was engaged in diverse activities and the focus was not only on management consultancy services, that if MOIAPL was rejected is comparable than ICRA should also be rejected as valid comparable, that the order by the TPO in the subsequent years were clean orders, that there was no discussion on accepting or rejecting the comparables. He referred to the pages number 64, 84, 96, 253-56 of the PB.

With regard to IDCL, the DR referred to the case of Teva Pharma (18 taxman.148) and supported the order of the TPO. He also made reference to pages number 300-326, 332, 339, 342, 347, 349 of the PB and stated that observations made by the DRP were not considered by the Tribunal, while deciding the appeals for the AY. 2010-11, that it was engaged in rendering Global IT Advisory, Investment research services, IT advisory tools etc., that IDCL was a product company. He referred to the website extract relied on by the DRP in its directions for the Appellant for AY. 2011-12 which listed the various products and services provided by IDCL. He further argued that there was no break up of direct expenses (Rs. 5,68,92,754/-) in the account of IDCL, that products of IDCL were e-products which could be subscribed and downloaded by the users online on a monthly/ quarterly/ annual basis, that there was no inventory in the annual report of IDCL, that 'market research and management consultancy'

was the primary reportable segment of IDCL, that no segmental details were available with respect to business convention income earned, that the annual report of IDCL mentioned 'Royalty charges in foreign currency' under the schedule of foreign currency transactions, that breakup of expenses had not been provided in the annual report, that the same formed a part of 'direct expenses'. In short, for the comparable selected by the assessee and excluded by the DRP in the final list, he supported the order of the DRP. About MOIAPL, he stated that if ICRA was to be accepted as valid comparable MOIAPL should also be considered. With regard to NBAL, he relied upon the order of the TPO.

5. We have heard the rival submissions and perused the material before us. Effective grounds of appeal raised by the AO and the assessee are about excluding/including certain comparables from the list of the valid comparables. We find that the assessee had benchmarked the IT.s. by selecting four comparables, that the TPO rejected all the comparables selected by the assessee, that the DRP upheld the rejection of and further rejected MOIAPL and NBAL from the final list of the comparables, that DRP approved LCAPL as valid comparable, that the assessee had objected to exclusion of ICRA, IDCL, ITL and ICSL and inclusion of LCAPL, that the AO had filed appeal against the exclusion of MOIAPL and NBAL from the list of comparables, that the AO made an adjustment of Rs. 6, 67,12,196/-,

5.1. First we would like to decide the appeal filed by the AO, who has challenged the exclusion of MOIALP and NBAL. We find that the DRP had rejected NBAL as a valid comparable as it was found that it was engaged in distribution and marketing financial products, that the DRP had also held that it was not functionally similar to the assessee company, that NBAL was engaged in corporate advisory, IPO advisory, structured finance, India entry strategy, Sri Lanka advisory, FII advisory, Stock Market Investment Strategy, that while considering it is a valid comparable the TPO had not carried out any analysis to demonstrate that NBAL was engaged in rendering investment advisory services, that as per the annual report of the company it was engaged in the business of marketing and distribution of various financial products. Considering these facts we are of the opinion that the DRP had rightly rejected NBAL as a valid comparable. As far as MOIAPL is concerned we would like to mention that while deciding the appeal for the earlier year, the Tribunal had dealt with the issue in details and had held that MIOALP cannot be compared with an assessee who is engaged in providing investment advisory services. We are reproducing the relevant portion of the order of the Tribunal and it reads as under:

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 AY. 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 Id. 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.”

Considering the above we hold that MOIAPL has to be rejected as a valid comparable from the list of the final comparables on the ground that it was engaged in merchant banking/ investment banking services, that said fact was evident from the annual report and web site extracts of the MOIAPL, that despite such dissimilarity the Accounts of the company had not provided break-up of results from the said two activities separately. MOIAPL has to be excluded. Effective ground of appeal raised by the AO is decided against him.

5.2. Now we would take up the comparables included by the assessee in its TP study and excluded by the DRP. We have already decided the issue of inclusion of MOIAPL in the list of comparables, while deciding the appeal filed by the AO. We would now deal with exclusion of ICRA and IDCL. We find that the ITAT in the order of Temasek for AY.2010-11 had approved ICRA on broader functional comparability. We would like to reproduce the relevant extract of the order of the Tribunal and it reads as under:

"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 has 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 has 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."

So, we are of the opinion that order in the case of Temasek for the AY.2011-12 was not an order that followed the decision of earlier year without considering the merits, as argued by the DR. It is a reasoned and independent order. We also would like to refer to Note 12 of the annual report of ICRA which clearly mentions that it had only one business segment i.e. consulting services and had no other primary reportable segment (Pg.273 of the PB). Besides, the product description provided in the annual report specifies Management Consultancy Services as the only product offered by it (Pg.295 of the PB). So, we are of the opinion that ICRA is a valid comparable and that MOIAPL and ICRA are not performing similar functions. In our opinion, the argument, that if ICRA is considered a valid comparable then MOIAPL should also be considered a valid comparable, is devoid of merits.

5.3.a. We find that while deciding the appeal for the AY.2010-11, in the appellant's own case, all the arguments raised by the DR, with regard to IDCL, were dealt with by the ITAT. It is also a fact the IDCL was accepted as a valid comparable in the subsequent AY.s. We are

aware that order for the subsequent years are not elaborate order like the order for earlier years, but the TPO had considered all the material with regard to IDCL while passing the this order. Therefore, same cannot be ignored treating them 'clean orders'. So, to include it in the final list of comparables in the subsequent AY.s. was an informed decision of the AO.s.

5.4. We find that while deciding the appeal for the AY.2010-11 (supra), the Tribunal had held that ICRA and IDCL should be included in the list of valid comparables, that the AO had filed an appeal before the Tribunal against the inclusion of ICRA and IDCL in the final list of comparables. The DR has advanced the same arguments that were advanced last AY., the only difference is of the numbers of pages of the PB. We would like to re-produce the arguments of the DR and the relevant portion of the order of the Tribunal for the sake of completeness and same reads as under:

“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 IDCL.

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 advice would be 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 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 Temasek 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 to 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), Tamasek (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 AY. 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 AY. 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 have also 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 IDCL 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 follow:

"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 IDCL Ltd are concerned, the same are similar to the activity of the appellant. Therefore, in our considered view, IDCL 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.

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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."

Considering the above, we hold that ICRA and IDCL should be included in the final list of valid comparables. In our opinion, the case of Teva Pharma (supra), relied upon by the DR, is of no help to the department as it does not deal with an assessee that is engaged in non-binding investment consulting services. Secondly the said case was available to the department when the matter for earlier year was argued.

6. We find force in the preliminary submission of the AR that if ICRA and IDCL are accepted as comparables and if MOIAPL and NBAL are excluded from the final list the margin earned

by the assessee would be within the limit of +/-5% range. We would like to recalculate the margin and it can be tabulated as under:

SN.	Comparable	Margin%
1.	ICRA	15.90%
2.	IDCL	10.33%
3.	LCAPL	52.42%
	Arithmetic Mean	26.22%.

The assessee has shown margin of 20.56% for the services rendered by it to its AE. As it falls within the range of +/-5%, so, in our opinion, the adjustment made by the AO to determine the ALP of the IT.s., entered into by the assessee during the year under consideration, has to be deleted.

As a result, appeal filed by the assessee is allowed and appeal of the AO stands dismissed.

फलतः निर्धारित की अपील मंजूर की जाती है और निर्धारित अधिकारी की अपील नामंजूर की जाती है।

Order pronounced in the open court on 04th January, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांक 04 जनवरी, 2017 को की गई।

Sd/-

(शक्तिजीत डे / Saktijit Dey)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(राजेन्द्र / Rajendra)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 04.01 .2017.

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 "A " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.