

IN THE INCOME TAX APPELLATE TRIBUNAL

"K" BENCH, MUMBAI

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.424/Mum./2018

(Assessment Year : 2011-12)

Altico Capital India Pvt. Ltd.
(Formerly Clearwater Capital
Partners (I) Pvt. Ltd.)
21, 2nd Floor, Maker Maxity
Bandra Kurla Complex
Bandra (East), Mumbai 400 051
PAN – AACCC3064F

..... Appellant

v/s

Asstt. Commissioner of Income Tax
Circle-14(1)(2), Mumbai

.....Respondent

ITA No.11/Mum./2018

(Assessment Year : 2011-12)

Jt. Commissioner of Income Tax (OSD)
Circle-14(1)(1), Mumbai

..... Appellant

v/s

Clearwater Capital Partners (I) Pvt. Ltd.
(Now known as Altico Capital India Pvt. Ltd.)
21, 2nd Floor, Maker Maxity
Bandra Kurla Complex
Bandra (East), Mumbai 400 051
PAN – AACCC3064F

..... Respondent

Assessee by : Shri Madhur Agrawal a/w
Shri Fenil Bhatt

Revenue by : Shri Rajesh Kumar Yadav, Sr. AR

Date of Hearing – 28.04.2022

Date of Order – 04/07/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present cross appeals have been filed by either parties challenging the impugned order dated 25/10/2017, passed under section 250 of the Income Tax Act, 1961 ("the Act") by learned Commissioner of Income Tax (Appeals)-55, Mumbai, ("learned CIT(A)"), for the assessment year 2011-12.

2. In its appeal, the Revenue has raised following grounds:

"Whether on the facts of the case and in law the cita erred in holding that M/s.ICRA Management Consulting Services Ltd, a become bench the of the ass and has in directing to include this comparable company to benchmark the transaction of the ass and has erred in directing to include this comparable in the set of the comparables, without appreciating the fact that ICRA Management Consulting Services Ltd., is performing diversified functions including the M&A which is classified as merchant bankers which is different from investment advisors and no segmental for investment advisory are available.

Whether on the Sacs of the care and in tow the learned CITA) erred in holding that M/s. Future Capital Investment Advisory Services as a comparable company benchmark the transaction of assessee and has directing to include this comparable in the set of the comparables without appreciating the fact that M/s. Future Capital Investment Advisory Services has realigned the business and has made agreements with Everstone Investment Advisors Limited to do so and has not reported any operating income in the year 2010-11 relevant to A.Y. 2011-12.

3. Whether on the facts of the case and in law the learned CIT(A) erred in Toting that M/s. Goldman Sachs India Securities Pvt. Ltd. und M/s. AGM India) Advisors Ltd. as comparable companies to benchmark the transaction of the assessee and has erred in directing to include this comparable in the set of the comparables, without appreciating the fact that these two companies are captive providers of advisory services and fails RPT filter. The CITIA) also erred in appreciating that the Mumbai ITAT, in the c of Technimont 138 TTD 23 (Mum.), has held that comparison has to be male with

uncontrolled transaction and these two comparables are having 100% controlled transactions.

4. Whether on the facts of the case and in law the learned CITA) erred in holding that M/s. Motilal Oswal Investment Advisors Ltd is not a comparable company to benchmark the transaction of the assessee and has erred directing to exclude this comparable from the set of the comparables, without appreciating the fact that the assessee is also engaged in business of acquiring non-performing loans and other assets and providing long term finance to corporate borrowers thus performing functions which are akin to the functions performed by Motilal Oswal Investment Advisors Ltd.

5. Whether on the facts of the case and in law the learned CITIA) erred in holding that M/s. Ladderup Corporate Advisors Pvt. Ltd is not a comparable company to benchmark the transaction of the assessee and has erred in directing to exclude this comparable from the set of the comparables, without appreciating the fact that the assessee is also engaged in business of acquiring non-performing loans and other assets and providing long term finance to corporate borrowers thus performing functions which are akin to the functions performed by Ladderup Corporate Services Private Limited.

6. The appellant prays that the order of CIT (A) on the above ground be set-aside and that of the assessing officer be restored.

7. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

3. While, assessee, in its appeal, has raised following grounds:

"Ground 1:

1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the upward adjustment made by the Assistant Commissioner of Income-tax 14(1)(2), Mumbai (hereinafter referred to as 'learned AO')/ Deputy Commissioner of Income-tax (Transfer Pricing)-1(2)(1), Mumbai (hereinafter referred to as 'learned TPO' with respect to the international transaction pertaining to payment of interest on Fully Convertible Debentures (FCDs):

2. In upholding the transfer pricing adjustment with respect to the international transaction pertaining to payment of interest on FCDs, the learned CIT(A) has erred on the following grounds.

2.1 In rejecting the transfer pricing documentation maintained by the Appellant without considering the provisions of section 92C(3) of the Act;

2.2 In not accepting the benchmarking analysis and arm's length price (ALP) of the aforementioned international transaction as conducted/determined by the Appellant in accordance with the provisions of the Act read with the Income-tax Rules, 1962.

2.3 In rejecting the average lending rates for advances (other than export credit) offered by commercial bank in India at which at least 60 percent of the business is conducted (as published on the website of the Reserve bank of India) adopted by the Appellant and re computing the arm's length rate by applying the average of 6 month USD LIBOR + 800 basis points, thereby upholding an upward adjustment of INR 4,57,86,528

2.4 In ignoring the principle of consistency since during the previous assessment years the learned AO/ TPO had considered the average lending rates offered by Indian commercial banks as an appropriate benchmark and there has been no change in facie of the Appellant in the Financial Year 2010-11 as compared to the previous assess years;

2.5 Without prejudice to the grounds above, in not providing the basis for arriving at 800 basis points while choosing the average 6 month USD LIBOR to determine the ALP of the payment of interest on FCDs.

Ground 2

3. On the facts and circumstances of the case, the learned CIT(A) has erred in not correctly appreciating the relevant facts of the case and submissions filed by the Appellant for the year under consideration with respect to the international transaction of non-binding investment advisory services rendered by the Appellant to its associated enterprises (AEs);

4. Without prejudice of the above ground, the learned CIT(A) based on the facts and circumstances of the case, has erred:

4.1 In not adjudicating and not considering Appellant's submissions and contentions on inclusion of certain companies considered as comparable in its transfer pricing study Le IDC (India) Limited, Informed Technologies (India) Limited and Integrated Capital Services Limited which are functionally comparable to the non-binding investment advisory services rendered by the Appellant;

4.2 In adjudicating on a comparable Future Capital Investment Advisors Limited, which was neither a comparable in Appellant's set nor in learned TPO's set;

4.3 In rejecting the use of contemporaneous and multiple year data available for computing the ALP as on the date of filing of return of income and relying on the single year data (.e. the year ended 31 March 2011) for the purpose of determining the ALP;

Each of the grounds of appeal referred above is separate, and may kindly be considered independent of each other.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the grounds of appeal, at any time before or at, the time of hearing of the appeal, so as to enable the Hon'ble Income Tax Appellate Tribunal to decide this appeal according to law."

4. Both assessee and Revenue are, inter-alia, aggrieved against the findings of the learned CIT(A) in respect of selection of comparables for benchmarking the international transaction pertaining to 'Provision of Investment Advisory Services'. Therefore, grounds pertaining to selection of comparables in appeals by both the parties are considered together.

5. In its appeal, Revenue has raised grounds challenging inclusion of M/s ICRA Management Consulting Services Ltd., M/s Future Capital Investment Advisory Services and M/s Goldman Sachs India Securities Private Limited, and exclusion of M/s Motilal Oswal Investment Advisers Ltd and M/s Ladderup Corporate Advisers Private Limited. While, assessee in its appeal, inter-alia, has raised grounds challenging exclusion of IDC (India) Ltd, Informed Technologies (India) Ltd and Integrated Capital Services Ltd.

6. The brief facts of the case, as emanating from record, are: the assessee is engaged in business of acquiring non-performing loans, other assets and providing medium to long term finance to corporate borrowers. For the year under consideration, the assessee e-filed its return of income on 29/09/2012 declaring total income of Rs.

16,02,09,260. The assessee is a subsidiary of Clearwater Capital Partners (CCP) Cyprus, and was incorporated as Private Limited Company under the provisions of the Companies Act, 1956. During the year under consideration, the assessee entered into following international transactions with its associated enterprises:

<i>Sr. No.</i>	<i>Transaction</i>	<i>Amount (Rs.)</i>	<i>Method</i>
1.	<i>Provision of Investment Advisory Services</i>	<i>64,947,189</i>	<i>TNMM</i>
2.	<i>Payment of interest on fully convertible debentures (FCD)</i>	<i>156,982,378</i>	<i>CUP</i>
3.	<i>Recovery of expenses</i>	<i>1,980,267</i>	<i>NA</i>

7. In respect of international transaction pertaining to 'Provision of Investment Advisory Services', assessee acts as a sub- advisor and provides various investments advisory and appraisal services, which include sourcing of deals, analysis of industry, sponsor checks, transaction structuring, financial modelling, preparation of draft term sheet, etc., to its associated enterprise CCP, Singapore. For benchmarking this transaction, the assessee used Transactional Net Margin Method ("TNMM") as the most appropriate method with Profit Level Indicator ("PLI") of Operating Profit to Operating Cost ("OP/OC"). By considering itself as the tested party, assessee identified 7 comparable companies with three-year average weighted margin of 12.59%. As the assessee computed its own PLI at 20%, accordingly, it claimed that the international transaction of 'Provision of Investment Advisory Services' is

at arm's length price ("ALP"). In its transfer pricing study, following functions have been stated to have been performed by the assessee in relation to the investment advisory services:

- a) *Advice on investment opportunities in Indian stock market;*
- b) *Advice on the merits, timing of any acquisition or disposal of investments held are proposed to be acquired by the overseas funds;*
- c) *Assistance in monitoring such investments including the analysis of the performance of the Indian companies and to advise on divestments being considered;*
- d) *Advice in relation to the economic and political developments in India having bearing on investment opportunities; and*
- e) *To keep under surveillance and review the portfolio from time to time and as circumstances may require, recommend changes in such a portfolio.*

In the transfer pricing study, it is further submitted that assessee makes the investment recommendations to its associated enterprises, whereas associated enterprises retains the right to make the final investment recommendations.

8. The Assessing Officer ("AO") made reference to Transfer Pricing Officer ("TPO") for determination of ALP of the aforesaid international transactions. During the transfer pricing assessment proceedings, in response to the notice, assessee provided updated margins of comparable companies using the data for the relevant assessment year. As a result, ultimately only following 4 comparable companies, having arithmetic mean margin of 11.13%, were considered by the assessee for

benchmarking the international transaction pertaining to 'Provision of Investment Advisory Services':

- 1) *ICRA Management Consulting Services Ltd.*
- 2) *IDC (India) Ltd.*
- 3) *Informed Technologies India Ltd.*
- 4) *Integrated Capital Services Ltd.*

As assessee's profit margin was higher than the comparables' margin, the international transaction was claimed to be at ALP. The TPO vide order dated 27/01/2015 passed under section 92CA(3) of the Act, arrived at a set of 2 comparables (viz. Motilal Oswal Investment Advisory Private Limited and Ladderup Corporate Advisory Private Limited) after excluding all the comparables selected by the assessee, for benchmarking the international transaction pertaining to 'Provision of Investment Advisory Services'. The average OP/OC of comparables selected by TPO was computed at 67.36%. By applying the arm's length margin, the TPO, inter-alia, proposed an upward adjustment of Rs. 2,56,32,491 in respect of international transaction of 'Provision of Investment Advisory Services'. In conformity, the Assessing Officer, inter-alia, passed the order under section 143(3) r.w.s. 144C(3) of the Act. In appeal, learned CIT(A) vide impugned order dated 25/10/2017 partially allowed the appeal filed by the assessee. Being aggrieved, both assessee and Revenue are in appeal before us.

9. During the course of hearing, at the outset, Shri Madhur Agrawal, learned counsel appearing for the assessee, accepted Revenue's contention in respect of Future Capital Investment Advisory Services and submitted that this comparable should be excluded and said company was not even considered as comparable by the assessee due to non-availability of single year data during transfer pricing assessment proceedings. Learned counsel submitted that assessee in its appeal in ground No. 4.2 has also sought exclusion of this comparable. Accordingly, ground No. 2 raised in Revenue's appeal as well as ground No. 4.2 raised in assessee's appeal are allowed and the TPO/AO is directed to exclude Future Capital Investment Advisory Services for purpose of benchmarking the international transaction. Further, learned counsel also agreed to the Revenue's prayer for exclusion of Goldman Sachs India Securities Private Limited, and therefore ground No. 3 raised in Revenue's appeal is allowed. The TPO/AO is directed to exclude Goldman Sachs India Securities Private Limited for purpose of benchmarking the international transaction.

10. Further, learned counsel submitted that if Informed Technologies (India) Ltd and ICRA Management Consulting Services Ltd are directed to be included, while Motilal Oswal Investment Advisers Pvt. Ltd and Ladderup Corporate Advisers Private Limited are directed to be excluded, then entire transfer pricing adjustment made in respect of international transaction of 'Provision of Investment Advisory Services' will be deleted. In view of the above, as challenge of both the parties is now confined to

these 4 comparables, therefore, we have confined our findings only in respect of these comparables in present appeals by both the parties. Thus, in view of the above, the other issues raised in assessee's appeal are treated as not pressed and are kept open for adjudication, if they arise in assessee's case in future.

i) ICRA Management Consulting Services Ltd

11. The first comparable under dispute is ICRA Management Consulting Services Ltd for the purpose of benchmarking of international transaction pertaining to 'Provision of Investment Advisory Services'. ICRA Management Consulting Services Ltd was selected as comparable by the assessee in its transfer pricing study report on the basis that the said company offers consultancy services in area of strategy, risk management, operations improvement, regulatory economics and transaction advisory. During the proceedings before the TPO, assessee retained this comparable due to availability of single year data for benchmarking the international transaction. Vide order passed under section 92CA (3) of the Act, TPO, by referring to the data received under section 133 (6) of the Act, held that ICRA Management Consulting Services Ltd is not an appropriate comparable as the services being rendered by it are management consultancy services, which are no way related to the services rendered by the assessee. The learned CIT(A) vide impugned order dated 25/10/2017, inter-alia, directed inclusion of ICRA Management Consulting Services Ltd for the purpose of benchmarking

international transaction. Being aggrieved, Revenue is in appeal before us.

12. During the course of hearing, Shri Rajesh Kumar Yadav, the learned Departmental Representative ("learned DR") submitted that the learned CIT(A) without any reasoning accepted and rejected the comparables for the purpose of benchmarking. The learned DR further submitted that the learned CIT(A) completely ignored the findings by TPO and failed to show as to how they have gone wrong. It was further submitted that the learned CIT(A) had made general observations and there is no discussion on facts of each comparable and thus the findings in the impugned order lacks merits and factual basis.

13. On the other hand, learned counsel, appearing for the assessee, submitted that the assessee is providing non-binding advisory services to its associated enterprises and it was for its associated enterprises to make the final decision in respect of the investments. Learned counsel further submitted that ICRA Management Consulting Services Ltd was accepted as a comparable in assessee's own case in earlier and subsequent assessment years.

14. We have considered the rival submissions and perused the material available on record. In the present case, the functional profile of the assessee in respect of international transaction pertaining to 'Provision of Investment Advisory Services' is not in dispute. TPO/AO rejected the impugned comparables selected by the assessee treating them not to be

functionally comparable to the assessee. We find that ICRA Management Consulting Services Ltd was selected as a comparable by the assessee in the preceding as well as subsequent assessment years. While, in assessment years 2007-08, 2008-09, 2012-13 and 2013-14, ICRA Management Consulting Services Ltd was selected as a comparable by the assessee for benchmarking its international transaction pertaining to 'Provision of Investment Advisory Services' and the said transaction was accepted by the TPO and no adjustment was made. We find that even in assessment year 2010-11, ICRA Management Consulting Services Ltd was selected as a comparable by the assessee for benchmarking, however, the TPO rejected the said comparable while making the adjustment in respect of the international transaction pertaining to 'Provision of Investment Advisory Services'. In appeal, learned CIT(A) granted relief to the assessee and directed inclusion of ICRA Management Consulting Services Ltd. No material has been brought on record to show that the Revenue has not accepted the findings of learned CIT(A) and has filed appeal against the said order granting relief in respect of the impugned comparable. Further, in assessment year 2009-10, ICRA Management Consulting Services Ltd was again in dispute and while adjudicating assessee's appeal in *Clearwater Capital Partners India Private Limited vs ACIT*, in ITA No. 4851/Mumbai/2015, vide order dated 13/03/2020, the coordinate bench of Tribunal observed as under:

"8. We have considered rival submissions in the light of the decisions relied upon and perused the material on record. It is observed, the comparability of this company with a non binding investment advisory

service provider has come up for consideration not only before the Tribunal, but even before the Hon'ble Jurisdictional High Court. After analyzing the function, asset and risk (FAR) of this company, the Tribunal found that the service provided by this company is akin to the service provided by an investment advisory service provider. Therefore, this company has been found to be a good comparable. The decisions relied upon by the learned Counsel for the assessee, as referred to above, clearly support this view. In fact, in assessee's own case in Assessment Year 2010-11, though this company was rejected by the TPO, however, learned Commissioner (Appeals) having found this company to be functionally similar, accepted it as a comparable. This is evident from the order passed by the Tribunal in ITA no.5142/Mum./2017, dated 10th January 2010. Therefore, respectfully following the observations made in the judicial precedents referred to above, we hold that this company being a good comparable has to be retained."

15. In the present case, the TPO/AO rejected the impugned comparable merely on the basis of functional dissimilarity. However, as stated above the said comparable was not only selected by the assessee, but, the said comparable was also retained by the TPO/AO for benchmarking the international transaction in assessment years 2007-08, 2008-09, 2012-13 and 2013-14. Further, in assessment year 2010-11, learned CIT(A)'s order directing inclusion of ICRA Management Consulting Services Ltd has not been challenged by the Revenue. Similarly, in assessment year 2009-10, the said company was held to be comparable to the assessee. In the present case, neither there is any allegation by the Revenue that there is any change in functional profile of ICRA Management Consulting Services Ltd in the relevant assessment year nor any material to that effect has been brought on record.

16. Before concluding, it is relevant to note that Hon'ble jurisdictional High Court in Pr.CIT vs AGM India Advisors Private Limited, in ITA No. 1377 of 2017, vide judgment dated 11/03/2020, for the assessment year

2011-12, upheld the inclusion of ICRA Management Consulting Services Ltd as a comparable to a taxpayer, who was engaged in business of providing non-binding investment advisory services.

17. In view of the above, respectfully following the judicial precedent in assessee's own case as well as the decision of Hon'ble jurisdictional High Court cited supra, the TPO/AO is directed to include ICRA Management Consulting Services Ltd as comparable for benchmarking international transaction of 'Provision of Investment Advisory Services'. As a result, ground No. 1 raised in Revenue's appeal is dismissed.

ii) Informed Technologies (India) Ltd

18. The next comparable under dispute is Informed Technologies (India) Ltd. The said company was selected as comparable by the assessee in its transfer pricing study report on the basis that the company collect and analyse the data on financial fundamentals, corporate governance, director/executive compensation and capital market. During the proceedings before the TPO, assessee retained this comparable due to availability of single year data for benchmarking the international transaction. Vide order passed under section 92CA(3) of the Act, TPO rejected this company as a comparable by holding that the company calls itself as "Knowledge Process Outsourcing" company and is also engaged in IT enabled services and therefore, is not functionally comparable to the assessee. The learned CIT(A), vide impugned order dated 25/10/2017,

inter-alia, upheld the conclusion reached by the TPO. Being aggrieved, assessee is in appeal before us.

19. During the course of hearing, learned counsel submitted that this comparable was directed to be included by coordinate bench of the Tribunal in assessee's own case. On the other hand, the learned DR vehemently relied upon the orders passed by the lower authorities.

20. We have considered the rival submission and perused the material available on record. We find that the coordinate bench of Tribunal in assessee's own case in Clearwater Capital Partners India Private Limited vs ACIT (supra), while directing inclusion of Informed Technologies (India) Ltd., observed as under:

"11. We have considered rival submissions and perused the material on record. From the material placed before us, it appears that the services provided by this company are in the nature of advisory services. The assessee is also providing advisory services to its AE. That being the case, the company appears to be functionally similar to the assessee. In fact, in various decisions cited before us, some of which relate to the impugned assessment year, the Tribunal as well as the Hon'ble Jurisdictional High Court has held that this company is functionally similar to an investment advisory service provider. Therefore, following the consistent view expressed in relation to this company in the judicial precedents referred to above, we direct the Assessing Officer to include this company as a comparable."

21. We further find that Informed Technologies (India) Ltd. was selected as a comparable by the assessee in the preceding as well as subsequent assessment years. In assessment years 2008-09, 2012-13 and 2013-14, Informed Technologies (India) Ltd. was selected as a comparable by the assessee for benchmarking its international

transaction pertaining to 'Provision of Investment Advisory Services' and the said transaction was accepted by the TPO and no adjustment was made. In the present case, the TPO/AO rejected the impugned comparable merely on the basis of functional dissimilarity. Further, neither there is any allegation by the Revenue that there is any change in functional profile of Informed Technologies (India) Ltd. in the relevant assessment year nor any material to that effect has been brought on record. Thus, respectfully following the judicial precedent in assessee's own case cited supra, the TPO/AO is directed to include Informed Technologies (India) Ltd. as comparable for benchmarking international transaction of 'Provision of Investment Advisory Services'. As a result, ground No. 4.1 raised in assessee's appeal is allowed to this extent.

iii) Motilal Oswal Investment Advisers Pvt. Ltd.

22. The next comparable under dispute is Motilal Oswal Investment Advisers Pvt. Ltd. This company was included as comparable by the TPO vide order passed under section 92CA(3) of the Act on the basis that the strategic and financial advisory services rendered by this company are comparable with the high-quality, investment advisory services rendered by the assessee. In appeal, learned CIT(A) vide impugned order, following decisions of coordinate bench of Tribunal, directed exclusion of this company as the same is not comparable to the assessee. Being aggrieved, Revenue is in appeal before us.

23. During the course of hearing, learned DR by vehemently relying upon the order passed by the TPO submitted that this company is having single reportable operational income segment and it is not in investment banking/Management assets. On the other hand, learned counsel submitted that this company has been held as not comparable to a taxpayer having similar functional profile as the assessee.

24. We have considered the rival submissions and perused the material available on record. In the present case, during the course of transfer pricing assessment proceedings, assessee submitted that Motilal Oswal Investment Advisers Pvt. Ltd. offers comprehensive investment banking solutions and transaction expertise covering private placement of equity, debt and convertible instruments covering international and domestic capital markets, merger and acquisition advisory and restructuring advisory on implementation. On the other hand, assessee is only engaged in rendering non-binding investment advisory services to its associated enterprise and in the process simply identifies potential investment opportunities and therefore is not engaged in investment banking private equity placement. Thus, assessee submitted that Motilal Oswal Investment Advisers Pvt. Ltd. is not comparable to the assessee. The assessee further submitted that Motilal Oswal Investment Advisers Pvt. Ltd. is engaged in merchant banking and other similar activities, which are not functionally comparable to assessee, which is engaged in rendering advisory services. However, TPO rejected the contention of the assessee and considered Motilal Oswal Investment Advisers Pvt. Ltd. as

comparable for benchmarking the international transaction. In appeal, learned CIT(A) following judicial precedents directed exclusion of this company for the purpose of benchmarking international transaction.

25. We find from the annual report for FY 2010-11 of Motilal Oswal Investment Advisers Pvt. Ltd., forming part of the paper book, that the company derives its business income from 4 different business verticals, namely, equity capital markets, mergers and acquisitions, private equity syndications and structured debt. However, from the schedules to profit and loss account, we find that there is only one segment under the head 'income from operations' and there is no break-up of the revenue from various business streams this company is engaged.

26. We further find that the coordinate bench of Tribunal in M/s AGM India Advisors Pvt. Ltd. Vs DCIT, in ITA No. 537 & 199/Mum./2016, vide order dated 04/01/2017, for assessment year 2011-12, while directing exclusion of this company as comparable in case of a taxpayer, which was also engaged in providing non-binding investment advisory services to its associated enterprise, observed as under:

"Considering the above we hold that MOIAPL has to be rejected as a valid comparable from the list of the final comparables on the ground that it was engaged in merchant banking investment banking services that said fact was evident from the annual report and web site extracts of the MOIAPL that despite such dissimilarity the Accounts of the company had not provided break-up of results from the said two activities separately MOIALP has to be excluded Effective ground of appeal raised by the AO is decided against him."

27. The aforesaid decision of coordinate bench of Tribunal came up for consideration before Hon'ble jurisdictional High Court in Pr.CIT vs AGM India Advisors Private Limited (supra), wherein the Hon'ble court dismissed the appeal filed by the Revenue and upheld the conclusion of coordinate bench of Tribunal in aforesaid decision.

28. Since, the aforesaid judicial pronouncements are pertaining to same assessment year as involved in the present cross appeals and functional profile of the assessee in the present case is not in dispute, therefore, respectfully following the aforesaid judicial pronouncements, we upheld the findings of the learned CIT(A) in directing exclusion of Motilal Oswal Investment Advisers Pvt. Ltd., while benchmarking international transaction of 'Provision of Investment Advisory Services'. As a result, ground No. 4 raised in Revenue's appeal is dismissed.

iv) Ladderup Corporate Advisers Pvt. Ltd.

29. The next comparable under dispute is Ladderup Corporate Advisers Pvt. Ltd. This company was included as comparable by the TPO vide order passed under section 92CA(3) of the Act on the basis that the company is engaged in business of financial advisory services and also offers various types of services such as equity investments, business and equity valuations, project and acquisitions financing. Further, the TPO also held that the company has earned income of Rs. 11.18 crores, for the year ended 31/03/2011, from business of financial and management advisory and consultancy fees. In appeal, learned CIT(A) vide impugned order,

following decisions of coordinate bench of Tribunal, directed exclusion of this company as the same is not comparable to the assessee. Being aggrieved, Revenue is in appeal before us.

30. During the course of hearing, learned DR vehemently relied upon the order passed by the TPO. On the other hand, learned counsel submitted that this company has been held as not comparable to a taxpayer having similar functional profile as the assessee.

31. We have considered the rival submissions and perused the material available on record. In the present case, during the course of transfer pricing assessment proceedings, assessee submitted that Ladderup Corporate Advisers Pvt. Ltd. is engaged in high end investment banking activity and debt capital management. The assessee, by referring to the website extract of the company, further submitted that the company is engaged in investment banking and debt capital services and not in investment advisory, as is the case of assessee. The assessee also submitted that the company is engaged in the business of merchant bankers and acts as Syndicate Member i.e. carrying on the activity of underwriters. Accordingly, Ladderup Corporate Advisers Pvt. Ltd. is not functionally comparable to the assessee.

32. We find that while deciding on comparability of Ladderup Corporate Advisers Pvt. Ltd. with a taxpayer, who was engaged in providing non-banking investment advisory services to its associated enterprise,

coordinate bench of the Tribunal in the case of Goldman Sachs Asset Management (India) Pvt. Ltd. Vs ACIT, in ITA No. 502 and 835/Mum/2016, vide order dated 09/09/2020, for assessment year 2011 – 12, observed as under:

"6.4 Finally, we come to the issue of comparability of Ladderup Corporate Advisory Pvt. Ltd. (in short 'LCAPL'). The TPO selected LCAPL on the ground that (i) it is engaged in the business of financial advisory services; it offers various types of services such as equity investments, business and equity valuations, project and acquisition financing, (ii) it has earned revenue of Rs.11.18 crores from the business of financial and management advisory and consulting fees.

The Ld. counsel submits that as per the web portal of the company, it is engaged in rendering investment banking, capital markets, wealth management, project finance and growth stage investment. It is further stated that LCAPL is registered as Category 1 Merchant Banker with the Securities & Exchange Board of India (SEBI) and is engaged in rendering merchant banking services. Further, it is explained that as per the annual report of LCAPL for FY 2010-11, there are no reportable segments. Finally, it is stated that LCAPL is engaged in rendering investment/merchant banking services and therefore, it cannot be considered as comparable to the advisory functions performed by the assessee.

It is the contention of the Ld. DR that as per the annual report of LCAPL, its income during the year is Rs.11.18 crores derived from financial and management consultancy fees; there is no evidence that the income has been received from merchant banking. It is also explained by him that merely being a SEBI registered merchant banker does not mean that the company has earned its income or any part of it from merchant banking. Thus it is stated that LCAPL is a valid comparable.

6.5 Let us discuss the case laws relied on by the Ld. Counsel. In Wells Fargo Real Estate Advisors Pvt. Ltd. (supra), the assessee is engaged in the business of providing non binding advisory services, it adopted TNMM to determine the ALP of the international transactions entered into by it with its AEs. The Tribunal observed that (i) Ladderup Corporate Advisory Pvt. Ltd. is registered as a category 1 merchant banking with SEBI and is engaged in rendering merchant banking services w.e.f. July 2010, which factual position stands duly substantiated from the perusal of the web portal extracts of the aforesaid company, (ii) As per the annual report of Ladderup Corporate Advisory Pvt. Ltd, it is engaged in only one segment, which includes merchant banking.

Observing as above, the Tribunal held that "we thus in the backdrop of the very fact that the aforesaid comparable is engaged in the merchant banking /investment banking and other similar activities, are of

considered view that the same cannot be considered as functionally comparable to the assessee company which is engaged in the business of rendering non-binding investment advisory services.”

In the case of Kitara Capital Pvt. Ltd. (supra), the assessee company is engaged in provision of investment advisory services to its group company. During the AY 2011-12 the assessee entered into international transaction with its AEs for providing investment advisory services. To benchmark its transaction, the assessee selected TNMM is the most appropriate method. The Tribunal observed that the DRP has upheld inclusion of Ladderup Corporate Advisory Pvt. Ltd. merely on the ground that the said company has not reported segment wise breakup of income and no income has been reported from merchant banking advisory activities. The Tribunal further found that Ladderup Corporate Advisory Pvt. Ltd. has been excluded by the Coordinate Bench in the case of SUN Ares Real Estate Pvt. Ltd., vs. DCIT (ITA No. 621/Mum/2016) for AY 2011-12. Similar view has been taken by the Tribunal in the DCIT vs. General Atlantic Pvt. Ltd., (91 taxmann.com 406) (Mum Trib) for AY 2011-12.

Thus following the above two decision of Coordinate Bench, the Tribunal directed the TPO/AO to exclude LCAPL from the list of comparables. The relevant paragraphs of the above order of Tribunal are produced below:

7. The DRP has upheld inclusion of 'Ladderup' merely on the ground that the said company has not reported segment wise breakup of income and no income has been reported from merchant banking advisory activities. We find that the Co-ordinate Bench of the Tribunal in the case of SUN-Ares Real Estate Pvt. Ltd.(supra) has directed exclusion of 'Ladderup' in assessment year 2011-12 as is not functionally comparable with the entity engaged in providing non-binding Investment Advisory Services. The relevant extract of the findings of Tribunal on this issue are as under:-

"4.1 We have carefully heard the rival contentions and perused relevant material on record including the decisions cited by respective representatives for exclusion / inclusion of the comparable. First of all, both sides converge on the point that the assessee was engaged in providing investment advisory services of non-binding in nature. The fact is not in dispute before the lower authorities. On this backdrop, we find that so far as the selection of final comparable namely Ladderup is concerned, this Tribunal in the case of Temasek Holding Advisors India P. Ltd. Vs. DCIT [87 Taxmann.com 168] for identical Assessment year observed that Ladderup was registered as Category-1 Merchant Banker with SEBI and was engaged in rendering merchant banking services w.e.f. 01/07/2010 which fact was duly substantiated by the website of the company as well as its Annual Reports and therefore, not functionally comparable with an entity which was engaged in the business of rendering non-binding investment advisory services. The ratio of this decision has subsequently been followed in recent decision of the Tribunal rendered in Wells Fargo Real Estate Advisors Private Ltd. Vs DCIT [ITA No. 1520/M/2016 17/01/2018]. We also find that the reliance of the revenue on the case of AGM India Advisors Pvt. Ltd. Vs DCIT [supra] was misplaced since no

findings regarding this comparable has been given by the Tribunal in that order since the assessee came within the range of +/-5% even with inclusion of this comparable. Therefore, finding identical facts in the present case and respectfully following the judicial precedent, we direct exclusion of this comparable from final analysis."

7.1 Similar view has been taken by the Tribunal for exclusion of 'Ladderup' in the case of General Atlantic Pvt. Ltd.(supra). The relevant extract of the finding of the Tribunal reads as under:-

"16. Insofar as Ladderup Corporate Advisory Pvt. Ltd. is concerned, it is seen that the comparability of this company to an investment advisory service provider came up for consideration before the Tribunal, Mumbai Bench, in Temasek Holding Advisors India Pvt. Ltd. (supra). The Bench after considering the submissions of the parties having found that the company is registered as a Category-1 Merchant Banking Company with SEBI and is engaged in Merchant Banking service w.e.f. July 2010 held that the company cannot be treated as comparable to non-binding investments advisory provider. Respectfully following the aforesaid decision of the Co-ordinate Bench, we exclude this company from the list of comparables."

8. Therefore, in view of the finding of the Tribunal excluding Ladderup from the list of comparables, in the case of companies engaged in Non-binding investment advisory services, we direct the Assessing Officer /TPO to exclude the said company from the list of comparables being functionally different. The grounds of appeal by the assessee are thus, allowed.

6.6 Facts being identical, we follow the order of the Coordinate Bench in Kitra Capital Pvt. Ltd. and Wells Fargo Real Estate Advisors Pvt. Ltd. mentioned hereinabove and direct the TPO/AO to exclude Ladderup Corporate Advisory Pvt. Ltd. from the list of comparables."

33. Since, the aforesaid judicial pronouncement is pertaining to same assessment year as involved in the present cross appeals and functional profile of the assessee in the present case is not in dispute, therefore, respectfully following the aforesaid judicial precedent, we upheld the findings of the learned CIT(A) in directing exclusion of Ladderup Corporate Advisers Pvt. Ltd., while benchmarking international transaction of 'Provision of Investment Advisory Services'. As a result, ground No. 5 raised in Revenue's appeal is dismissed.

34. To sum up, Informed Technologies (India) Ltd and ICRA Management Consulting Services Ltd are to be included, while Motilal Oswal Investment Advisers Pvt. Ltd and Ladderup Corporate Advisers Private Limited are to be excluded, while benchmarking international transaction of 'Provision of Investment Advisory Services'. Further, Future Capital Investment Advisory Services and Goldman Sachs India Securities Private Limited are also to be excluded, while benchmarking the aforesaid international transaction.

35. In its appeal, assessee is also aggrieved against transfer pricing adjustment of Rs. 4,57,86,527 in respect of international transaction of 'Payment of Interest on Fully Convertible Debentures (FCDs)'.

36. The brief facts of the case pertaining to this issue, as emanating from record, are: As per the transfer pricing study report, the assessee is engaged in the business of acquiring non-performing loans, other assets and providing medium to long term finance to corporate borrowers. As the assessee would require finance from time to time to engage in the activities described above, assessee requested its associated enterprises (CCP Cyprus) to provide such finance by subscribing to FCDs issued by the assessee on a private placement basis. All the FCDs issued by assessee to the associated enterprise carried interest at the rate of 12%, during the year under consideration. The assessee benchmarked this international transaction by applying Comparable Uncontrolled Price ('CUP') method as the most appropriate method. Further, the assessee

considered the lending rates offered by other banks, as published by RBI on a quarterly basis, in respect of advances other than export credits to be an appropriate benchmark for the rate of interest paid by the assessee to its associated enterprise. Thus, accordingly arm's length rate of interest was worked out to 11.48%. As the assessee was paying interest at the rate of 12% on FCDs issued to the associated enterprise, the assessee claimed the international transaction to be at arm's length.

37. During the course of transfer pricing assessment, TPO noted that the assessee has paid interest at the rate of 12% amounting to Rs 15,69,82,378 on FCDs issued to its associated enterprise and same has been debited in the books of accounts. The TPO vide order passed under section 92CA(3) of the Act held that similar uncontrolled transaction would have provided FCD for lower interest and thus the international transaction representing issue of FCDs at higher interest rate is not at ALP. Accordingly, TPO computed the ALP by applying the interest calculated on the basis of 6 month average USD LIBOR + 800 basis point (i.e. 8.5% p.a.). As a result, TPO made an upward adjustment of Rs. 4,57,86,527 to the international transaction of 'Payment of Interest on FCDs'. In conformity, the Assessing Officer, inter-alia, passed the order under section 143(3) r.w.s. 144C(3) of the Act. In appeal, learned CIT(A) vide impugned order upheld the upward adjustment made by the TPO. Being aggrieved, assessee is in appeal before us.

38. During the course of hearing, learned counsel submitted that assessee is NBFC and therefore it doesn't qualify as an eligible borrower to raise External Commercial Borrowing. It was further submitted that LIBOR is not applicable as there is no lending/borrowing in foreign currency and assessee had issued rupee dominated debentures. Learned counsel further submitted that in earlier year, TPO has taken Indian rates for charging interest on FCDs and not LIBOR rate, and therefore the same transaction following/percolating from previous years should not be taxed on different basis.

39. On the other hand, learned DR by vehemently relying upon the orders passed by the lower authorities submitted that in the present case, risk factor is not high to justify higher interest charged by the associated enterprise.

40. We have considered the rival submissions and perused the material available on record. We find that the coordinate bench of Tribunal in assessee's own case in Clearwater Capital Partner (India) Pvt. Ltd. vs DCIT, in ITA No. 6641 and 6642/Mum/2012, vide order dated 22/04/2021, for assessment year 2005-06 and 2007-08, while considering similar issue upheld the TPO's approach of adopting average PLR of Indian banks, observing as under:

"9. Considered the rival submissions and material on record. We notice that assessee has issued fully convertible debentures represented by Indian currency and agreed to pay 12% per annum to its A.E. In initial year that is assessment year 2005-06, assessee adopted PLR +5% and subsequently it adopted fixed rate of 12%. At the time of benchmarking

for the purpose of TP study assessee adopted on the basis of PLR data of Indian banks maintained by RBI and it adopted the maximum interest rate range at which at least 60% of the business was contracted by the commercial banks. We notice that on the other hand TPO adopted the average of the PLR of Indian banks as it would be the most appropriate comparable while applying the CUP method. We notice that the assessee argues that investment in its company would be inherently risky due to following reason that it is in start-up stage and it received its NBFC license only in the year 2005. It did not have past performance record which could induce investors to invest, it's business activities mainly comprised of revamping distressed assets, the quality of assets would be low and risk of recovering money would be high and it has long gestation period i.e., 3 to 4 years before it would start making profits. It did not have any securities to offer which the banks in India would normally require for advancing money. It was submitted that considering the above challenges, no bank would have ordinarily lent funds, even it is considered to lent, it would have added a significant risk premium on the rate of interest charged by them considering the fact that nothing to offer as collateral. It is submitted before us that above factors were considered while benchmarking the interest payment against the arithmetic mean of maximum interest rate at which 60 percent of the business was contracted by Indian banks. It is also submitted before us that how the Indian banks are financing the start-up companies without collateral securities.

10. We notice that the associate company invested in the assessee company by subscribing to fully convertible debentures considering the risk factors to invest in the start-up company like assessee company. It clearly indicate that it has invested only in fully convertible debentures and not regular debentures. It shows that the risk factor was already considered and mitigated to offset the risk element in investing in the assessee company, we are not in agreement with the submissions of the assessee that no Indian bank will invest in the start-up company like the assessee having the risk factors. It is not brought on record assessee has really approached any Indian bank for such proposal. It is in the interest of the associate enterprise to invest in the start-up companies, in which it has interest and wanted to expand the business in India. To invest in associated enterprise like assessee company, no parent company for that matter associate enterprises will analyze the risk factor similar to banks. As discussed above risk factor can never play an important element in benchmarking the transaction with the associate enterprises, it doesn't matter how risky the venture is. In our considered view the benchmarking has to be done based on the prevailing market rate which a normal bank would lend money with the minimum risk. Since the assessee has already mitigated the risk by investing in the fully convertible debentures when the risk is already mitigated one more time the same risk element cannot be considered for bench marking on the interest payment also. Based on the above discussion, we are in agreement with the findings of the Ld CIT(A) therefore the grounds of appeal raised by the assessee in both the appeals are dismissed."

41. As there is no change in facts and the methodology adopted by the assessee for benchmarking the international transaction of 'Payment of Interest on FCDs' has been accepted in the prior years, we see no reason to deviate from the view so taken by the coordinate bench of Tribunal in assessee's own case cited supra. Further, the learned DR could not show us any reason to deviate from the aforesaid order. Thus, respectfully following the order passed by the coordinate bench of Tribunal in assessee's own case cited supra, we uphold the plea of the assessee and delete the impugned adjustment in respect of international transaction of 'Payment of Interest on FCDs'. Accordingly, grounds No. 1 and 2 (and sub-grounds thereto), raised in assessee's appeal are allowed.

42. In the result, cross appeals by the assessee and Revenue are partly allowed.

Order pronounced in the open court on 04/07/2022

Sd/-
AMARJIT SINGH
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED:

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai