

**IN THE INCOME TAX APPELLATE TRIBUNAL
"K" Bench, Mumbai**

**Before Shri G. Manjunatha, Accountant Member
and Shri Ravish Sood, Judicial Member**

**ITA No.900/Mum/2017
(Assessment Year: 2012-13)**

General Atlantic Private Ltd.
Level 19, Birla Aurora,
Dr. Annie Besant Road, Worli,
Mumbai – 400 030

Deputy Commissioner of Income-
tax, Circle -5(1)(1),
Room No. 568, Aayakar Bhavan,
Vs. Maharashi Karve Road,
Churchgate,
Mumbai – 400020

PAN – AABCG7917Q

(Appellant)

(Respondent)

Appellant by: Shri Divesh Chawla, A.R
Respondent by: Shri Rignesh K. Das, Sr. D.R
Date of Hearing: 09.04.2019
Date of Pronouncement: 12.04.2019

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the A.O under Sec. 143(3) r.w.s 144C(13) of the Income Tax Act, 1961 (for short 'I.T Act'), dated 06.12.2016 for A.Y. 2012-13. The assessee assailing the order passed by the A.O has raised before us the following grounds of appeal:

"The Appellant objects to the order dated 28 January 2016 passed under section 92CA(3) of the Income-tax Act, 1961 ("the Act") by the Joint Commissioner of Income Tax, Transfer Pricing - 2(2), Mumbai ("TPO"). The Appellant objects to the order dated 6 December 2016 passed under section 143(3) read with section 144C (13) of the Income-tax Act, 1961 ("the Act") by the Deputy Commissioner of Income Tax, Circle 5(1)(1), Mumbai ("DCIT" or "AO") following the directions issued by the Dispute Resolution Panel - I ("DRP") in respect of the aforesaid assessment year, inter alia on the following grounds:

1. *The learned DCIT/DRP/TPO erred in determining the arm's length price of the international transaction pertaining to the provision of non-binding investment advisory services by the Appellant to its Associated Enterprise, General Atlantic Service Company, LLC ("AE" or "GASC LLC") by rejecting most of the comparable companies selected by the Appellant in its TP study and by selecting functionally different company, thereby resulting in an upward adjustment of Rs.2,87,41,335/- to the arm's length price declared by the Appellant.*
2. *The learned DCIT/DRP/TPO erred in holding Ladderup Corporate Advisory Pvt. Ltd, a company engaged in investment banking, merchant banking, corporate finance and corporate advisory services as comparable to the Appellant.*
3. *The learned DCIT/DRP/TPO erred in rejecting Crisil Risk and Infrastructure Solutions Ltd, Cyber Media Research Ltd, ICRA Management Consulting Services Ltd and Informed Technologies India Ltd. as comparable to the Appellant.*
4. *The learned DCIT/DRP/TPO grossly erred in disregarding/distinguishing the orders of the Hon'ble jurisdictional Income-tax Appellate Tribunal ("Tribunal") in the Appellant's own case for earlier assessment years, wherein the Hon'ble jurisdictional Tribunal has adjudicated that the companies engaged in any activity of investment banking or merchant banking are not functionally comparable to the Appellant.*
5. *The learned DCIT/DRP/TPO erred in not accepting the Appellant's contention for use of multiple year data for calculating the cost plus mark-up of comparable companies i.e. data for financial year 2009-10, 2010-11 and 2011-12.*
6. *The learned DCIT/DRP/TPO erred in not making suitable adjustments to the cost plus mark-up of the Appellant vis-a-vis the comparable companies for difference in risk profile, in terms of Rule 10B of the Income-tax Rules, 1962.*
7. *The learned DCIT erred in initiating penalty proceedings under section 271(1)(c) of the Act.*
8. *The learned DCIT erred in not appreciating that there was no concealment of income or furnishing of inaccurate particulars of income by the appellant for penalty proceedings to be initiated in this regard.*

The Appellant submits that each grounds of appeal is without prejudice to one another.

The Appellant craves leave to add, alter, vary, omit, substitute or amend of the above ground 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 and facts."

2. Briefly stated, the assessee company viz. General Atlantic Pvt. Ltd. which is engaged in the business of rendering investment advisory services to General Atlantic Services Corporation, USA had e-filed its return of income for A.Y. 2012-13 on 29.11.2012, declaring total income of Rs. 6,99,96,930/-. The return of income filed by the assessee was processed as such under Sec. 143(1) of the I.T Act.

Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2).

3. The assessee company had entered into an “agreement” dated 31.10.2002, (updated on 31.03.2010) with its ‘Associate Enterprise’ (for short ‘AE’) viz. General Atlantic Service Corporation, USA. As per the aforesaid agreement the assessee was to provide services to its AE in relation to certain matters viz. (i) the economic and the political conditions in India; (ii) the information technology sectors of the economy of India; (iii) particular information technology enterprises in India; and (iv) possible investment opportunities involving information technology enterprises in India. Observing, that the assessee during the year had entered into international transactions with its AE exceeding an amount of Rs.15 crores, the A.O made a reference under Sec.92CA(1) of the I.T Act to the Transfer Pricing Officer (for short ‘TPO’) after obtaining the approval of the Commissioner of Income-tax-3, Mumbai, vide order dated 14.10.2014. The TPO in the course of the proceedings before him observed that the assessee was compensated by its AE on cost +18% basis for the non binding investment advisory services rendered to it. The assessee had chosen the Transaction Net Margin Method (for short ‘TNMM’) as the most appropriate method for determining the arm’s length price (for short ‘ALP’), selecting itself as the tested party. The assessee had calculated its margin on total cost on the investment advisory services rendered to its AE at 17.65% and had claimed the transaction as being at an arm’s length. As directed, the assessee in the course of proceedings before the TPO filed the margins of the comparables on single year basis, as under:

S.No.	Name of Company	OP/TC %
1.	Crisil Risk & Infrastructure Solutions Ltd.	26.68%
2.	Cyber Media Research Ltd.	-30.51%
3.	ICRA Management Consulting Services Ltd.	6.95%

4.	ICRA Online Ltd.	14.93%
5.	Informed Technologies India Ltd.	7.09%
	Mean	5.03%

However, the TPO on the basis of the FAR analysis of the aforesaid comparables selected by the assessee, declined to accept the same, except for one viz. ICRA Online Ltd. Apart there from, the TPO holding a conviction that a company viz. Ladderup Corporate Advisory Pvt. Ltd. which as per him was providing similar kind of services and possessed similar kind of talent pool, included the same as a comparable for benchmarking the international transactions of the assessee for the year under consideration. In the backdrop of his aforesaid deliberations the TPO worked out the average arm's length margins of the comparables falling in the final list of the comparables at 26.45% [operational profits to total cost], as under:

Sr. No.	Name of the Company	Cost plus Markup for F.Y. 2011-12
1.	Ladderup Corporate Advisory Private Limited	37.96%
2.	ICRA Online Ltd.	14.93%
	Average	26.45%

On the aforesaid basis the TPO made a Transfer Pricing Adjustment of Rs.2,87,41,335/- to the total income of the assessee, as under:

	Particulars	Amount of Rs.
(A)	Operating income (A)	384,112,570
(B)	Less: Operating expenses (B)	326,495,773
(C=A-B)	Operating profit (A-B)=C	57,616,797
(D=C/B)	OP to TC	17.65%
(E)	Arm's Length Price (OP/TC)	26.45%
(F=B*E)	Hence arm's length OP	86,358,132
(G=B+F)	Arm's Length Operating Income =E=(D+B)	412,853,905
(H=G-A)	Adjustment = (E-A)	28,741,335

Further, the TPO while culminating his order observed that the assessee company had entered into an 'Advance Pricing Agreement' (for short 'APA') with the CBDT in relation to the international transaction of provision of non-binding investment advisory services to its AE with an agreed cost plus mark-up of 21%, which was valid for

F.Y 2013-14 to F.Y 2017-18. The TPO observed that the assessee had also moved an application in Form No. 3CEDA before the APA team for the roll back years i.e F.Y 2009-10 to F.Y 2012-13. In the backdrop of the aforesaid facts, it was observed by the TPO that in case the assessee succeeded in the rollback provision, then the same would take precedence over the aforesaid adjustment which would get nullified.

4. The A.O on receipt of the order passed by the TPO under Sec. 92CA(3), dated 28.01.2016 passed a draft assessment order under Sec. 144C(1) r.w.s 143(3), dated 25.02.2016. In the aforesaid order the A.O proposed a TP adjustment of Rs. 2,87,41,335/- under Sec. 92CA(4) of the I.T Act. The assessee filed its objections before the Dispute Resolution Panel-1 (WZ), Mumbai, which vide its directions dated 08.11.2016 rejected the same. Resultantly, the A.O vide his order passed under Sec.143(3) r.w.s 144C(13), dated 06.12.2016 made an upward adjustment under Sec.92CA(4) of Rs.2,87,41,335/- and assessed the income of the assessee company at Rs.9,87,38,270/-.

5. The assessee being aggrieved with the order passed by the A.O under Sec.143(3) r.w.s. 144C(13) has carried the matter in appeal before us. The Id. Authorized Representative (for short 'A.R') for the assessee at the very outset of the hearing of the appeal submitted that as per instructions he was restricting his contentions solely to exclusion of Ladderup Corporate Advisory Pvt. Ltd. from the final list of comparables. It was submitted by him that in case the said comparable which was included by the TPO in the final list was excluded, then the ALP of the assessee would fall within the safe harbour range of +/- 5% and resultantly no TP adjustment would be called for in its hands. Adverting to the merits of his contention, it was averred by the Id. A.R that the assessee was engaged in the business

of rendering non-binding investment advisory services to its AE viz. General Atlantic Service Corporation, USA, vide the terms of an “agreement” dated 31.10.2002 (updated on 31.03.2010). Insofar the nature of such investment advisory services were concerned, the ld. A.R took us through the relevant extracts of the order passed by the TPO under Sec. 92CA(3) of the I.T Act. The ld. A.R further took us through the observations of the Hon’ble High Court of Bombay in the assessee’s own case for A.Y. 2006-07 i.e CIT-3, Mumbai Vs. General Atlantic (P) Ltd. (2016) 68 taxman.com 88 (Bom). It was submitted by the ld. A.R that the Hon’ble High court had in its aforesaid order upheld the view taken by the Tribunal that the assessee was functionally similar to M/s Carlyle India which was providing non-binding investment advisory services to its AE. In sum and substance, it was the contention of the ld. A.R that the assessee was providing non-binding investment advisory services to its AE i.e General Atlantic Service Corporation, USA, which fact had been approved by the Hon’ble High Court in its aforementioned case for the preceding year. It was averred by the ld. A.R that there was no change in the functional profile of the assessee during the year under consideration and it continued to render non-binding investment advisory services to its aforementioned AE. In fact, it was submitted by the ld. A.R that the Tribunal while disposing off the cross-appeals in the assessee’s own case for A.Y. 2011-12, had observed that undisputedly the assessee was engaged in the business of providing non-binding investment advisory services to its AE viz. General Atlantic Service Corporation, USA. In the backdrop of the aforesaid fact that the assessee was a non-binding investment advisory service provider, it was submitted by the ld. A.R that the AO/TPO had erred in including Ladderup Corporate Advisory Pvt. Ltd. as a comparable for benchmarking the international transactions of the assessee. It was submitted by the ld.

A.R that the Tribunal in the assessee's own case for A.Y. 2011-12 had after necessary deliberations excluded the said company i.e Ladderup Corporate Advisory Pvt. Ltd. from the list of the comparables. It was submitted by him that the Tribunal while so concluding had observed that as the aforementioned company viz. Ladderup Corporate Advisory Pvt. Ltd. was registered as a Category-1 merchant banking company with SEBI and was engaged in merchant banking service w.e.f July, 2010, hence the same could not be treated as a comparable to a non-binding investment advisory service provider. Apart there from, it was submitted by the ld. A.R that the Tribunal while disposing off the aforesaid appeal had also relied on the order passed in the case of Temasek Holdings Advisors India (P) Ltd. Vs. DCIT (2017) 87 taxman.com 168 (Mum), in which case the Tribunal had after necessary deliberations concluded that as Ladderup Corporate Advisory Pvt. Ltd. which was engaged in merchant banking/investment banking and other similar activities during the year was functionally incomparable to the assessee before them which was providing non-binding investment advisory services, hence it could not be included in the final list of comparables. The ld. A.R culminating his contentions submitted that as it stood proved to the hilt that Ladderup Corporate Advisory Pvt. Ltd. was functionally incomparable to the assessee, therefore, the same may be excluded from the final list of comparables.

6. Per contra, the ld. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities.

7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and considered the material and the judicial pronouncements relied upon by them. Admittedly, the assessee company as observed by the TPO was

engaged in the business of rendering investments advisory services to its AE i.e General Atlantic Service Corporation, USA. As is discernible from the orders of the lower authorities, the assessee had entered into an “agreement” dated 31.10.2002 (updated on 31.03.2010) with its AE for provision of non-binding investment advisory services. In the backdrop of the concession advanced by the Id. A.R that he was seeking only the exclusion of Ladderup Corporate Advisory Pvt. Ltd. from the final list of comparables, we confine our adjudication of the said aspect only. We find that the TPO holding a conviction that the aforementioned company viz. Ladderup Corporate Advisory Pvt. Ltd. alike the assessee was providing similar kind of services and also possessed the similar kind of talent pool had included it in the final list of comparables for benchmarking the international transactions of the assessee during the year under consideration. As observed by us hereinabove, on the basis of the aforesaid deliberations the TPO had worked out an upward adjustment of Rs. 2,87,41,335/- to the ALP of the international transactions of the assessee with its AE.

8. We have deliberated at length on the issue under consideration and find substantial force in the contention advanced by the Id. A.R that the aforementioned company viz. Ladderup Corporate Advisory Pvt. Ltd. being functionally incomparable could not have been included in the final list of comparables for benchmarking the international transactions of the assessee for the year under consideration. In fact, the Tribunal in the assessee's own case for the immediately preceding year i.e AY. 2011-12 had after giving thoughtful consideration concluded that as Ladderup Corporate Advisory Pvt. Ltd. was registered as a Category-1 merchant banking company with SEBI and was engaged in merchant banking services w.e.f July, 2010, therefore, it could not be treated as a comparable to the assessee which was providing non-binding investment advisory services to its

AE. As the functional profile of the assessee and that of the aforesaid entity viz. M/s Ladderup Corporate Advisory Pvt. Ltd. had not witnessed any change during the year under consideration, therefore, we find no reason to take a different view and thus respectfully following the view taken by the Tribunal in the assessee's own case for A.Y. 2011-12, direct the A.O to exclude the aforementioned company i.e Ladderup Corporate Advisory Pvt. Ltd. from the final list of comparables. Before parting, we may herein observe that the Tribunal in the case of Temasek Holding Advisors Pvt. Ltd. Vs. ITO, Circle 14(3)(1), Mumbai (ITA No. 1429/Mum/2017; dated 03.01.2018 for A.Y. 2012-13) had after necessary deliberations rejected the aforementioned company i.e Ladderup Corporate Advisory Services Pvt. Ltd. as a comparable in the case of the assessee before them which was providing non-binding investment advisory services. Further, the Hon'ble High Court of Delhi in the case of Avenue Asia Advisors Pvt. Ltd. Vs. DCIT (2017) 85 taxman.com 311 (Del) had also rejected Ladderup Corporate Advisory Pvt. Ltd. as a comparable in the case of an assessee which was providing non-binding investment services to its AE. In fact, this Tribunal had recently while disposing off the appeal in the case of Carlyle India Advisors Pvt. Ltd. Vs. ITO, 14(1)(2), Mumbai (ITA No. 2366/Mum/2017) for A.Y. 2012-13, had directed the A.O/TPO to exclude the aforementioned company i.e Ladderup Corporate Advisory Pvt. Ltd. from the final list of the comparables for computing the ALP of the international transactions of the assessee which was providing non-binding investment services to its AE. In sum and substance, as the aforementioned company viz. Ladderup Corporate Advisory Pvt. Ltd. is functionally different as in comparison to the assessee before us, therefore, as observed by us hereinabove, the A.O/TPO are directed to exclude the aforementioned company viz. Ladderup Corporate Advisory Pvt. Ltd. from the final list

of comparables and recompute the ALP of the international transactions of the assessee for the year under consideration. In case the ALP of the assessee is within the safe harbour range +/- 5%, then no transfer pricing adjustment shall be made in the hands of the assessee.

9. The appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 12.04.2019

Sd/-

(G. Manjunatha)
ACCOUNTANT MEMBER
मुंबई Mumbai; दिनांक 12.04.2019
Ps. Rohit

Sd/-

(Ravish Sood)
JUDICIAL MEMBER

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,
उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT,
Mumbai

