

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, K, मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "K", MUMBAI**

**Before Shri Saktijit Dey, Judicial Member, and
Shri Ashwani Taneja, Accountant Member**

**ITA NO.496/Mum/2015
Assessment Year: 2010-11**

TA Associates Advisory P. Ltd. Avantha House, Crompton Greaves Building, 12 th Floor, Dr. Annie Besant Road, Worli Mumbai -400004	<u>बनाम/</u> Vs.	DCIT CIR- 3(3) Aayakar Bhavan Mumbai
(Assessee)		(Revenue)
P.A. No.AADCT0884H		

निर्धारिती की ओर से / Assessee by	Shri Porus Kaka & Shri Divesh Chawla (AR)
राजस्व की ओर से / Revenue by	Shri N.K. Chand -CIT (DR)

सुनवाई की तारीख / Date of Hearing :	18/1/2016
आदेश की तारीख /Date of Order:	22/01/2016

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

This appeal has been filed by the Assessee against the order of Ld. Commissioner of Income Tax (Appeals)-15, Mumbai {(in short Ld. CIT(A)} dated 27.10.2014 for the assessment year 2010-11, decided against the assessment order passed by the Assessing Officer (in short 'AO') u/s 143(3) of the Act.

2. During the course of hearing, Shri Porus Kaka & Shri Divesh Chawla Authorised Representative (Ld. Counsel) on behalf of the assessee and Shri N.K. Chand, CIT, Departmental Representative (Ld DR) on behalf of the Revenue, argued the case.

3. At the very outset, it has been noted that appeal filed by the assessee is late by one day. In response to our query, Ld. Counsel of the assessee has drawn our attention to the petition filed by the assessee requesting for condonation of the delay. We have gone through the said petition explaining the delay on the ground that managing director of the company was not available and that is how delay occurred. The assessee has supported the reason along with duly sworn affidavit. No serious objection has been raised by the department for condonation of delay. In view of these facts and in the interest of justice, the delay is condoned and appeal is admitted for adjudication.

4. Ground No.1: In this ground, the assessee has challenged the action of Ld. CIT(A) in confirming the action of AO in making addition as a result of upward Transfer Pricing Adjustment. The main grievance of the assessee is that the AO has wrongly included one comparable namely M/s. Motilal Oswal Investment Advisors Pvt. Ltd.

4.1. During the course of hearing, it has been submitted by the Ld. Counsel that the aforesaid comparable has been included by the AO abruptly in the assessment order without

making any fresh search and without following due procedure as prescribed under the law. It has been also submitted that Motilal Oswal (i.e. M/s. Motilal Oswal Investment Advisors Pvt. Ltd.) is not, even, functionally comparable to the assessee company. It has been submitted that based on the Functional, Assets and Risk analysis of the assessee as documented in its Transfer Pricing Study Report, it can be concluded that the assessee company is a captive service provider with limited risk associated with carrying out such business and does not perform any decision making function and its activities are merely restricted to the provision of non-binding Investment Advisory Services under the institutions of its Associated Enterprises. The role of the company is limited to the provision of non-binding Investment Advisory Services, and thus, it assumes limited risk such as market risk, loss and investment risk, credit risk, foreign exchange risk and manpower risk. Thus, the assessee received returns having regard to its functionality and its profile.

4.2. It has been submitted that on the other hand, Motilal Oswal is not functionally comparable to the assessee company, since Motilal Oswal is an investment banking company engaged in providing investment banking solutions. It has a team of experienced bankers and is capable of providing services for various projects viz capital markets mergers and acquisition, private equity and structured debt. It has been submitted that Motilal Oswal is primarily into merchant banking and IPO services, and quantification of its

fee and remuneration stand on a absolutely different platform, which is charged mostly on percentage basis. Motilal Oswal is involved in the decision making process as well as implementation. On the other hand, the assessee company is merely a sub-advisor. Its role is confined merely to advisory that too upto a pre-investment stage. The assessee company's role is confined mostly in providing opinion to its clients for various investments options available in the market. How and in what manner advice/opinion of the assessee company would be implemented or executed by the client, in none of the business of the assessee company. Our attention has been drawn on various pages of the paper book to show Transfer Pricing Reports and Annual Reports of Motilal Oswal as well as the assessee company to show the distinction between the working mechanisms of both the companies.

4.3. Lastly, it has been submitted by the Ld. Counsel that this issue is no more res-integra. It has been decided in various judgments coming from the Tribunal and Hon'ble Bombay High Court that Motilal Oswal is not pure advisory company and the same was rejected as comparable to pure advisory companies in following cases:

1. Carlyle India Advisors (P.) Ltd. v. Assistant Commissioner of Income-tax 10(1), Mumbai. (7901/Mum/2011) (Mumbai)
2. Commissioner of Income-tax-10, Mumbai v. Carlyle India Advisors (P.) Ltd. (32 taxmann.com 23) (Bombay)
3. Carlyle India Advisors (P.) Ltd. v. Deputy Commissioner of Income-tax, Circle -10(1), Mumbai (43 taxmann.com 184) (Mumbai - Tub.)
4. Carlyle India Advisors (P.) Ltd. v. Deputy Commissioner of

- Income-tax, 10 (1), Mumbai (49 taxmann.com 476) (Mumbai - Trib.)
5. General Atlantic (P.) Ltd. v. Deputy Commissioner of Income-tax, Circle - 3(1), Mumbai (32 taxmann.com 178) (Mumbai - Trib.)
6. General Atlantic (P.) Ltd. v. Assistant Commissioner of Income-tax (OSD), Circle-3(1), Mumbai. (36 taxmann.com 44) (Mumbai - Trib.)
7. Temasek Holdings Advisors (I) (P.) Ltd. v. Deputy Commissioner of Income-tax, Circle -3(3), Mumbai. (38 taxmann.com 80) (Mumbai - Trib.)
8. Deputy Commissioner of Income-tax, Cir. 3 (3), Mumbai v. Temasek Holding Advisors (P.) Ltd. (47 taxmann.com 311) (Mumbai - Trib.)
9. Q India Investment Advisors Pvt Ltd v/s Deputy Commissioner of Income-tax - 3(3), Mumbai. (923/Mum/2015)
10. NVP Venture Capital India Pvt Ltd v/s Deputy Commissioner of Income-tax - 3(2)(2), Mumbai. (1 564/Mum/ 2015)
11. Bain Capital Advisors (I) P Ltd v/s Deputy Commissioner of Income-tax - 3(1), Mumbai. (413/Mum/2015)
12. Bain Capital Advisors (I) P Ltd v/s Deputy Commissioner of Income-tax —3(1), Mumbai. (1360/Mum/2014)
13. Acumen Fund Advisory Services India (P.) Ltd. v. Deputy Commissioner of Income-tax - 2(1), Mumbai. (50 taxmann.com 317) (Mumbai - Trib.)
14. Deputy Commissioner of Income-tax - 2(1), Mumbai v/s Arisaig Partners India Pvt Ltd. (1083/Mum/2014)
15. Lehman Brothers Advisers Pvt Ltd v/s ACIT - Circle 6(3) -ITANo.7722

4.4. Ld. Counsel has read before us various judgments from the above list to show that Motilal Oswal was excluded from the list of comparables in these cases which are having similar facts with the assessee company.

4.5. On the other hand, Ld. DR vehemently opposed the submissions made by the Ld. Counsel of the assessee. Our

attention was drawn on annual report of Motilal Oswal wherein statutory auditors of the said company have mentioned that the Motilal Oswal had only one segment and there were not separate reportable segments as defined in AS-17. It was further submitted that even if the functions of the said company and the assessee company are not similar, but skill sets required to perform the functions are similar. In view of these facts Motilal Oswal should be held as comparable to the assessee company.

4.6. We have gone through the submissions made by both the sides. In our considered opinion, functions and activities carried out by Motilal Oswal are different from the functions and activities of the assessee company. Accordingly, the risk profiles of the two are also different. It has been clearly mentioned in the annual report of Motilal Oswal that the said company is engaged in the business of merchant banking and investment, business advisory services. It is further noted by us that actually we need not labour much on this issue as various benches have already addressed this issue at great length and detail in the aforesaid precedents relied upon by the Ld. Counsel. In the case of Lehman Brothers Advisors Pvt. Ltd., in which one of us (i.e. Hon'ble Judicial Member was a party), it was held, with regard to Motilal Oswal as under:

“4. We have heard both the parties on the limited issue of if the MOIAPL is a good comparable and whether it passed the functional test. In this regard, we examined the directors’ report placed on page 13 of the paper book and the following is reported by the directors under the

heading “review of operations and future outlook”, which reads as under:

“The market for the services of the Company is buoyant and the Company made a quantum jump in business during the year 2007-08. On the whole, 23 assignments were completed successfully in the year as against 14 completed in the previous year. Income from cross border M&A activity and the related financing solutions has been the largest contributor to the revenue mix during the year. The team size has now increased to 30 and there is a good blend of relationship managers, products specialist and sector expert. Specifically, the knowledge and expertise in the industry areas of real estate, oil & gas, information technology, steel and power have been strengthened.

The Capital Markets business gained momentum during the year deriving its synergy from distribution team at Motilal Oswal Securities Limited. The company' was ranked as number one in Bloomberg ranking for QIP business during the quarter ended March, 2008. The Company has been able to originate and structure high quality deals in private equity business and, is hopeful that the same trend would continue in the coming year. Clients have appreciated the capability of the Structured Finance team and it remains a strong selling proposition for the Company to strengthen its position in the market place and to be able to cross sell its services across the clients and Industry sectors.

The financial markets have seen an unprecedented turmoil over the last three months with both equity and credit markets being unstable and in a state of uncertainty. The market situation would have impact on the capital markets business of the Company in the coming year. At the same time, the liquidity crunch and re-valuation of assets across the board globally has opened up opportunistic buying and selling possibilities for our clientele in the industry and financial markets. The team has a good combination of skill set and knowledge to address the change in the market conditions. The Company expects a larger flow of transactions in the product areas of business and financial restructuring, private equity have-offs shareholder value creation through buy-back/sell-outs and mergers.”

5. From the above it is evident that the said company MOIAPL has undertaken 23 assignments successfully in the year under consideration. Major portion of the income is earned by MOIAPL out of cross border activity services and related financial services. The capital market business is one of the source³s of the advisory fees earned by the assessee. Assessee has also earned fees out of assessee's capability of the structured finance teams, financial markets, ie both equity and credit market, is another source of income for the assessee. These functions of the assessee were analyzed by the Tribunal during the proceedings in the case of Carlyle India Advisors (P) Ltd (supra). The detailed findings of the Tribunal in this regard are mentioned in para 12 of the said Tribunal's order (supra) and the same is reproduced as under:

"12.The only dispute is whether Motilal Oswal Investment Advisors Pvt Ltd can be considered as a comparable for the determination of ALP. A perusal of three comparables considered by the TPO shows that M/s. Future Capital Investment Advisors Ltd has operative profit at 21.79% whereas OPM of Motilal Oswal Investment Advisors Pvt Ltd is 72.33%. The comparables used by the TPO themselves are showing extreme OPM. A perusal of the Director's report of Motilal Oswal Investment Advisors Pvt Ltd shows that during the year under consideration, the said company has completed 23 assignments successfully as against 14 completed in the immediately preceding year. A close look at the financial statements of the said company show that the income from operations have been shown only as advisory fees whereas it is admittedly an undisputed facts that the said company is engaged in diversified activities. Segmental reporting is not available. Profit and loss account appears to be only of consolidated accounts. The said company is registered with SEBI as a merchant banker and the Director's report show that it is into takeover acquisitions, disinvestments etc. In the absence of specific data it is not possible to make comparison. It can therefore be safely said that the said company being into merchant banking and cannot be considered as a comparable. We, accordingly, direct the AO not to consider Motilal Oswal Investment Advisors Pvt

Ltd as a comparable for the determination of ALP and re-determine the Arm's Length Price excluding Motilal Oswal Investment Advisors Pvt Ltd [as per the findings] and including M/s. IDC [as per the directions of the DRP] i the light of the provisions of section 92C(2) r.w.s 92C(2A) of the Act. Ground no.4.1 and ground no.9 are accordingly allowed.”

6. The contents of above extracted para highlights the fact that the MOIAPL is into merchant banking, and therefore, is functionally different to that of the assessee which is engaged in the business of non-binding advisory services. Therefore, in our opinion, the assessee is engaged in the function of non-binding advisory services whereas MOIAPL is into the merchant banking, capital markets, finance markets etc. Therefore, we find the MOIAPL is functionally dissimilar and therefore, the same should be excluded for benchmarking the international transactions. Accordingly, AO / TPO is directed to exclude the same. Thus, Ground no. 1 raised by the assessee is allowed in favour of the assessee.

4.7. Similarly, in case of Q-India Investment Advisors Private Limited (supra), similar view has been taken. Detailed finding of the Hon'ble Bench are reproduced herein:

“7. We have considered rival contentions, carefully gone through the orders of the authorities below and found that assessee is engaged in rendering investment advisory services to its AE. As per finding recorded in various judicial pronouncements in above referred cases, M/s Motilal Oswal Investment Advisory Pvt. Ltd. has been excluded from the list of comparables on the plea that it is engaged in diversified activities. In the case of Acumen fund Advisory Services (I) Pvt. Ltd. (supra), the Tribunal observed that M/s Motilal Oswal Investment Advisory Pvt. Ltd. is engaged in acquisition, disinvestment, IPO, etc, whereas the assessee is engaged in investment advisory services. In case of Carlyle India Advisors Pvt. Ltd.(supra),

the Tribunal observed that M/s Motilal Oswal Investment Advisory Pvt. Ltd. is registered with SEBI as merchant banker and is engaged in diversified activities, acquisition, disinvestment, IPO etc. 8. As per the annual report of M/s Motilal Oswal Investment Advisory Pvt. Ltd. for the year ending on 31-3-2010 relevant assessment year 2010-2011, the company derives its business income from four different business verticals viz. Equity Capital Markets, Mergers & Acquisitions, Private Equity Syndications and Structured Debt. The income source across the four products was more or less evenly balanced. The company continues to perform well on advising Indian corporate on cross border acquisitions. The Private Equity business over the last three years has also resulted in a good pipeline of IPOs in the coming year.

9. In view of the above observations regarding nature of business carried on by Motilal Oswal and the judicial pronouncements, it is crystal clear that in addition to investment advisory services in which assessee was involved, M/s Motilal Oswal Investment Advisory Pvt. Ltd. was engaged in diversified activities and registered with SEBI as a merchant banker. Thus, M/s Motilal Oswal Investment Advisory Pvt. Ltd. is functionally different from the assessee. Accordingly, we direct the AO to exclude M/s Motilal Oswal Investment Advisory Pvt. Ltd. from the list of comparables.”

4.8. It is noted that the assessment year in the above said case is A.Y. 2010-11 which is same as that of assessee in the case before us. It is further noted by us that decision of Hon’ble Bombay Bench in the case of Carlyle India Advisors (P) Ltd. (supra) has been upheld by the Hon’ble Bombay High Court in the case of CIT vs. Carlyle India Advisors (P) Ltd. 32 taxmann.com 23(Bombay). Thus, respectfully following the aforesaid judgments and in view of the facts brought before us. We find that Motilal Oswal is not comparable to the assessee company and the AO is directed to exclude the same from the

list of comparables and re-compute the Arm's Length Price and also the Transfer Pricing Adjustment to be made, if any after the excluding the aforesaid company.

4.9. It is submitted by the Ld. Counsel of the assessee that other grounds raised by the assessee are consequential to ground no.1 and if ground no.1 is decided in favour of the assessee the other grounds become academic in nature and infructuous. Since, we have decided ground no.1 in favour of the assessee, therefore other grounds are dismissed as infructuous.

5. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 22nd January, 2016.

Sd/-
(Saktijit Dey)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(Ashwani Taneja)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 22/1/2016

Paet, P.S./नि.स.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai