

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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
MS. KAVITHA RAJAGOPAL, JM

ITA No. 72/Mum/2018

(Assessment Year: 2010-11)

Citigroup Global Markets (India)

Private Limited
1402, 14th Floor,
First International Financial
Centre,
Bandra Kurla Complex,
G Block, Bandra (East),
Mumbai-400 051

(Appellant)

Vs.

The DCIT
Circle -4(1),
Aaykar Bhavan
M.K. Road,
Mumbai-400 020

(Respondent)

PAN No.AAECs7234F

ITA No. 45/Mum/2018

(Assessment Year: 2010-11)

The JCIT (OSD)
4(1)(1)
Room No. 640, 6th Floor,
Aaykar Bhavan,
M.K. Road,
Mumbai-400 020

(Appellant)

Vs.

Citigroup Global Markets (India)
Private Limited
1402, 14th Floor,
First International Financial
Centre,
Bandra Kurla Complex,
G Block, Bandra (East),
Mumbai-400 051

(Respondent)

Assessee by : Shri Nishant Thakkar &
Mr. Jasmin Amalsadwala, ARs
Revenue by : Ms. Vranda U. Matkari, DR

Date of hearing: 04/08/2023

Date of pronouncement : 25/10/2023

ORDER

PER PRASHANT MAHARISHI, AM:

01. ITA No. 72/Mum/2018 is filed by Citigroup global Market (India) Private Limited (assessee /appellant) and ITA No.45/Mum/2018 is filed by Jt. Commissioner of Income Tax (OSD) 4(1)(1), Mumbai (the learned Assessing Officer) for A.Y. 2010-11 against the appellate order passed by the Commissioner of Income-tax (Appeals)-55, Mumbai [the learned CIT (A)] dated 12th October, 2017, wherein the appeal filed by the assessee against the assessment order dated 26th March, 2014, passed by the Dy. Commissioner of Income Tax, Circle 4(1), Mumbai under Section 144C read with section 143(3) of the Income-tax Act, 1961 (the Act), by the assessee was partly allowed. Both the parties aggrieved with the assessment order and therefore, are in appeal before us.

02. In ITA No.45/Mum/2018 The learned Assessing Officer is aggrieved by raising following grounds of appeal:-

"1. Each ground is without prejudice to the others.

1.1 "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified in including comparable namely M/s IDC (India) Ltd., overlooking the fact that functional comparability and application of RPT is not ascertainable from the financials?"

1.2 "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified in

including comparable namely M/s IDC (India) Ltd., on the basis of functional comparability without giving opportunity to the AO/TPO?"

1.3 "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified in including comparable namely M/s IDC (India) Ltd., overlooking the fact that M/s IDC Ltd. is owning a brand and in the case of M/s Rolls Royce Marine India Pvt. Ltd. reported in [2014], 49 taxmann.com 365 (Mum. Trib.) Hon'ble ITAT has held that brand Owners Company can't be taken as comparable."

1.4 "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified in including comparable namely M/s IDC (India) Ltd., overlooking the fact that M/s IDC Ltd. is earning income from sale of subscription services and in the case of M/s Linked In Technology Information (P.) Ltd. [2016] 71 taxmann.com 249 (Delhi - Trib.) ITA No. 706 (DELHI), Hon'ble ITAT has held that company having subscription income can't be taken as comparable."

1.5 "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified in including comparable namely M/s IDC (India) Ltd., overlooking the fact that the company is not preparing segmental account in spite of carrying out different segmental activities?"

2. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified in

excluding comparable namely M/s IDFC Investment Advisors Ltd., on the basis of functional dissimilarity?"

3. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified in excluding comparable namely M/s Ladderup Corporate Advisory Pvt. Ltd. on the basis of functional dissimilarity?"*

4. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified in excluding comparable namely M/s Motilal Oswal Investment Advisory P. Ltd. on the basis of functional dissimilarity?"*

5. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding the loss on error trade as business loss without appreciating the fact that the provisions of Explanation to Section 73 of the Income Tax Act, 1961 are applicable to the assessee-company which states that "where any part of the business of a company consists of purchase and sale of shares of other companies, such company shall, for the purpose of this section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares."*

03. In ITA No. 72/Mum/2018 assessee is also aggrieved raising following grounds of appeal:-

"On the facts and circumstances of the case and in law, Citigroup Global Markets India Private Limited (hereinafter referred to as 'CGMIPL' or the

'Appellant'] craves to prefer an appeal against the order passed by the Commissioner of Income- tax (Appeals) - 55, Mumbai (hereinafter referred to as the learned CIT(A)], under section 250 of the Income-tax Act, 1961 (Act) in respect of the order passed by the Deputy Commissioner of Income-tax-4(1), Mumbai (the AO) under section 143(3) read with section 144C(3) of Act, on the following grounds:

1. The learned CIT(A) erred in re-computing the arm's length price (ALP) of the international transaction, pertaining to provision of broking services to Citigroup Global Markets Limited, UK (CGM UK), as Rs 6,242,387 as against Rs 4,161,591, resulting in an upward adjustment of Rs 2,080,796.

2. In determining the ALP of the International transaction of provision of broking services to CGM UK, the learned CIT(A) has inter alia erred on the following grounds:

-Rejecting the transactional net margin method as the most appropriate method and considering the comparable uncontrolled price method (CUP) as the most appropriate method to benchmark the aforesaid international transaction; and

-While applying CUP as the most appropriate method, in not granting the adjustments sought to be made to the brokerage rates charged to Non AES, on account of differences in the

efforts involved, functions performed and risks assumed between the services rendered to AEs vis-à-vis Non AEs.

3. The learned CIT(A) erred in disallowing a sum of Rs 48,325 under section 14A of the Act read Rules.

Without prejudice to the above, the learned CIT(A) failed to appreciate the fact that the no expenditure having direct and proximate connection with earning of exempt income has been incurred by the Appellant and thus, no disallowance as expenditure Incurred in relation to earning exempt Income is warranted under the provisions of section 14A read with Rule 8D of the Rules.

4. The learned CIT(A) erred in disallowing Rs 46,50,827 being 10 percent of the following expenditure incurred by the Appellant on the ground that the expenses were not entirely incurred for the purpose of the business and were not adequately supported by bills etc:

(i) Entertainment and conference expenses amounting to Rs 2,04,69,264

(ii) repairs and maintenance expenses amounting to Rs 1,34,67,869; and

(iii) books and periodicals amounting to Rs 1,25,71,315.”

04. The brief facts of the case shows that assessee is a company engaged in the business of stock broking, investment banking and rendering various other



services to customers in relation to different financial products. Assessee filed its return of income on 29th September, 2010, declaring income of ₹467,80,98,162/-. The return of income was picked up for scrutiny. As assessee has entered into international transactions with its Associated Enterprises as per form no.3CEB, the reference was made to the Addl. Commissioner of Income Tax, Transfer Pricing Officer, Mumbai, (the learned TPO) for examination of Arm's Length Price of these international transactions. The assessee is providing origination and other support services to its Associated Enterprises and provides support services and other related advisory services to clients in India. It also acts as a broker in the equity and derivative segment mainly to institutional clients. It has entered into 17 different kind of international transactions. The only two international transactions are in dispute before us. The research report services amounting to ₹16,24,58,348/- and brokerage fees of ₹181,49,41,232/- for the impugned assessment year. Assessee adopted the Transactional Net Margin Method [TNMM] as the most appropriate method [MAM] for benchmarking research support services. The assessee's benchmarking shows that assessee has earned a margin of 15%. Assessee selected four comparable companies whose margin operating profit / total cost was 19.57% and therefore, since, the arithmetic mean of comparable prices is within

+ - 5% of the transfer prices, assessee concluded that its transaction is at Arm's Length Price.

05. The learned Transfer Pricing Officer asked for further details on accepts / reject matrix. The learned Assessing Officer found that assessee has used the data for three years of the comparable company and has taken the weighted average in the accept/ reject matrix. Assessee originally selected 6 companies but rejected two companies having significant related party transactions and one company on functional dissimilarity, thereafter, assessee based on the transfer pricing study report of subsequent year selected one more comparable as IDC India Limited because same was found comparable on the basis of annual report for financial year 2009-10. Therefore, the learned Transfer Pricing Officer was of the view that assessee has done cherry picking. Further, the assessee is also using same set off comparables for investment banking as well as for research support services. Accordingly, a show cause notice was issued. The learned Transfer Pricing Officer accepted the three comparables selected by the assessee but rejected IDC India Limited having a margin of 14.72%. Further, the learned Transfer Pricing Officer looked up at comparables rejected by the assessee in it's accept/ reject matrix. He found that three comparables which qualified all the filters but rejected by assessee. The learned Transfer Pricing Officer collected certain information under Section

133(6) of the Act. The learned Transfer Pricing Officer also examined the employees' profile of the assessee company and noted that the average salary of 55 employees of the assessee is ₹8,97,237/-, per employee, the learned Transfer Pricing Officer on the basis of the information included IDFC Investment Advisories Ltd., Ladderup Corporate Advisory Pvt. Ltd. and Motilal Oswal Investment Advisory P. Ltd. The learned Transfer Pricing Officer was of the view that this companies are functionally comparable accordingly, he selected six comparables, computed their average margin of 35.48% and computed the adjustment of ₹2,89,31,713/- as adjustment on account of research report services. Thus, the Arm's Length Price of research report services of ₹16,24,58,348/- was computed at ₹19,13,90,061/-.

06. With respect to brokerage services, assessee has received brokerage fees of ₹181,49,41,232/-. Assessee adopted the Comparable Uncontrolled price Method [CUP method] as MAM . Assessee submitted that the average broking charges of the assessee to the Associated Enterprises in respect of cash equity trade is 0.25% and assessee has also earned commission in respect of trade executed with unrelated parties, average brokerage commission charged to top of 10 unrelated foreign institutional investors in cash equity trade is 0.15%. Therefore, the assessee claimed that transaction is at Arm's Length.

07. The learned Transfer Pricing Officer found that assessee has charged 0.10% to Citi Group Global Market Limited, UK at the rate of 0.10%. Therefore, assessee was asked to explain that why benchmarking of this transaction should not be made by adopting the rate charged to FIIs. The assessee objected to the same stating that there are functional differences in a respect to broking services rendered to Associated Enterprises and non-Associated Enterprises, however, it agreed for an adjustment of 0.05%. Accordingly, an adjustment of ₹20,80,796/- is made.
08. Accordingly, the order under Section 92CA(3) of the Act was passed on 29th January 2014.
09. During the course of assessment proceedings, the learned assessing officer further examined :-
- a. that assessee has earned the tax-free dividend income of ₹ 520,000 and the same has been claimed as exempt. Assessee contended that no expenses were incurred for earning of exempt income and no sumo to disallowance was offered. Therefore, the learned assessing officer held that a certain percentage of the expenses claimed by the assessee company would definitely be attributable to the tax-free income earned by the assessee, as it is the common pool of human and financial resources, which are being utilized on income in various forms. He recorded his satisfaction about the correctness of



the claim of the assessee that there is no expenditure incurred by the assessee. Accordingly the provisions of rule 8D of the IT rules read with section 14 A of the act were applied and accordingly the disallowance of ₹ 48,325/- was made.

b. The AO found that assessee has shown ₹ 3,241,723 under the head leasehold improvements and assessee was asked to justify the claim. Assessee submitted that it has incurred the expenditure in the least office premises from which it operates to meet the Citigroup standards. The assessee submitted that it is done electrical work for third floor of ₹ 1,811,469, interior work of ₹ 1,044,205 and paid project management fees of ₹ 386,050/- totaling to ₹ 3,241,725/- which is in the nature of repairs and renovation and is purely a of revenue nature. The learned AO rejected the contention of the assessee and held that the capital expenditure debited under the head repairs and maintenance's for the reason that the benefit of the above repairs to the assessee clearly extends to the assessee beyond the year and they are not of the nature of current repairs. Accordingly he held it to be a capital expenditure and granted depreciation at the rate of 10% amounting to ₹ 324,172/- and disallowed the balance sum of ₹ 2,917,552/-.

c. The AO during the course of assessment proceedings also found that assessee has incurred loss on trading



transaction of ₹ 2,310,600,114/- the assessee was asked to explain why the provisions of explanation to section 73B invoked in the assessee's case. The assessee submitted that this loss is on account of adult rates and same are not covered by the above provisions. Assessee stated that it is engaged in the business of providing equity broking services including services such as trade act usual, clearing and settlement of trade of its clients. In the normal course of its business, the company incurs the above loss on account of errors committed by legs the deals. The company being a registered broker is responsible for the purchase and sale of shares including the payment and delivery thereof even if the transaction is on the behalf of the clients. Therefore the loss of incurred by the assessee is incidental to the companies business the learned assessing officer disbelieved the explanation of the assessee and applied the provisions of section 73 and disallowed the above sum holding that the above provision applies to the purchase and the sale of shares and therefore the loss on trade is treated as a speculation loss.

- d. Assessee has paid a sum of ₹ 1,981,158 levied on the assessee by the stock exchange as penalty relating to non-maintenance of complete records, delay in payout of funds and securities and incomplete forms short collection of margins et cetera. The assessee has argued that such penalties

levied towards certain delay/technical non-compliance et cetera and therefore they are not hit by the explanation to section 37 (1) of the act. The learned assessing officer held it to be the penalty and disallowed the sum.

- e. The AO noted that assessee has debited the business development and entertainment expenditure of ₹ 59,764,000, repairs and maintenance of ₹ 13,468,000 and books and periodicals of ₹ 125,71,000/- wherein the assessee was asked to substantiate these expenses with supporting bills and vouchers. Assessee merely explain the nature of such sum submitted that these are not capital expenditure and are allowable as expenditure wholly and exclusively incurred for the purposes of the business. The learned assessing officer held that the explanation of the assessee is general and casual in nature and these expenses are not fully supported by proper bills and vouchers. The learned AO held that there is an element of personal expenditure in these heads of expenditure, which cannot be ruled out for want of itineraries and logbooks and final details. Accordingly he disallowed 20% of the said expenses amounting to ₹ 9,301,653/-.

010. Accordingly, the draft assessment order was forwarded to the assessee on 18/2/2014 in response to which the assessee on 20/3/2014 submitted that they have opted not to file objection before the

dispute resolution panel against the draft assessment order. Consequently assessment order under section 143 (3) of the act was passed on 26/3/2014 wherein the total income of the assessee is determined at ₹ 4,746,798,774/-.

011. Assessee preferred the appeal before the learned CIT (A), who passed an appellate order on 12th October, 2017, partly allowing the appeal. The learned CIT (A) while adjudicating the transfer pricing adjustment directed the learned Transfer Pricing Officer to

a. include the IDC India Limited in comparability analysis as he found that comparable is engaged in research and analysis services based on the analysis report and website extract provided by the appellant. According to the learned CIT (A), this comparable is functionally similar. He further stated that there is no reason for the learned Transfer Pricing Officer to go beyond the RPT schedule and check the reliability of the financial statement. Even otherwise, he held that IDC India Limited is a good comparable.

b. With respect to IDFC Investment Advisories Ltd. included by the learned Transfer Pricing Officer in the final set of comparable but objected by the assessee, he held that same is primarily engaged in providing portfolio services, whereas the assessee is engaged in rendering research



report services and therefore, is functionally different and hence excluded.

- c. With respect to the Ladderup Corporate Advisory Pvt. Ltd. which is included by the learned Transfer Pricing Officer objected to by the assessee, he held that it is primarily engaged in providing investment banking services, where the assessee is engaged in rendering research report services and therefore, the same is to be excluded.
- d. on the issue of M/s Motilal Oswal Investment Advisory P. Ltd. included by the learned Transfer Pricing Officer and objected by the assessee, he found that it performs the investment banking activities and therefore, functionally dissimilar.
- e. Accordingly, after the order of the learned CIT (A), four comparable companies remain in the comparability analysis whose operating margin was 19.57% and therefore, the TP adjustment with respect to the research report services was deleted.
- f. With respect to the adjustment on account of the provision for broking services, the learned CIT (A) agreed with the learned Transfer Pricing Officer and confirmed the addition on account of broking services.



- g. On the another issue of disallowing loss of ₹2,31,06,114/- on account of error trade by the learned Assessing Officer holding that the loss arises on account of share trading by the assessee and therefore, the same is speculative in nature. During the course of verification by the learned Assessing Officer, it was noted that assessee has incurred loss on error trade transaction. The assessee was asked to explain that why the provisions of Section 73 should not be applied. The assessee explained that looking at the nature of its business of broking these are the losses arising out of the purchase and sale of shares with an obligation of payments and delivery to certain times the client does not accept the loss and therefore, assessee has to bear it by reversal of the trade. The learned Assessing Officer disallowed the same holding that the provisions of Section 73 of the Act hit it and loss is speculative. The learned CIT (A) relying on the decision of the Hon'ble Bombay High Court in 379 ITR 146, deleted the disallowance.
- h. The learned Assessing Officer during the course of assessment proceedings, disallowed 20% of entertainment and conference, repairs and maintenance and books and periodical expenditure holding that this expenditure were not incurred wholly and exclusively for the

purpose of business. The learned Assessing Officer was of the view that assessee has given a general and casual answers without any supporting. The assessee merely submitted the some ledger of the said expenses but has not furnished sufficient details. Therefore, ₹93,01,653/- was disallowed. The learned CIT (A) after considering the explanation of the assessee confirmed the disallowances at the rate of 10% only. He held that the analysis made by the learned Assessing Officer is correct.

012. Therefore, both the parties are aggrieved with the order of the learned Commissioner of Income tax (Appeals). The learned Assessing Officer is aggrieved with the order of the learned CIT (A), wherein he deleted the addition on account of Arm's Length Price of the international transaction by directing inclusion of IDC Limited and exclusion of IDFC Investment Advisories Ltd., Ladderup Corporate Advisory Pvt. Ltd. and M/s Motilal Oswal Investment Advisory P. Ltd.
013. The learned Departmental representative submitted that
- i. IDC India Limited that assessee did not have the above comparable company in it's accept/reject matrix. However, assessee included the same, as it was part of its comparability

analysis for A.Y. 2011-12. He referred to the paragraph no.7.4 of the learned Transfer Pricing Officer. According to him when in the accept/ reject matrix of the assessee where six companies were selected cyber media research limited earlier known as IDC Limited was not a comparable company. The assessee included the same only on the basis that for A.Y. 2011-12 and 2012-13 this company was in the comparability analysis of the assessee. He submitted that the assessee has conducted the search on prowess capital line and place and venture intelligence database. How a comparable company can enter into a comparability analysis beyond the search filters adopted by the assessee. He submitted that the CIT (A) has given the reasoning in paragraph no.4.4, which is bad and beyond a comprehension in transfer pricing.

- ii. With respect to the inclusion of IDFC investment advisory limited by the learned Transfer Pricing Officer but excluded by the learned CIT (A), he submitted that the learned Transfer Pricing Officer has categorically stated that IDFC investment advisories limited qualify all the filters adopted by the assessee and the learned Transfer Pricing Officer rejected it merely because of RPT filter. According to the assessee, it has related party transaction more

than 25%. In the whole submission of the assessee, there is no challenge that it did not cross all the filters by the assessee as well as by the learned Transfer Pricing Officer. Assessee objected before the learned Transfer Pricing Officer that this comparables fails RPT filter, however, before the learned CIT (A), there is no whisper about RPT filter but altogether a functionality ground was decided and this comparable was excluded.

- iii. With respect to the Ladder up corporate advisory Pvt. Ltd., the assessee has excluded the same on account of business review and
- iv. Similarly, Motilal Oswal Investment Advisories Pvt. Ltd. was also objected on that basis. Both the objections were rejected by the learned Transfer Pricing Officer by obtaining 133(6) of the Act, information from those parties and were considered as functional comparable.
- v. It was stated that the learned CIT (A) has without making any enquiry not even looking at the 133(6) of the Act information has directed the learned Transfer Pricing Officer to exclude these comparables.
- vi. He submitted that the learned CIT (A) has not even referred to various observations of the learned Transfer Pricing Officer with respect to



the functions of the assessee and the functional profile of its employees.

vii. Therefore, according to him the learned CIT (A) in a stereotype manner without considering the finding of the learned Assessing Officer has decided on inclusion or exclusion of the comparables. Thus, the order of the learned CIT (A) was stated to be unsustainable.

014. On the issue of applicability of Section 73 as per ground no.5 of the appeal, the learned Departmental Representative vehemently submitted that assessee has traded into securities and has incurred losses on transaction of shares and therefore, it is hit by provisions of Section 73 of the Act.

015. The learned Authorized Representative supported the order of the learned CIT (A) on the issue of various grounds in the appeal of the learned Assessing Officer. He submitted that

i. each of the comparable company was analyzed by the learned CIT (A) and has correctly dealt with its inclusion or exclusion. He submitted that IDC India was appearing in the accept reject matrix of the assessee however the same was inadvertently rejected it was submitted before the learned transfer pricing Officer as per letter dated 10 January 2014 and before the learned CIT – A as per letter dated ninth



may 2017 and therefore assessee did not cherry picked the comparable. He submitted that since IDC India is a comparable its inclusion could not be objected now. It was further stated that in the related party transaction disclosures of that company does not have any bearing on the profits of the company is only RPT transactions reflected was an increasing sundry debtors, which undisputedly had no impact on the profit and loss account. He further placed the detailed submission on the functional comparability by placing reliance on the website extract, disclosure and annual report on the information on employee functions furnished by the TPO.

- ii. With respect to the exclusion of IDFC investment advisors Ltd, Motilal Oswal investment advisors private limited and ladder up corporate advisory private limited, he submitted that the learned CIT – A has given his detailed finding that why the above comparable is to be excluded. The learned departmental representative did not challenge the reasons given by the learned CIT – A.
- iii. With respect to ground no.5 of the appeal, he submitted that the learned CIT (A) has followed the decision of the Hon'ble Bombay High Court on identical facts and circumstances and

therefore, the provision of Section 73 of the Act does not apply.

016. On assessee's appeal, the learned authorized representative did not press ground number 1 and 2 of the appeal regarding T P adjustment confirmed by the learned CIT – A of ₹20,80,796/-.
017. On the issue of disallowance under Section 14A of the Act, he submitted that though assessee has earned tax-free dividend income of ₹5,20,000/- assessee has stated it has not incurred any expenditure towards earning exempt income for the reason that it is holding only the shares of stock exchange for which it is broking. The learned Assessing Officer without saying anything has invoked the provisions of Section 14A read with Rule 8D of the Rules and worked out the disallowances of ₹48,325/-. He submits that there is no satisfaction recorded by the learned Assessing Officer on the disallowance not offered by the assessee. He otherwise submitted that when the assessee hold shares of the stock exchange, where it is member, there is no expenditure as such incurred by the assessee. Therefore, disallowance under Section 14A of the Act should not have been made. He submitted that the learned CIT (A) did not consider any of the explanation, but has confirmed the disallowance. He referred to Para no.6.2 of the order. Even otherwise

he submitted that the disallowance be restricted to the amount disallowed by the AO only

018. Coming to ground no.4, he submitted that assessee has incurred entertainment and conference expenses, repairs and maintenance expenses and books and periodicals expenses for the purpose of the business. Before the lower authorities, all these details were produced in the form of the ledger. However, an adhoc disallowance was made by the learned Assessing Officer and confirmed by the learned CIT (A). He submitted that there is no reason that why this adhoc disallowances could have been made.
019. During the course of hearing, an additional ground of appeal was raised by the assessee stating that in the research report service income segment comparability analysis Kshitij Investment company advisories limited has wrongly been considered as comparable. It was submitted that since it has undergone a realignment of business during the assessment year 2010-11, therefore, assessee submits that above ground should be admitted for the purpose of determination of Arm's Length Price. It was further stated that the above ground should be admitted relying on the decisions of the Hon'ble Supreme Court.
020. The learned Departmental Representative vehemently objected to the same stating that

additional ground cannot be admitted if the facts are not on record and further, same is required to be investigated. It was further stated that it is a factual aspect, which now at this stage cannot be entertained.

021. The learned Authorized Representative relied upon the decision of the Hon'ble Bombay High Court in case of CIT vs. Tata Power Solar Systems Ltd. 77 taxmann.com 326, stating that if a comparable has been included mistakenly, assessee has not been barred in law from withdrawing the comparable.
022. During the course of hearing, the assessee was also directed to explain and submit search process for research support services, which was submitted along with accept/ reject matrix for the same. It was submitted. The assessee was also asked about the comparability of the employee cost ratio between the assessee and IDC Ltd, it was submitted that the assessee employee cost was 34.9% whereas the employee cost of IDC India Ltd is 34.50%.
023. We have carefully considered the rival contention and perused the orders of the lower authorities along with the transfer pricing study report submitted by the assessee as well as further details called for by us. In the appeal of the revenue, the learned AO is aggrieved by the direction of the learned CIT – A to include IDC (India) Ltd, and to exclude IDSA investment advisors Ltd, Ledger up corporate

advisory private limited and Motilal Oswal investment advisory private limited.

024. As per ground number 1 of the appeal, the assessee has challenged the order of the learned CIT – F for inclusion of cyber media research Ltd (formerly IDC (India) Ltd) stating that its inclusion does not support the functional comparability, absence of segmental account in spite of carrying out different segmental activities and the application of related party transaction filter. Further, it is also the claim of the assessing officer that without giving any opportunity to the learned assessing officer the learned CIT – A has directed for inclusion of the above comparable. The learned CIT – A has held that that this entity is engaged in research and analysis services based on the annual accounts and screenshot of the website of the company. The comparable has earned 90% of its revenue from market research and management consultancy. The learned CIT – A held that it is functionally comparable with the assessee's functions as assessee has provided the quantitative and qualitative analysis of companies, industries, markets, collection and verification of financial data and administration and application support services to its AE, the functions are comparable. With respect to the related party transaction filter, the learned CIT – A that it does not cross 25% of the revenue of the comparable company. To establish the functional

comparability, we have also compared the employee cost of assessee and this comparable and we found that the total employee cost of the assessee out of the operating cost was 34.9% whereas in case of the comparable company it is 34.5%. However, in the original except reject matrix of the assessee this company appeared as a comparable. Inadvertently it was excluded. When the assessee pointed out the same before the learned TPO asking for its inclusion, the learned TPO held it to be functionally not comparable stating that the annual account of the assessee company are not reliable because of incorrect disclosure of related party transactions. Before us it was not shown that how the disclosure in the annual accounts of that company could be said to be erroneous without making any enquiry under section 133 (6) of the act. As no new facts, additional evidences were submitted by the assessee for its inclusion before the learned CIT – A, we do not find any infirmity in the order of the learned CIT – A in directing the learned TPO to include the above comparable. Accordingly ground number 1 of the appeal of learned AO is dismissed

025. The learned assessing officer has challenged the order of the learned CIT – A as per ground number 2 – 4 with respect the order of the learned CIT – A that has excluded the IDFC investment advisors Ltd on the basis that it is engaged in the business of providing portfolio management services as a



registered portfolio manager with the securities and board of India which is having 90% of its revenue coming from that stream and only 10% revenue stream is from advisory services. The learned CIT – A has also directed for exclusion of Ledger up corporate advisory private limited, which is found to be engaged primarily in the business of providing investment banking services like that syndication, private equity deals and other corporate advisory mandates. It is also registered with the securities and exchange board of India and therefore the learned CIT – A held that it is engaged in merchant banking activities and therefore not comparable to the assessee. On the issue of exclusion of Motilal Oswal investment advisors private limited, it was held that it is engaged in the business of providing investment banking, merchant banking services based on the extracts of the annual reports. It was also found that it is an investment banking company engaged in providing comprehensive investment banking solution. All these findings of the learned CIT – A remain unchallenged by the learned departmental representative before us. We find that there is a reasonable basis for the learned CIT – A to hold so that all these entities are selected as comparable by the learned transfer pricing officer are having different functions. Accordingly we do not find any infirmity in the order of the learned CIT – A and

uphold the order of the learned CIT – A by dismissing ground number 2 – 4 of the appeal.

026. With respect to ground number 5 wherein the learned CIT – A has deleted the addition/disallowance of ₹ 23,106,114 on account of error trade loss,, the learned CIT – A deleted the disallowance following the decision of the honourable Bombay High Court in case of CIT versus HSBC securities and capital markets India private limited 379 ITR 147. We also found that assessee does not have any share trading income and does not hold any stock in trade of equity except the shares of Bombay stock exchange. It is not also in dispute that losses have arising on account of error trades only. Therefore, provisions of section 73 of the income tax act with respect to the speculation loss does not apply in case of the assessee. Accordingly we do not find any infirmity in the order of the learned CIT – A in deleting the above disallowance. Ground number 5 of the appeal of the learned assessing officer is dismissed.
027. Accordingly, ITA number 45/M/2018 filed by the learned assessing officer for assessment year 2010 – 11 is dismissed.
028. Coming to ITA number 72/M/2018 filed by the assessee, ground number 1 and 2 of the appeal with respect to the transfer pricing adjustment of ₹

2,080,796/- pertaining to brokerage services is not pressed , therefore same are dismissed.

029. Ground number 3 of the appeal is against the disallowance confirmed by the learned CIT – A of ₹ 48,325/- under section 14 A of the act read with rule 8D. The assessee has also without prejudice raised an issue that no expenditure having direct and proximate connection with the earning of exempt income has been incurred by the appellant and thus no disallowances of expenditure incurred in relation to earning exempt income is warranted. The claim of the assessee is that assessee has earned tax-free income from shares of Bombay stock exchange Ltd as dividend. Assessee is stockbroker and was holding shares of Bombay stock exchange. On conversion of the Bombay stock exchange membership card of the assessee into the shares under the scheme of 2005 assessee got equity shares. From these equity shares, assessee received the above dividend. Assessee claims that it has not incurred any expenditure for earning the dividend income. On the issue of not incurring any expenditure for earning dividend income , ld AO rejected stating that there is common pool of expenses for earning taxable and exempt income. The learned AO, disallowed ₹ 48,325/- applying rule 8D. On appeal before the learned CIT – A, he upheld the validity of rule 8D following his own order in assessee’s case for earlier year and confirmed the disallowance. Assessee has

twin claims before us, (i) non-recording of satisfaction by the AO before invoking rule 8D and (ii) the assessee received the shares and has not incurred any expenditure. We find that according to the Para number 5.2 the learned assessing officer has categorically stated that there is a composite use of funds and there is a common pool of human and financial resources which are being utilized by the assessee for earning income in various forms and therefore the claim of the assessee that it did not incur any expenditure towards earning of exempt income is not correct. We find that the satisfaction is recorded by the learned assessing officer. We also find that the law does not require a specific manner in which such satisfaction is to be recorded. Further, we do not find any relevance of dominant purpose of holding investments while making disallowance under section 14 A of the act. Thus, the claim of the assessee that the shares were acquired on demutualization of Bombay stock exchange membership card where assessee is a stockbroker does not help the case of assessee. In this case the total dividend income of ₹ 520,000 is received and according to rule 8D, the learned that AO has disallowed ₹ 48,325/-. We do not find any infirmity in the order of the learned lower authorities in confirming the above disallowance. Accordingly, ground number 3 of the appeal of the assessee is dismissed.

030. Ground number 4 of the assessee is against the ad hoc disallowance of 10% of entertainment and conference expenses, repair & maintenance expenses and books and periodical expenses. Fact shows that during the course of assessment proceedings the assessee was asked the details of these expenditure, assessee submitted the nature of these expenditure and the learned AO held that the explanation submitted by the assessee is very general and casual in nature and is not supported by any cogent evidences or strong nexus for inclination to say that the expenses has got a business incidence. On verification of details filed, it was observed by the AO, that these expenses are not fully supported by proper bills and vouchers and certain expenses are incurred through self-made vouchers in cash. Claim of Id AO is that Assessee has furnished some Ledger accounts for the said expenses however the assessee has not furnished sufficient detail to substantiate the claim of the expenses incurred for business and non business purposes separately as the volume of the same are huge and bulky. Accordingly the AO disallowed 20% of the above expenditure resulting into disallowance of ₹ 9,301,653/-. The learned CIT – A confirmed the action of the learned assessing officer however reduced the disallowance from 20% to the 10% of the total expenditure. We find that the learned CIT – A has confirmed the ad hoc disallowance by reducing



the quantum of disallowance from 20% to 10%. We find that the above expenditure incurred by the assessee is merely 1.6% of the total expenditure incurred by the assessee. In earlier years, no such disallowances are made. Thus, this disallowance is resulted only for this year. We find that, if the assessing officer is not satisfied by any amount of expenditure, the expenditure to that extent should have been disallowed irrespective of its percentage. Merely applying an ad hoc percentage to the total expenditure for holding that such expenditure are not bifurcated into business and non business expenditure is not correct. It is not the case of the revenue that any bogus expenditure has been debited in the books of accounts. Further merely because certain vouchers are held to be prepared by self showing cash expenditure, does not result into any illegality as there are certain types of expenditure which are prepared on self made vouchers and reimbursed or paid in cash, i.e. Petty cash expenditure, conveyance etc. As such, the assessee has submitted all the Ledgers of such expenditure, which had proper narration of the nature, and the amount spent along with the name of the person who spent it. Further, the assessing officer after obtaining the explanation of the assessee did not further point out to the assessee about specific instances of such expenditure with respect to disallowance. As the disallowance is ad

hoc without pointing out any instances of nature of expenditure which are not supported by voucher, we reverse the orders of the lower authorities and direct the learned assessing officer to delete the disallowance of 10% of such expenditure confirmed by the learned CIT – A amounting to ₹ 4,650,827/-. Accordingly ground number 4 of the appeal of the assessee is allowed

031. As the assessee has raised an additional ground with respect to the transfer pricing adjustment that Kshitij investment advisory Co Ltd is required to be excluded from the comparability analysis. On perusal of the transfer pricing study report, we found that while computing the arm's-length PLI of the assessee, assessee selected this comparable namely Kshitij investment advisory Co Ltd by prowess database having a margin of 23.46%. Thus, it is assessee's own comparable. The learned assessing officer/transfer pricing officer also did not dispute the above comparable as assessee selected the same and it was also functionally comparable as found by the lower authorities also. However before us assessee has stated that note number 14 (17) of notes to the accounts of Kshitij investment advisors Co Ltd has realigned its investment advisory activities by the alignment agreement effective from 1 January 2010 wherein Everstone investment advisors private limited would be carrying on all investment advisory services. Thus with effect from



that date the functionality of comparable is different. Thus, at least Comparable continued same activity only for nine months of the year. This is an extraordinary event, which has affected margin of the comparable for that year. Therefore, it should be excluded from comparability analysis. Honourable Bombay High Court in CIT versus Tata Power solar systems limited (2017) 77 taxmann.com 326 (Bombay) wherein, Tribunal held that party is not barred in law from withdrawing from its list of comparables, if the same is found to have been included on account of mistake as on facts, it is not comparable, was upheld. In that case, the issue of exclusion of a comparable, which was included by the assessee, was argued before the TPO, it is not permitted by the TPO. In this case also, though it was not argued before the TPO, but first time argued before us, for exclusion of Kshitij investment advisory Ltd. We are also duty bound to compute the ALP of international Transaction. Therefore, there is not much difference whether it is challenged before TPO or before us for the first time. We find that comparable company with effect from 1 January 2010 has hived of its investment advisory services to Everstone investment advisors private limited. Therefore, there is an extraordinary event in the comparable company, which has affected the profitability/PLI of the comparable, as investment advisory services business revenue/expenses is not



to be included in the financial of comparable company from 1/1/2010. Therefore, we direct the learned AO/ TPO to exclude Kshitij investment advisory Co Ltd from comparability analysis. The additional ground raised by the assessee is thus allowed.

032. In the result, appeal filed by the assessee is partly allowed.

033. Thus, for assessment year 2010 – 11, appeal of the AO is dismissed and appeal of the assessee is partly allowed.

Order pronounced in the open court on 25.10.2023.

Sd/-
(KAVITHA RAJAGOPAL)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated:25.10.2023

Dragon

Copy of the Order forwarded to:

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

BY ORDER,

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai