

THE INCOME TAX APPELLATE TRIBUNAL
"K" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 7515/Mum/2019 &
S.A. No. 28/Mum/2020
(Assessment Year 2015-16)

Carlyle India Advisors Private Limited 1 st Floor, Quardant-A The IL & FS Financial Centre, Plot C-22 G-Block Bandra Kurla Complex, Bandra East Mumbai-400 051. PAN : AABCC4522F (Appellant)	Vs.	ACIT-14(1)(2) 475, Aayakar Bhavan M.K. Road Mumbai-400 020. (Respondent)
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Assessee by	Shri Mukesh Butani & Shri Shreyas Shah
Department by	Shri Anand Mohan
Date of Hearing	01.09.2020
Date of Pronouncement	04.09.2020

O R D E R

Per Shamim Yahya (AM) :-

This is appeal by the assessee directed order of the assessee officer dated 24.10.2019 u/s. 144C read with section 143(3) passed pursuant to the direction of the Dispute Resolution Panel dated 5.9.2019.

2. Although assessee has raised various grounds, these are directed against transfer pricing adjustment of Rs. 8,37,42,465/-. In this regard the issues raised as summarised by the learned counsel of the assessee are as under :-

- (i) Treatment of the assessee as KPO instead of provider of non-binding investment adversely services and related support services.
- (ii) Inclusion of the following comparables in the T.P. analysis :-

- Almondz Global Securities Ltd.
- Crisil Risk & Infrastructure Solutions Ltd.
- ICRA Management Consulting Services Ltd.

3. Exclusion of the following comparables in the T.P. analysis :-

- Cheers Interactive (India) Private Ltd ('Cheers Interactive')
- Cross Domain Solutions Private Ltd ('Cross Domain')

4. Brief facts of the case are as under :-

Carlyle India Advisors Private Limited is a subsidiary of Carlyle Asia Investment Advisors Limited ('Carlyle Hong Kong') and is engaged in providing non-binding investment advisory and related support services. During the course of assessment proceedings, the international transactions entered into by the Assessee with its AEs were referred by the AO to the Deputy Commissioner of Income-tax, Transfer Pricing Officer- 1(3)(1), Mumbai ('the TPO'), for determination of arm's length price ('ALP') under section 92CA of the Act. The TPO vide order passed under section 92CA(3) dated 31 October 2018 has proposed an adjustment of INR 26,33,04,278/-.

5. The DRP in-principle upheld the order of the TPO. However, the DRP had directed the assessee on a without prejudice basis, to a conduct a fresh benchmarking of companies engaged in provisions of KPO services, based on which the DRP in its directions agreed to include two additional KPO service providers. Based on the directions issued by Hon'ble DRP, the TP adjustment reduced from Rs. 26,33,04,278/- to Rs. 8,37,42,465/- which is incorporated in the final assessment order passed by the Assessing Officer as under :-

Particulars	Introduced by	TPSR set	TPO set	DRP set
Almondz Global Securities Ltd	Assessee	10.84%	--	
Crisil Risk & Infrastructure Solutions Ltd	Assessee	12.48%	--	--
ICRA Management Consulting Services Ltd.	Assessee	6.89%	--	--
Eclerx Services Ltd (Eclerx')	TPO	--	48.82%	48.82%

Cheers Interactive (India) Private Ltd ('Cheers Interactive')	DRP	--	--	9.53%
Cross Domain Solutions Private Ltd ('Cross Domain')	DRP	--	--	18.92%
Arithmetic Mean		10.07%	48.82%	25.76%

6. At the outset learned counsel Shri Mukesh Butani of the assessee submitted that the issues raised in this appeal are covered in favour of the assessee by the order of this tribunal in assessee's own case for the earlier years.

7. As regards the issue of the characterisation of the assessee as a KPO/high-end ITeS service provider the learned counsel of the assessee submitted that for this issue in assessee's own case for assessment year 13-14 and 14-15 the ITAT has held that the lower authority was not correct in re characterisation of the assessee as KPO in place of providing nonbinding investment advisory and related support services.

8. As regards the exclusion of comparable companies which are not comparable to the assessee, the learned counsel of the assessee submitted that ITAT in assessment year 13-14 had rejected KPO companies by observing that Eclerx services Ltd was not comparable to the assessee. Hence learned counsel of the assessee pleaded that on same lines the other 2 companies namely Cheers interactive and Crossdomain should also be rejected

9. For the purpose of inclusion of the three comparables as above learned counsel of the assessee submitted that this ITAT for assessment year 13-14 has accepted that the comparables namely Almondz Global Securities Ltd, Chrisil risk and infrastructure solutions limited and ICRA management consulting services are to be included in the comparability analysis as their services are comparable to that of the assessee.

10. Per Contra learned departmental representative Shri Anand Mohan submitted that as regards the issue of characterisation of the assessee he fairly

admitted that ITAT in assessee's own case in earlier year has accepted the assessee's plea that it should not be characterised as a KPO instead of provider of nonbinding investment advisory and related support services

11. As regards the issue of inclusion of the 3 companies in the comparability analysis namely Almondz Global Securities Ltd, Crisil Risk and Infrastructure Solutions and ICRA Management Consulting Services the learned departmental representative fairly agreed that ITAT in assessee's own case in earlier year has accepted these companies to be comparable to the assessee.

12. As regards the issue of exclusion of Eclerx services Ltd., learned departmental representative agreed that ITAT in assessee's own case in earlier year has accepted the exclusion of this company as it was found that this company was not comparable, to that of the assessee. However, as regards the issue of exclusion of Cheers Interactive (India) Pvt. Ltd. and Cross Domain Solutions Pvt. Limited. The learned departmental representative submitted that this issue was also there in earlier year but it was not adjudicated by the tribunal. Hence he submitted that it cannot be submitted that ITAT has agreed for the exclusion of these companies. However he submitted that assessee should not have any grievance if by excluding Eclerx services Ltd and including the 3 other companies as referred above the assessee would succeed.

13. In the rejoinder learned counsel of the assessee submitted that it should not be accepted that assessee has agreed for the exclusion of the 2 companies namely Cheers Interactive and Cross Domain Solutions Pvt. Ltd.

14. However he fairly accepted the proposition canvassed by the learned departmental representative that if the assessee is accepted as not a KPO and the 3 companies proposed above are included and Eclerx is excluded assessee would not have any grievance.

15. Upon careful consideration we find that this tribunal in ITA No. 7277/Mum/2018 for A.Y. 2014-15 vide order dated 15.7.2020, has held as under as regards the characterisation of assessee by KPO by local authority :-

“We have noted that on identical set of facts in assessee's own case for assessment years 2012-13 and 2013-14 in ITA No. 2366 & 6321 dated 27.02.2019, wherein the assessee's appeal for A.Y. 2013- 14 has raised specific ground for re-characterisation of assessee as a KPO in place of non-binding investment advisory and related services. The Tribunal while considering the functional similarities/dissimilarity of the assessee with other comparable held that the assessee is engaged in providing non-binding investment advisory and related support services. Though, no specific finding is mentioned in the order for AY 2012-13 and 2013-14, however, the objection of the revenue that the assessee is KPO, is virtually rejected. We have further seen that in appeal for AY 2007-08 the coordinate bench of the Tribunal after detail analysis of service agreement held that the assessee is providing non-binding investment advisory and related support services. The order of the Tribunal was upheld by Hon'ble Bombay High Court in ITA No. 1286 of 2012 dated 22.02.2013 reported vide (2013) 357 ITR 584(Bom). 9. No change in the facts or the functions undertaken by the assessee is brought to our notice. The subsistence of “service agreement” which is in existence since 01.04.2006, till the period under consideration, is not disputed by the lower authorities. No contrary law is also brought to our notice. More over the international transaction related with provision of non-binding investment advisory and related supported services, reported by the assessee in its Form3CEB, was identified and examined by TPO for computation of ALP. Thus, in absence of any contrary law or fact and respectfully following the decision of earlier years wherein the assessee was held as engaged in providing non-binding investment advisory and related support services. With the aforesaid observation, we hold that lower authority was not correct in re-characterizing the assessee as KPO in place of providing non-binding investment advisory and related support services of the year under consideration. In the result, this ground of appeal is allowed.”

16. As regards the issue of inclusion of the three companies namely

- (i) Almondz Global Securities Ltd.
- (ii) Crisil Risk & Infrastructure Solutions Ltd.
- (iii) ICRA Management Consulting Services Ltd.

the ITAT has held as under :-

“We have considered the submission of both the parties and find that coordinate bench of Tribunal in assessee’s own case for A.Y. 2013-14 in ITA No. 6321/Mum/2017 dated 27.02.2019 while considering the comparability of Almond, Crisil and ICRA passed the following order:

“41. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We shall first advert to the maintainability of the exclusion of certain companies which were selected by the assessee as comparables in its TP study report, but the same not finding favour with the TPO/DRP were excluded from the final list of comparables, as under:

(A) CRISIL RISK AND INFRASTRUCTURE SOLUTIONS LTD: We find from a perusal of the „notes“ to the financial statements of Crisil Risk and Infrastructure Solutions Ltd. that it is a leading advisor to regulators and governments, multilateral agencies, investors and large public and private sector firms and is providing a comprehensive range of risk management tools, analytics and solutions to financial institutions, banks and corporates. In our considered view the provision of advisory services by the aforementioned company can safely be held to be comparable to the investment advisory services that were provided by the assessee during the year under consideration. The aforementioned company was rejected as a comparable by the TPO/DRP for the reason that it had failed the export filter. We have deliberated at length and are unable to persuade ourselves to subscribe to the exclusion of the aforementioned company viz. Crisil Risk and Infrastructure Solutions Ltd. as a comparable for benchmarking the international transactions of the assessee for the year under consideration. We find that the DRP had in the assessee’s own case for the immediately preceding year viz. A.Y. 2012-13 directed the TPO not to consider export filter as it was not a relevant filter in the case of the assessee, since the services were rendered by the assessee for the A.E in India and also investments were to be made in India. In our considered view as there is no change in the facts during the year under consideration as against that of the immediately preceding year viz. A.Y. 2012-13, therefore, upholding of the application of the export filter by the DRP by adopting an inconsistent approach cannot be accepted. Our view that in absence of any change in the facts the principle of consistency has to be followed finds support from the judgments of the Hon’ble Supreme Court in the case of (i). Radhsoami Satsang Vs. CIT (1992) 193 ITR 321 (SC) and (ii). CIT Vs. Excel Industries ltd. (2013) 358 ITR 295 (SC) and the judgment of the Hon’ble High Court of Bombay in the case of Pr. CIT Vs. Quest Investments Advisory Pvt. ltd. (ITA No. 280 of 2016) (Bom). Apart therefrom, we find that Crisil Risk and Infrastructure Solutions Ltd. was in itself accepted by the TPO as a comparable in the case of certain assessee’s which were providing investment advisory services viz. (i) Kitara Capital Pvt. Ltd. Vs. ITO (ITA No. 130/Mum/2014; and (ii) General Atlantic (P) Ltd. Vs. DCIT (2015) 64 taxmann.com 423 (Mumbai). We thus in the backdrop of our aforesaid

observations are of the considered view that the TPO/DRP has erred in excluding the aforementioned company viz. Crisil Risk and Infrastructure Solutions Ltd. from the final list of the comparables. In terms of our aforesaid observations, we herein direct the A.O/TPO to include the said company viz. Crisil Risk and Infrastructure Solutions Ltd. in the final list of comparables for benchmarking the international transactions of the assessee during the year under consideration.

(B) ALMONDZ GLOBAL SECURITIES LTD: We have perused the “Annual report” of the aforementioned company and find that the business of the assessee during the year comprised of providing consultancy in the financial areas. The assessee has taken the margin earned by the aforementioned company under the segment of Corporate Finance and Advisory Fee segment. As per the “annual report” of the company the SEBI had passed two ad interim ex-parte orders on 28.12.2011 (which were confirmed vide interim orders dated 11.09.2012 and 21.09.2012), as per which the company was prohibited from taking new assignment or involvement in any new issue of capital including IPO, follow-on issue etc. from the securities market in any manner whatsoever, from the date of the order till further directions. In sum and substance, the aforementioned company having been debarred had not undertaken any merchant banking activities during the under consideration viz. A.Y. 2013-14. We find substantial force in the contention advanced by the Id. A.R that in the backdrop of the aforesaid facts as the aforementioned company i.e. Almondz Global Securities ltd. which during the year under consideration viz. A.Y. 2013-14 was purely into research based investment advisory, thus are of the considered view that the same was rightly selected as a comparable by the assessee. Insofar, the rejection of the said company as a comparable by the TPO/DRP is concerned, we find that the same is for the reason that the said company had failed the export filter. We are unable to subscribe to the aforesaid view so taken by the lower authorities and for the reasons discussed at length by us hereinabove, that as observed by the DRP in the case of the assessee for A.Y. 2012-13 the export filter was not relevant in the case of the assessee, thus do not find any favour with the said observations so drawn by the lower authorities and are of the considered view that the TPO/DRP had wrongly rejected the aforementioned company viz. Almondz Global Services Ltd. as a comparable in the case of the assessee. In terms of our aforesaid observations, we direct the AO/TPO to include the abovementioned company viz. Almondz Global Services ltd., in the final list of comparables for the purpose of benchmarking the international transactions of the assessee for the year under consideration.

(C) ICRA MANAGEMENT CONSULTING SERVICES LTD: We find that ICRA Management Consultancy Ld. is into advisory and management consultancy, while for the assessee is into providing non-binding investment advisory services. In our considered view as the functions performed in investment advisory as well as in management consultancy remain the

same, thus a company providing management consultancy can safely be taken as a comparable as against that involved in providing investment advisory. We find that the various objections raised and the basis adopted by the Id. D.R to justify the exclusion of the aforementioned company viz. ICRA Management Consulting Services Ltd. as comparable in the case of the assessee, had been rebutted and dislodged by the Id. A.R in his submissions placed in the appeal of the assessee for A.Y 2012-13. We are of the considered view that as the facts of the case before us, as well as the functional profile of the assessee and the aforementioned company viz. ICRA Management Consulting Services Ltd. had not witnessed any change during the year under consideration, therefore, our observations recorded for including the said company as a comparable in the case of the assessee for A.Y 2012-13 shall apply mutatis mutandis in the present appeal of the assessee for A.Y 2013-14. We thus in terms of our aforesaid observations are of the considered view that the assessee had rightly included the aforementioned company viz. ICRA Management Consulting Services Ltd. as a comparable in the case of the assessee and the same had wrongly been excluded by the TPO/DRP. In terms of our observations recorded while disposing off the appeal of the assessee for A.Y 2012-13 i.e in ITA No. 2366/Mum/2017, we herein direct the A.O/TPO to include ICRA Management Consulting Services Ltd. in the final list of comparables for benchmarking the ALP of the international transactions of the assessee during the year under consideration viz. A.Y 2013-14.”

17. As regards the issue of exclusion of Eclerx Ltd. the ITAT in its order dated 27.2.2019 for A.Y. 2013-14 has held that the said company was not comparable to assessee.

18. The facts in the present case are not disputed to be different. Accordingly in the background of aforesaid discussion and precedent we hold that the authorities were not correct in re characterisation of the assessee as KPO/high-end ITeS service provider instead of provider of nonbinding investment advisory services and related support services. We also hold that following comparables should be included for the analysis.

- Almondz Global Securities Ltd.
- Crisil Risk & Infrastructure Solutions Ltd.
- ICRA Management Consulting Services Ltd.

19. We also hold that Eclerx Services Ltd. comparable should be excluded. The assessing officer/transfer pricing officer is directed to make the necessary competition in light of directions as above.

20. In the result this appeal by the assessee is partly allowed.

21. In the Stay Application No. 28/mum/2020 the assessee is seeking stay of demand arising in the ITA appeal adjudicated by us above. Since the issue has been partly decided in favour of the assessee and matter remitted back to the Assessing Officer for fresh computation the request of stay of demand becomes infructuous as the demand arising no longer survive.

122. In the result Stay Application is treated as infructuous as assessee's appeal has been partly allowed.

Order pronounced under ITAT rules 34(4) on 04.09.2020 by placing result on notice board.

Sd/-
(AMRJIT SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 04/09/2020

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

PS