



**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"K" BENCH, MUMBAI**  
**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**  
**SHRI ASHWANI TANEJA, ACCOUNTANT MEMBER**

ITA no.6912/Mum./2012  
(Assessment Year : 2008-09)

Goldman Sachs (I) Securities P. Ltd.  
951-A, Rational House  
Appasaheb Marathe Marg  
Prabhadevi, Mumbai 400 025  
PAN – AABCT3784C

..... Appellant

v/s

Addl. Commissioner of Income Tax  
Range-3(1), Aayakar Bhawan  
101, M.K. Road, Mumbai 400 020

..... Respondent

Assessee by : Shri P.J. Pardiwala, Sr. Counsel  
Revenue by : Shri N.K. Chand

Date of Hearing – 29.04.2016

Date of Order – 22.07.2016

**ORDER**

**PER SAKTIJIT DEY, J.M.**

Captioned appeal at the instance of assessee is directed against the assessment order dated 23<sup>rd</sup> October 2012, passed under section 143(3) r/w 144C of the Income Tax Act, 1961 (for short "*the Act*") in pursuance to the directions of Dispute Resolution Panel (DRP) for the assessment year 2008-09.

Grounds raised by the assessee are as under:–

*Aggrieved by the order passed by the Additional Commissioner of Income-tax Range-3(1), Mumbai ('AO') in pursuance of the*

*directions issued by Dispute Resolution Panel -I (DRP'), Mumbai dated 23 October 2012 under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 ('Act'), the Appellant respectfully submits that the learned AO erred in passing the order on the following grounds:*

*1. In making an upward transfer pricing adjustment of Rs. 946,786,679 in determining the arms length pricing (ALP) of the international transactions pertaining to (a) investment advisory services in respect of listed Indian equities; (b) Investment advisory/support services in respect of strategic (unlisted) investments and (c) Investment banking services, provided by the Appellant to its overseas associated Enterprises (AE) by rejecting comparables selected by the Appellant, inter-*alia*, on following grounds:*

*i. Rejecting the separate functional analysis, search process adopted and documentation maintained by the Appellant for these transactions and treating these three separate international transactions as a single international transaction for the purpose of determining the ALP.*

*ii. Adopting a set of comparable companies whose functions are not similar to that of the Appellant, in the context of the said international transactions.*

*iii. Rejecting the multiple year data and relying only on the single year data (i.e. for the year ended March 2008);*

*iv. Considering companies with related party transactions as comparable to the Appellant.*

*vi. Considering companies with established presence and supernormal profits as comparable to the Appellant which is in its full first year of operations.*

*vii. Not granting an adjustment on account of employee cost.*

*viii. Not granting an adjustment on account of difference in risks assumed by comparable companies selected by the TPO vis-à-vis the Appellant.*

*2. In making an upward transfer pricing adjustment to the extent of Rs. 42,181,115 for the international transaction pertaining to provision of Information Technology enabled services to its AE and in re-computing the arm's length price under the Transactional Net Margin Method, inter *alia*, on following grounds:*

- i. *Rejecting the functional analysis, search process adopted and documentation maintained by the Appellant for the international transaction;*
- ii. *Adopting a set of comparable companies for the international transaction whose functions are not similar to that of the Appellant;*
- iii. *Considering companies with exceptional year of operation as comparable to the Appellant;*
- iv. *Using of information obtained under Sec 133(6) of the Act;*
- vi. *Rejecting the multiple year data and relying only on data for the year ended 31 March 2008 for the comparable companies;*
- vii. *Not granting an adjustment on account of differences between the working capital of the Appellant and the comparable companies;*
- viii. *Rejection of the credit risk adjustment; and*
- ix. *Erroneously calculation the operating margin of Moldtek Technologies Limited (MTL) at 96.66% instead of the correct margin being 20.64% (after considering provision for derivative losses as operating in nature). This is without prejudice to the Appellant's position that MTL is not comparable to the Appellant.*

3. *Without prejudice to above grounds, in not granting the benefit of the provisions of section 92C(2) (i.e variation of +/- 5 percent) of the Act in computing the revised ALP for the following international transactions:*

- *Investment advisory services in respect of listed Indian equities;*
- *Investment advisory services in respect of strategic investments;*
- *Investment banking services; and*
- *Information Technology enabled Services.*

4. *Based on the facts and circumstances of the case, the learned AO has erred in law and in fact, in making a reference to TPO without satisfying the preconditions necessary for making such reference.*

5. *Based on the facts and circumstances of the case, the learned AO has erred in law in disallowing the amortization and mark to market cost (hereinafter collectively referred as ESOP cost) amounting to Rs 203,156,936 incurred by the Appellant in respect*

*of restricted stock units (RSU5) granted to its employees, on the basis that the ESOP costs are notional/ contingent in nature.*

*6. Based on the facts and circumstances of the case, the learned AO has erred in law in disallowing charges paid to the National Securities Clearing Corporation Ltd., Bombay Stock Exchange and National Stock Exchange (stock exchanges) amounting to Rs.1,186,105 for non-confirmation of clearing house trades, client code modification, bad/ short delivery, etc. on the basis that the payments made are in nature of penalties / fine.*

*7. Based on the facts and circumstances of the case, the learned AO has erred in law in not accepting Appellants contention that the telecommunication charges are not required to be reduced from export turnover for the purpose of computing deduction under section 10A of the Act.*

*8. Without prejudice to the above ground, the learned AU erred in reducing the telecommunication charges only from the export turnover and not from both, i.e total turnover and export turnover, in computing the deduction u/s 10A of the Act.*

*9. The Appellant craves leave to add, alter, vary, omit, substitute or amend any or all of the above grounds of appeal, at any time before or at, the time of the appeal, so as to enable the Hon'ble Income-Tax Appellate Tribunal to decide this appeal according to law."*

2. Grounds no.1 to 4 are on transfer pricing issues, whereas grounds no.5 to 8 are on corporate tax issues.

3. Ground no.1, relates to transfer pricing adjustment made in respect of investment advisory and investment banking service segment.

4. Brief facts are, the assessee an Indian company is engaged in the business of securities broking, investment banking, underwriting and other financial services business in India. It is a wholly owned

subsidiary of Goldman Sachs (Mauritius) LLC and its nominees. For the assessment year under consideration, assessee filed its return of income on 30<sup>th</sup> September 2008, declaring income of ₹ 169,13,92,530. In the course of assessment proceedings, the Assessing Officer noticing that assessee has entered into international transactions with its A.E. made a reference to the Transfer Pricing Officer (Transfer Pricing Officer) for determining the arm's length price (arm's length price). In the course of proceedings before him, the Transfer Pricing Officer after verifying the records noticed that as per the audit report submitted in Form no.3CEB, during the relevant previous year assessee had entered into following international transactions:-

<i>S.no.</i>	<i>Particulars</i>	<i>Amount (₹)</i>	<i>Method</i>
1.	<i>Provision of Investment banking services</i>	<i>134,689,017 (Receipt for services) 21,618,329 (Payment for services)</i>	<i>TNMM</i>
2.	<i>Provision of sales support services</i>	<i>215,587,341</i>	<i>TNMM</i>
3.	<i>Investment advisory and support services in respect of strategic invest-ments into India</i>	<i>797,071,410</i>	<i>TNMM</i>
4.	<i>Securities broking services in respect of securities traded in the cash equity segment on NSE and BSE</i>	<i>797,071,410</i>	<i>TNMM</i>
5.	<i>Securities broking services in respect of securities traded in the cash equity segment on NSE and BSE</i>	<i>1,039,994,747</i>	<i>CUP</i>

6.	<i>Securities broking and clearing services in respect of contracts entered in the derivatives segment on NSE and BSE</i>	409,746,296	CUP
7.	<i>Provision of information technology enabled services</i>	411,868,557	TNMM
8.	<i>Reimbursement / recovery of expenses</i>	728,272,995	N.A.
9.	<i>Transfer of fixed asset from AE to GSISPL</i>	20,587	N.A.

5. The Transfer Pricing Officer after examining the transfer pricing study report submitted by the assessee and other documents on record found that the assessee has classified its services rendered in investment advisory and banking segment under three different categories which are as under:-

- i) *Provisions for investment advisory service in respect of listed Indian securities amounting to ₹ 21,55,87,341;*
- ii) *Provisions for investment advisory in connection with making strategic investment in India amounting to ₹ 79,70,71,410;*
- iii) *Provisions of investment banking services of ₹ 33,56,74,029.*

6. The Transfer Pricing Officer after analysing the activity of the assessee and the nature of business in the aforesaid three categories was of the view that the functions are basically in the nature of merchant banking service for the Associate Enterprise (A.E). Though, the assessee tried to impress upon the Transfer Pricing Officer that the aforesaid categories of transactions are different in nature, hence, were bench marked separately the Transfer Pricing Officer, however,

was not agreeable to such proposition. After analysing the nature of services provided by the assessee in each of these categories, Transfer Pricing Officer in Para-5 of his order observed, the functions performed in each of these categories are quite similar and overlapping. He opined, though the assessee had classified the services to three categories, but, they are more or less relating to investment banking services which the assessee performed for its A.E. Thus, on the aforesaid basis, the Transfer Pricing Officer finally concluded that all the three categories of services separately shown by the assessee are to be clubbed together under the head "*investment banking service*" for the purpose of transfer pricing analysis. On the aforesaid basis, the Transfer Pricing Officer undertook a search process for identifying comparable companies for determining the arm's length price. After undertaking a search in data bases, Transfer Pricing Officer proposed following seven companies under the merchant banking segment for comparability analysis.

<i>Name of Company</i>	<i>Operating Revenue (₹)</i>	<i>Operating Cost (₹)</i>	<i>Operating Profit (₹)</i>	<i>Operating Margin on Operating Cost (%)</i>
<i>Centrum Capital Ltd (segment)</i>	<i>As per T.P. report</i>	<i>As per T.P. report</i>	<i>As per T.P. report</i>	<i>102.32</i>
<i>Chartered Capital &amp; Investment Ltd.</i>	<i>86,551,000</i>	<i>27,992,000</i>	<i>58,559,000</i>	<i>209.20</i>
<i>Edelweiss Capital Ltd.</i>	<i>816,136,000</i>	<i>491,660,000</i>	<i>324,476,000</i>	<i>66.00</i>
<i>IDC (India) Ltd.</i>	<i>157,740,718</i>	<i>137,315,837</i>	<i>20,424,881</i>	<i>14.87</i>
<i>L&amp;T Capital Co. Ltd.</i>	<i>69,804,499</i>	<i>24,500,192</i>	<i>45,304,307</i>	<i>184.91</i>
<i>SREI Capital Markets Ltd.</i>	<i>205,564,831</i>	<i>193,003,247</i>	<i>12,561,584</i>	<i>6.51</i>
<i>Sumedha Fiscal Services Ltd.</i>	<i>31,454,643</i>	<i>18,162,447</i>	<i>13,292,196</i>	<i>73.19</i>
<i>Arithmetic mean</i>				<i>108.28</i>

7. Though, the assessee objected to the approach of the Transfer Pricing Officer in clubbing all the three segments together and further proposing comparables under the merchant banking segment and sought rejection of five out of six companies selected by the Transfer Pricing Officer except IDC India Ltd. and Sumedha Fiscal Services Ltd., for which the assessee submitted revised margin and also inclusion of one company i.e., ICRA Management Consulting Service, but, the Transfer Pricing Officer did not accept the contention of the assessee and finally selected the following comparables:–

<i>S.no.</i>	<i>Name of Company</i>	<i>Margin for the year ended 31.3.2008</i>
1.	<i>Centrum Capital Ltd. (Segmental)</i>	<i>102.32%</i>
2.	<i>Chartered Capital &amp; Investment Ltd.</i>	<i>209.20%</i>
3.	<i>Edelweiss Capital Ltd.</i>	<i>66.00%</i>
4.	<i>IDC India Ltd.</i>	<i>13.88%</i>
5.	<i>L&amp;T Capital Co. Ltd.</i>	<i>184.91%</i>
6.	<i>SERI Capital Markets Ltd.</i>	<i>6.51%</i>
7.	<i>Sumedha Fiscal Service Ltd. (segmental)</i>	<i>48.84%</i>
8.	<i>Keynote Corporate Services Ltd. (segmental)</i>	<i>209.19%</i>
	<i>Arithmetic mean</i>	<i>105.10%</i>

8. Applying the arithmetic mean of 105.10%, the Transfer Pricing Officer worked out the arm's length price of the international transaction in respect of each of the categories and the resultant shortfall was treated as adjustment to be made to the price charged.

On the basis of the order passed by the Transfer Pricing Officer, the Assessing Officer passed a draft assessment order incorporating the adjustment made to the arm's length price. Being aggrieved of the addition made in the draft assessment order, the assessee filed objections before the DRP.

9. As far as assessee's objection with regard to clubbing of the investment advisory service and investment banking services for the purpose of comparative analysis, the DRP held that as per the functional analysis in the transfer pricing study, the functions under both the segments are similar to merchant banking. The DRP further noted that in assessee's own case for assessment year 2007-08, the DRP has already confirmed the clubbing of both the segments. Accordingly, they rejected the contention of the assessee for segregating the investment advisory service from investment banking for comparative analysis. As far as selection of comparables is concerned, DRP found that out of the eight comparables selected by the Transfer Pricing Officer, five were selected by the assessee itself in its transfer pricing study. As far as three new comparables viz. Chartered Capital and Investment Ltd., Edelweiss Capital Ltd. and L&T Capital Co. Ltd. are concerned, the DRP while upholding selection of Chartered Capital and Investment Ltd., directed the Assessing Officer to examine the related party transaction (RPT) of Edelweiss Capital

Ltd. and L&T Capital Co. for accepting or rejecting them as comparable depending upon the RPT threshold limit of 25%. As far as the companies proposed for inclusion as comparable by the assessee, the DRP did not accept them. In terms of the directions of the DRP, the Assessing Officer passed the final assessment order which is under challenge in the present appeal.

10. The learned Sr. Counsel, Shri P.J. Pardiwala, appearing for the assessee submitted, the functions, assets and risk of investment advisory segment being completely different from investment banking segments both of them cannot be clubbed together and treated as investment banking segment as has been done by the Transfer Pricing Officer. He submitted, the approach of the Transfer Pricing Officer to combine both the segments for bench marking by applying margins of investment banking companies is totally incorrect. The learned Sr. Counsel submitted, the Transfer Pricing Officer in assessee's own case for assessment year 2007-08 and 2009-10 had combined the investment advisory (listed and unlisted) segment for bench marking purpose, hence, the same approach should be followed in the impugned assessment year. The learned Sr. Counsel further submitted in assessee's own case for the assessment year 2007-08 and 2009-10, the Tribunal had also upheld bench marking of investment advisory as a separate segment by selecting comparables from that

segment. Learned Sr. Counsel submitted, the assessee had benchmarked the price charged for investment advisory service segment by selecting comparables from that segment which were rejected by the Transfer Pricing Officer by combining the investment advisory services to investment banking segment and selecting comparables from investment banking segment. Learned Sr. Counsel submitted, the comparable selected by Transfer Pricing Officer were rejected by the Tribunal in assessee's own case as not comparable to investment advisory segment. Learned Sr. Counsel submitted, the companies selected by the assessee as comparable in the investment advisory service segment have been accepted as good comparables by the Tribunal in the case of Temasek Holdings Advisors India Pvt. Ltd., for the assessment years 2008-09, 2009-10 and 2010-11. He, therefore, submitted, the comparable selected by the assessee in the investment advisory service segment should be accepted.

11. Learned Departmental Representative though accepted that investment advisory and investment banking are two completely different segments and, hence, cannot be combined for benchmarking, however, he submitted that the comparables selected by the assessee cannot be considered as comparable in the impugned assessment year.

12. We have considered the submissions of the parties and perused the material available on record. It is evident from the impugned order of the Transfer Pricing Officer, he has clubbed both investment advisory service segment and investment banking segment as one and held that it will come within the category of investment banking service and accordingly has undertaken a search for selecting comparables under investment banking segment. In our view, such approach of the Transfer Pricing Officer is flawed. Investment advisory service being functionally different from investment banking service segment, both the segments cannot be combined together to be treated as investment banking service. In fact, in assessee's own case for assessment year 2007-08 and 2009-10, the Transfer Pricing Officer, though, has considered investment advisory service (both listed and unlisted) as a separate segment, but, he selected comparables from investment banking segment for determining the margin of the assessee. The Tribunal, while deciding appeals preferred by the assessee, rejected certain comparables selected by the Transfer Pricing Officer on the reasoning that they are in investment banking segment. In this context, we refer to the orders passed by the Tribunal in ITA no.7724/Mum./2011, dated 23<sup>rd</sup> January 2013 and ITA no.222/Mum./2014 dated 30<sup>th</sup> November 2015, for the assessment years 2007-08 and 2009-10 respectively. That being the case, we

hold that investment advisory service segment cannot be clubbed with investment banking service for the purpose of bench marking the margin. In our view, bench marking of the price charged for investment advisory service segment should have to be independently undertaken. As the Transfer Pricing Officer has not undertaken such exercise, we are inclined to restore the issue back to the file of the Transfer Pricing Officer to undertake such exercise by treating investment advisory service as a separate segment. The Transfer Pricing Officer must carefully examine the comparables selected by the assessee in its transfer pricing study and decide whether they are functionally similar, hence, suitable to be selected as comparable in respect of investment advisory segment. In case, the Transfer Pricing Officer finds them not to be comparable to the assessee, he may conduct a search process himself to find out comparables in the aforesaid category. Of-course, while doing so the Transfer Pricing Officer must assign cogent reasons for selecting / rejecting a comparable. While selecting comparables, he must keep in view the decisions of the Tribunal in assessee's own case as well as other cases cited before us by examining whether the facts and reasons on which the comparables were selected or rejected are also applicable to the impugned assessment year. We make it clear the Transfer Pricing Officer must afford reasonable opportunity of hearing to the assessee

to put forward his submissions on the issue of selection / rejection of the comparables.

13. The next issue arising for consideration is in relation to selection / rejection of comparable in the investment banking service segment and certain adjustments for computing the margin as proposed by assessee.

14. As stated by the assessee, it received license from Security Exchange Board of India to commence its investment banking business in December 2006. Thus, the first year of its activity in investment banking segment is financial year 2007-08 relevant to the assessment year under dispute. It is the claim of the assessee that in respect of international transactions with its A.E. in this category, the assessee earned fees on a revenue sharing basis on per deal basis. The assessee bench marked the price charged to the A.E. using TNMM as the most appropriate method and reported margin of 21.52%. In the transfer pricing study undertaken through external consultant 16 companies were selected as comparable with average arithmetic mean of 21.85%. The Transfer Pricing Officer after perusing the transfer pricing study of the assessee noticed that the assessee has done financial analysis of the comparable companies on the basis of multiple year data instead of current year data.. He, therefore, rejected the

transfer pricing study as well as many of the comparables selected by the assessee and thereafter undertook a search process himself on the basis of single year data and short listed eight companies as comparables. Arithmetic mean of the comparable companies selected by the Transfer Pricing Officer worked out to 105.10% as against margin shown by the assessee of 21.52%. Thus, resultant shortfall was treated as transfer pricing adjustment.

15. Before the DRP, the assessee objected to selection of certain comparables. The DRP after considering the submissions of the assessee found that out of eight comparables selected by the Transfer Pricing Officer five were from the comparables selected by the assessee itself. From the rest of the three comparables, the DRP after considering the submissions of the assessee directed the Assessing Officer to decide the acceptability of two comparables namely; Edelweiss Capital Ltd. and L&T Capital Co. Ltd., after verifying whether RPT has exceeded the threshold limit of 25% of the total sales.

16. Learned Authorised Representative contesting the rejection of its transfer pricing study submitted, investment banking industry is highly cyclical in nature. Through a chart submitted, learned Authorised Representative made an attempt to demonstrate the volatile nature of business in this segment. It was submitted, the effect of sub-prime

crisis in the developed economy had started affecting the investment banking industry worldwide including India by the last quarter of the financial year 2007–08. Therefore, a multiple year analysis of the margin of the comparables has to be considered to get a correct analysis. He submitted, closure of investment banking mandates are dependent on various factors such as economic condition in the country financial stability of the corporate industry, change in regulation relating to M&A deals, global financial environment, changes in taxation laws, political environment, regulatory approvals, etc. It was submitted, investment banking mandates are generally spread over more than one year and the companies are generally entitled to fees only on successful completion of the mandates which is dependent upon various factors. He submitted, considering the cyclical nature of industries, dynamic environment affecting the investment banking service and the uncertainty around the collection / generation of investment banking revenues, utilisation of multiple year data for bench marking purpose would provide more accurate bench mark of companies. It was submitted, there is a long lead time between identification of potential opportunities and winning mandates and subsequent closure of mandates leading to very uneven recognition of revenue across players within the sector. In order to smooth out this volatility in revenues and to present a more accurate representation of

profitability and performance of business multiple year data should be used. He submitted, market-wise and year-wise deal volume data by the Indian Investment Banking Industry for last six years supports the claim of the assessee why multiple year data should be used. He submitted, investment banking business requires significant nurturing in terms of creating and building client relationships and goodwill before it can be leveraged for business growth. He submitted, in comparison to comparable companies, the relevant previous year is the first full year of assessee's investment banking operation. Therefore, in addition to the fact that the assessee has invested significant amount of time and resource in building up its business during the year, it has also faced significant competition against companies that have already been set-up and have a market presence for a substantial period of time. Learned Authorised Representative submitted, given the nature of business activities of the assessee, economic condition and usage of broad range of comparables, use of multiple year data would capture market cycles, reduce the variability / distortions in the financial results arising from the use of single year data and produce better results, therefore, use of multiple year data is more appropriate for cyclical industries like investment banking. He submitted, assessee's average margin taking into account subsequent three years' financial results is 138% which would indicate that the

margin of 21.52% earned during the impugned year is due to first year of operation. He submitted, assessee being in the first year of operation, is not comparable to other established players. In this context, he relied upon the decision of the Tribunal in Scoda Auto India Pvt. Ltd. v/s ACIT, [2009] 30 STO 319 (Pn.) He also relied upon the decision of the Tribunal in Cummins Turbo Technologies Ltd., ITA no.161 and 269/Pn./2013, wherein a comparable was excluded with the reasoning that the margin shown by that company lacks credibility and does not show a normal business trend if financial results of either three preceding financial year or succeeding financial year is taken. He, therefore, submitted rejection of the comparables selected using multiple year data is not proper.

17. Learned Departmental Representative referring to the observations of the Transfer Pricing Officer / DRP submitted assessee is required to demonstrate that earlier year data has an impact on the profits of the current financial year of the assessee as well as the comparable companies which have not been done by the assessee. He further submitted, assessee's contention cannot be accepted as details for later years were not available with the Transfer Pricing Officer and law provides use of only one year data. He submitted, in respect of some of the comparables data relating to assessment years 2008-09 and 2007-08 were not available. Learned Departmental

Representative submitted, the year 2007 is a good year for investment banking industry and impact of change in global market has affected all comparables as well as the assessee. Learned Departmental Representative submitted, use of own data of future year is also not permissible in law. He submitted, the assessee has also not furnished data relating to its own cost accounted for and revenue recognized in investment banking transactions.

18. In the rejoinder, it was submitted by the learned Sr. Counsel that assessee had been remunerated by A.Es on the basis of revenue sharing policy consistently followed by the group even in the subsequent years also. He submitted, the Transfer Pricing Officer has accepted the revenue sharing policy in the subsequent years and has not made any adjustment to the transaction of provisions of investment banking services. Therefore, the revenue earned by the assessee from its A.E. on the basis of aforesaid global revenue sharing policy should be accepted. Learned Sr. Counsel submitted, another factor which has an impact on the margin and necessary adjustment on that count has to be made is employee cost. Referring to the working of adjustment on account of employee cost, learned Sr. Counsel submitted, the employee cost of the assessee was 71.5% of the total operating cost for the impugned assessment year, therefore, for the purpose of making an appropriate comparison, the same

should be adjusted to the average employee cost of the comparable companies selected by the Transfer Pricing Officer. He submitted, if employee cost of the assessee is considered at 29% as that of comparable companies, the margin of the assessee works out to 110% as against the operating margin of 105.10% determined by the TPO.

19. Contesting the aforesaid submissions of the assessee, learned Departmental Representative submitted, neither the assessee nor the Transfer Pricing Officer had applied employee cost filter while selecting comparables. He submitted, better quality employee base should reflect better revenue. Referring to rule-10B of the I.T. Rules, 1962, he submitted, adjustment cannot be made to the margin of the tested party and if at all any adjustment has to be made it has to be made in case of comparables. For such proposition, he relied upon the decision of the Tribunal, Delhi Bench, in *Haworth (I) Pvt. Ltd. v/s DCIT*, [2011] 131 ITD 215 (Del.). Learned Departmental Representative submitted, though, it is the first year of operation of investment banking activity, however, the assessee must have leveraged on the existing client relationship from investment advisory to seek mandate for investment banking. He submitted, the skill set required for investment advisory and investment banking are same and many professional would render both types of services. Learned Departmental Representative

submitted, in any case of the matter, filter of 25% to 50% of the employee cost can be considered.

20. In the rejoinder, it was submitted by the learned Authorised Representative that the allegation of the Department that assessee had leveraged on the existing client relationship from investment advisory to seek mandate from investment banking is incorrect. He submitted, skill set required for investment advisory and investment banking are not same as investment advisory services are rendered by the assessee only to A.E., whereas, investment banking service are rendered to third part clients in co-ordination with A.Es, therefore, there cannot be a leverage of clients between both the segments. Learned Sr. Counsel submitted, considering the fact that this is the full year of operation if the employee cost of assessee is considered at 29% as that of comparable companies, the margin of assessee works out to 110% as against the margin of 115.10% determined by the Transfer Pricing Officer. Learned Sr. Counsel thereafter advanced his argument on selection / rejection of comparables in the investment banking segment as under:–

**CHARTERED CAPITAL INVESTMENT LIMITED**

21. Seeking exclusion of this company as a comparable, learned Sr. Counsel submitted, as per audit report, the auditors have mentioned

accounts prepared by the assessee is not following AS-15 as no provision for gratuity is made. In this context, learned Authorised Representative referred to the annual report of the company.

22. Learned Departmental Representative submitted, no adverse opinion or qualification was made by the auditors in the audit report to indicate over / under statement of profits due to non-provision of gratuity liability. On the contrary, auditors in the audit report have accepted that the financial statement gave a true and fair affairs and disclosure reported by it. Learned Departmental Representative submitted, even otherwise also, no qualification by auditors and audit report indicates that amount pertaining to provision of liability of gratuity may not be significant enough to affect the profits. He submitted, the assessee has offered no objection to the functional comparability of this company. Referring to the submissions made by the assessee before the Departmental Authorities, learned Departmental Representative submitted, the assessee itself has stated that this company is engaged in providing merchant banking service and has one reportable segment. Therefore, there is no justification to exclude this company.

23. In the rejoinder, the learned Sr. Counsel referring to Note-6 of Schedule-XVII of annual report of the company submitted, the

auditors have clearly stated non-compliance to AS-15 in respect of accounting for retirement benefits. Therefore, it cannot be said that the audit report is not qualified. He submitted, as the company has not made provision for gratuity the margin of the company cannot be relied upon. Learned Sr. Counsel submitted, the employee cost to operating cost ratio of the company is only 19.54% compared to assessee's employee cost of 71.5%. For this reason also, the company cannot be treated as comparable. For such proposition, learned Sr. Counsel relied upon the following decisions:–

- i) Maersk Global Service Centre (India) Pvt. Ltd., ITA no.3774/Mum./2011;*
- ii) Stream International Services Pvt. Ltd., ITA no.8997/Mum./2010, ITAT, Mumbai;*
- iii) Stream International Services Pvt. Ltd. ITA no.8290/Mum./2011;*
- iv) Maersk Global Services Centre v/s DCIT, ITA no.2492/Mum./2014, ITA no.2594/Mum./2014.*

**EDELWEISS CAPITAL LIMITED**

24. Objecting to the selection of this company, learned Sr. Counsel submitted, this company has number one ranking in both Bloomberg and Prime Database League Tables for Mid Market Private Equity Placements. It is an established player in the market unlike assessee who is in its first year of operation. He submitted, the RPT ratio of this company is 24.9%, hence, it cannot be considered as comparable.

25. Learned Departmental Representative referring to the observations of Transfer Pricing Officer submitted that the Transfer Pricing Officer has applied RPT filter of 25% as a quantitative filter for rejection of companies. He submitted as the RPT of the company is less than 25% there is no justification for excluding this company by applying RPT filter. Learned Departmental Representative submitted, the quantitative RPT filter applied by the Transfer Pricing Officer has been upheld in a number of cases by the Tribunal. Learned Departmental Representative submitted, in any case of the matter, the DRP has directed the Assessing Officer to verify the RPT figures by applying 25% bench mark, hence, the matter should be remanded back to the Assessing Officer / Transfer Pricing Officer with a direction not to consider capital transaction for the RPT computation. As far as the contention of the learned Sr. Counsel that this company should not be treated as a comparable as it is an established player in the segment the learned Departmental Representative submitted, assessee is in its second year of operation in the merchant banking field and is an associate of Goldman Sachs group which has an established name in financial markets of the world. He also submitted, as the assessee is in investment advisory business in the past years, the assessee could have leveraged their existing relationship with

Indian corporate to identify opportunity and originate transactions. He, therefore, justified inclusion of this company.

26. In the rejoinder, learned Sr. Counsel relying upon the decision of the Tribunal, Pune Bench, in Scoda Auto India Pvt. Ltd. v/s ACIT, [2009] 30 STO 319, submitted as the assessee is in the first year of operation in the investment banking segment, it cannot be compared with established players. Learned Sr. Counsel submitted, the margin earned by Edelweiss Capital Ltd. in this year is 66% which cannot be expected from a company in first year of business particularly in a sector like investment banking which takes time for establishment and relationship building. In this context, the learned Sr. Counsel referring to the margin earned by the assessee in the subsequent years which averages to 138% submitted, the first year's margin is not comparable to established companies. To justify his claim that companies having RPT of more than 15% should be excluded, learned Sr. Counsel relied upon the following decisions:-

- i) *24x7 Customer.com Pvt. Ltd., ITA no.227/Bang./2010;*
- ii) *Kshema Technologies Ltd., IT(TP)A no.1105/Bang./2012; and*

**L&T LIMITED**

27. Objecting to this company, learned Sr. Counsel submitted, unlike assessee, interest free debt funding is available to this company. Further, RPT exceeds 25%.

28. Learned Departmental Representative on the other hand submitted, before the Transfer Pricing Officer assessee has not objected to inclusion of the company as a comparable. He submitted, assessee while computing RPT had included the interest cost on interest free unsecured loan obtained by L&T Capital Ltd. from its holding company. He submitted, interest cost is outside the computation of PLI being non-operating in the nature, accordingly should be excluded from RPT computation. He also referred to the observations of the DRP wherein Assessing Officer / Transfer Pricing Officer was directed to compute RPT by applying RPT filter of 25%.

29. In the rejoinder, Learned Sr. Counsel submitted, even excluding the interest cost while computing RPT it works out to more than 15%, therefore, company cannot be treated as a comparable. He further submitted, employee cost to operating cost of this company is 13.66% compared to employee cost of assessee at 71%. Therefore, it cannot be treated as a comparable.

#### **CENTRUM CAPITAL LIMITED**

30. Learned Sr. Counsel submitted, this company is in investment banking business over a decade and is a leading company in the field whereas, assessee is in the first full year of operation. Hence, did not enjoy economies of scale as enjoyed by Centrum Capital Ltd.

31. Learned Departmental Representative relying upon the observations of Transfer Pricing Officer / DRP submitted, this company was selected by the assessee itself, therefore, there should not be any objection for retaining this company. Responding to the submissions made by the learned Sr. Counsel, that this company enjoyed name, goodwill and strong presence, the learned Departmental Representative submitted, the assessee being part of Goldman Sachs Group also carries international goodwill and assessee is also operating since last many years in various other fields. Therefore, the plea that it is in a start-up mode is unacceptable.

**KEYNOTE CORPORATE SERVICES LIMITED**

32. Objecting to the selection of this company, learned Sr. Counsel submitted, as per disclosure in the directors' report for financial year 2006-07 and 2007-08, this company continues to be a leading player in the domestic capital market for Midcap Companies. The company was amongst top three merchant bankers in India in respect of number of rights issues handled continuously for the past five financial years. This company is amongst the most active advisor on FCCB and GDR issues for Indian companies in the international market as during the financial year 2007-08, it has completed five such transactions. In

comparison, assessee is in the first year of operation and has not yet established goodwill like Keynote Corporate Services Ltd.

33. Learned Departmental Representative countering the claim of the assessee submitted, the assessee is also a part of well-known international group and enjoys the same goodwill as Keynote Corporate Services Ltd.

34. In rejoinder, learned Authorised Representative submitted, besides being an established player in the investment banking segment, this company has earned super normal profit of 209.19% which cannot be compared to assessee. Learned Authorised Representative submitted, for the same reason, Centrum Capital Ltd., Chartered Capital and L&T Capital Ltd. also cannot be treated as comparable as each of these companies earned margin of more than 100% during the year. Learned Authorised Representative submitted, earning of such high margin is possible only because of the fact they are in the field of investment banking for about 10 to 15 years, whereas assessee is in its first year of operation. Therefore, it cannot be expected to earn such profit margin.

35. Learned Authorised Representative challenging the rejection of comparable selected by the assessee in the transfer pricing study submitted that neither the Transfer Pricing Officer nor the DRP have

assigned any reason while rejecting those comparables without considering their functional similarity to the assessee. He, therefore, submitted that the companies selected by the assessee must also be considered as comparable as there is no basis provided by the Departmental Authorities for rejecting them.

36. We have heard the rival contentions carefully in the light of the facts and material on record as well as the decisions relied upon by both the parties. At this stage, we must observe, in the earlier part of the order, we have disapproved the approach of the Transfer Pricing Officer in rejecting the transfer pricing analysis of the assessee without proper application of mind and clubbing the investment advisory and investment banking services and treating it as investment banking segment for bench marking the price charged to A.E. For this reason alone, the transfer pricing adjustment by the Transfer Pricing Officer and confirmed by the DRP even in respect of investment banking services needed to be set aside. However, as learned Counsels appearing for the respective parties were heard at length on investment banking issues, it is necessary to deal with the submissions made on behalf of the parties with regard to certain adjustments claimed by the assessee in the investment banking segment while computing the margin of the assessee / comparables as well as also issues relating to selection / rejection of comparables. It is the

contention of the assessee that since it is in the first year of operation in investment banking segment, whereas, the comparables are established players in investment banking business having started their operation for more than 10 to 15 years, the average employee cost ratio of comparables are lower than assessee's employee cost, hence, necessary adjustment on account of employee cost has to be made. The Department has countered the claim of the assessee by submitting that as neither the assessee nor the Department has applied employee cost filter while selecting comparable, there is no requirement for allowing adjustment for employee cost. In our view, the purpose of bringing in transfer pricing provision is to find out whether transactions between two or more related parties are at arm's length when compared to a similar uncontrolled transaction. Therefore, it is necessary to compare the price charged for such transaction between related parties with price charged for uncontrolled transactions under more or less similar condition. Therefore, if certain factors which have influence / impact over the profit margin of the tested party or even the comparables, the same has to be taken into account and necessary adjustment has to be made while computing the margin of the comparables / tested party. As per the facts on record, it is not disputed that the assessee is in the start-up mode as the impugned assessment year is the first full year of operation as far

as investment banking segment is concerned. Whereas, the comparable companies no doubt have established themselves in the investment banking segment as they are in operation for substantial period. It is the submission of the assessee that the employee cost of the assessee was 71.5% of the total operating cost, whereas, the average employee cost of the comparable companies selected by the Transfer Pricing Officer is 29.43%. In this context, a reference can be made to a working of the average employee cost of comparables at Page-47 of the paper book. The assessee has also submitted a working as per which if employee cost is taken at 29% then assessee's margin would be 110% which is more than the margin of 105% computed by the Transfer Pricing Officer. In our view, the aforesaid contention of the assessee needs to be examined in detail after verifying the employee cost of both the assessee and comparable companies. It is evident from the order of the Transfer Pricing Officer and DRP, they have not examined the issue of adjustment towards employee cost in a proper perspective.

37. As far as use of multiple year data is concerned, in our view, one has to adhere to provisions of rule 10B(4) and proviso thereunder. As per the aforesaid provision use of multiple year data is not entirely prohibited. However, it is for the assessee to establish on record by bringing sufficient fact and material to show that data related to earlier

years reveal certain factors which can have influence on the determination of margin in relation to the transactions being compared. If the assessee is able to establish this with relevant facts, then the Transfer Pricing Officer certainly has to consider them. As far as the assessee's objection to selection of certain comparables are concerned from the facts and material on record, we find that out of eight comparables selected by the Transfer Pricing Officer, the DRP has dealt with only three companies, namely; Chartered Capital and Investment Ltd., Edelweiss Capital Ltd. and L&T Capital Company Ltd., whereas, there is no discussion by the DRP in respect of rest of the five comparables on the ground that they were selected by the assessee itself.

38. As far as **Chartered Capital and Investment Ltd.** is concerned, it is the contention of the assessee, as per the report of the auditor the company has not followed AS-15, by not making provision for gratuity. However, the DRP has rejected the aforesaid contention of the assessee by observing that the auditors have not passed any adverse opinion which could indicate that the financial results are not true and fair. On a perusal of the relevant extracts from the annual report of Chartered Capital and Investment Ltd. i.e., Note-6 of Schedule-XVII to the annual report, it is noted that auditors have categorically stated that non-provision for liability of gratuity is in

contravention to AS-15 issued by the ICAI. That being the case, in our view, assessee's contention with regard to the comparability of this company needs to be examined afresh by examining / analysing the impact of non-provision of liability for gratuity on the margin of the company. It is the further contention of the assessee that the employee cost of this company is only 19.54% compared to employee cost of 71% of the assessee. This aspect has also not been examined by the Departmental Authorities. Necessary facts have to be examined to find out whether the low employee cost is due to out sourcing of activities or any other factor and necessary adjustment accordingly is to be made to the margin of the comparable / assessee.

39. The assessee has also raised issue of super normal profit earned by the company. This factor, in our view, also requires examination as to whether there is any special reason for earning such profit may be as a result of merger or acquisition or due to any other factor. As these facts have not been examined either by the Transfer Pricing Officer or the DRP, we are inclined to restore the issue relating to comparability of this company to the file of the Assessing Officer / Transfer Pricing Officer for examination afresh.

**EDELWEISS CAPITAL LIMITED**

40. As could be seen from the order of the DRP, a direction has been issued to the Assessing Officer to examine the RPT and exclude if it is found to be above 25%. It is the contention of the assessee before us that a company having RPT above 15% cannot be considered as comparable. It has been further submitted that Edelweiss Capital Ltd. being an established player in investment banking cannot be treated as comparable. However, we are not convinced with the aforesaid submissions of the assessee. In our view, RPT filter of 25% applied by DRP is reasonable and hence, needs no interference. If Edelweiss Capital Ltd. is functionally similar to the assessee, only because it has started its operation earlier compared to the assessee, it cannot be excluded for that reason alone. Of-course, necessary adjustment can be made to the margin of the comparable / assessee keeping in view relevant factors which might have influenced the margin of the comparable. However, it is for the assessee to establish such facts with cogent evidence. With the aforesaid observations, we restore the issue to the file of the A.O. / Transfer Pricing Officer for fresh consideration.

**L&T CAPITAL LIMITED**

41. The basic contention of the assessee objecting to selection of this company are RPT is more than 25%, employee cost is much lower to the assessee and it has earned super normal profit. We have noted that the DRP has directed the Assessing Officer to verify the RPT of the company whether exceeds the threshold limit of 25%. In addition to the aforesaid direction of the DRP, we further direct the Assessing Officer / Transfer Pricing Officer to also examine the factors which have resulted in lower employee cost of this comparable and make necessary adjustment if need be. Similarly, the Assessing Officer / Transfer Pricing Officer should also ascertain any extra ordinary reasons for earning of high margin of 91%. If there is any extraneous circumstances which impacted the margin earned by the comparable, compared to the assessee then this company should not be included as a comparable.

**CENTRUM CAPITAL LIMITED****KEYNOTE CORPORATE SERVICE LIMITED**

42. As stated earlier, these two companies were selected by the assessee itself on the basis of multiple year data. However, the Transfer Pricing Officer while retaining these two companies as comparable has used the current year data only. The objection of the

assessee in respect of these companies have been dealt with earlier, hence, we do not intend to repeat the same again. However, we have noted that the DRP has not dealt with assessee's objection in respect of these two companies merely for the reason that they were selected by the assessee itself. The aforesaid approach of the DRP is not correct. Though, it may be a fact that the assessee had selected these two companies as comparable on the basis of multiple year data, however, that cannot prevent the assessee from objecting to the comparable selected even by him on some valid reasons. As the Departmental Authorities have not dealt with assessee's objection with regard to selection of these two companies, we are inclined to restore the issue to the file of Assessing Officer / Transfer Pricing Officer for examining afresh after providing due opportunity of being heard.

43. Insofar as five other companies selected by the assessee viz. Aryaman Financial Services Ltd., Excess India Advisors India Ltd., ICRA Management Consulting Services Ltd., ICRA On-line Limited, Kinetic Trust Ltd., on a perusal of the order of the Transfer Pricing Officer, we find, he has neither made any discussion on these companies nor has assigned any reason why they are not comparable to the assessee. DRP's order is also totally silent on this issue. In the aforesaid view of the matter, we direct the Assessing Officer / Transfer Pricing Officer to examine the comparability of these five companies

while considering the issue of comparability of other comparables objected by the assessee.

44. With the aforesaid observations, we restore the issue back to the file of the Assessing Officer. Consequently, ground no.1, is allowed for statistical purposes.

45. In ground no.2, assessee has challenged transfer pricing adjustment made in respect of information technology enabled services (ITES) segment.

46. Though, in ground no.2 with sub grounds the transfer pricing adjustment with regard to ITES segment has been contested on various issues but at the time of hearing, learned Sr. Counsel appearing for the assessee confined his argument to selection of certain comparables by the Transfer Pricing Officer and sustained by the DRP. Therefore, we will deal with this issue only.

47. Brief facts are, as stated earlier, the assessee is also engaged in providing ITES to its A.E. and during the relevant previous year, it earned revenue of ₹ 41,18,68,557 from its overseas A.E. towards provision of ITES. For bench marking the price charged to its A.E. for provision of ITES, the assessee through an external agency conducted transfer pricing analysis by selecting Transaction Net Margin Method

(TNMM) as the most appropriate method with operating profit / operating cost as Profit Level Indicator (PLI). Services undertaken in data bases by the assessee yielded 13 comparables with arithmetic mean of 14.04%. The margin shown by the assessee being 15.65%, the price charged to the A.E. for the international transaction was found to be within arm's length. The Transfer Pricing Officer after perusing the transfer pricing study of the assessee, however, was of the view that some of the companies selected by the assessee are not appropriate comparables as they did not match the functional profile of the assessee on FAR analysis. The Transfer Pricing Officer observed, the search criteria and acceptance / rejection matrix applied by the assessee while selecting comparables are not reliable as the assessee has rejected certain comparables by applying inappropriate filter, whereas, certain appropriate filters were not applied by the assessee. He also noted that in terms of rule-10B(4) the assessee has not restricted itself in utilizing the current year data in respect of comparable but has used multiple year data for which no specific reason was assigned by the assessee. He also noted that the assessee has selected companies having different financial years. Thus, observing that certain filters applied by the assessee are not appropriate, the Assessing Officer applied fresh filters for selecting comparables which are as under: –

- *Companies whose data is not available for the FY 2007-08 were excluded and the data for the FY 2007-08 has been considered for the period from 01-04-2007 to 31-03-2008.*
- *Companies whose IT enabled service income <Rs. 1 cr. were excluded*
- *Companies whose IT enabled service revenue is less than 75% of the total operating revenues were excluded*
- *Companies who have more than 25% related party transactions (sales as well as expenditure combined) of the operating revenues were excluded*
- *Companies who have less than 75% of the revenues as export sales were excluded*
- *Companies who have diminishing revenues/persistent losses for the period under consideration were excluded*
- *Companies having different financial year ending (i.e. not March 31, 2008) or data of the company does not fall within 12 month period i.e. 01-04-2007 to 31-03-2008, were rejected.*
- *Companies that are functionally different from that of taxpayer or working in*
- *Peculiar economic circumstances, after giving valid reasons, were excluded."*

48. The Transfer Pricing Officer pointing out various defects in the transfer pricing analysis done by the assessee ultimately rejected it and applying the filters as noted above, undertook a search process independently to find out comparables. The search carried out by the Transfer Pricing Officer yielded 22 comparables with average weighted

margin of 27.53% as against margin shown by the assessee at 15.65%. The final comparables selected by the Transfer Pricing Officer with their margin is as under:–

Name of Company	Sales (₹)	Total Cost (₹)	Operating Profit (₹)	OP / TC (%)
Accentia Technologies Ltd. (Seg.)	407293974	287301205	119992769	41.76
Acropetal Technologies (Seg.)	208000505	153737300	54263205	35.30
Aditya Birla Minacs Worldwide Ltd.	1881373000	1840860000	40513000	2.20
Asit C. Mehta Financial Services Ltd. (Seg.)	42434946	38782844	3652102	9.42
Caliber Point Business Solutions Ltd.	531355282	478836110	52519172	10.97
Coral Hubs Ltd. (Formerly Vishal Information Technologies Ltd.)	380784348	252713811	128070537	50.68
Cosmic Global Ltd.	58663285	47577163	11086122	23.30
Crossdomain Solutions Ltd.	265981723	209497067	56484656	26.96
Datamatics Financial Services Ltd. (Seg.)	61925019	45915837	16009182	34.87
e4e Healthcare Solutions Ltd.	258185816	221205351	36980465	16.72
Eclerx Services Ltd.	1221990000	736670000	485320000	65.88
Genesys International Corporation Ltd.	471943198	320181048	151762150	47.40
HCL Comnet Systems & Services Ltd. (Seg.)	3886156998	2924114030	962042968	32.90
Infosys BPO Ltd.	8275563629	6895526075	1380037554	20.01
Iservices India Pvt. Ltd.	133954773	122242652	11712121	9.58

49. Applying the aforesaid margin of 27.53% to the operating cost mark-up of ₹ 9,77,47,989 was computed as against mark-up offered by the assessee @ 15.65% at ₹ 5,55,66,873, the resultant shortfall of ₹ 4,21,81,115, was treated as transfer pricing adjustment. Though, the assessee objected to selection of certain comparables before the

DRP, but the DRP mostly rejected the contention of the assessee and retained the comparables selected by the TPO. Hereafter, we will deal with each of the comparable objected by the assessee.

**MOLD-TEK TECHNOLOGIES LIMITED**

50. Learned Sr. Counsel for the assessee submitted, this company cannot be selected as comparable as it is involved in providing high end engineering and design service to its clients which is in the nature of Knowledge Process Outsourcing (KPO). He further submitted, it is also unique year for the company as there was an amalgamation as well as demerger during the relevant previous year. He further submitted that the RPT is more than 25%, hence, it cannot be treated as comparable. Besides, the company has also earned super normal profit. In support of such contention, learned Sr. Counsel relied upon the following decisions:-

- i) *Maersk Global Centres (I) Pvt. Ltd., ITA no.7466/Mum./2012;*
- ii) *Lionbridge Technologies P. Ltd., ITA no.7498/Mum./2012;*
- iii) *Stream International Services P. Ltd., ITA no.8290/M./2011;*
- iv) *Symphony Mktg Solutions (I) P. Ltd., ITA no.1316/ B./2012.*

51. Learned Departmental Representative submitted, engineering design service also comes within ITES that being the case, no further

distinction / differentiation can be made between ITES provider by terming it as high end or low end. Learned D.R. submitted, as far as merger and acquisition are concerned, if the post merger and acquisition functions and pre-merger and acquisition functions of the company have not changed it cannot be said to have undergone exceptional year of operation. In this context, he relied upon the decision of Mumbai Bench of the Tribunal in Willis Processing. As far as earning of super normal profit is concerned, the learned Departmental Representative submitted, if the company is otherwise functionally similar, it can be considered as a comparable in spite of the fact that it has earned high profit margin. In this context, he relied upon the decision of the Hon'ble Delhi High Court in Chrys Capital.

52. In the rejoinder, the learned Sr. Counsel referred to the specific finding in the Special Bench decision of the Tribunal in Maersk Global Centres India Pvt. Ltd.

53. We have considered the submissions of the parties and perused the material available on record. We find that the Tribunal, Mumbai Special Bench in Maersk Global Centres India Pvt. Ltd. (supra) while specifically dealing with the comparability of the aforesaid company to a ITES service provider has held that since the company is engaged in providing engineering design service which is a high end service in the

nature of KPO it cannot be treated as comparable. The ratio laid down by the Special Bench as aforesaid has been consistently followed in the other decisions of the Tribunal cited by the learned Sr. Counsel wherein it has been held that the company cannot be treated as comparable as it is involved in providing KPO service which is functionally different from low end ITES service provider. Further, it is seen that in case of Symphony Marketing Solutions India Pvt. Ltd. (supra) this company has been rejected on the ground of more than 25% RPT as well as merger and acquisitions made during the relevant previous year. In view of the aforesaid decisions of the Tribunal including the Special Bench decision, we are persuaded to hold that this company cannot be treated as comparable to the assessee. Accordingly, we direct the Assessing Officer / Transfer Pricing Officer to exclude the same from the list of comparables.

**eCLERX SERVICES LIMITED**

54. Objecting to this comparable, learned Sr. Counsel submitted, the company is engaged in providing high end service involving specialised knowledge and domain expertise in the field, which is in the nature of KPO service. Further, during the relevant previous year, there was acquisition by the company. Further, though it was engaged in diversified activities, segment-wise details are not available in public

domain. The functional profile of the company is not similar to the assessee, hence, it cannot be treated as a comparable. In support of such proposition, he relied upon the following decisions:-

- i) *Maersk Global Centres (I) Pvt. Ltd., ITA no.7466/Mum./2012 (SB);*
- ii) *Mindcrest India P. Ltd., ITA no.7289/Mum./2012;*
- iii) *Stream International Services P. Ltd., ITA no.8290/Mum./2011;*
- iv) *Symphony Marketing Solutions India P. Ltd., ITA no.1316/Bang./2012;*
- v) *Capital IQ Information Systems India P. Ltd. ITA no.124 & 170/Hyd./2014;*
- vi) *Excellence Data Research P. Ltd. ITA no.159/Hyd./2014;*
- vii) *Hyundai Motors India Engineering P. Ltd., ITA no.255/Hyd./2014.*

55. Learned Departmental Representative submitted, service provided by this company comes within the ambit of ITES, hence, it cannot be rejected as a comparable. He submitted, information obtained by the Transfer Pricing Officer under section 133(6) was furnished to the assessee, however, assessee did not raise any objection. Learned Departmental Representative submitted, even if there is some minor / narrow difference in functionality of the company but it has no impact on the bench marking of the transaction under TNMM.

56. We have considered the submissions of the parties and perused the material available on record. As per the annual report of this company, it is noted that the company is engaged in offering solutions in the field of data analytics, operations management, audits and reconciliation, matrices management and reporting services. The functionality of the company was not only considered by the Tribunal, Mumbai Special Bench, in the case of Maersk Global Centres India Pvt. Ltd. (supra), but a host of other decisions referred to earlier, wherein, it has been held that the company is involved in providing high end services which is in the nature of KPO, hence, cannot be compared to a general ITES provider. In fact, the Hon'ble Delhi High Court in Rampgreen Solutions Pvt. Ltd., ITA no.102 o 2015, has held that this company being a KPO service provider cannot be considered as a comparable to ITES companies. We may further mention, many of the orders passed by the co-ordinate benches of the Tribunal rejecting Eclerx Services Ltd. as a comparable to ITES service provider is for the very same assessment year 2008-09. Therefore, respectfully following the view expressed by various judicial authorities, we hold that Eclerx Services Ltd. being functionally different cannot be treated as comparable to the assessee.

**VISHAL INFORMATION TECHNOLOGIES LIMITED**

57. This company, earlier known as Coral Hubs Ltd., was objected by the assessee primarily on the ground that it out-sources the entire ITES activity to third party vendors and it is not carrying out any activity itself. He submitted, this fact is evident from the low employee cost to sales ratio of 2.93%. He, therefore, submitted as the business profile of this company is completely different from the assessee, it cannot be treated as a comparable. In support, assessee relied upon a number of decisions as under:–

- i) *Maersk Global Centres (I) Pvt. Ltd., ITA no.3774/Mum./2011;*
- ii) *Capital IQ Information Systems India P. Ltd. ITA no.1961/Hyd./2011;*
- iii) *Stream International Services P. Ltd., ITA no.8290/Mum./ 2011; and*
- iv) *Symphony Marketing Solutions India P. Ltd., ITA no.1316/Bang./2012;*
- v) *Zavata India P. Ltd., ITA no.1781/Hyd./2011;*
- vi) *Avineon India P. Ltd., ITA no.1989/Hyd./2011*
- vii) *Hapag Lloyd Global Services P. Ltd., ITA no.8499/Mum./ 2010;*
- viii) *Cognizant Technology Services P. Ltd., ITA no.2106/Hyd./ 2011 and ITA no.1864/Hyd./2012;*
- ix) *Maersk Global Centres (I) P. Ltd., ITAT (SB), ITA no. 7466 /Mum./2012;*
- x) *M/s. Logica P. Ltd., ITA no.1192/Bang./2012;*
- xi) *M/s. Google India P. Ltd.,ITA no.1170/Bang./2011;*

*xii) HSBC Electronic Data Processing India P. Ltd., ITA no. 1826/Hyd./2011;*

*xiii) HSBC Electronic Data Processing India Ltd., ITA no.1624/Hyd./2010.*

58. He also relied upon the decision of the Hon'ble Delhi High Court in Rampgreen Solutions Pvt. Ltd., wherein rejection of this company was upheld on account of low employee cost.

59. Learned Departmental Representative vehemently objecting to the rejection of this company submitted, this company was selected by the assessee itself in its transfer pricing study. He submitted, before the Transfer Pricing Officer / DRP, the assessee has also not objected to selection of this company. Therefore, at this stage, assessee's objection could not be entertained.

60. In the rejoinder, learned Sr. Counsel submitted, though, the assessee had selected this company in its transfer pricing study but subsequently on the basis of data available in public domain, it was found that the company is not comparable. Therefore, the assessee cannot be prevented from objecting to the selection of the said company. For such proposition, he relied upon the decision of the Tribunal, Delhi Special Bench, in Quark Systems Ltd.

61. We have considered the submissions of the parties and perused the material available on record as well as the decisions relied upon.

No doubt, assessee in the transfer pricing study has selected this company as a comparable. It is also a fact either before the Transfer Pricing Officer or the DRP, assessee has not raised any specific objection in respect of the aforesaid company. Even then, assessee's objection cannot be overruled for that reason alone. When the Transfer Pricing Officer has rejected the transfer pricing analysis of the assessee the department cannot use it selectively to their advantage. Moreover, it appears from the facts and materials placed on record that this company is different from the assessee considering the fact that it outsources its ITES service to third party vendors. In other words, this company does not carry out the ITES activities itself but gets it done through others. This is evident from low employee cost of the company. Compared to the aforesaid practice of this company, the assessee claims to have carried out the ITES activities all by itself, thereby, has incurred a comparatively higher employee cost. We have also noted that the Tribunal in a number of decisions including the Special Bench decision in Maersk Global Centres India Pvt. Ltd. has held the company as not comparable on account of low employee cost. In fact, the Hon'ble Delhi High Court in Rampgreen Solutions Pvt. Ltd. has upheld the rejection of this company on account of low employee cost. We, therefore, direct the Assessing Officer / Transfer Pricing Officer to examine this aspect by verifying the annual report of the

company and other relevant documents and if assessee's claim of low employee cost of this company is found to be correct, this company should not be treated as comparable keeping in view the judicial authorities referred to herein before.

**ACCENTIA TECHNOLOGIES LIMITED**

62. Objecting to this company, it was submitted that this company cannot be treated is comparable to the assessee as it is engaged in rendering software development and medical transcription services unlike ITES provided by the assessee. Further, learned Sr. Counsel submitted, during the relevant previous year, extra ordinary event like merger and demerger took place in the company which effected its profitability. In support of his contention, learned Sr. Counsel relied upon the following decisions:-

- i) *Agilent Technologies International P. Ltd., ITA no.6047/Del./2012;*
- ii) *Capital IQ Information Systems India P. Ltd. ITA no.124 and 170/Hyd./2014;*
- iii) *Stream International Services P. Ltd., ITA no.8290/Mum./2011; and*
- iv) *Symphony Marketing Solutions India P. Ltd., ITA no.1316/Bang./2012;*
- v) *Hyundai Motors India Engineering P. Ltd., ITA no.255/Hyd./2014;*
- vi) *Excellence Data Research, ITA no.159/Hyd./2014;*

- vii) Mindteck (I) Ltd., ITA no.70/Bang./2014*
- viii) Parexel International (I) Pvt. Ltd., ITA no.144/Hyd./2014;*
- ix) Avineon India P. Ltd., ITA no.1989/Hyd./2011;*

63. Learned Departmental Representative submitted, the company is engaged in providing, hence, ITES has been rightly selected as a comparable. He submitted, even though it has earned major part of its revenue from medical transcription, it should be taken as a comparable. He submitted, the sector in which services are provided is irrelevant if the segment is comparable. Learned Departmental Representative submitted, merger and acquisition have no impact in the profitability of the company as the margin shown by the company is comparable to the preceding year.

64. We have considered the submissions of the parties and perused the material available on record. The assessee has sought exclusion of this company primarily for the reason that it is functionally different and secondly the acquisitions and mergers effected during the year had impacted the profitability. We find comparability of this company for the very same assessment year came up for consideration before the Tribunal, Bangalore Bench, in Symphony Marketing Solutions India Pvt. Ltd. (supra), the Tribunal following another decision of the Tribunal in case of Capital IQ Information Systems Pvt. Ltd. v/s DCIT,

[2013] 32 Taxman.com 21, excluded this company on the reasoning that extra ordinary event which took place might have impacted the profitability. In view of the aforesaid, we agree with the assessee that this company cannot be treated as comparable.

**ACROPETAL TECHNOLOGIES LIMITED**

65. Learned Sr. Counsel for the assessee, objecting to this company submitted, it is functionally different from the assessee as it rendered software development and engineering design service. In support of such contention, the assessee relied upon the following decisions:-

- i) *Mindcrest India P. Ltd., ITA no.7289/Mum./2012;*
- ii) *Market Tools Research P. Ltd., ITA no.1811/Hyd./2012;*
- iii) *Capital IQ Information Systems India P. Ltd. ITA no.1961/Hyd./2011;*
- iv) *Excellence Data Research, ITA no.159/Hyd./2014;*
- v) *Maersk Global Centres (I) P. Ltd., ITA no.7466/Mum./2012;*
- vi) *Symphony Marketing Solutions India P. Ltd., ITA no.1316/Bang./2012;*

66. Learned Departmental Representative, however, submitted that the functions / services rendered by this company broadly fits into ITES segment, hence, it was treated as comparable. Learned Departmental Representative referring to the observations of the

Transfer Pricing Officer in Page-37 of his order submitted, assessee also provides high end information technology enabled services, hence, assessee's objections should not be accepted.

67. We have considered the submissions of the parties and perused the material available on record. We have noted that the Tribunal, Bangalore Bench, in Symphony Marketing Solutions India Pvt. Ltd. (supra), after perusing the annual report of this company found that major source of income is from providing engineering design service which is not comparable to ITES / BPO functions. The Bench observed, provision of engineering design service is a high end service amongst the BPO which requires high skill, hence, it can be regarded as KPO service. The bench, therefore, excluded the company as a comparable to ITES / BPO segment. The Tribunal, Hyderabad Bench, in M/s. Market Tools Research Pvt. Ltd. v/s DCIT, following co-ordinate bench decision in Symphony Marketing Solutions India Pvt. Ltd. (supra) has also held that the company cannot be treated as comparable to a company performing ITES / BPO functions. As these decisions rendered by the Tribunal are for the very same assessment year, respectfully following the same, we direct exclusion of this company from the list of comparables. It has been submitted before us by the learned Sr. Counsel that on exclusion of these companies, the margin of the assessee would be within +/- 5% tolerance band of the

arithmetic mean of the comparable companies requiring no further adjustment to the price charged. In view of the aforesaid submissions of the learned Sr. Counsel, we do not consider it necessary to deal with the other comparables objected to by the assessee as it is merely of academic interest. Ground no.2, raised by the assessee is partly allowed.

68. Grounds no.3 and 4, have not been pressed by the learned Sr. Counsel for the assessee, hence, these grounds are dismissed as "*not pressed*".

69. In ground no.5, assessee has raised the issue of disallowance of cost relating to ESOP.

70. Brief facts are, in the course of assessment proceedings, the Assessing Officer noticing that the assessee has claimed deduction of ₹ 20,31,56,936, on account of ESOP cost called upon the assessee to justify the claim. In response, it was submitted by the assessee that it grants Restricted Stock Units (RSU), to its employees that derive their value from the shares of Goldman Sachs Group Inc. as per policy of global stock award plan. The sum payable by the assessee to Goldman Sachs Group Inc. In respect of RSUs is determined with reference to the value of the shares of GST on the date of vesting of RSU. The value of RSU is amortized over three years and assessee marks to

market the value of such RSU over a three year period in its books of account. The Assessing Officer, however, did not accept the contention of the assessee. Relying upon the decision of the Tribunal, Delhi Bench in Ranbaxy Laboratories Ltd., he disallowed assessee's claim of deduction. Though, assessee challenged the disallowance before the DRP, the Panel also sustained the disallowance agreeing with the Assessing Officer that it is a contingent liability till such time assessee actually pays it.

71. We have considered the submissions of the parties and perused the material available on record. We have noted that identical issue of deduction claimed on account of ESOP arose for consideration in assessee's own case for assessment year 2009-10 before the Tribunal in ITA no.222/Mum./2014. The Tribunal vide order dated 30<sup>th</sup> November 2015, held as under:-

*"12.3. Before us, the Ld. Senior Counsel drew our attention to the decision of the Special Bench of the Bangalore Tribunal in the case of Biocon Ltd 144 ITD 21 (Bang) wherein on similar facts the discount on issue of ESOP was allowed as deduction.*

*12.4. The Ld. DR could not bring any distinguishing decision in favour of the Revenue. Respectfully following the decision of the Special Bench (supra), we hold that discount on issue of employees stock options is allowable as deduction in computing the income under the head profits and gains of business of profession. Ground No. 5 & 6 are accordingly allowed."*

72. No material difference in facts having been brought to our notice by the learned Departmental Representative, respectfully following the

decision of the co-ordinate bench as referred to above, we allow assessee's claim of deduction and delete the addition made by the Assessing Officer.

73. The issue raised in ground no.6, relates to deduction claimed of an amount of ₹ 11,86,105, paid to Bombay Stock Exchange and National Stock Exchange.

74. Brief facts are, during the assessment proceedings, the Assessing Officer noticing that the assessee has claimed deduction towards payment made to stock exchanges called for necessary details. After verifying the details submitted by the assessee he observed that such payment was towards fine for non-confirmation of clearing house trades, client code modification, etc. He, therefore, called upon the assessee to explain the payment made being in the nature of penalty why should not be disallowed. Though, the assessee objected to the disallowance by stating that the payment made are not for breach of any statutory provisions, however, the Assessing Officer rejected the claim of the assessee and disallowed the amount. Being aggrieved, assessee challenged the disallowance before the DRP.

75. The DRP also sustained the disallowance accepting the reasoning of the Assessing Officer.

76. We have considered the submissions of the parties and perused the material available on record. Identical issue came up for consideration before the co-ordinate bench in assessee's own case for assessment year 2009-10 in ITA no.222/Mum./2014. The Tribunal after considering the submissions of the parties in the context of facts and material on record being convinced that the payment made by the assessee to stock exchanges were not for infraction of any law in view of the judgment of Hon'ble Jurisdictional High Court deleted the addition. For ready reference, the observations of the Tribunal is reproduced below:-

*"13.2. Before us, the Ld. Senior Counsel drew our attention to the decision of the Hon'ble High Court of Bombay in the case of Angel Capital & Debit Market Ltd. in Income Tax Appeal (L) No. 475 of 2011 wherein the Hon'ble Court had the opinion to consider the following question of law.*

*"Whether on the facts and in the circumstances of the case and in law the Hon'ble Tribunal was justified in deleting the disallowance made by the Assessing Officer of claim of the Assessing Company for a deduction of payment of Rs. 6,51,240/- towards penalty paid to Stock Exchange even though such penalty payment was clearly disallowable under Explanation to Section 37(1) of the Income Tax Act?"*

*and the same was answered by the Hon'ble High Court as under:*

*"As regards question (C) is concerned, the finding of fact recorded by the ITAT is that the amount paid as penalty was on account of irregularities committed by the assessee's clients. Such payments were not on account of any infraction of law and hence allowable as business expenditure. In such a case the explanation to Sec. 37 would not apply. Accordingly question (C) raised by the revenue cannot be entertained."*

*Respectfully following the ratio laid down by the Hon'ble High Court (supra), we direct the AO to delete the impugned additions. Ground No. 7 is accordingly allowed."*

77. No material difference in facts having been brought to our notice by the learned Departmental Representative, respectfully following the decision of the co-ordinate bench and the decision of the Hon'ble Jurisdictional High Court cited supra, we allow deduction claimed by the assessee. Ground no.6, is allowed.

78. In grounds no.7 and 8, the assessee has challenged the decision of the Departmental Authorities in reducing the telecommunication charges from export turnover while computing deduction under section 10A. Alternatively, it was claimed that if telecommunication charges are to be reduced from export turnover, the same has to be reduced from total turnover for computing deduction under section 10A.

79. We have considered the submissions of the parties and perused the material available on record. This issue is no more res integra, as different High Courts including the Hon'ble Jurisdictional High Court in CIT v/s Gem Plus Jewellery India Ltd., [2011] 330 ITR 175 (Bom.) as well as different benches of the Tribunal including Mumbai Benches have held that telecommunication charges have to be excluded both from export turnover as well as total turnover for computing deduction under section 10A. In fact, in assessee's own case for assessment year

2009–10, in ITA no.222/Mum./2014, dated 30<sup>th</sup> November 2015, the co-ordinate bench held that telecommunication charges have to be excluded both from export turnover as well as total turnover for computing deduction under section 10A. Respectfully following the ratio laid down as above, we direct the Assessing Officer to exclude the telecommunication charges both from export turnover as well as total turnover and thereafter compute deduction under section 10A. Grounds no.7 and 8 are allowed.

80. Ground no.9 being general in nature, do not require any adjudication.

81. In the result, appeal stands partly allowed.

Order pronounced in the open Court on 29.07.2016

**Sd/-**  
**ASHWANI TANEJA**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SAKTIJIT DEY**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 29.07.2016**

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury  
Sr. Private Secretary

True Copy  
By Order

(Dy./Asstt. Registrar)  
ITAT, Mumbai

		Date	Initial	
1.	Draft dictated on	22.06. - 08.07.2016	}	Sr.PS
2.	Draft placed before author	11-21.07.2016		Sr.PS
3.	Draft proposed & placed before the second member	--		JM/AM
4.	Draft discussed/approved by Second Member	--		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	29.07.2016	}	Sr.PS
6.	Date of pronouncement	22.07.2016		Sr.PS
7.	File sent to the Bench Clerk	29.07.2016		Sr.PS
8.	Date on which file goes to the Head Clerk			
9.	Date of dispatch of Order			