

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "K", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND  
SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER**

**ITA NO.3424/MUM/2016 (A.Y: 2011-12)**

M/s. Kotak Mahindra Asset Management Company. Ltd., 27 BKC, G. Block Bandra Kurla Complex Bandra (E), Mumbai - 51  <b>PAN: AAACK5576C</b>	v.	Asst. CIT Range – 14(2)(1) Aayakar Bhavan Mumbai -400 020
<b>(Appellant)</b>		<b>(Respondent)</b>

**Assessee by : Shri Vispi T. Patel**

**Department by : Shri D.G. Pansari**

**Date of Hearing : 21.06.2019**

**Date of Pronouncement : 19.09.2019**

**ORDER**

**PER C.N. PRASAD (JM)**

1. This appeal is filed by the assessee against the order of the Learned Commissioner of Income Tax (Appeals) – 56, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 29.02.2016 for the A.Y. 2011-12.

2. The first ground of the grounds of appeal is in respect of confirming the disallowance of ₹.11,65,000/- made u/s. 14A r.w. Rule 8D (2)(iii) of I.T. Rules.

3. Briefly stated the facts are that, while completing the assessment the Assessing Officer noticed that during the year under consideration assessee earned dividend income of ₹.2,75,19,717/-. He also noticed that in the computation of income assessee made disallowance u/s. 8D at ₹.6,25,000/- with a note that this amount was calculated after excluding long term strategic investments contending that no expenditure is incurred for investments made as strategic and long term investments made in group companies has been excluded while arriving the disallowance at 0.5% as per Rule 8D of I.T. Rules. The assessee was asked to submit working u/s. 14A r.w. Rule 8D and expenses there to and assessee submitted letter dated 30.12.2013 explaining the reasons for arriving at the disallowance calculated at ₹.6,25,000/-. The Assessing Officer rejected the contention of the assessee and computed the disallowance u/s. 14A r.w. Rule 8D and arrived at disallowance of ₹.11,65,000/- and since the assessee had already made disallowance of ₹.6,25,000/- he restricted the disallowance to 5,40,000/-. On appeal the Ld.CIT(A) sustained the disallowance observing that since Assessing Officer was not satisfied with the claim made by the assessee in relation to the expenses incurred for earning exempt income from the investments made and the approach of the Assessing Officer to invoking the provisions of section 14A(2) is justified.

4. Before us, Ld. Counsel for the assessee firstly submits that the Assessing Officer made disallowance u/s. 14A r.w. Rule 8D(2)(iii) without recording his satisfaction regarding the correctness of the claim of the assessee and without establishing the fact whether such expenditure has been really incurred for earning the exempt income by the assessee. Reliance was placed on the decision in the case of Godrej and Boyce Manufacturing company Ltd. v. DCIT [394 ITR 449 (SC)] and the decision in the case of Maxopp Investment Ltd. v. CIT [402 ITR 640].

5. Without prejudice to the above Ld. Counsel for the assessee submits that for computing the administrative expenses to be disallowed under Rule 8D (2)(iii) of I.T. Rules, only those investments are to be considered which yielded exempt income. Reliance was placed on the decision of the Special Bench in the case of ACIT v. Vireet Investments Private Limited [165 ITD 27] and the Coordinate Bench decision in the case of Revashankar Gems Limited v. DCIT in ITA.No. 1046/Mum/2016 dated 05.02.2018.

6. Ld. DR vehemently supported the orders of the authorities below.

7. We have heard the rival submissions, perused the orders of the authorities below. On a perusal of the Assessment Order we find that the Assessing Officer required the assessee to furnish the working of section

14A r.w. Rule 8D of I.T. Rules, assessee vide letter dated 30.12.2013

contended as under:

*“a) Investments made in group companies are strategic in nature and have been made out of own funds.*

*b) During the year under assessment, there is no interest expenditure incurred to earn tax free income,*

*c) As regards administrative expenses, since the investments are strategic in nature, no day to day expenditure is incurred once the investments are made. Therefore, no expenditure are incurred towards administrative nature during the year under assessment.*

*d) The disallowance u/s 14A has been made by the company u/s 14A(1) and not in accordance with 14A(2) read with Rule 8D.*

*e) However since the company has already disallowed ₹.6,25,000/- in the return of income, no further disallowance is required under section 14A.*

8. We observe from the Assessment Order that subsequently assessee submitted another letter dated 13.02.2014 without prejudice to its earlier letter dated 30.12.2013 giving the working outstanding demand disallowance u/s. 14A as per Rule 8D arriving at the disallowance of ₹.11,65,000/-. We observe from the Assessment Order that the Assessing Officer rejected the contention of the assessee that the strategic and long term investment should be excluded from the purview of the disallowance. Accordingly, the Assessing Officer computed the disallowance at ₹.11,65,000/-. The contention of the assessee, that there is no satisfaction recorded by the Assessing Officer with regard to the correctness of the disallowance claim made by the assessee is not correct. The Assessing Officer rejected the contention of the assessee

which were submitted on 30.12.2013 and moreover the assessee himself has submitted its without prejudice claim working out disallowance at ₹.11,65,000/-, in such circumstances we do not see any fault of the Assessing Officer in not recording any satisfaction rejecting the claim of the assessee. This contention is rejected.

9. Coming to the without prejudice contention of the assessee that while computing administrative expenses to be disallowed u/s. 14A r.w. Rule 8D2(iii) of I.T. Rules, only those investments are to be considered which yielded exempt income during the year under consideration, we agree with the Ld. Counsel for the assessee. The Special Bench in the case of the ACIT v. Vireet Investments Private Limited (supra), has taken a similar view. Thus, respectfully following the said decision we direct the Assessing Officer to consider only those investments which yielded exempt income during the year under consideration and recompute the disallowance u/s. 14A r.w. Rule 8D of I.T. Rules. This ground is partly allowed.

10. Coming to Ground No. 2 of the grounds of appeal regarding the adjustments made u/s. 92C(3) of the Act by the TPO, the following grounds have been taken: -

“1. The AO erred in making a transfer pricing adjustment under section 92C(3) amounting to INR 42,93,059 without following the due process of law,

2. The AO erred in rejecting the detailed Transactional Net Margin Method (TNMM) analysis conducted by the Appellant for benchmarking the international transaction.

3. The AO erred in stating that the Appellant has submitted non-contemporaneous data of Financial Year (FY) 2009-2010 while the Appellant had submitted data of comparable companies for FY 2010-2011.

4. The AO erred in applying the TNMM on an arbitrary basis i.e. by rejecting the scientific search process carried by the Appellant without providing any cogent reasons and by selecting the companies which are not functionally comparable to the business of the Appellant.

5. The AO erred in the following:

a. Cherry-picking companies for benchmarking and not giving detailed search process applied by him in selecting the comparable companies;

b. Not giving financial statements, data about the companies and calculation of margins of the comparable companies selected by him;

c. Selecting comparable companies which have related party transactions over 15 per cent of turnover.

Thus, the comparable companies selected by the AO were arbitrary and need to be rejected.

6. The AO erred in not considering the submissions made by the Appellant on the comparable companies selected by the AO, which gave detailed reasons why they need to be rejected as they were not in line with Rule 10B(1), (2) and (3) of Income-tax Rules, 1962, r.w. Section 92C(2) of the Act.”.

11. The Ld. Counsel for the assessee submitted that assessee company is a captive service provider exposed to limited risks associate carrying non-binding investment advisory business. Ld. Counsel for the

assessee submits that Transactional Net Margin Method [TNMM] has been selected as the most appropriate method for benchmarking the fees received by the assessee company for providing non-binding investment advice services to its AE's and for determining the arm's length price of the transactions. Ld. Counsel for the assessee submits that assessee company has chosen three comparable namely Ajcon Global Services Limited, Future Capital Investment Advisors Limited and Pallavan Transport Consultancy Services Limited for computation of profit margin of comparable companies its operating profit to total cost and the average operating margin of these three comparable companies is 4.92. The Ld. Counsel for the assessee submits that since the return of total cost of the company for the year ended 31<sup>st</sup> March 2011 is 14.65% consequently the international transactions of the assessee company is considered to be at arm's length.

12. Ld. Counsel for the assessee further submits that in the course of the assessment proceedings in Transfer Pricing study a fresh search was carried out on the external data base i.e. Prowess on 29.01.2014 and selected two comparables namely Ajcon global Services Limited and SREI Venture Capital Limited and the operating margin of the comparable companies selected after carrying out qualitative analysis, the arithmetic mean of these two comparable is as under: -

Sr. No.	Name of the Company	Year	OP / OC (%)
1.	Ajcon Global Services Ltd.	March 2011	-2.20
2.	S R E I Venture Capital Ltd.	March 2011	11.98
	Arithmetic Mean		4.89

Since the same is lower than company's margin i.e. 14.65% the international transactions of the assessee company are at arm's length.

13. Ld. Counsel for the assessee submits that the Assessing Officer in his order selected four companies for benchmarking the assessee's international transactions of non-binding investment advisory services as follows: -

Sr. No.	Name of the companies	OP/OC (%)
1.	Aditya Birla Capital Advisors Private Limited	33.49
2.	Motilal Oswal Investment Advisors Private Limited	22.56
3.	A R Venture Funds Management Limited	83.18
4.	Noonday Capital Management India Private Limited	23.00
	Arithmetic Mean	40.56

Ld. Counsel for the assessee submits that the Assessing Officer compared the arithmetic margin of comparable companies of 40.56% with the assessee's margin of 14.65% and made a Transfer pricing adjustment of ₹.42,93059/- and the Ld.CIT(A) upheld the transfer pricing adjustment made by the Assessing Officer.

14. Ld. Counsel for the assessee referring to transfer pricing report at Page Nos. 130 to 133 of Paper Book where the functional, asset and risk analysis and economic characters of the assessee was provided submits

that based on the FAR analysis risk assumed the assessee can be characterized as captive service provider exposed to limited risk associated with carrying on non-binding investment advisory business. Ld. Counsel for the assessee submits that Assessing Officer in his order referring to Page No. 3 Para 6.1 recorded a finding that the assessee provides support services to its AE by way of non-binding investment advisory services. The Ld. Counsel for the assessee submitted before us that out of the four comparables selected by the Assessing Officer if Motilal Oswal Investment Advisory Pvt. Ltd., is excluded and from out of the comparables selected by the assessee Ajcon Global Services Limited is included the international transactions of the assessee would be at arm's length considering  $\pm 5\%$  benefit as per proviso to section 92C of the Act. The Ld. Counsel for the assessee submits that Assessing Officer had rejected Ajcon Global Services Limited on the ground that financial data for 31<sup>st</sup> March 2011 was not available. The Ld. Counsel for the assessee referring to the Assessment Order submits that the comparables selected by the assessee were rejected stating that data for A.Y. 2009-10 were used to arrive at comparable PLI and they are functionally different. Ld. Counsel for the assessee before us referring to the annual report of the Ajcon Global Services Limited submitted that observation of the Assessing Officer that data for 31<sup>st</sup> March 2011 is not available is not

correct and since data for 31<sup>st</sup> March 11 is available in respect of Ajcon Global Services Limited the same should be accepted as a comparable company.

15. Coming to Motilal Oswal Investment Advisory Pvt. Ltd., the comparable company which the Assessing Officer has chosen, the Ld. Counsel for the assessee referring to Page Nos. 167,173 and 184 of the Paper Book submits that Motilal Oswal Investment Advisory Pvt. Ltd., is not functionally comparable as it is engaged in the business of investment banking, Merchant banking, merger and acquisition, private equity syndication etc., and it was no way similar to the assessee's business of non-binding investment advisory services. Reliance was placed on the following decisions: -

- (i) Pr.CIT v. *Bain Capital and Advisors India Pvt. Ltd.*, in ITA.No. 541 of 2016 dated 24.01.2018
- (ii) *AGM India Advisors Pvt. Ltd.*, v. DCIT [70 taxmann.com 219]
- (iii) *ACIT v. Blackstone Advisors India Pvt. Ltd.*, [101 taxmann.com 116]

16. Ld. Counsel for the assessee submits that out of the four comparables selected by the Assessing Officer if Aditya Birla Capital Advisors Pvt. Ltd., and Motilal Oswal Investment Advisory Pvt. Ltd., is excluded and if Ajcon Global Services Limited is included as comparable companies the international transaction of the assessee would be at arm's length considering  $\pm 5\%$  benefit as per proviso to section 92C of the Act.

17. Ld. Counsel for the assessee referring to Page No. 154 of the Paper Book which is the Director's report in the financials of the Aditya Birla Capital Advisors Pvt. Ltd., it is submitted that this company is mainly into the business of raising of funds, deploying and managing the same and hence, the same was functionally different from the assessee's business activity of non-binding investment advisory services. Ld. Counsel for the assessee submits that it is not an advisory company unlike the assessee which is only an investment advisory. Referring to Page Nos. 158 and 162, Ld. Counsel for the assessee submits that Aditya Birla Capital Advisors Pvt. Ltd., earned management fee for the investment management agreement entered into between company and the fund managers. Therefore, it is submitted that this company cannot be a comparable since functionally different. Reliance was placed on the decision in the case of McKinsey Knowledge Centre (P.) Ltd. v. DCIT [77 taxmann.com 164]. Hence the Ld. Counsel for the assessee submits that the Aditya Birla Capital Advisors Pvt. Ltd., should be rejected as a comparable company.

18. On the other hand, Ld. DR referring to Page No. 28 of the annual report of the Ajcon Global Services Limited submitted that no segmentals have been provided and assessee has not given any pdf form in respect of the Ajcon Global Services Limited to the Assessing Officer and

therefore the matter may go back to the Assessing Officer for verification.

In reply, Ld. Counsel for the assessee submits that majority of income of Ajcon Global Services Limited was from advisory services and therefore a direction may be given only to see computation of margins.

19. We have heard the rival submissions, perused the orders of the authorities below. On a perusal of the Assessment Order, we find that there is no dispute that assessee is only an investment advisory company. On a perusal of the Transfer Pricing report also it reveals that assessee is providing non-binding investment advisory services related support services to its AE's. In the case of PCIT v. M/s. Bain Capital and Advisors India Pvt. Ltd., (supra) the Hon'ble Bombay High Court had to considered whether Bain Capital and Advisors India Pvt. Ltd., its activities are not comparable to the activities of the Motilal Oswal Investment Advisory Pvt. Ltd., which is a merchant banker and not an investment advisor and the Hon'ble Bombay High Court held as under: -

*"2. The Revenue has urged the following re-framed question of law for our consideration:*

*(i) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in holding that Motilal Oswal Investment Advisors Pvt. Ltd. and M/s. IDFC Ltd. not comparables for the purpose of Rule 10B of the Income Tax Rules?*

*3. The impugned order of the Tribunal allowed the respondent assessee's appeal by holding that it is engaged in providing investment research and advisory services to Bains Capital a Mauritius based Pvt. Ltd. Company. In the above facts, its activity is not comparable to the activity of Motilal Oswal Investment Advisors Pvt. Ltd. which is a Merchant Banker and not an investment advisor*

as the respondent. Similarly, it held that IDFC Investment Advisors Ltd. is also performing functionally different activity i.e. of portfolio management from that of non binding investment advice given by the respondent. Thus, holding that Motilal Oswal Investment Advisors Pvt. Ltd. and IDFC Investment Aedvisors Ltd. are not comparables to the respondent so as to use them as comparables to determine the Arms Length Price of the respondent's transactions with its related party i.e. Bains Capital (Mauritius).

4. Mr. Suresh Kumar, learned Counsel appearing for the Revenue fairly states that the issue arising herein stands concluded against the Revenue and in favour of the respondent assessee by the decisions of this Court in CIT Vs. Carlyle India Advisors (P) Ltd. 357 ITR 584 and CIT Vs. General Atlantic (P) Ltd. 384 ITR 271 and the order dated 17th November, 2016 passed in the case of CIT Vs. Temasek Holdings Advisors India Pvt. Ltd. (Income Tax Appeal No. 1051 of 2014).

5. In view of the above, as the issue is concluded by orders of this Court, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.”

20. In the case of ACIT v. Blackstone Advisors India Pvt. Ltd., (supra) the Coordinate Bench considered whether Motilal Oswal Investment Advisory Pvt. Ltd., is a merchant banker or investment advisor company and the Coordinate Bench observed as under: -

“28. This company, though, was selected as a comparable by the Transfer Pricing Officer, however, the DRP excluded this company as a comparable by holding that it is a merchant banker. Being aggrieved with the aforesaid decision of the DRP, Revenue is in appeal before us.

29. The learned Departmental Representative relied upon the observations of the Transfer Pricing Officer.

30. The learned Sr. Counsel for the assessee strongly relying upon the observations of the DRP submitted that the company being a merchant banker cannot be treated as a comparable to the assessee. In support of such contention, he relied upon the following decisions: –

i) AGM India Advisors Pvt. Ltd. v/s DCIT, [2017] 79 taxmann.com 86;

ii) *Temasek Holding Advisors India Pvt. Ltd. v/s DCIT, [2016] 67 taxmann.com 221;*

iii) *Carlyle India Advisors India Pvt. Ltd. v/s DCIT, [2014] 43 taxmann.com 184.*

31. Further, the learned Sr. Counsel for the assessee submitted that in assessee's own case for assessment year 2008-09, the Tribunal has held that the company cannot be a comparable to the assessee.

32. We have considered rival submissions and perused materials on record in the light of the decisions relied upon. As could be seen from the functional profile of this company as revealed from the material brought on record, it is engaged in the business of investment banking, merchant banking, merger and acquisition, private equity syndication, etc., which are no way similar to the assessee's activities of non-binding investment advisory services. In a number of decisions including decisions relating to the impugned assessment year, as referred to above, the Tribunal has held that this company cannot be a comparable to an investment advisory service provider. In fact, in assessee's own case for assessment year 2008-09 (*supra*), the Tribunal taking note of the functional differences between the activities of the assessee and this company has held that it cannot be a comparable to the assessee. Therefore, considering the overall facts and circumstances of the case, we hold that this company cannot be a comparable to the assessee. Accordingly, we uphold the decision of the DRP on this issue."

21. In the case of the AGM India Advisors (P.) Ltd., v. DCIT (*supra*) the

Coordinate Bench observed as under: -

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

25. This comparable has been included by the TPO and while including the said comparable he has observed that its income is only from Advisory fees during the year and it is performing advisory services in that field of investment like assessee. Before us, Ld. CIT DR arguing for its inclusion submitted that, if the ICRA Management services can be included for having revenue from advisory services then on same analogy this company should also be given the same treatment. From the perusal of the directors' report, it is seen that this company derives its business income from four different business verticals, i.e. Equity capital markets, merger

*and acquisitions, profit equity syndications and structured debt. It also give advises on cross border acquisition. Its core competence is in the field of merchant banking. It also provides comprehensive investment banking solutions and transaction expertise covering private placement of equity, debt and convertible instruments in international and domestic capital markets, monitoring mergers and acquisitions and advising M&A as professional and restructuring advisory and implementations. It is also involved in various professional activities of the merchant banking. A Merchant Banker provides capital to companies in the form of share ownership instead of loans. It also provides advisory on corporate matters to the companies in which they invest. The focus is on negotiated private equity investment. The wide range of activities include portfolio management, credit syndication, counseling on M&A, etc. This whole range of functions and activities carried out by Motilal Oswal is definitely are far wider and much different from investment advisory services where core functions is to give advices for making the investments in diversified fields. A company which is engaged in merger and acquisitions, private equity syndication, loan/credit syndication and performing most of the function of a Merchant Banker, then the entire functions and transactions affects the generation of revenue and margins. Such functions are entirely different from investment advisory services. Mere classification of revenue as 'advisory fees' will not put the company in a comparable basket sans functional similarity and transactional analysis. In case of Carlyle India Advisors Pvt. Ltd (supra), it has been held that, the merchant banking functions are entirely different from investment advisory services and this decision of the Tribunal has been upheld by the Hon'ble Bombay High Court. Thus, in view of plethora of judicial decisions as referred to by Ld. Counsel and in view of functional differences as discussed as above, we hold that Motilal Oswal cannot be put into the comparability list and is directed to be excluded."*

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

*"6. We have heard the rival submissions and perused the material before us. We find that on 07.12.2012 the assessee had submitted its profile and analysis of the functions performed, assets utilised and risks assumed. As per the FAR the assessee would identify opportunity for parent company to participate in equity security particularly relating to commercially physical projects in the real estate sector, that it was sharing business intelligence, market research, compliance of regional regulatory requirement so as to assist its AE, that it would not conclude any contract on behalf of the*

*AE nor was it facilitating external commercial borrowings in real estate business. We find that the TPO had rejected the comparable selected by the assessee and had adopted three new comparables. As far as MOIAPL is concerned, there is no doubt that the job profile of both the companies are different. The assessee is engaged in investment advisory services, whereas MOIAPL was carrying on business of mergers and acquisitions and other related activities. The assessee is not a merchant banker like MOIAPL. In the case of Carlyle India Advisors Private Limited (supra), the Tribunal has held that MOIAPL cannot be taken as a valid comparable in cases, where the assessee is rendering advisory services. In that matter the Tribunal held as under:*

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

*"12..... The only dispute is whether Motilal Oswal Investment Advisors Pvt Ltd can be considered as a comparable for determination of ALP.A perusal of three comparables considered by the TPO shows that M/s. Future capital Investment Advisors Ltd., has operating profit at 21.79% whereas OPM of Motilal Oswal Investment Advisors Pvt Ltd is 72.33%. The comparables used by the TPO themselves are showing extreme OPM.A perusal of the Directors report of Motilal Oswal Investment Advisors Pvt Ltd*

*shows that during the year under consideration, the said company has completed 23 assignments successfully as against 14 completed in the immediately preceding year. A close look at the financial statements of the said company show that the income from operations have been shown only as advisory fees whereas it is admittedly an undisputed facts that the said company is engaged in diversified activities. Segmental reporting is not available. Profit and loss account appears to be only of consolidated accounts. The said company is registered with SEBI as a merchant banker and the Directors report show that it is into takeover, acquisitions, disinvestments etc. In the absence of specific data it is not possible to make comparison. It can therefore, be safely said that the said company being into merchant banking and cannot be considered as a comparable. We, accordingly, direct the AO not to consider Mottial Oswal Investment Advisors Pvt Ltd as a comparable for determination of ALP..... "*

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

*The Hon'ble Jurisdictional High Court has dismissed the appeal filed by the Department in the case of Carlyle India Advisors Private Limited (IT Appeal 1286 of 2012, dated 22. 02.2013).*

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

*"7. We have carefully considered the rival submissions. We find that the assessee has been consistently canvassing before the lower authorities that Motilal Oswal Investment Advisors Private limited be excluded from the final set of comparables on the ground that its activities' are functionally incomparable to the activity of Provision of investment advisory services being rendered by the assessee to its Associated Enterprises. In fact, before the TPO, assessee pointed out that the said concern was engaged in providing comprehensive investment banking solutions and that it was rendering services across various products, viz. Equity Capital Markets, Mergers & Acquisitions, Private Equity Syndications and Structured Debt, etc. The appellant relied upon the decision of the Tribunal in the case of Carlyle India Advisors Private Limited (214 Taxmann 492), to support its plea for exclusion of the said concern from the final set of*

*comparables. The TPO rejected the aforesaid plea on the ground that the Profit and Loss account of the said concern for the year under consideration showed that the only stream of income was from advisory services and not from any activity of merchant banking and, therefore, the said concern was carrying out only advisory services and, according to him, the said concern was includible in the final set of comparables. The DRP also accepted the position that the said concern was engaged in advisory services which are broadly comparable to the assessee's activities under test.*

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

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

*Following the above orders, we hold that job profile of MOIAPL was different as compared to the activities undertaken by the assessee. It was rendering investment advisory services, specifically related with real estate business whereas MOIPAL is a merchant banker. So, we hold that MOIAPL is liable to be excluded from the final set of comparables.”*

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

22. As could be seen from the above judgments, Motilal Oswal Investment Advisory Pvt. Ltd., has been held to be a merchant banker and not an investment advisor company. Thus, in view of the above, we direct the Assessing Officer to exclude Motilal Oswal Investment Advisory Pvt. Ltd., from the comparables chosen by him for benchmarking the international transactions of the assessee.

### **Ajcon Global Services Limited**

23. This company was rejected by the Assessing Officer observing that data for the A.Y. 2009-10 was used and not a comparable company. Assessee before us submitted the annual report for the F. Y. 2010-11 relevant to the A.Y. 2011-12 which is the year under consideration

according to which we see that 76% of its revenue is from consultancy and advisory services and the balance is from stock marketing, DP operations, and security trading activities. Therefore, since 76% of the income is from consultancy and advisory services it can safely be held that this company is into consultancy and advisory services. However, for limited purpose of examining whether this company can be considered as having similar functionalities that of the assessee company, we direct the Assessing Officer to examine this aspect and consider the same as comparable if the said company is functionally comparable.

### **Aditya Birla Capital Advisors Pvt. Limited**

24. In the case of McKinsey Knowledge Centre (P.) Ltd., v. DCIT (supra) the Delhi Bench of the Tribunal held as under:

*“26.1. The TPO proposed this company as comparable which was objected by the assessee on the ground that it was a company rendering asset management services and, hence, functionally dissimilar. The TPO treated it as comparable, which was approved by the DRP. The assessee is aggrieved against such inclusion.*

*26.2. After considering the rival submissions and perusing the relevant material on record, we find that this company, as noted by the TPO himself on page 20 of his order: ‘offers Investment Management and advisory services as Aditya Birla Private Equity to domestic and global investors’. This company is ‘managing a series of private equity funds to invest in and harvest business growth opportunities’. When we view the Annual report of this company, a copy of which is placed on page 246 of the paper book, it turns out that: “The company’s focus continues on the alternative assets excluding Realty and Hard Infrastructure investments. At the current activity levels, the Company has raised and managements two*

*sector– agnostic domestic funds, namely, Aditya Birla Private Equity Fund-I and Aditya Birla Private Equity - Sunrise Fund'. Break-up of "Revenue from Operations" given on page 253 of the paper book gives the description of the nature of its revenues, namely: "Management Fees." Thus, it is apparent that the nature of business of this company, being raising of funds and deploying the same, is entirely different from what the assessee is doing in this segment, namely, rendering services in the nature of Knowledge on call, Practice research and Analytics. This company is, therefore, directed to be excluded from the list of comparables."*

25. As could be seen from the above, for the very same assessment year i.e. 2011-12 the Tribunal held that the nature of business of Aditya Birla Capital Advisors Pvt. Ltd., is rising of funds and deploying the same. The Tribunal also observed that on perusing the material on record it was found that company namely Aditya Birla Capital Advisors Pvt. Ltd., offers investment management and advisory services as Aditya Birla Private Equity to domestic and global investors and it is managing series of private equity funds to invest in harvest business growth opportunities. Therefore, it can be held that Aditya Birla Capital Advisors Pvt. Ltd., is not into non-binding advisory services but it was into pooling of funds and deploying the same and managing series of private equity funds and advisors to domestic and global investors. However, the assessee is only into non-binding advisory services to its AE and therefore Aditya Birla Capital Advisors Pvt. Ltd., is functionally different and cannot be considered as a comparable. Thus, we direct the Assessing Officer to exclude this company from the comparable for benchmarking the

international transactions of the assessee company and recompute the arm's length price of the international transactions accordingly.

26. In the result, appeal of the assessee is partly allowed as indicated above.

Order pronounced in the open court on the 19<sup>th</sup> September, 2019

Sd/-  
**(RAJESH KUMAR)**  
**ACCOUNTANT MEMBER**  
Mumbai / Dated 19/09/2019  
Giridhar, Sr.PS

Sd/-  
**(C.N. PRASAD)**  
**JUDICIAL MEMBER**

**Copy of the Order forwarded to:**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**