

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: '1-2' NEW DELHI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND
DR. BRR KUMAR, ACCOUNTANT MEMBER**

ITA No.458/Del/2016
Assessment Year: 2011-12

M/s.ChrysCapital Investment Advisors (India) Private Ltd. Suite 101, The Oberoi, Dr. Hussain Marg, New Delhi-1100 01	Vs.	ACIT, Circle 6(1), New Delhi.
PAN :AABCC4609H		
(Appellant)		(Respondent)

Appellant by	S/Shri Mayank Aggarwal and Vikas Shrivastava, Adv.
Respondent by	Shri Umesh Takyar, Sr. DR

Date of hearing	15.02.2022
Date of pronouncement	19.04.2022

ORDER

PER SAKTIJIT DEY, JUDICIAL MEMBER:

The assessee has filed the captioned appeal assailing the final assessment order dated 30.11.2015 passed under Section 143(3) read with section 144C(13) of the Income-Tax Act, 1961 for the assessment year 2011-12, in pursuance to directions of learned Dispute Resolution Panel (DRP).

2. At the outset, it needs to be mentioned, this appeal was earlier disposed of vide order dated 17.05.2019. Subsequently, while considering the miscellaneous application filed by the assessee registered as M.A. No.595/Del/2019, the Tribunal having found that there are rectifiable mistakes in the appeal order passed on 21.03.2020, recalled the appeal order for the limited purpose of deciding ground nos. 5, 6, 7, 9 and 10. This is how the appeal came up for hearing before this Bench. The issue raised in ground nos. 5, 6, 7, 9 and 10 relates to the issue of applicability of certain filters while selecting comparables and risk adjustment. Briefly put the facts are, assessee, a resident company, is engaged in the business of providing investment advisory services to its overseas associated enterprises (AE). For providing such services to the AE, the assessee has earned revenue of Rs.48,49,75,777 during the year. For benchmarking the aforesaid transaction with the AE, the assessee had selected transactional net margin method (TNMM) as the most appropriate method. After conducting a search in databases, the assessee selected four companies as comparable. By applying profit level indicator (PLI) of operating profit to

operating cost (OP/OC), the mean margin of the comparables was worked out at 6.28%. The margin shown by the assessee at 25.84% being much higher to the average margin of the comparables, the assessee claimed the transaction with the AE to be at arm's length. The Transfer Pricing Officer (TPO), however, did not accept the benchmarking of the assessee, though, he accepted TNMM as the most appropriate method with OP/OC as PLI, however, he was of the view that there are various deficiencies in the transfer pricing analysis done by the assessee. According to TPO, the assessee did not apply proper qualitative and quantitative filters resulting in exclusion of various functionally similar comparables and inclusion of some companies which are not comparable. Accordingly, he rejected the benchmarking of the assessee. Having done so, he proceeded to select fresh comparables independently. In the process, he shortlisted 13 companies as comparables with average margin of 43.01%. Of course, out of the four comparables selected by the assessee, the TPO retained three comparables while rejecting One. While computing the margin, the TPO did not provide for any adjustment on account of risk undertaken by the comparables vis-à-vis the assessee as well as working capital. Thus, based on the average margin of the selected comparables, the TPO proposed upward adjustment to the ALP of provision of investment advisory services to the AE. The adjustment proposed by the TPO was incorporated in the draft assessment

order. Against the draft assessment order so passed, assessee raised objections before learned DRP. However, the assessee did not get the desired relief.

3. Before us, learned counsel for the assessee submitted, assessee, basically, is aggrieved with three comparables selected by the TPO, namely, Motilal Oswal Investment Advisors Pvt. Ltd., IM + Capital (formerly known as Brescon Corporate Advisors) and Keynote Corporate Services Ltd.. In so far as selection of Motilal Investment Advisors Pvt. Ltd. as a comparables, learned counsel submitted that this company is functionally different from the assessee as it is engaged in merchant banking and is executing various deals. He submitted, this company has four distinctive line of activities viz. equity capital market, merger and acquisition, provide equity indication and structure debts. Whereas, the company does not maintain segmental accounts and whole of its income is reported under the head “advisory services”. Thus, he submitted, the company cannot be treated as comparable to the assessee. Without prejudice, he submitted, the company also fails related party transaction (RPT) filter. He submitted, RPT works out to 42.14%, if expenses are

compared with expenses only. Thus, he submitted, this company cannot be treated as comparable.

4. Per contra, learned Departmental Representative submitted, after detailed analysis by the TPO, this company having been found to be functionally similar to the assessee was included as a comparable. He submitted, though, in assessee's own case in assessment year 2009-10, the Tribunal had included this company as a comparable, however, after the matter was remanded back by the Hon'ble High Court while deciding the appeal of Revenue, the Tribunal held this company to be a comparable to the assessee. In this context, he drew our attention to the relevant observations of the Tribunal while disposing of the appeal for assessment year 2009-10 vide order dated 10.12.2020. As regards the contention of the assessee that the company does not pass the RPT filter, learned Departmental Representative submitted, since plea is unacceptable as similar contention of the assessee was rejected by the Tribunal in assessment year 2009-10. Thus, he submitted, this company cannot be rejected as a comparable.

5. In rejoinder, learned counsel for the assessee submitted, for applying RPT filter, sale to sale and expenses to expenses ratio has to

be seen in case of the assessee as well as comparables. He submitted, the assessee operates in a completely risk free environment as the transactions are with the AE.

6. We have considered rival submissions and perused the material available on record. The assessee has sought exclusion of Motilal Oswal Investment Advisor Pvt. Ltd. primarily on the ground that it is functionally different from the assessee and secondly it does not qualify RPT filter. Notably, while examining the functional similarity of the aforesaid comparable in assessee's own case in assessment year 2009-10, the Tribunal had excluded this company as a comparable. However, while deciding Revenue's appeal in ITA No. 286/2018, the Hon'ble High Court, in order dated 12.03.2018, remanded the issue relating to comparability of this company to the Tribunal for fresh consideration. The reasons being, the Hon'ble High Court was of the opinion that the formula of percentage of RPT being equal to expenses paid to related parties divided by total expenditure multiplied by 100 cannot be applied only to one particular entity without applying the same procedure in respect of all other comparables, as, it may lead to a distorted picture. While deciding the issue post remand by the Hon'ble

jurisdictional High Court, the Tribunal in order dated 10.12.2020 has held as under:

“10. With respect to the Motilal Oswal Investment Advisors Private Ltd., the contention of the assessee has been reproduced at page number 38 of the order of the learned transfer pricing officer wherein it has been stated that it has entered into substantial related party transaction and the details of such expenses were provided. It was noted that out of total expenses of the comparable of Rs.24,73,83,621 out of which the expenditure of Rs.90,886,291 are paid to the related parties and therefore 36.74% of the total expenditure have been incurred /paid to the related parties. Therefore, the contention of the assessee is that that this comparable does not cross the 25% threshold of RPT filters. The learned transfer pricing officer has rejected the above contention stating that related party transaction has been measured with respect to sales transaction primarily because the sale transactions are clearly identifiable. He further noted that according to the uniform practice and in case of all comparable companies selected either by the assessee or by the TPO the RTP has been calculated in relation to the sales turnover. Therefore he rejected the contentions of the assessee. This was not challenged before the learned CIT-A. The learned and CIT-A in para number 7.5 has stated that after excluding Religare and Keynote from the final set of comparables, the average margin of the comparable comes to 21.82% whereas the margin of the appellant is 24.79%. Therefore, there is no requirement of any adjustment. In view of this even otherwise the exclusion or inclusion of Motilal Oswald Ltd. was merely an academic exercise. Even otherwise we are not of the view that related party filter should be applied only with respect to the total expenditure. Further the 25% since filter with respect to sales to related party, this comparable has crossed that filter. Even before us there was no functional dissimilarity shown in the comparable vis-à-vis the functions of the assessee. In view of this we are of the view that Motilal Oswald

investment and advisory services Ltd. has crossed the RPT filter and is functionally similar therefore same cannot be excluded.”

7. As could be seen from the foresaid observations of the co-ordinate Bench, assessee's contention that the RPT filter should be applied only with respect to the total expenditure did not find favour with the Bench. Thus, the claim of the assessee that this company was functionally different and also failed the RPT filter was rejected by the Bench. Basic facts relating to the comparability of this company, being more or less identical in the impugned assessment year, respectfully following the aforesaid decision of the co-ordinate Bench in assessee's own case, we hold that Motilal Oswal Advisors Pvt. Ltd. being comparable to the assessee cannot be excluded.

8. The next comparable under challenge is IM+Capitals Ltd., formerly known as Brescon Corporate Advisors. Objecting to selection of this company, learned counsel for the assessee submitted, the company has a completely different functional profile than the assessee as it is engaged in debt syndication/debt resolution and financial restructuring activity which are completely different from the

activities performed by the assessee. He submitted, in assessee's own case in assessment years 2006-07, 2007-08 and 2009-10, the company has been rejected as a comparable by the Tribunal. Thus, he submitted, this company cannot be considered as a comparable. Learned Departmental Representative strongly relied upon the observations of the learned TPO and DRP.

9. Having considered rival submissions, we find that this company has been consistently rejected as a comparable in assessee's own case not only by the co-ordinate Bench, but even by the Hon'ble High Court while deciding the appeal for assessment years 2006-07, 2007-08 and 2009-10. Factual aspects of the issue in the impugned assessment year being more or less identical to assessment years 2006-07, 2008-09 and 2009-10, respectfully following the decision of co-ordinate Bench and Hon'ble jurisdictional High Court, we direct the Assessing Officer to exclude this company from the list of comparables.

10. As regards M/s Keynote Corporate Services Ltd., learned counsel for the assessee submitted that this company is a category one merchant banker involved in activities like lead managing IPO, rights

issue and buyback offer. Further, he submitted, the operating margin of this company is extremely volatile and cannot be relied upon. He submitted, considering all these aspects, the Tribunal in assessee's own case in assessment years 2007-08 and 2009-10 has rejected this company as a comparable. Learned Departmental Representative strongly relied upon the observations of the Assessing Officer and learned DRP.

11. We have considered rival submissions and perused the material available on record. As could be seen from material placed before us, while examining the comparability of this company in assessee's own case in assessment year 2007-08, the Tribunal looking at the abnormally volatile nature of profit margin shown by the company has rejected it as a comparable. In assessment year 2009-10 also, post remand by the Hon'ble jurisdictional High Court, the Tribunal, in order dated 10.12.2020, has upheld the rejection of this company as a comparable with the following observations:

“9. We first come to the Keynote corporate services Ltd, this comparable has been selected by the learned transfer pricing officer. The assessee has raised several objections in para

number 8.1 at page number 28 of the transfer pricing officer's order. The assessee has raised the functional dissimilarity issue stating that the comparable company is engaged in the merchant banking business and has also acted as a lead manager in various initial public offerings and right issues. This functional dissimilarity has been dealt with in the last paragraph at page number 37 of the order of the learned transfer pricing officer wherein it has been stated that this entity has been used as a comparable by the assessee in previous year and in this year too it qualifies as a comparable based on the assessee's own search process. He held that comparable company is also functioning in the domain of financial consultancy and therefore the same will be used for the purpose of benchmarking the transaction of the assessee. The learned CIT-A has given one of the reasons for the exclusion of the above comparable that the dispute resolution panel in the assessee's own case for assessment year 2006-07 has held that this comparable is not a robust comparable. The learned CIT-A has also held that comparable company is engaged in rendering a number of diversified services like managing and advising on public offerings such as IPOs, the GDR etc. we are of the view that a merchant banker has a different role and responsibility as provided in the SEBI rules and regulation whereas the functions performed by the assessee are not comparable with a merchant banker who is engaged in managing the initial public offerings of financial instruments such as equity and GDRs. However, we are not of the view that if a comparable has been excluded by the learned dispute resolution panel or any adjudicating authority in one financial, same is always excludible, as each year is different and only the functional comparability of the assessee vis-à-vis comparable is required to be seen each year. Further we are also not swayed by the number of judicial precedents where particular comparable has been excluded by comparing the functionality of that assessee because each assessee has a different function and the comparable selected based on filters i.e. Accept/Reject Matrix should be considered for the comparability analysis. However, in the present case we find that Keynote corporate consultant y

private limited is functionally different from the assessee for this year. Therefore, we direct the learned transfer pricing officer/assessing officer to exclude the above comparable and accordingly we uphold the order of the learned CIT-A directing its exclusion.”

12. Facts being identical, respectfully following the aforesaid decision of the co-ordinate Bench, we direct the Assessing Officer to exclude this company from the list of comparables.

13. The only other surviving issue arising from the grounds left for consideration by this Bench is, with regard to assessee's claim of providing working capital and risk adjustment. Learned counsel for the assessee submitted, the assessee performs in risk free environment and has been guaranteed a mark-up of 25% over the cost. He submitted, the mark up is not dependent upon any investment or subsequent exit. Whereas, he submitted, the comparables have diversified area of additional functions, such as, marketing etc. and have more risk exposure. Therefore, a risk adjustment has to be allowed while computing the margin. In this context, learned counsel for the assessee drew our attention to the observations of the Hon'ble

jurisdictional High Court while deciding assessee's appeal in assessment year 2008-09:

“41. This Court, on a perusal of the orders of the lower authorities and the assessee's submissions before them which have been placed on record in this appeal, finds that securities were based only on their exceptionally high profit margins for the assessment year in question and not on the grounds of functional dissimilarities. Indeed, the assessee did not contend the later before the lower authorities. The assessee has sought to highlight differences in the risk profiles of the assessee and Brescon in the present appeal. However, this court holds that such a contention cannot be raised for the first time at this stage. Therefore, Brescon and Khandwala Securities are held to be functionally similar, and the matter is remitted to the DRP for the purposes of examination under Rule 10B(3) of the Rules. In the event that the material differences arising out of the extremely high profits cannot be eliminated as per Rule 10B(3), these two entities will have to be discarded as comparables.”

14. Learned Departmental Representative submitted, risk adjustment cannot be provided to the assessee just for the asking. He submitted, the burden is on the assessee to point out the difference in the risk profile of the comparables. He submitted, unless the assessee brings specific facts regarding the risk profile of the assessee vis-à-vis the comparables, the TPO is not duty bound to provide the adjustment. He submitted, in the present case, the assessee has not pointed out any

difference in risk profile qua the comparables with empirical evidence. In this context, he drew our attention to the TP study report of the assessee. Further, drawing our attention to certain observations of the Hon'ble High Court, while deciding the appeal for assessment year 2008-09, he submitted, Hon'ble High Court has also observed that the assessee has to furnish the relevant information to stake its claim of risk adjustment.

15. We have considered rival submissions and perused the material available on record. Though, we agree with the assessee that considering the nature of risk undertaken by the assessee as well as the comparables, adjustment in specific cases has to be made to the margin of the comparables on account of risk profile, however, burden is entirely on the assessee to furnish required details regarding the risk profile of the comparables to ascertain the nature of risk being undertaken by the assessee and the comparables. Since, the required details regarding the risk profile of the comparables are not properly gone into either due to lack of details furnished by the assessee or otherwise, we are inclined to restore this issue to the Assessing Officer for considering assessee's claim of risk adjustment after examining the

material on record and in accordance with settled legal principles. Needless to mention, the Assessing Officer must provide reasonable opportunity of being heard to the assessee.

16. In the result, appeal is partly allowed.

Order pronounced in the open court on 19th April, 2022.

**Sd/-
(DR. BRR KUMAR)
ACCOUNTANT MEMBER**

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

Dated: 19th April, 2022.

Mohan Lal

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi

Sl. No.	Particulars	Date
1.	Date of dictation (Order drafted through Dragon software):	06.04.2022
2.	Date on which the draft of order is placed before the Dictating Member:	06.04.2022
3.	Date on which the draft of order is placed before the other Member:	07.04.2022
4.	Date on which the approved draft of order comes to the Sr. PS/PS:	19.04.2022
5.	Date of which the fair order is placed before the Dictating Member for pronouncement:	
6.	Date on which the final order received after having been singed/pronounced by the Members:	19.04.2022
7.	Date on which the final order is uploaded on the website of ITAT:	
8.	Date on which the file goes to the Bench Clerk	19.04.2022
9.	Date on which files goes to the Head Clerk:	
10.	Date on which file goes to the Assistant Registrar for signature on the order:	
11.	Date of dispatch of order:	