

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "K", MUMBAI

Before Shri G S Pannu, Accountant Member
& Shri Sandeep Gosain, Judicial Member

IT(TP)A No.1552/Mum/2016
Assessment Year : 2011-12

Mount Kellett Capital Management India Private Limited., 1302 Tower-3, Indiabulls Finance Centre, Senapati Bapat Marg, Elphinstone Road (West), Mumbai 400 013. PAN AAFCM6895B (Appellant)	Vs.	Dy. CIT 14(2)(2), Mumbai (Respondent)
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Appellant By : Shri Yogesh Thar & Ms. Aayushi Modani
Respondent By : Ms Amrita Ranjan

Date of Hearing : 16.07.2018

Date of Pronouncement : 27.07.2018

ORDER

Per G S Pannu, Accountant Member

This appeal by the assessee is directed against the order of the DRP-3, Mumbai, dated 22.12.2015, u/s. 144C(5) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") relating to A.Y. 2011-12.

2. In this appeal the assessee has raised the following concise Grounds of appeal:

"1. On the facts and in the circumstances of the case and in law, the Dispute Resolution Panel ("DRP") erred in upholding the action of the Assessing Officer ("AO")/transfer Pricing Officer ("TPO") of making an adjustment of Rs 81,80,657/- to the international transaction of provision of Investment Advisory Services by the Appellant.

2. Without prejudice to ground 1, on the facts and in the circumstances of the case, the AO erred in inadvertently adjusting an

amount of Rs. 81,80,657/- instead of Rs 81,08,657/- thereby resulting in an erroneous addition to the extent of Rs 72,000/-"

A perusal of Grounds of appeal reveal, the solitary dispute relates to addition of ₹ 81,80,657/- made by the Transfer Pricing Officer while determining the Arm's Length Price of international transaction of provision of Investment Advisory Services by the assessee to its Associate Enterprise.

3. The facts relevant to address the controversy raised in this appeal can be summarized as follows. The appellant before us is a company incorporated under the Companies Act, 1956, and is, inter alia, engaged in the business of providing non-binding investment advisory services. For the year under consideration, it filed its return of income declaring total income of ₹ 4,83,69,560/-, which was subject to scrutiny assessment whereby the total income has been assessed at ₹5,65,50,220/-. The difference between the assessed and returned income comprised of Rs 81,08,657/-, which was transfer pricing adjustment worked out by the Transfer Pricing Officer (TPO) in his order passed u/s.92CA(3) of the Act dated 27.03.2015 (read with his communication dated 12.01.2018), while determining the Arm's Length Price of the international transaction of services rendered by the assessee on account of investment advisory services to its Associated Enterprise. Pertinently, the appellant is an indirect subsidiary of one Mount Kellett Capital Management LP (MK LP), which is based in New York and is engaged in potential investment opportunities in securities and financial instruments. A group concern M/s. Mount Kellett Capital Management (Mauritius) Ltd. (MK Mauritius) provides non-binding investment advisory services to fund and asset management companies located outside India. The company in Mauritius is, inter-alia, providing non-binding investment advisory services to New York concern. The company in Mauritius in turn appointed the assessee as a sub-advisor to provide non-exclusive and non-binding investment advisory services to it. For such services, assessee was compensated on a cost plus 22% margin. The said international transaction of ₹ 14,96,60,513/- was benchmarked by the assessee by adopting the Transactional Net Margin Method (TNMM) as the most appropriate method and a factor of operating profit to operating cost (OP/OC) was considered as Profit Level Indicator

(PLI). After considering the margins of the comparables selected, the assessee asserted that the stated value of its international transactions on account of provisions of non-binding investment advisory services was at an Arm's Length Price. The TPO however, differed with the assessee and adopted the following concerns as the final set of comparables:-

Sr. No.	Name of the Company	OP/TC (%)
1	Motilal Oswal Investment Advisory Pvt. Ltd.	88.80%
2	Ladderup Corporate Advisory Pvt. Ltd.	55.52%
3	New Berry Advisors Ltd.	35.63%
	Average	59.98%

By considering the aforesaid average margin of 59.98% and comparing that assessee's margin of 22%, an adjustment of ₹ 4,65,91,035/- was worked out to bring the stated value of the international transactions to the Arm's Length Price. The Assessing Officer passed a draft assessment order u/s. 143(3) r.w.s. 144C(1) r.w.s. 92CA of the Act, dated 03.03.2015, determining the total income after including the Transfer Pricing adjustment of ₹ 4,65,91,035/- worked out by the TPO against which the assessee raised various objections before the DRP. The DRP after considering the submissions of the assessee passed directions, dated 22.12.2015, in terms of which the Assessing Officer, worked out the final assessment by making a Transfer Pricing addition of ₹ 81,80,657/-, which was based on re-working done by the TPO in compliance to the directions of the DRP dated 22.12.2015(supra). Not being satisfied with the assessment, assessee is in appeal before us assailing the addition of ₹ 81,80,657/- as per the Grounds of appeal before us.

4. Though the assessee has raised an omnibus Ground of appeal challenging the addition of ₹ 81,80,657/-, but the specific points raised before us are two-fold, which revolve around the inclusion and/or exclusion of certain concerns from the final set of comparatives. Firstly, the plea of the learned representative is that the TPO erred in not including i) Cyber Media Research Ltd. and ii) Primary Real Estate Advisors Private Limited, in the final comparables. Secondly, it is convassed that

the TPO erroneously included Ladderup Corporate Advisory Private Limited as comparable, which ought to be excluded.

5. The inclusion of Ladderup Corporate Advisory Private Limited is sought to be assailed by the assessee on the point of it being functionally dissimilar to the activities undertaken by the assessee. It is pointed out that assessee is engaged in provision of non-binding investment advisory services, whereas the activities undertaken by Ladderup Corporate Advisory Private Limited are functionally distinct from the services being rendered by the assessee. It has been pointed out that in the following decisions the Tribunal has found it fit to exclude the said concern from the list of comparables in similar circumstances:

- Avenue Asia Advisors (P) LTd. vs. DCIT (398 ITR 120) (Del)
- Temasek Holdings Advisors (I)(P.) Ltd. vs. DCIT (87 taxmann.com 168)
- DCIT vs. General Atlantic (P.) Ltd. (91 taxmann.com 406)
- Wells Fargo Real Estate Advisors (P.) Ltd. vs. DCIT (90 taxmann.com 18)

6. On this aspect, the learned CIT-DR appearing for the Revenue referred to the relevant discussions made by the TPO as well as the DRP, which is to the effect that the said concern is a good comparable as it offers various types of services such as equity investments, business and equity valuations, project and acquisitions financing etc., and that its revenue stream includes income from management advisory and financial consultancy services.

7. We have carefully considered the rival submissions on this aspect and find that the pleas raised by the assessee are quite potent. In so far as the assessee's nature of services are concerned, there is no dispute that it is engaged in providing non-binding investment advisory services. In this background, in the case of DCIT vs. General Atlantic (P.) Ltd (supra), wherein also our co-ordinate Bench was dealing with the tested transaction relating to providing of non-binding investment advisory services, the concern Ladderup Corporate Advisory Private Limited was found functionally incomparable. The co-ordinate Bench followed earlier decision of the Mumbai Bench in the case of Temasek Holdings Advisors (I)(P.) Ltd. vs. DCIT

(supra), wherein it was found that Ladderup Corporate Advisory Private Limited was, inter alia, a Category-1, Merchant Banking Company registered with SEBI. It was noted that said company was engaged in Merchant Banking activities w.e.f. July 2010 onwards and, therefore, the Bench held that the same could not be treated as comparable to a concern engaged in provision of non-binding investment advisory services. In fact, the decision of our Co-ordinate Bench in the case of DCIT vs. General Atlantic (P.) Ltd.(supra), has also been rendered for A.Y. 2011-12 itself, which is the year under consideration before us and, therefore, the factual findings of the Co-ordinate Bench are fully applicable to the case before us. Thus, following the aforesaid precedents, which have been rendered under identical circumstances, we uphold the plea of the assessee for exclusion of Ladderup Corporate Advisory Private Limited from the final set of comparable in order to arrive at Arm's Length Price.

8. The next plea of the assessee seeks inclusion of Cyber Media Research Ltd. (formerly known as IDC (India) Ltd.), in the final set of comparables. The relevant discussion in the order of TPO reveals that the said concern has been excluded from the final set of comparables on the ground that it was functionally operating in different field. According to the TPO, as per para 3.4.2 of his order, the said concern was engaged in the business of services of media and media related services including research based insights and consulting services, market intelligence, market sizing, stakeholder satisfaction, growth opportunity identification etc., regarding various industries such as IT Sector, Telecommunication, Semi Conductors, infrastructure etc. Thus, as per the TPO the aforesaid was no where similar to the business of non-binding investment advisory services carried on by the assessee. Similar reasoning has prevailed with the DRP also to exclude the said concern from the final set of comparables.

9. In this background, the learned representative for the assessee submitted that the lower authorities have erred in excluding the said concern in as much as the same has already been found to be good comparable to concerns involving

similar activities as are being tested in the instant case and for said proposition, he has relied upon the following decisions:

- CIT vs. Carlyle India Advisors (P.) Ltd. (357 ITR 584) (Bom)
- CIT v. General Atlantic (P.) Ltd. (384 ITR 271) (Bom)
- AGM India Advisors (P.) Ltd. v. DCIT (79 taxmann.com 86)
- TPG Capital India (P.) Ltd. v. DCIT (79 taxmann.com 101)
- DCIT v. General Atlantic (P.) Ltd. (91 taxmann.com 406)
- Goldman Sachs (India) Securities (P.) Ltd. v. ACIT (78 taxmann.com 142)
- Temasek Holdings Advisors (I)(P) Ltd. v. DCIT (27 ITR(T)125)
- Sandstone Capital Advisors (P.) Ltd. v. ACIT (147 ITD 240)

First decision sought to be relied upon by the assessee is the judgment of Hon'ble Bombay High Court in the case of Carlyle India Advisors (P.) Ltd, (supra), wherein the tested transaction was of providing investment advisory & related support services. In the said case also IDC (India) Ltd (later known as Cyber Media Research Ltd.) was found by the Tribunal to be functionally comparable. The judgment of Hon'ble Bombay High Court in the case of DCIT v. General Atlantic (P.) Ltd. (supra), has also been referred to, wherein the Tribunal had found IDC (India) Ltd. (now known as Cyber Media Research Ltd.) to be a good comparable to the activity of providing investment advisory services. The decision of the Tribunal was founded on its earlier decision of Carlyle India Advisors (P.) Ltd.(supra). The aforesaid aspect was confirmed by the Hon'ble Bombay High Court also. The aforesaid decision of Hon'ble High Court has been referred by the learned representative to show that earlier decision in the case of Carlyle India Advisors (P.) Ltd (supra), has been further affirmed by the Hon'ble Bombay High Court. The learned representative also referred to the decision of the Tribunal in the case of AGM India Advisors (P.) Ltd. v. DCIT (supra), which has been rendered for A.Y. 2011-12 i.e. the assessment year which is under consideration before us also. Notably, in AGM India Advisors (P.) Ltd (supra), the tested transaction was also providing of non-binding investment advisory services and IDC (India) Ltd. was found to be a good comparable by the Tribunal. The aforesaid decisions, in our

view, clearly support the proposition sought to be canvassed by the assessee for inclusion of Cyber Media Research Ltd. (formerly known as IDC (India) Ltd.) as a concern in the final set of comparables.

10. The learned CIT-DR appearing for the Revenue supported the discussion made by the lower authorities in the respective orders and also relied upon the decision of the Delhi Bench of the Tribunal in the case of Actis Adviers (P.) Ltd. vs. ACIT (55 taxman.com 485) to say that in the context of investment advisory services, IDC (India) Ltd. (later known as Cyber Media Research Ltd.) has not been found to be a good comparable having regard to its functional profile.

11. We have perused the said decision and find that the same relates to A.Y. 2009-10, which does not correspond to the assessment year under consideration before us. Secondly and more importantly, what is to be appreciated is that the functional profile noted by the Bench in the case of Actis Advisers (P.) Ltd was on wrong footing, which has been eloquently brought out by another co-ordinate Bench in the case of TPG Capital India (P.) Ltd. v. DCIT (supra) in the following words:

"We find that in the case of Actis Advisers Private Limited (supra) the comparable IDC India Limited had been rejected by relying on the information available on the website relating to Cyber Media (India) Limited, viz <http://www.cybermedia.co.in/static/produts>, which was not the website link for IDC India Limited, but for its holding company, i.e Cyber Media (India) Limited. Thus in the backdrop of the aforesaid facts, it can safely be concluded that no adverse inference as regards selection of the comparable, viz IDC India Limited can be drawn by relying on the order of the ITAT, Delhi bench in the case of : Actis Advisers Private Limited (supra)".

Therefore, in view of the aforesaid discussion, we find that the decision of Actis Advisers (supra) does not held help the case of the Revenue before us. .

12. The learned CIT-DR also relied on the decision of Mumbai Bench of the Tribunal in the case of Tevapharm (P.) Ltd. vs. Addl. CIT (18 taxmann.com 148). Though the activities of Tevapharm (P.) Ltd are not in the field of non-binding investment advisory services but the learned CIT-DR pointed out that activities of

IDC (India) Ltd. noted by the Tribunal clearly bring out that it is involved in market research and survey services, which cannot be considered to be comparable to the activities of the assessee under test before us. On this aspect also, we are unable to persuade ourselves to the plea of the learned CIT-DR. Firstly, the said decision is in the context of A.Y. 2007-08 and, therefore, the activities of IDC (India) Ltd, noted by the Tribunal, cannot ipso facto be construed as comparable to the activities of the assessee in the instant year which is A.Y. 2011-12. In fact, similar situation in the context of A.Y. 2009-10 itself has been considered by our Co-ordinate Bench in the case of TPG Capital India (P.) Ltd. v. DCIT (supra), wherein also the tested transaction was providing of investment advisory services. In the said decision reliance placed by the Revenue in the case of Tevapharm (P.) Ltd. (supra), in order of justify the exclusion of IDC (India) Ltd. did not find favour with the Bench. Therefore, on the issue of inclusion of IDC (India) Ltd. (later known as Cyber Media Research Ltd.) we also, uphold the plea of the assessee and direct that the said concern be included in the final set of comparable for the purpose of computing the Arm's Length Price. On this aspect, it may also be noted that for A.Y. 2012-13, the TPO vide its order, dated 27.01.2016, under section 92CA(3) accepted the inclusion of the said concern in the final set of comparables, and a copy of the said order has also been placed before us.

13. The next plea of the assessee was for inclusion of Primary Real Estate Advisors Private Limited in the final comparables. The TPO has excluded the said concern on the ground that it was engaged in advising for real estate investment and was servicing land owners, developers, overseas investors and domestic investors. It was not providing any portfolio investment advisory service or any other type of financial advisory. For the same reason the DRP has also affirmed the exclusion of the said concern from the final set of comparables.

14. The plea of the assessee for inclusion of the said concern is that it is involved in market research and management consultancy services, which are broadly similar to investment advisory services being provided by the assessee.

15. On the other hand, learned CIT(A)-DR has defended the decision of lower authorities by reiterating the reasons contained therein, which we have noted earlier and are not repeated for the sake of brevity.

16. Having considered the rival stands, in our view, the income tax authorities made no mistake in excluding Primary Real Estate Advisors Private Limited from the final set of comparables, in as much as the functional profile of the said concern is qualitatively different from the non-binding investment advisory services being rendered by the assessee. Though the said concern is also engaged in providing consultancy services, but it is clearly discernible that its services are of the nature which cannot be considered as comparable to the non-binding investment advisory services being carried on by the assessee for its AE. Thus, on this aspect the assessee fails.

17. No other plea has been raised before us with regard to the transfer pricing addition and therefore, we deem it fit and proper to direct the Assessing Officer to re-determine the Arm's Length Price considering the aforesaid directions.

18. The only other ground raised before us is by way of an Additional Ground of appeal, which reads as under:

- 1. The Dispute Resolution Panel erred in not granting the range benefit of 5% of the actual international transaction price should be given under second proviso to section 92C(2) of the Act.*
- 2. The Appellant prays that the aforesaid benefit be granted."*

On this aspect, it was a common ground between the parties that the same may be appropriately considered by the Assessing Officer as per law. We direct accordingly.

19. In the result, the appeal is partly allowed for statistical purposes.

The above decision was pronounced in the open court today i.e. 27th July, 2018.

Sd/-
(Sandeep Gosain)
JUDICIAL MEMBER

Sd/-
(G S Pannu)
ACCOUNTANT MEMBER

Mumbai, Dated : 27th July, 2018.

SA

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT , Mumbai.
5. The DR, 'K' Bench, ITAT, Mumbai

BY ORDER

//True Copy//

(Assistant Registrar)
Income Tax Appellate Tribunal, Mumbai