

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "J" :MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
AND
SHRI ANIKESH BANERJEE, JUDICIAL MEMBER

ITANo.5636/MUM/2014
Assessment Year 2008-09

DCIT(3(2), Mumabi.	vs.	M/s Macquarie Capital (India) Pvt. Ltd. (Formerly Known as Macquarie Capital Advisors (India) Pvt. Ltd.) 92, Level 9, 2 North Avenue, Bandra Kurla Complex Mumbai- 400051. PAN. No. AAACB2354D
(Appellant)		(Respondent)

ITANo. 5709/MUM./2014
Assessment Year 2008-09

M/s Macquarie Capital (India) Pvt. Ltd. (Formerly Known as Macquarie Capital Advisors (India) Pvt. Ltd.) 92, Level 9, 2 North Avenue, Bandra Kurla Complex Mumbai- 400051. PAN. No. AAACB2354D	vs.	DCIT(3(2), Mumabi.
(Appellant)		(Respondent)

For Assessee :	Sh.Nishant Thakkar & Ms Jasmin Amasadvala
For Revenue :	Shri Sael Pitta, CIT-DR

Date of Hearing :	27.07.2022
Date of Pronouncement :	05.08.2022

ORDER**PER ANIKESH BANERJEE, J.M.**

The instant appeals were filed by both the Revenue & Assessee against the order of the Learned Commissioner Income Tax (Appeals)-11, Mumbai [in short CIT(A)] bearing appeal No. CIT(A)-11/DC3(2)13-14/299 dated 30.06.2014 was passed u/s 250 of the Income Tax Act, 1961 (in short 'Act'), for assessment years 2008-09. The impugned order was generated from the order of the ld. Dy. Commissioner of Income Tax-3(2), Mumbai (in short 'A.O.') passed on dated 30.01.2012 u/s 143(3)r.w.s. 144C(3) of the Act, 1961.

2. The Revenue has raised the following grounds: -

"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was right in rejecting the list of comparable companies selected by the TPO and granting relief to the assessee.

2. *Whether on the facts and in the circumstance of the case and in law, the Ld.CIT(A) was right in rejecting the list of comparable companies by the TPO without adjudicating on the finding of the TPO that main business of the assessee company is not merely investment banking but knowledge process Outsourcing Services (KPO Services).*

3. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was right in reducing list of 8 comparable companies selected by the assessee itself in its TP Study report only on the basis of difference in functionality.*

4. *The appellant prays that the order of CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.*

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

3. Both the assessee and the revenue filed cross appeal against the order of the Ld. CIT(A). Here, we are passing a common order by considering both the appeals for the assessment year 2008-09.

4. In brief we advert the fact of the case. The assessee is engaged in supporting its associated enterprises(in short

AE) with respect to their “AE” investment banking activities.

The brief activities of the assessee is extracted from the order of the ld. TPO which is as follows:-

“3. Background: MCAIPL is a Macquarie group company, engaged in the business of investment banking and specialises in corporate finance and advisory services in India. The assessee is registered with the Securities and Exchange Board of India as a Category I Merchant Banker. Further, the assessee assists clients in raising funds (both equity and debt) and also provides strategic advisory services for mergers and acquisitions and other type of transactions. MCAIPL functions as an originator of transactions in India and also lends assistance/ support in the execution of the mandates awarded to the Macquarie Group involving Indian clients. The support services are in the nature of undertaking/ receiving some services under an investment banking mandate. The services could be in the nature of execution related support, marketing/ research related support, structuring a transaction, originating a transaction, undertaking due diligence, legal review etc. “

4.1 On a review of the above function the ld. Transfer Pricing Officer (in short TPO) has held the assessee is

engaged in the business of rendering investment advisory and investment support services. So the TPO rejects the entire set of comparables selected by the assessee by stating that the assessee's activities are akin to those performed by Knowledge Process Outsourcing (KPO) companies and thereafter selected six companies all of which were engaged in either engineering design services or data analytics. The assessee's grievance is exclusion of the assessee's comparable without considering nature of the business and inclusion are erroneous. Further, the assessee filed an appeal before the Ld. CIT(A) and the Ld. CIT(A) accepted the assessee plea and reject the some companies from the list of comparable such as:-

- i. Aryaman Financial Services Ltd.
- ii. Centrum Capital Market Ltd
- iii. CRISIL Ltd
- iv. Capital Trust Ltd.
- v. Besant Raja International Ltd.

vi. NTPC Electric Supply Company Ltd.

Rejected the assessee's plea to exclude two companies from the list of comparable i. Khandwala Securities Ltd & ii. Keynote Corporate Services Ltd. The revenue filed an appeal before the ITAT on the grounds that the Ld. CIT(A) erred by rejecting the comparison of the assessee to KPO companies selected by the TPO. On the other hand, the assessee filed an appeal on ground that the Ld. CIT(A) erred by rejecting the assessee's prayer to exclude two companies i.e. Khandwala Securities Ltd. and Keynote Corporate Services Ltd from the list and not including KJMC Global Market (India) Limited and Kinetic Trust Limited in the final list. Second ground which was selected by the assessee as comparable in its TP study. Incorrectly including two companies Khandwala Securities Ltd. and Keynote Corporate Services Ltd. by the Ld. CIT(A) without considering the activities of the company. Both the revenue and assessee filed an appeal before the ITAT for further adjudication.

5. The learned counsel of the assessee vehemently argued that the ld. TPO in his order determined the function of investment Banking Support service specific to AE as captive unit would fall under a KPO services with the Broad Category of BPO. The ld Counsel mentioned the nature of business is the point of contradiction with TPO in between KPO vs Investment Advisory Company. The ld. CIT(A) appreciated and accepted the argument of the Assessee. Since the Assessee functions were similar to companies providing services in the field of finance.

5.1. As the argument of ld. Counsel, the ld. TPO was wrong in comparing the Assessee to engineering design services or data analytics companies engaged in engineering design services or data analytics. The CIT(A) therefore held that the comparable selected by the Assessee being more appropriate were to be accepted and those selected by the TPO deserve to be rejected. The CIT(A) thereafter proceeded to scrutinize the set of companies selected by the Assessee and considered the submissions of the Assessee with respect to removal of certain companies which were a part of the

Assessee's own set of comparable. After hearing the Assessee, the CIT(A) finally:

a. Accepted the Assessee prayer to exclude the following companies from the list of comparable:

- i. Aryaman Financial Services Ltd.
- ii. Centrum Capital Market Ltd.
- iii. CRISIL Ltd.
- iv. Capital Trust Ltd.
- v. Besant Raj International Ltd.
- vi. NTPC Electric Supply Company Ltd.

b. Rejected the Assessee prayer to exclude the following companies from the list of comparable: -

- i. Khandwala Securities Ltd.
- ii. Keynote Corporate Services Ltd.

In sum, the final list of comparable after the order of the CIT(A) was as under:

1. Access India Advisors Ltd.
2. ICRA Management Consulting Services Ltd.
3. IDC (India) Ltd.
4. Sumedha Fiscal Services Ltd. (Segmental)

5. SREI Capital Markets Ltd.
6. Keynote Corporate Services Ltd. (Segmental)
7. Khandwala Securities Ltd. (Segmental)

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5.2. Related **Ground no 1 & 2** of the revenue the ld DR vehement argued and relied on order of the TPO. In argument,ld DR mainly pointed out that the ld. CIT(A) erred rejecting the comparison to KPO companies selected by the TPO and erred in accepting the assessee's contention to reject Aryaman Financial Services Ltd, Centrum Capital Markets Ltd, CRISIL Ltd, Capital Trust Ltd., Besant Raj International Ltd and NTPC Electric Supply Company Ltd being companies selected by itself.

5.3. The ld Counsel drew our attention on the grounds raised by the Department are fully covered in favour of assessee by the **Apax Partners India Advisers Pvt. Ltd. v/s. DCIT (AY 2008-09) [86 taxmann.com 169 (Mum.)]** -

(Pg 3 of the legal paperbook). The relevant paragraph is extracted as follows: -

“7. The learned AO/TPO under the directions of the Hon'ble DRP erred on facts and in law in not allowing appropriate adjustments namely; risk adjustment to the comparables as is required to be done in accordance with the provisions of Rule 10B(1)(e)(iii) of the Income-tax Rules, 1962 to account for difference between the risk profile of the Appellant and the alleged comparable selected by the learned AO/TPO.”

It was also pointed out that the view expressed in the aforesaid decision is the consistent view of the Hon'ble Tribunal by relying on the following other decisions:

1. Apax Partners India Advisers Pvt. Ltd. v/s. DCIT (AY 2009-10) [98 taxmann.com 500 (Mum.)]
2. Cariyle India Advisors Pvt. Ltd. v/s. DCIT (AY 2014-15) [118 taxmann.com 135 (Mum.)]
3. Cariyle India Advisors Pvt. Ltd. v/s. DCIT (AY 2015-16) [ITA no 7515/Mum/2019 and SA No 28/Mum/020]
6. In **Ground no-3**, during the hearing the only submission made by the Revenue's Counsel was that that the Assessee ought not to be permitted to seek exclusion of

companies selected by itself in its comparable set. The Ld. DR did not challenge the basis on which the CIT(A) accepted the rejection of the companies.

6.1 The ld Counsel of assessee drew our attention to the decision of the jurisdictional High Court in the case of **CIT-7 v/s. Tata Power Solar Systems Ltd, 77 Taxmann.com 326(Bom)** which has held that a party is not barred in law from withdrawing from its list of comparables, a company, if the same is found to have been included on account of mistakes as on facts and in particular the following paragraph is extracted here:-

"3 (d) We find that the impugned order of the Tribunal holding that a party is not barred in law from withdrawing from its list of comparables, a company, if the same is found to have been included on account of mistake as on facts, it is not comparable. The Transfer Pricing Mechanism requires comparability analysis to be done between like companies and controlled and un-controlled transactions. The comparison has to be done between like companies and requires carrying out of FAR analysis to find the same. Moreover, the Assessee's submission in arriving at the ALP is not final. It is for the TPO to examine and find out the companies listed as comparables which are, in fact comparable. The impugned order has on FAR analysis found

that M/s. Indowind Energy Ltd. and B.F. Utilities Ltd. are not comparable. They are in a different area i.e., wind energy while the Respondent-Assessee is in the filed of solar energy."

6.2. The ld DR in argument did not able to show any contrary view against the submission of assessee.

6.3. We heard the rival submissions and considered the documents available on records. The determination of nature of activities the crux of the case. It was explained by the ld. Counsel that while it was predominantly engaged in providing advisory and support services to its AEs, the Assessee had also been engaged in origination activities, i.e. sourcing clients in India who would be interested in engaging the investment banking services of its AE's abroad - which function is one of the several functions performed by an investment banker. Since the Assessee is not carrying on full-fledged investment banking activities. It would be relevant to consider a blend of comparable companies that are involved in provision of investment banking and advisory activities, since it is not possible to identify comparable companies engaged in exactly the same functions as undertaken by the assessee. The assessee had

selected Investment Banking companies in addition to those companies engaged in the field of providing advisory services. The assessee placed reliance on the ruling of **JP Morgan India Pvt Ltd v/s ACIT (ITA no 1502/Mum/2014)** for AY 2009-10, wherein the Tribunal recognised in identical circumstances, that since it was not possible to identify any other company which carries on exactly same nature of activities as that of the assessee. There is no other option but to include Investment Banking companies in the comparable set.

Ld Counsels submitted that where only companies engaged in advisory services are considered from the list of comparables selected by the assessee. The same can be identified from the comparable already selected by the assessee, and upheld by the CIT(A), without requiring a remand of the matter. The same are provided below:

Name of the Company	Nature of Activity	Margin
Access India Advisors Ltd	Advisory/ consultancy services	45.97%
ICRA Management Consulting Services Ltd	Advisory/ consultancy services	3.22%
IDC (India) Ltd	Consultancy services	14.87%

Kinetic Trust Limited	Consultancy services	-4.27%
Arithmetic mean		14.84%

The assessee is not comparable to KPO. In fact, that TP analysis had undertaken by the ld. TPO for determination of ALP of the international transaction of appellant to be far greater than the ALP determined by the assessee. The comparable were selected by the TPO on basis of business activities KPO which is summarily rejected by the ld. CIT(A). The comparable are rescheduled accordingly by the ld. CIT(A).

Accordingly Ground no-1,2,3 & 4 of the revenue is dismissed. Ground no 5 is general in nature.

ITA No. 5709/M/2014-Assessee's Appeal

7. Ground 1 of the Assessee: erroneous rejection of KJMC Global Market (India Limited and Kinetic Trust Limited.

The ld. Counsel argued that CIT(A) had rejected the inclusion of KJMC Global Market (India) Limited and Kinetic

Trust Limited on the basis that both the mentioned companies are persistent loss-making companies.

7.1. The assessee submitted that the parameters to test whether a company can be treated as a persistent loss-making company are no longer res Integra - Tribunals and Courts (including the jurisdictional High Court) have consistently held that for a company to be treated as a persistent loss making company so as to be excluded from being treated as a comparable.It should have incurred/suffered a loss for 3 consecutive previous years (including the year under consideration). Reliance is placed on the following decisions in this regard:

- CIT v/s. Goldman Sachs (India) Securities Pvt. Ltd. 69 taxmann.com 19(Bom.).
- Sabc Innovative Plastics India Pvt. Ltd., 104 taxmann.com 162 (Ahm-Trib) –
- MOL Maritime India Pvt. Ltd. 120 taxmann.com 245(Mum.).

7.2. It is submitted that the said companies are not persistent loss makers as is evident from Page 135 of the Factual paper book:

a. Since KJMC Global Market (India) Limited has earned a 4.27% profit margin in AY 2007-08 (i.e. immediately preceding Assessment Year) it cannot be regarded as a persistent loss making company and therefore cannot be excluded.

b. Since Kinetic Trust Limited has earned a 6.76% profit margin in AY 2006-07 (i.e. 1st of the 3 years to be taken into consideration) it cannot be regarded as a persistent loss making company and therefore cannot be excluded.

7.3. We heard the rival submission & considered the documents available in records. The persistence loss-making company are normally excluded as comparable. As per the submission of assessee both the companies are made profit in relevant years. Ld. DR did not strongly object on the plea of assessee. No objection was made by the ld DR in factual position. So, these companies should not be excluded on the ground of loss-making company. It is to be

directed to the Id. TPO that KJMC Global Market (India) Limited and Kinetic Trust Limited be included in the set of comparable.

Accordingly, the Ground no-1 of the assessee is allowed.

7.4. Ground 2 of the Assessee: Erroneous acceptance of KhandwalaSecurities Ltd and Keynote Corporate Services Ltd.

The Id Counsel further argued that the Id. CIT(A) had erred in rejecting the plea of the assessee to exclude Khandwala Securities Ltd, on the basis that it is functionally comparable to the Assessee.

7.4.1.The Id. Counsel further stated that Khandwala Securities Ltd. is not a comparable since the percentage of income from corporate advisory to total revenue from fee based operations for FY 2007-08 is less than 75% (Pg 1052 and 1081 of the Factual paperbook of assessee). The company has derived 48.88% of its revenue from broking activity under this segment and therefore the revenue from consultancy/advisory activities is 51.12%, i.e. less than

75% and there is no further segmental/break-up available in the financial statements.

7.4.2. The filter of revenue from comparable activity must be more than 75% has been applied both by the TPO (Page 39 of the appeal set of assessee) as well as by the Assessee in its transfer pricing study report (Refer Page 87 of the Factual Paperbook).

7.4.3. Moreover, the filter of 75% revenue from comparable activity is a relevant filter and must be applied for selection of comparable is settled by the following decisions, and particularly to exclude Khandwala Securities Ltd:

i. Pipal Research Analytics and Information Services India Pvt. Ltd. v/s. ITO, 96 taxmann.com 396 (Delhi) for AY 2008-09

ii. JP Morgan India Private Limited v/s. ACIT. ITA No. 8193/M/2010 (Mum.) -upheld by the Bombay High Court in **PCIT v/s. JP Morgan India Pvt. Ltd. [102 taxmann.com 335 (Bom.)]**—The extract of relevant paragraph is as follows:

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“7. iv. In view of the above, findings of the fact by the Tribunal that the services are rendered by M/s. Khandwala Securities Limited being different from the service rendered by the respondent to its AE's, the exclusion of M/s. Khandwala Securities Limited from the list of comparison cannot be disturbed. This in the absence of the respondent pointing out how function of the two are similar. The mere fact that the respondent had included M/s. Khandwala Securities Ltd as a comparable, would not bar the respondent from contending otherwise. The object and purpose of the entire exercise of determining the ALP is by having proper comparables. Thus, there is no merit in the above objection taken by the Revenue.”

7.5. The Id Counsel further argued that the Id. CIT(A) has erred in rejecting the plea of the Assessee for exclusion of Keynote Corporate Services Ltd. on grounds of high profit. CIT(A) has misconstrued the argument of the assessee - the argument of the Assessee is that the profit of Keynote Corporate Services Ltd. is highly fluctuating.

7.5.1. The Id Counsel submitted that the principle that companies making abnormally high profit margin are required to be excluded has been approved by the following cases:

• PCIT v/s. Honeywell Turbo India Pvt. Ltd. [ITA 877 of 2016 Mum] -

• **PCIT v/s Barclays Technology Centre India Pvt Ltd 95 taxmann.com 170 (Bom.)**—Here the relevant paragraph is extracted: -

“a. The impugned order of the Tribunal excluded M/s. FCS Software Solutions Ltd. from the list of comparables in view of its abnormally high profit margin for the subject Assessment Year at 57.02% as compared to operating profit margins in the preceding financial year of 19.94% to 14.75% and in the succeeding financial year at 37.09%.

b. The impugned order of the Tribunal following the decision of the Special Bench in Maersk Global Centers (India) (P.) Ltd. v. Asstt. CIT [2014] 43 taxmann.com 100/147 ITD 83 (Mum. - Trib.) rendered by the Tribunal on 7.3.2014 carried out further analysis and concluded that high profit margin of FCS Software Solutions Ltd. was not a normal business condition. Consequently, the same could not be considered as comparable.”

7.5.2. We heard the above-mentioned arguments of the ld Counsel. The ld DR did not make any strong objection in this issue. No contrary judgment was produced by ld DR during hearing. We are directing that M/s Khandwala

Securities Ltd & M/s Keynote Corporate Services Ltd be excluded from the set of comparable.

Accordingly, the Ground no-2 of the assessee is allowed.

8. In the result the appeal of the revenue ITA no-**5636/Mum/2014** is dismissed and appeal of assessee ITA no-**5709/Mum/2014** is allowed.

Order pronounced in the open Court on 05.08.2022.

Sd/-
(B.R. BASKARAN)
ACCOUNTANT MEMBER

Sd/-
(ANIKESH BANERJEE)
JUDICIAL MEMBER

Mumbai, Dated 5th August, 2022

Santosh/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'E' Bench, Mumbai
6.	Guard File.

// By Order //

Assistant Registrar : ITAT Delhi Benches : Mumbai

Sl.No.	Particulars	Date	
1.	Date of Dictation	02.08.2022	Sr. P.S.
2.	Date of draft order placed before the Hon'ble	03.08.2022	Sr. P.S.

	Member		
3.	Date of draft order approved by the Hon'ble Second Member	05.08.22	JM/AM
4.	Date of receipt of approved draft order	05.08.22	Sr. P.S.
5.	Date of pronouncement		Sr. P.S.
6.	Order uploaded on the website of the Tribunal		Sr. P.S.
7.	Order sent to Bench clerk		Sr. P.S.
8.	Order signed by the Head Clerk		
9.	Order Signed by Asst. Registrar		
10.	Date of Dispatch of order		