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

BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER

ITA No. 6638/Del/2013
Assessment Year: 2009-10

Avenue Asia Advisors Pvt. Lower Ground Floor, C-4/5, Safdarjung Development Area, New Delhi (PAN: AADCP7362G)	Vs.	DCIT, Circle-2(1), New Delhi.
(Appellant)		(Respondent)

Appellant by : S/sh. Mukesh Butani, Vishal Kalra & Vivek Bansal, Adv. and Ms. Shweta Kashyap, CA
Respondent by : Sh. Anand Kumar Kedia, CIT(DR)

Date of hearing: 26.10.2015
Date of pronouncement: 22.01.2016

ORDER

PER O.P. KANT, A.M.:

The present appeal by the assessee is directed against the order dated 10.10.2013 of the Deputy Commissioner of Income-tax, circle-2(1), New Delhi under Section 143(3) r.w.s. 144C of the Income-tax Act, 1961 (for short ñthe Actò) in relation to assessment year 2009-10. The grounds of appeal raised by the assessee are as under:

1. *That the learned Assessing Officer ("AO") erred on the facts and circumstances of the case and in law in making an addition to the total income of the Appellant amounting to Rs. 95,945,630/- in pursuance to the directions of the Hon'ble Dispute Resolution Panel ("DRP") upholding the adjustment to the transfer price proposed by the learned Transfer Pricing Officer ("TPO").*

Atment made for the international transactions relating to the provision of investment advisory services.

2. *That each of the learned AO/DRP/PO erred on the facts and circumstances of the case and in law in making an addition of Rs 32,029,913 in respect of the international transactions relating to investment advisory support services alleging the same to be not at arm's length in terms of the provisions of Sections 92C(1) and 92C(2) of the Act read with Rule 10D of the Income-tax Rules, 1962 ("the Rules")*

2.1 *That each of the learned AO/DRP/TPO erred on the facts and circumstances of the case and in law by not appreciating the business model of the Appellant and by comparing the activities of the Appellant, which is engaged in provision of 'investment advisory and related support service' to the activities undertaken by investment banks and merchant banks.*

3. *That each of the learned AO/DRP/TPO erred on the facts and circumstances of the case and in law by rejecting the comparable companies selected by the Appellant, without giving adequate reasons for the rejection and further choosing "comparable" companies which were functionally or otherwise not comparable to the Appellant.*
4. *That each of the learned AO/DRP/TPO erred on the facts and circumstances of the case and in law by not providing a relief on account of difference in the risk profiles between the appellant and the "comparable companies" selected by the TPO for the purpose of determination of an arm's length price.*
5. *That each of the learned AO/DRP/TPO erred on the facts and circumstances of the case and in law by not taking into account the judicial precedents (including that of Carlyle India Advisors Private Limited Vs ACIT, Mumbai, ITA No. 1286/Mum/2012) which is squarely applicable) deal with similar facts and functions as those of the Appellant.*

Adjustment made in relation to outstanding receivables

6. *That each of the learned AO/DRP/TPO erred on the facts and circumstances of the case and in law by levying interest of INR 5,134,309/- on the amount of outstanding receivables.*
7. *That each of the learned AO/DRP/TPO erred on the facts and circumstances of the case and in law by considering the outstanding receivables as an international transaction.*

8. *That each of the learned AO/ORP/TPO erred on the facts and circumstances of the case and in law by concluding that the appellant has not received payment for the services provided to associate enterprises within the time period specified by the TPO.*
9. *That each of the learned AOITPO/ORP erred on the facts and circumstances of the case and in law by applying an imputed rate of interest which is based on incurred assumptions.*
10. *That each of the learned AO/ORPITPO erred on the facts and circumstances of the case and in law by providing no relief for the amount of receivables realized by the appellant within the time period specified by the TPO.*

Other grounds

11. *That each of the learned AO/TPO/DRP erred on the facts and circumstances of the case and in law by ignoring the provisions of Rule 10B(3) of the Rules and judicial pronouncements, which advocate usage of multiple year data of comparable companies for the purpose of determination of arm's length price.*
12. *That each of the learned AO/DRP/TPO erred on the facts and circumstances of the case and in law by not allowing the Appellant's claim for working capital adjustment.*
13. *That each of the learned AO/DRP/TPO erred on the facts and circumstances of the case and in law by not providing the Appellant the benefit of 5% range as provided by the proviso of section 92C(2) of the Act.*
14. *That the learned AO erred on the facts and circumstances of the case and in law in charging interest under Sections 234B, 234C and 234D of the Act.*

2. The facts in brief are that the assessee company was established in the year 2005. For the assessment year under consideration, the assessee company filed its return of income on 30.09.2009, declaring income of Rs. 5,87,81,405/-. The case was selected for scrutiny. In the return of income , the assessee claimed to have provided investment advisory and support services to its Associated

Enterprises (in short óAEô), namely, Avenue Asia Capital Management LP, which is a investment management firm based in New York, USA. The óAEô agreed to make payment at cost plus 20% of the cost to the assessee company towards services rendered by the assessee. The Assessing Officer (in short óAOô) after taking statutory approval from the Commissioner of Income Tax, Delhi-I, New Delhi, referred the international transactions between the assessee and its óAEô to the Transfer Pricing Officer (in short ñthe TPOò) for determination of armôs length price of the transaction. The TPO took note of the profile of the assessee from transfer pricing study, agreement with the AE and financial statement filed by the assessee and then characterized the assessee company as **fee based investment/ financial advisory service provider**. The TPO accepted the Transactional Net Margin Method i.e. TNMM applied by the assessee for benchmarking its international transaction and used Net Operating Profit Mark-up on cost (OP/TC) as the profit level indicator. The TPO observed that the assessee earned OP/TC of 21.93% in the year under consideration as against the average OP/TC of 17.48% in respect of eight comparables identified in the transfer pricing documentation filed by the assessee, having detail as under:

S. No.	Comparable	Margin (%)
1.	Ambit Capital Private Limited	27.33
2.	CRISIL Limited	32.03
3.	Future Capital Holdings	17.20

	Limited	
4.	ICRA Management Consulting Services Limited	9.75
5.	IDFC Investment Advisors Limited	(11.65)
6.	Mecklai Financial & Commercial Services Limited	14.74
7.	SREI Capital Markets Limited	6.68
8.	Sumedha Fiscal Services Limited	43.78
	Arithmetic Mean	17.48

2.1 During the transfer pricing proceedings before the TPO, the assessee company requested to exclude ôSumedha Fiscal Services Ltd.ô as comparable, however, the TPO declined the exclusion of ôSumedha Fiscal Services Ltd.ô Further, out of remaining seven comparables, the TPO after applying various filters like turnover, multiyear data, declining sales/persisting loss making for 3 years, different year ending, related party transactions (RPT) more than 25% etc., accepted ôFuture Capital Holdings Limitedô, ôICRA Management Consulting Services Limitedô and ôMecklai Financial & Commercial Services Limitedô and rejected the remaining comparables of the assessee company. Simultaneously, the TPO included six new comparables to the list of comparables, thus, finally chosen ten comparable companies with an average margin of 39.13%, having details as under:

S.No.	Parculars	Chosen	Margin(%)
1.	Future Capital Holdings	Appellant	23.39
2.	ICRA Management Consulting	Appellant	(1.02)

	Services Limited		
3.	Mechlai Financial & Commercial Services Limited	Appellant	13.29
4.	Sumedha Fiscal Services Limited	TPO	56.85
5.	Khandwala Securities Limited	TPO	39.80
6.	Brescon Corporate Advisors Limited	TPO	116.70
7.	Ladderup Corporation Limited	TPO	66.05
8.	Birla Sunlife Asset Management Company Limited	TPO	11.31
9.	Almondz Global Securities Limited	TPO	34.57
10.	Axis Private Equity Limited	TPO	30.42
	Mean		**39.13**

2.2 Then the TPO determined the armôs length price of the international transaction of advisory services and made upward adjustment Rs. 3,20,29,914/- as under:

Amount in INR

Operating cost of the assessee	184868442
Armôs length Margin	39.13%
Armôs length Price	257207463
Price received	225177550
105% of International Transaction	236436428
Shortfall	32029913.4

2.3 The TPO further proposed an adjustment of Rs. 51,34,309 for interest at the rate of 15.77 percent on the amount of receivables from the AE, holding the same as an international transaction.

2.4 In the draft assessment order issued on 28.02.2013, the Assessing Officer included both the additions proposed by the TPO, i.e., upward adjustment of Rs. 3,20,29,914/- and adjustment for interest towards receivables

2.5 Against the draft assessment order, the assessee company filed objections before the Dispute Resolution Panel (in short ñthe DRPò) on 08.04.2013. The DRP after giving opportunity of hearing to the assessee disposed off the objections directing the AO to confirm the addition proposed by the TPO. In compliance of the direction of the DRP, the Assessing Officer passed the impugned assessment order on 10.10.2013 making both the additions. Aggrieved, the assessee is before us.

3. The Ground No. 1 of the assesseeôs appeal being general in nature, not required to be adjudicated.

4. In Ground Nos. 2, 3 and 5 of the appeal, the assessee has challenged the upward adjustment of Rs. 3,20,29,913/- made to international transaction of providing advisory and support services to the AE, so we are taking these grounds together for disposal. The TPO has accepted the TNMM chosen by the assessee has most appropriate method (MOM) of computation of armôs length price of the international transaction as well as the operation profit over cost as Net Profit Level Indicator. The assessee has claimed it as an investment advisory

firm, whereas the TPO has held the assessee as a fee based investment and finance advisory firm.

Functional Profile of the Assesssee

5. The learned AR drawn our attention to the transfer pricing documentation filed before the TPO, which are submitted before us at page no. 324 to 432 of the paper book. He also drawn our attention to the copy of the sub advisory agreement entered into between the AE and the assessee on 1st July, 2006 and further amended on 5th December, 2008 and made effective from 1st January, 2007, which is submitted at page no. 119 to 127 of the assesseeôs paper book. Referring to various clauses of the said agreement, ld AR submitted that during the assessment year under consideration, the assessee company was engaged in providing nonbinding investment advisory services to the AE, which (i.e. the óAEô) was considering investments in the form of **Private Equity, Distressed Debt and Listed and Unlisted Securities** in India. The ld. AR further submitted that for rendering the aforementioned services the assessee company was compensated on the basis of cost plus 20% mark up. The ld AR also referred to page no. 300 of the assesseeôs paper book, which is copy of profit and loss account of the assessee for the relevant assessment year, showing revenue of Rs. 22,51,77,550 from advisory service, interest of Rs. 84,651, Miscellaneous

income of Rs. 1,45,000 and other income of Rs. 4950/- and profit before tax of Rs. 3,77,64,192/-.

5.1 The ld. CIT(DR), on the other hand, submitted that the assessee was engaged in whole range of activities of advising in investment and finance, i.e., conversion of debt into equity or vice versa and providing support services. He further submitted that private equity fund generally involve in management of Investee Company through the advisory firm. He submitted that the assessee did not provide the detail of support services provided. He submitted that as per agreement third parties were appointed with consent of the AE, and thus the assessee was more than an advisory firm.

5.2 We have heard the rival submissions in respect of functional profile of the assessee. In the profit and loss account, the assessee has reported revenue from advisory activity only, but break-up of the advisory services has not been reported. The functions performed by the assessee company are specified in the agreement between the assessee and its AE, which is placed at page no. 119 to 127 of the assesseeôs paper book, the relevant clauses of which are reproduced as under:

ARTICLE II
POWERS AND DUTIES OF SUB-ADVISOR

3.1 During the continuance of its appointment hereunder, Sub-Advisor shall be subject to the overall supervision of the Company, shall

act in accordance with the objectives of the Company but subject thereto Sub-Advisor shall be authorized to do any of the following-

3.1.1 Sub-Advisor shall identify opportunities for investment and shall be responsible for carrying out the assessment of those opportunities according to generally accepted professional standards and then, once the opportunity becomes concrete, recommended such investments to the Company. The Company will make an assessment of the appropriateness of a proposed transaction.

3.1.2 Sub-Advisor shall have the responsibility to recommend the provision of any equity or debt or similar financing to investee Companies, once in opportunity becomes concrete and the Company notifies the Sub-Advisor of the same. Debt or similar financings may include the purchase of certificates of deposit, the making of senior loans; the purchase of senior or subordinated notes or bonds (which may or may not be convertible into equity or be purchases with related warrants or options to acquire equity securities); the purchase of preferred securities; investments in asset-backed securitization vehicles; and the issuance of guarantees.

3.1.3 Sub-Advisor may recommend to the company once an opportunity becomes concrete the options for the exchange of investments for other investments in connection with any reorganization, recapitalization, splitting of shares, change of par value, conversion of otherwise.

3.1.4 Sub-Advisor may with the prior consent of the Company engage and, subject to this Agreement, remunerate third-party service providers for providing services for the benefit of the company.

3.1.5 Sub-Advisor shall provide its services to the company with prudence, due care and due regard to the attendance risk of providing the services in the Republic of India and to the reputation of the Company and its members.

ARTICLE IV
REPORTS

4.1 As soon as available, but in any event, within six (60) days after the end of each half of the Accounting Period, the Sub-Advisor is to provide a report on the financial progress and prospects for investments in the Investee Companies to the Company. The Sub-Advisor shall promptly provide notice of any event or condition, which might materially and adversely affect business and operation including any fraud, mismanagement or any other circumstances relating to an Investee Company of which the Sub-Advisor is aware of or should be aware of which could materially and adversely affect the value of the recommendations proposed by the Sub-Advisor to the Company.

5.3 From an overview of the above clauses of the agreement between the assessee and its AE, we find that during the year, the assessee was engaged in providing broadly four types of services:

(i) Firstly, identify the investment opportunity in private equity, distressed debt and listed or unlisted securities and then advise or recommend to the AE for investment in identified target.

(ii) Secondly, advise the investee company for financing the investment through equity or debt finance or similar financing, which include purchase of certificates of deposit, making of senior loans; purchase of senior or subordinated notes or bonds (which may or may not be convertible into equity or be purchases with related warrants or options to acquire equity securities); purchase of preferred securities, investments in asset-backed securitization vehicles, and

issuance of guarantees. Also, advise the AE, the options for the exchange of investments for other investments in connection with any reorganization, recapitalization, splitting of shares, change of par value, conversion of otherwise

(iii) Thirdly, arrange support service (i.e. on outsource basis) for the AE, based on requirement for executing the intended task.

(iv) Fourthly, monitor the performance of Investee Company and advise the AE in respect of exit strategy from investment

5.4 In view of the above summary of activities carried out by the assessee, we do not agree with the contention of the Ld AR that the assessee was merely a nonbinding investment advisory service provider as against characterisation by the TPO as fee based investment and financial advisory service provider. In addition to the advisory, the assessee was also engaged in providing support services to the AE for execution of advisory. The assessee was engaged in providing advice for financing the investment in the investee company and the advice for financing included all kind of possible modes of equity and debt financing. The word equity finance is a very wide term and it includes raising of capital through sale of shares, may be to a small group of friends and family or to private companies or to public at large through initial public offerings (IPO). The debt finance is understood as borrowing of fund from lender at a fixed rate

of interest with a predetermined maturity date. The debt may be in the form of loans or it may be in the form of bonds. The word reorganisation includes restructuring of a firm or a company to concentrate on core functioning and that is achieved through merger/demerger or dissolutions etc. The word restructuring in finance terminology includes exchange of equity finance with debt or such as removing preferred shares from the company's capital structure and replacing them with bonds. Thus, we find that the area of the advisory of the assessee is not limited to advisory in investment in equity fund, it includes advisory in respect of investment through private placement, IPO investment, financing though loans, financing through bonds, reorganization of entities through merger/demerger, advice on exit strategy and engaging service providers for support services.

In view of the above discussion, we uphold the action of the TPO in characterisation the functions of the assessee as advisory in investment and finance. We have also noted that the assessee was engaged in providing support services to the AE, which is clearly more than advisory in investment.

We now proceed to consider the functional comparability of the comparables keeping in mind our findings of the functions of the assessee discussed above.

Inclusion/ exclusion of comparables

5.5 During hearing of the case before us, the ld AR, objected to the inclusion of the seven comparables by the TPO, however, he submitted that if three comparables i.e. Sumedha Fiscal Services Ltd., Khandwala Securities Ltd. and Brescon Corporate Advisors Ltd. were excluded from the list of the comparables, profit margin of the assessee would be in the safe harbour zone and therefore he would not agitate for exclusion of other comparables. As, we did not agree with the proposal of the learned AR, he advanced his arguments for exclusion of all the seven comparables. In his arguments, the Ld AR submitted that functional profile of the comparables was different then the assessee, as those were engaged in the activities of investment/Merchant banking, loan syndication etc. We will deal these arguments of the Ld AR at length, while deciding exclusion/inclusion of the specific comparable.

5.6 On the other hand, the learned CIT (DR) submitted that firstly, under TNMM, profitability of a transaction is seen at net level and, therefore, there would always some difference between activities of two companies. He further submitted that the effect of minor difference is nullified by variation in operating expenses and, therefore, comparables should not be rejected on the ground of some activity other than investment advisory in the fee income of the comparable entity. Secondly, the Private Equity Industry attracts the best talent

in the country and the manpower at the private equity firm are the highest paid, therefore, the profit in the PE business are the highest. He further submitted that combining results of the PE advisory job with the financial result of merchant banking activity (with low profit margin) would result in profit margin of total entity getting reduced and thus, such comparables, if any, would adversely affect the Revenue rather than the assessee. Thirdly, he submitted that comparables chosen by the assessee i.e. Future Capital holding Ltd, ICRA Management consulting services ltd. and Mecklai Financial & Commercial Services Ltd. could also be rejected on the same ground that they were in divergent business. Further the Ld CIT(DR) submitted that either the matter be restored to the TPO with the direction to make fresh selection of comparables or in case no perfect comparables could be found, then use of other methods like profit split method might be explored.

5.7 On the proposition of the ld. CIT (DR) to reject the three comparables chosen by the assessee, ld AR raised objections and submitted that in the present appeal of the assessee, the department has not filed any cross objection and therefore, the ld. CIT (DR) was not at liberty to take new ground of appeal, though he submitted that it was within the purview of the Tribunal to accept the new ground. He further submitted that The Tribunal while considering the decision in the case of Maerk Global Service Center India Pvt. Ltd. (2011) 14

ITR (Trib.) 541 held that if the TPO himself does not reject comparable companies selected by the taxpayer on functional incomparability then the Revenue cannot later take the plea of incomparability. Whereas, the ld. CIT DR submitted that any ground could be raised before the Tribunal so long as they were subject matter of appeal or assessment. The CIT DR relied on number of judgments of the courts including the judgement of the supreme court in the case of NTPC reported in 229 ITR 383 in respect of the propositions to reject the three comparables chosen by the assessee. We have heard the submission of both the parties. We are not agreed with the contention of the Ld. CIT(DR) that the Revenue is at liberty to raise any ground of appeal at any stage of appellate proceeding. In this case Revenue has neither filed appeal nor any cross objection. It is settled position of law that once a respondent is not aggrieved by the impugned order, it can't be allowed to raise any additional ground in appeal. Moreover, the Tribunal in the case of Maerk Global India (P) Ltd (supra) has clearly held that the Revenue can't be allowed to object inclusion of a comparable by the TPO. The relevant para of the decision is reproduced as under:

> *42. We are unable to accept the contention of the ld. DR for excluding certain cases not rejected by the TPO but which in her opinion did not pass the test of comparability. It is evident that Departmental Representative has the duty to defend the order of the Assessing*

Officer while arguing the appeal filed by the Revenue. He is fully competent and free to support the reasoning of the Assessing Officer from any other angle so as to put forward a strong case of the Revenue. There is a marked distinction between supporting order of the AO/TPO by the Departmental Representative on one hand and finding flaws in the order of the AO/TPO in an attempt to show that the AO/TPO failed to do what was required to be done by him. In our considered opinion if the Departmental Representative is allowed to fill in the gaps left by the AO/TPO it would amount to conferring the jurisdiction of the CIT u/s 263 to the Departmental Representative, which is not permitted by the statute. Let us take another situation. Suppose a particular deduction is permissible on the cumulative satisfaction of three conditions. The AO examines the case and finds the very first condition as lacking. Without examining the fulfillment or otherwise of the other two conditions, he rejects the claim. In that case if such first requirement is subsequently found to be fulfilled in the appellate proceedings, the Departmental Representative can very well point out to the tribunal that the other two conditions were also not fulfilled. By so contending the DR cannot be said to set up a new case. Rather it would amount to supporting the view point of the Assessing Officer on the question of deduction. But in no circumstance the Departmental Representative can be allowed to take a stand contrary to the one taken by the AO/TPO.

43. The Special Bench of the Tribunal in Mahindra & Mahindra Limited Vs. DCIT [(2009) 122 TTJ (Mum.) (SB) 577] has laid down the proposition to the effect that the Departmental Representative has no jurisdiction to go beyond the order passed by the A.O. It has

further been observed in this case that the scope of argument of the Departmental Representative should be confined to supporting or defending the impugned order and he cannot be permitted to set up an altogether different case.

44. In the light of the above reasons we are of the considered opinion that the learned Departmental Representative cannot be allowed to argue that certain cases included by the assessee in the list of comparables, were in fact not comparable, when the TPO himself failed to point out as to how such cases were distinguishable. The situation would have been different if the TPO had found a case to be incomparable say on account of functional test. In that case on finding such a case to be functionally similar, the ld. DR could have justifiably shown such case to be distinguishable on some other valid ground. Presently we are dealing with a situation in which the TPO, by not adversely commenting upon the assessee's comparables, impliedly accepted such cases as comparable. Now it is too late in the day for the ld. DR to argue that such cases were not comparable. If the argument on the behalf of the Revenue in this regard is allowed to be made, it will amount to permitting the ld. DR to argue contrary to what has been done by the TPO. Obviously it is not permissible within the framework of the statutory provisions. We, therefore, refuse to permit the ld. DR to argue contrary to what TPO has done.

Respectfully following above decision of the Tribunal, we reject the arguments of the Revenue for exclusion of the three comparables retained by the

TPO and restrain ourselves in examining otherwise comparability of those comparables.

5.8 Now, in background of the functional profile of the assessee discussed, general submission of the parties and material place on record about comparables, we take up issue of inclusion of seven comparables objected by the assessee.

Sumedha Fiscal Services Ltd.

6 The TPO has compared the consultancy services segment data of this comparable company with the entity level data of the assessee. The ld. AR objected inclusion of the company for following reasons:

(a) that the company was engaged in diversified financial services as under:

i. ñCorporate services includes equity placement, financial restructuring, merchant banking, debt syndication, mergers and takeovers, and debt resolution services.
ii. Investment services includes stock broking, depository services, commodity broking, currency broking.
iii. Distribution services includes mutual funds, bonds, IPOôs and life insurance.

(b) that the company was a SEBI registered category-I merchant banker and its primary focus was on loan syndication, equity placement and project consultancy services.

(c) that the TPO compared consultancy segment result of the company with the result of the assessee company without appreciating that the consultancy

segment of the comparable comprises of assignment based consultancy income in the field loan syndication, merchant banking, restructuring and other related advisory services, and therefore, the comparable was functionally dissimilar to the assessee.

(d) that the comparable company was excluded by the Tribunal in the case of Carlyle India Advisors Pvt. Ltd. Vs. ACIT [(2012) 17 ITR (Trib.) 24 (Mum.) which has been affirmed by the Hon'ble Bombay High Court in CIT Vs. Carlyle India Advisors Pvt. Ltd. [2013] 357 ITR 584 (Bom.).

(e) that the comparable company was excluded by the Tribunal in the case of Xander Advisors India Pvt. Ltd. Vs. ACIT , 2014 (36) ITR 499 (Del.).

6.1 Ld. CIT (DR), on the other hand, submitted that the assessee has chosen TNMM as the most appropriate method for benchmarking of international transactions and under this method broad similarity of functions is required. He therefore submitted that consultancy in the field of merchant banking is broadly similar to the consultancy or advisory in investment or finance. He referred to the page 339 of the assessee's paper book, where the assessee itself has mentioned that under TNMM, the standard of comparability is less stringent as compared to other methods as only broad similarity of functions is required.

6.2 He submitted that merchant banks are also not only engaged in share issue management but provides various kinds of consultancy services which are

advisory in the nature. Moreover, he submitted that Private Equity fund generally invest in high risk emerging technology area and they expect high returns from such investments, generally through sale of shares or stock, through private placement or through public offering and for that purpose they engage peoples at very high salary package, as compared to the merchant banks. He attempted to convey that yield from PE fund investment is too high as compared to Merchant banks and so the fee from advisory in investment would be higher than the fee from the merchant banking advisory or merchant banking services of issue management, so comparing the assessee would not prejudice interest of the assessee. He further submitted that in the case of Carlyle India Advisor (supra), the Hon'ble Bombay High Court has not laid down any proposition of law, which could be followed in this case and the decision of the Tribunal in the case of Carlyle India (supra) was on the facts of the case and, therefore, the decision was distinguished on facts. He further submitted that in Interra Information Technologies, 151 TTJ 313 (Del.), it was held that businesses are so varied, that no two transactions are similar. He further submitted that in transfer pricing, there couldn't be precedent of facts.

6.3 We have heard the rival submission of the parties and perused the material placed on record. The ld. TPO has taken segment level result for comparison for this comparable and compared profit from consultancy segment with the profit

of the assessee, therefore, the argument of ld. AR that the company was engaged in diversified financial services is not relevant. Further, on page 547 of the assesseeôs paper book segmental result of company are reported and on page 548 of the same paper book below the notes, the activity undertaken under various segment is reported. The income from stock broking, investment, mutual fund and other product distribution has been reported under capital Market operation segment, with which, we are not concerned. The consultancy segment comprises of consultancy in Loan Syndication, Merchant banking, Restructuring and other advisory services. The loan syndication means providing of loan by more than one lenders, which is a type of debt financing and as the assessee was also engaged in advisory in debt financing by way of making of senior loans, purchase of senior or subordinated notes or bonds, purchase of preferred securities etc. Thus, the activity of consultancy in loan syndication canôt be said as a dissimilar function. Further, the assessee was engaged in advisory in restructuring, which is identical to the activity of comparable. The ld AR has raised doubt in respect of consultancy in the field of Merchant banking. We are aware with the difference between the activity of advisory in investment and investment banker. As per section 3(2)(a) of the SEBI (Merchant Bankers) Regulation Act,1992, Category-I Merchant banker is to carry on activity of issue management, and to act as advisor, consultants, manager, underwriter,

portfolio manager. So, the Merchant banker plays two kind of role. The first kind of role, i.e., manage issue of shares, underwriter, portfolio manager etc., which are in the nature of functions where work is executed by the Merchant banker. The second functions are in the nature of advisory or consultancy in respect of issue management etc. So, if the comparable has performed Merchant bankerôs role of first kind, it would be functionally different from the assessee, but if the comparable has performed Merchant bankerôs second kind of role, it is very much comparable being the consultancy in the nature of investment or finance. From the segment result, it is seen that the comparable has shown income from consultancy related to merchant banking and not from issue management. The fact of handling of issue management has been duly mentioned in the Annual Report of another comparable, namely, Almondz Global Securities Limited, but no such fact has been found in the Annual Report of this comparable company. Further, here the broad function of the assessee is advisory in the field of investment or finance and consultancy in the field of merchant banking is also akin to the advisory of financial nature. Ld. AR raised the issue that comparable is one of the category-I listed merchant banker and, therefore, it is functionally dissimilar to the assessee. We are not agreed with the ld. AR on this proposition, because what is being compared here is consultancy segment of the comparable company which include consultancy in the field of

Merchant banking and not the issue management income from merchant banking. The comparable might be SEBI registered Merchant Banker, but the TPO has compared the consultancy segment only. The definition of the Merchant Banker as provided in section 2(cb) of SEBI Act, include acting as consultants, advisor or rendering corporate advisory services in relation to issue managements, therefore, just saying that the comparable is category-I merchant banker, therefore, it should be rejected, does not appear to be justified. In our considered view, what must be seen is the actual services rendered by the comparable in that segment and not its category of Merchant Banker. The Tribunal in the case of Xandra (supra) has held that mere a company cannot be considered as comparable or non comparable on the generality of description of its category and no nomenclature can superimpose the real character of a transaction. The relevant para of the order is reproduced as under:

> *"7. Turning to facts of the instant case as stated by the ld. AR and those culled out from the material on record, the position which emerges is that there are three investors. Xander Master Fund, a Mauritius limited liability company (Fund), is responsible for private equity investment. It appointed Xander Investment Management Ltd., Mauritius (Manager) for providing overall investment advice. The Manager sub-contracted specific activities to the assessee (Indian Sub-Advisor). The Manager and the Indian SubAdvisor entered into an Agreement on 10.10.2005, under which the assessee (Indian Sub-Advisor) undertook to provide general advisory services to the Manager in relation to real estate sector in India. Such services, as discussed above include providing feedback to the Manager in relation to the real estate investment opportunities in India; identifying the potential vendors; negotiating with the vendors as an agent of the Manager, finalizing deals, if the Manager is satisfied, and; to provide*

actual support services, if the investment is made by the Manager. In this three-tier hierarchy, Xander Master Fund is 'the PE Fund', Xander Investment Management Ltd., Mauritius, is the 'Manager' and the assessee is simply 'Sub-Advisor to the Manager'. From an overview of the nature of activities discussed above, it is noticed that the contention of the ld. AR that the assessee acted as a PE Fund in India, is not tenable. The Manager subcontracted specific activities to the assessee, which were in the nature of advisory to him. By no stretch of imagination, the assessee can be described as PE Fund, who, in present facts is, Xander Master Fund. ***The name by which a transaction is coined is not decisive of its character.*** *It is the real nature of a transaction which is always relevant and conclusive. A bare perusal of the nature of activities carried out by the assessee in the extant international transaction abundantly proves that these are not that of a PE Fund. Ex consequenti, the decisions cited by the ld. AR seeking to canvass the exclusion of three companies on the strength of the assesse in those cases acting as PE Funds, do not advance his case any further. As such, we are desisting from considering such decisions, which were rendered drawing distinction between a merchant banker and a PE Fund and holding that a merchant banker cannot be considered as comparable to a PE Fund.* ***Be that as it may, a company cannot be considered as comparable or incomparable on the generality of mere description of its overall category. This assumes more significance when a company is otherwise entitled to pursue several lines of activities. One needs to verify the nature of activity actually carried on for deciding its comparability or otherwise. No nomenclature can superimpose the real character of a transaction****."* ***(emphasis supplied)***

6.4 The ld. AR has mainly relied on the decisions of Tribunal in the cases of Carlyle India Advisors Pvt. Ltd. (supra) and Xander Advisors India Pvt. Ltd. (supra) in his support but these cases are distinguishable because, first of all, the cases are related to AY 2008-09 and not related to this year. The activities of the comparable or the assessee may vary from year to year and accordingly, it may remain or loose as a comparable. Further, in transfer pricing, finding of one case can't be compared simply with another as facts of two cases may not be exactly

identical. On this issue, the ITAT in the case of Interra Information Technologies (India) Pvt. Ltd. in ITA No. 5568/Del/2010 held as under:

> *"64. While arguing the case none of the parties have spoken about the nature of business and the nature of transactions in each of these case laws cited by them. The decision given in those cases or the observation made have been referred to and it is claimed that they have precedenciary value. In Transfer Pricing our understanding is that the law and the rules have been prescribed and all the decisions cited by the parties were adjudicated based on the facts of each case. It is well settled that reliance should not be placed on any decision, without discussing the factual situation and as to how it will & ITA No.5680/Del/2011 fit in. These are not legal principles, in the sense that it does not involve interpretation of law. Picking up samples or comparables, stating that in a given situation a particular methodology should be adopted for benchmarking a transaction or coming to a conclusion that particular method is most appropriate method etc. are not legal interpretations but only solution found by the Bench, in its own wisdom, given a certain fact situation. It is difficult to have a case where the functions, assets and risk of an assessee, are same as the case decided subsequently. Seldom two business models are the same. Quoting these case laws and relying upon them as if they have laid down binding legal precedence without reference to the facts, to our mind is not only wrong but even misleading. Even in following a binding legal precedence, the Courts have cautioned that what has to be seen is whether the facts and circumstances are same. Though it is well settled, for sake of ready reference we quote following case laws:-*
>
> > *(i) GVK Gautami Power Ltd. vs. ACIT, 336 ITR 451 (A.P.) for the proposition that observations of Court are neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. The decision of the Court is only an authority for what is actually decides. What is the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it.*
> >
> > *(ii) CIT vs. V.K. Ferro Alloys Industries P. Ltd., 299 ITR 191 (A.P.)= **(2008-TIOL-60-HC-AP-IT)** for the proposition that observations in a judgement cannot be read out of context as laying down the law and must be examined in the light of the facts.*

(iii) CIT vs. Baroda Peoples Co-operative Bank Ltd., 280 ITR 282 (Guj.) for the proposition that a decision takes its colour from the question involved. The scope and authority of a precedent should not be expanded beyond the needs of a given situation, mere casual expression carry no weight at all, nor every passing expression of a judge can be treated as an excathedra having the weight of authority (p. 298) 2003 7SCC 197); a decision not expressed, not accompanied by reasons cannot be deemed to be a law so as to have binding effect.

(iv) Vinay Extraction P. Ltd. vs. Vijay Khanna, 271 ITR 450 (Guj.) for the proposition that Court should not place reliance on the decisions without discussing how factual situation fits in, they are not to be read as Euclid's theorems nor the observations therein as provisions of statute, observations must be read in the context in which they appear, one should avoid the temptation to decide cases by matching the colour.

(v) Ajanta Pharma Ltd. vs. ACIT, 267 ITR 200 (Bom.) for the proposition that no judgement can be read as statute, every decision is an authority for what it decides.

(vi) S. Shanmugavel Nadar Vs. State of Tamil Nadu & Another, 263 ITR 658 (SC) for the proposition that for a declaration of law there & ITA No.5680/Del/2011 should be a speaking order, a decision which is not expressed & is not founded on reasons nor on consideration of the issues cannot be deemed to be a law declared, to have a binding effect under article 141; a summary disposal by the SC, without laying down any law, is not a declaration; when no reasons are given, dismissal simpliciter is not a declaration of law by SC.

(vii) Dr. Nalini Mahajan vs. Director of Income-tax (Inv.), 257 ITR 123 (Delhi) = (2003-TIOL-184-HC-DEL-IT)for the proposition that a decision is only an authority for what it decides and not what can logically be deduced therefrom; even a slight distinction in facts may make lot of difference in decision making process; a point never considered in a decision shall not be an authority therefor.

(viii) Gujarat Co-operative Bank Ltd. vs. CIT, 250 ITR 229 (Guj.) for the proposition that for SC's decision to be law has to be declared or stated vocally to support conclusion, not mere conclusion by which case is disposed of.

(ix) CIT vs. Sun Engineering Works P. Ltd., 198 ITR 297 for the proposition that it is neither desirable nor permissible to pick out a word or a sentence from the judgment of this court, divorced from the context of the question under consideration and treat it to be the & ITA No.5680/Del/2011 complete "law" declared by this court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this court. A decision of this court takes its colour from the question involved in the case in which it is rendered and, while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this court to support their reasonings.

(x) Jaganmohan Rao (V.) vs. CIT, 75 ITR 373 (SC) for the proposition that Picking up word/sentence from judgment divorced from context not permissible. Judgements are to be read as a whole.

65. Hence, while adjudicating transfer pricing cases, we are of the opinion that there is no legal binding precedence on the issue of selection of most appropriate method, selection of comparable companies, selection of comparables transactions for benchmarking etc. as these are fact based and vary from company to company. Relying on precedence for each and every factual argument to drive home the point of the counsels, when facts are not at all similar is causing unnecessary clogging of the system resulting in & ITA No.5680/Del/2011 slower delivery. We suggest that the law and the rules be applied first, arguments be based on them and broad proposition relied upon when situations warrant."

6.5 In the cases cited, the functions of Carlyle India Advisors Pvt. Ltd and Xander Advisors India (P) Ltd have been compared with Sumedha and those entities have been held as engaged in investment advisory, whereas ,the present assessee is engaged not only in investment advisory but finance advisory and rendering support services also Therefore, the cases cited by the ld AR are of no help to the assessee. Though, in the financial statements of the comparable

company, we have not found any mention of handling of shares issue management during the year, but if the comparable has handled the issue management and revenue from the same is substantial, the comparableôs function would be dissimilar to the assessee. Since the TPO has not examined this issue, we, in the interest of natural justice, restore the matter back to the AP/TPO to examine the revenue from the activity of Merchant Banking and in case, he finds income from issue management as substantial, he is directed to exclude the comparable company as eligible comparable, otherwise the comparable is directed to be retained as eligible comparable.

Khandwala Securities Limited.

7. Learned Authorized Representative submitted that this company is one of SEBI registered Categoryï I Merchant Banker and engaged in diversified financial services such as investment banking, merchant banking, corporate advisory services, institutional broking, private client broking and investment advisory services. He further submitted that the TPO has compared ñfee based segmentò of the company without appreciating that the segment comprises of assignment based income on account of services relating to mergers and acquisitions, equity and debt issue management, portfolio management and broking, as comparable to the assessee. The functional profile of this company being different form the assessee company, the learned AR requested to exclude

the company from the list of comparables relying on the decision of the Hon'ble Bombay High Court in the case of Carlyle India Advisors Pvt. Ltd. Vs. ACIT (surpa) and Xander Advisors India Pvt. Ltd Vs. ACIT (supra).

7.1 We have gone though the Annual Accounts of the comparable company, which are available on page 554 to 601 of the paper book of the assessee. A perusal of the segmental result on page 593 of the paper book, it is seen that the company has two segments, one is Investment/stock operation and another is fee based operations. On page 592, segment information has been provided, according to which, the fee based division provides financial advisory services relating to mergers and acquisition, equity and debt issue management, portfolio management and broking. So apparently, two functions have been performed under this segment, one is advisory and other is broking, which can exclude the comparable, however, we are not in agreement with the ld AR that the company is category-I merchant banker and investment banker, so it should not be considered for comparison. If the comparable has performed the function of investment banker, then definitely functions are dissimilar. But if it has not performed those functions, then merely by a title of Merchant or investment banker, a comparable cannot be rejected. We have already held in the case of Sumedha, that a comparable cannot be rejected merely on the nomenclature or certificates it has obtained, but what is important for comparison is the functions

performed in relevant year. On perusal of segment result on page 593 and profit and loss account on page 582, we find that revenue of Rs. 1144.08 lakhs under fee based operations consist of revenue from corporate advisory services of Rs. 743.69 lakhs (65%) and revenue from brokerage of Rs. 395.47 lakhs (35%). Though the segment data of fee based operations is available but the percentage of brokerage revenue is substantial. We are of the opinion that activity of brokerage from securities cannot be compared with the investment and financial advisory services rendered by the assessee being a function dissimilar. The share of revenue from brokerage is substantial and we cannot ignore this vital fact. Therefore, we direct the TPO to exclude the comparable from the set of comparables.

Brescon Corporate Advisors Limited.

8. The ld. AR submitted that this company is engaged in diversified financial services such as assisting companies in any special situations through debt resolution, recapitalization, debt syndication, mergers and acquisitions, infusion of private equity or direct investment by the company. Further, he submitted that the TPO has compared Revenue from fee based financial services which was actually assignment based revenue on account of ódebt resolutionô and ódebt syndicationô. He further submitted that the Brescon has been held to be functionally not comparable to companies engaged in rendering non-binding

investment advisory services in the case of Xander Advisor India Private Limited Vs. ACIT, 2014 (36) ITR 499 (Del.).

8.1 The ld. CIT(DR), on the other hand, submitted that the Brescon Corporate Advisor Limited was accepted as a comparable in the case of Carlyle India Advisors Pvt. Ltd. Reported in 56 Taxmann.com 417 (Del), and therefore, the comparable can't be rejected in the case of the assessee.

We have gone through the rival submissions. The submission for relying on the cases decided by the Courts/Tribunal (supra) for treating the company (Brescon) as one of the comparables in the case of the assessee, have already been rejected by us while examining comparability of Sumedha Fiscal Securities Ltd.

8.2 We have gone through the Annual report of the company, which is available on pages 602 to 658 of the assessee's paper book. It is seen from the page 625 and 628 of the paper book that the company has shown income from fee based financial services from debt resolution and debt syndication. The other income from dividend, interest and profit from sale of investment has been shown below the profit before tax, hence, having no impact on the operating profit. We have seen from the profile of the assessee that it was engaged in advisory related to debt finance and we don't have any doubt that the term debt finance includes debt resolution and debt syndication. Further, we can't brush

aside the vital fact that the AE of the assessee invest not only through private equity model but also through ó**Distressed Debt'** in India and thus it is natural that the assessee has provided consultancy or advisory in respect of investment in ó**distressed debt**ô. The word ó**distressed debt**ô has been defined on page 463 of the Blackôs Law Dictionary (Ninth Edition) to mean as a debt instrument issued by a company that is financially troubled and in danger of defaulting on the debt, or in bankruptcy, or likely to default or declare bankruptcy in the near future. In other words, the distressed debt mean when an entity is not able to repay its debts, it offers to other secured parties to invest in such a debt and any advice in respect of such an investment falls in category of investment in distressed debt. In case of loan syndication more than one creditor join hands to extend the loan to a debtor. The consultancy or advisory in respect of loan syndication is thus similar to the advisory in investment in distressed debt. Further, the assessee has also advised in respect of reorganisation which includes merger and demerger, recapitalisation, splitting of shares etc. and the comparable company is also having background of similar services and hence, in our view the company is having functional similarity with the assessee and therefore the TPO is directed to retain the company as comparable.

Ladderup Corporation Limited.

9. The ld. AR submitted that this company was engaged in debt syndication, initial public offer advisory, private equity placement, mergers and acquisitions, corporate restructuring among a host of other corporate advisory services. Further, he submitted that the website of the company states that it is a category-I, merchant banker registered with SEBI and is engaged in investment banking, debt capital market services, corporate finance and corporate advisory services. He further submitted that the segment data of the company is not available, and company being functionally different from the assessee may be excluded from the list of comparables.

9.1 We have seen the Annual Report of the company, which is placed at page 659 to 692 of the assesseeôs paper book. It is seen from the page 684 that the company has shown operational income from financial and management consultancy fee. We have also noted from page 669 of the Annual Report under the title ñperformanceò that the companyôs main focus was on fee based activities which include Debt Syndication, IPO Advisory, Private Equity Placement, Merger and Acquisitions, corporate Restructuring and host of the other corporate advisory services. We have also noted the information under the title performance on page 670 that the company was planning to expand its wing by venturing into merchant banking activities and broaden its horizon, which

shows that during the year it was not engaged in merchant banking activities. The assessee company has also advised in respect of equity financing, debt financing, corporate restructuring, capitalisation, splitting of shares, exit strategy and also extended support services for execution of any of the these services and therefore, the activities of the assessee are functionally similar to the company, thus, we hold the company as comparable, and accordingly, we direct the TPO to retain this company as one of the comparable.

Birla Sunlife Asset Management Company Limited.

10.1 Ld. AR submitted that the company is registered under SEBI (Mutual Funds) Regulations, 1996 and SEBI (Portfolio Management) Regulations, 1993 and engaged mainly to act as an investment manager to Birla Mutual Fund, and management of several investment portfolios of Birla Mutual Fund. Therefore, it may not be included in the list of comparables. Further, the segment data of the company was also not available.

10.2 We have seen the Annual Report of the company, which is placed on page 693 to 718 of the assesseeôs paper book. On page 717 of the paper book, it is reported that the companyôs operations for the relevant period mainly relate to providing asset management services and portfolio management services. In the profit and loss account, which is placed at page no. 698 of the paper book, it is seen that income includes management and advisory fees, portfolio management

fees, investment income, other income. We find that no segment data related to advisory services of investment or financial nature is available and companyôs operation during the relevant year included income from investment, thus, the company is functionally different from the assessee company, hence we direct the AO/TPO to exclude it from the set of comparables.

Almondz Global Securites Limities.

11 The ld. AR submitted that related part transactions (RPT) of the company are 43.02% which being more than 25%, the company cannot be selected as appropriate comparable relying on the decision in the case of ADP Pvt. Ltd. Vs. DCIT [2011] 45 SOT 172 (Hyd.). He further submitted that this company is also one of the SEBI registered Category-I, Merchant Bankers and engaged in providing diversified financial services in the nature of debt and equity related market operations, underwriting, equity broking and commission of mutual funds, merchant banking, loan syndication etc., so, it cannot be selected as comparable to the assessee company. He further submitted that segment data of comparable is also not available. He further submitted that the TPO compared ñcorporate finance and advisory feeò segment without appreciating that the same comprises of assignment based income on account of merchant banking, underwriting commission, corporate and infrastructure advisory, loan syndication and arranger of debts/bonds.

11.1 We have seen the Annual report of the company, which is placed at page nos. 719 to 868 of the assesseeôs paper book. It is noted from page no. 785 of the assesseeôs paper book that segment data in respect of corporate and finance advisory is available but this segment comprises of services of merchant banking, underwriting, corporate and infrastructure advisory, loan syndication fees and arranger of debt and bonds etc. We have also noted from page 735 under the segment performance that during the year the assessee handled 2 IPOs aggregating to Rs. 148.97 crores. The handling of IPOs and underwriting of issues are the activities different from the advisory of investment and finance. Since income from handling of IPOs and underwriting commission is part of segment of corporate and finance advisory fee, it makes the segment functionally dissimilar to the assessee. As the segment of the company loses its comparability with the assessee, we direct the TPO to exclude this company from set of comparables.

Axis Private Equity Limited

12. The learned AR submitted that this company acts as an Investment Manager to Axis Infrastructure Fund and engaged in asset management activities, and manages investments of off-shore funds, pension funds, provident funds and other funds. The segment data of the assessee is also not available.

12.1 We have perused the Annual Reports of the company which is placed at page nos. 869 to 890 of the assesseeôs paper book. It is seen from the profit and loss account placed at page no. 878, that the income has been shown as received under the head direct income and miscellaneous income. In notes to account under the head background on page 883 of the paper book, it is reported that w.e.f. August 25, 2007, the company has carried the activity of managing directly or indirectly investments, managing mutual funds, venture capital fund, offshore fund, pension fund, provident fund, insurance fund etc. The activities of the kind mentioned in Annual Report, makes the company functionally different from the assessee. Looking to these facts that the company is functionally dissimilar to the assessee, the TPO is directed to exclude the company out of comparables.

Thus, the AO/TPO is directed to re-compute the average of Net operating profit Mark up on cost from the data of comparables directed to be retained and compute the adjustment to international transaction accordingly.

12.2 Now we deal with the argument of the ld CIT DR that under TNMM profitability of a transaction is seen at net level and therefore there would always some difference between activities of two companies and effect of minor difference is nullified by variation on operating expenses and therefore comparables should not be rejected on the ground of some activity other than

investment advisory in the fee income of the comparable entity. The Ld Authorized Representative, on the other hand, also submitted that under TNMM functions performed by the comparable should be similar to the tested party but the product might be different.

Our view in this regards is that while applying TNMM broad similarity of functions of tested party with comparables is sufficient, however, the difference in products between the tested party and comparable should not be so material as to affect the profitability of the tested party. Further, if there is difference in assets used and risk assumed between tested party and comparable, then suitable adjustments should be allowed. In the present case the ld CIT DR raised that human resources employed in the case of the assessee is highly paid as compared to the comparables, so to compensate the comparables, there profit should be increased. However, we find that the assessee has not taken any ground for adjustment on account of assets employed, so we are not dealing this issue. But, the assessee has taken ground for adjustment of risk, so, now we deal the ground no. 4 raised by the assessee.

Adjustment for Risk Undertaken

13. In Ground no. 4 of the Appeal, the assessee has requested for grant of benefit of risk adjustment. The TPO in his order held that the assessee was not a risk free entity, as according to the TPO it was facing a single customer risk of

loss of revenue in the event of bankruptcy of the customer. The TPO has also claimed that the assessee had not provided any back-up calculation for claim of risk adjustment as well as comparison of risk taken by the comparables. At the time of hearing before as it was contended by the learned AR that the assessee being a captive service provider, the assessee operated in relatively risk free environment as compared to the comparables chosen by the TPO as well as by the assessee which are entrepreneurial enterprises, which undertook full range of economic risk i.e. marked risk, price risk, product risk, credit risk etc. In view of the above, the ld. AR submitted that an appropriate risk adjustment ought to have been provided by the TPO. The ld. AR in support of his claim of risk adjustment relied on the following decisions of the Tribunal:

> Mentor Graphics Private Limited (Noida) (P.) Ltd. vs DCIT: [2007]1091TD 101 (Del)
> Egain Communication Pvt. Ltd. vs. ITO: [2008]23 SOT 385 (Pune)
> Philips Software Centre Pvt. Ltd. vs ACIT: [2008] 26 SOT 226 (Bang.)
> Cordys R&D (India) Private Limited vs DCIT: ITA No. 1092 (Hyd) of 2010

13.1 The CIT (DR), on the other hand, relied on the order of the lower authorities.

13.2 We have heard the rival submission and perused material on record including cases cited by the ld AR. In the transfer pricing study, the endeavor is to improve the comparability between the assessee and comparable. In our opinion, the risk taken by an independent entity and a captive service provider

are different. Since the remuneration of the captive advisor is not linked with the performance, it is not at a significant risk and therefore a suitable adjustment should be allowed. Accordingly, we restore the matter to the AO/TPO for examination of the issue and provide suitable adjustment towards risk in accordance to the law. The assessee is directed to extend cooperation to the TPO in quantification of risk adjustment. If the risk difference is of such a magnitude that reduces the effectively of TNMM method itself, then there are two options left for TPO. First, drop all the comparables and then look for entirely new set of comparables having FAR (Functions performed, Assets employed, Risk undertaken) similarity, and if that is also not possible, then second option is that drop the TNMM as most appropriate method and adopt any other method including profit split method for computation of armôs length price of the international transaction of the assessee. Needless to say, the assessee would be provided sufficient opportunity of hearing.

The grounds of appeal of the assessee from serial nos. 2 to 5 are accordingly allowed partly.

Adjustment for receivables

14. The grounds No. 6 to 10 of the assesseeôs appeal are related to adjustment made in respect of interest on receivables.

14.1 The TPO observed receivables of Rs. 3,25,57,442/-, i.e., the payment outstanding from Avenue US, in the balance sheet of the assessee as on 31st March, 2009, and held that such outstanding receivables was an international transaction as per sub-clause (c) to clause (i) of Explanation to section 92B of the Act and invoking the average prime lending rate for financial year 2008-09 plus 300 basis points as the Comparable Uncontrolled Price (CUP), computed interest rate of 15.77% as armôs length rate of interest and applying the said rate of interest for complete year on the balance of outstanding receivables as on 31st March, 2009, made an adjustment of INR 51,34,308/- . Before the ld. DRP, the assessee pleaded that if a working capital adjustment is allowed to the assessee, then adjustment for outstanding receivables would automatically factor therein and no separate adjustment would be required. The DRP confirmed the additions proposed by the TPO.

14.2 Before us, the ld. AR contended that assessee did not function like a normal trader/manufacturer, and it merely recovered the cost incurred by it from the AE along with a mark-up. The Ld AR further contended that the receivables as on the Balance-sheet date from Avenue US were pending only for the month of March and the average collection period of the assessee was better than six of the comparable selected by TPO in the final set for computing the ALP of the international transaction of provision of investment advisory services to AE,

barring two comparables which had a relatively lesser collection period as compared to the assessee. Further, he submitted that the TPO has made a wrong statement that as per general practice, the assessee allowed a credit period of 30 days, whereas there was no credit period agreed with the AE or stipulated in the provision of service agreement.

14.3 He further submitted that the Benches of the Tribunal, in the case of Logix Micro Systems Ltd. Vs. ACIT (2011) 8 ITR 159 and Dania Oro Jewellery Pvt. Ltd. Vs. ITO (ITA No. 6827/Mum/2012) have held that a reasonable period may be provided as interest-free period and no interest be calculated for such interest-free period.

14.4 It was further submitted that the assessee neither charged interest from the AE for late payment of receivables, and nor paid any interest for amount received in advance from the AE. The Ld AR further submitted that in the following cases, notional interest adjustment on account of monies outstanding from AEs on the balance sheet date has been deleted since no interest was charged or paid and a consistent approach was followed by the assessees:

> Bausch & Lomb (Eyecare) India Private Ltd vs ACIT: [2014] (32) ITR 404 (Del)
> CIT vs Indo American Jewellery Ltd.: [2012] (15) ITR 158 (Mum)

14.5 Further, without prejudice to the above submissions, he submitted that notional interest should have been computed after taking into account the

monthly payments received by the assessee. The assessee submitted a working of such interest computation of Rs. 2,79,359/- at page no. 102 of the paper book. The ld. AR further submitted that the amount of Rs. 2,79,359/- was also excessive as in the case of assessee LIBOR rate of interest should have been applicable rather than average prime lending rate. The ld. AR also argued that outstanding receivable from the AE was even not an international transaction. On the other hand, ld CIT DR relied on the decision of the Delhi Bench of Tribunal in the case of Ameriprise India P Ltd in ITA No 2010/Del/2014.

14.6 We have heard the rival submission and perused the material on record. In the case of Logix Micro System (supra) cited by the assessee, the Tribunal has not accepted the arguments of the assessee and held the outstanding receivables as an international transaction. The relevant paragraphs are reproduced as under:

> ***16.*** *In the light of the above, we cannot accept the contention of the assessee that, the AE was not retaining any funds of assessee in its hands and the funds are immediately remitted to the assessee as and when received from its clients. As the assessee is not having any dealings with the clients of the AE, assessee cannot be a witness for the delayed payments by AE customers. It is for the AE to see that its customers are paying in time so that it can pay the assessee in time. If the contention of the assessee is accepted, it would also mean that the AE has no working capital of its own to pay the assessee in time. It means that the AE was doing the business using the capital of assessee. AE collects money from clients as and when received even beyond normal period. It shows assessee is in fact financing the business of AE by accommodating delayed remittance of receivables.*

17. *As a general rule, we agree with the learned chartered accountant that what is to be assessed as income is the income earned by an assessee and not the income that could have been earned by the assessee. Thus there is a real difference between the actual and the probable. But that general rule of taxation is not as such directly applicable to the present case as the TPO was really examining the financial impact of an international transaction. What is made in an analysis of ALP is the evaluation of the said financial impact. On one side the pricing adopted by the assessee for all its international transactions with its AE is comparable and the ALP test is satisfied. To that extent in the present case, the TPO has accepted the position reported by the assessee company. But in spite of the fact that on one aspect of the transaction, the assessee has complied with the ALP parameters, on another side the assessee has parked huge amount of funds for long period with its AE in USA. Only for the reason that the pricing of international transactions has been accepted for ALP test, it is not possible to hold that the TPO should not go into this question of parking of funds with its AE in USA. If the funds are repatriated into India on ordinary within the normal period, the assessee would have been in a position to pay all its working capital loan or other loans, if any, and/or earning some income from an appropriate investment of those repatriated funds. This potential loss is definitely a factor to be considered while evaluating the financial impact of the international transactions concluded by the assessee with its AE in USA. Therefore, we agree with the arguments of the Revenue and uphold the finding of the TPO that an additional income is to be added in the present case as part of ALP analysis.*

18. *In the facts and circumstances of the case, the main contention of the assessee company is dismissed.*

Further, in the case of Ameriprise India (supra), the Tribunal has held as under:

21. After considering the rival submissions and perusing the relevant material on record, it is noticed as highlighted above, that the assessee argued before the TPO that interest on receivables is not an international transaction. At this stage, it would be apposite to note that the Finance Act, 2012 has inserted Explanation to section 92B with retrospective effect from 1.4.2002. Clause (i) of this Explanation, which is otherwise

also for removal of doubts, gives meaning to the expression 'international transaction' in an inclusive manner. Sub-clause (c) of clause (i) of this Explanation, which is relevant for our purpose, provides as under:-

`Explanation.—For the removal of doubts, it is hereby clarified that—

(i) the expression "international transaction" shall include—

(a) ……..

(b) ……..

(c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;….'

22. On going through the relevant part of the Explanation inserted with retrospective effect from 1.4.2002, thereby also covering the assessment year under consideration, there remains no doubt that apart from any long-term or short-term lending or borrowing, etc., or any type of advance payments or deferred payments, 'any other debt arising during the course of business' has also been expressly recognized as an international transaction. That being so, the payment/non-payment of interest or receipt/non-receipt of interest on the loans accepted or allowed in the circumstances as mentioned in this clause of the Explanation, also become international transactions, requiring the determination of their ALP. If the payment of interest is excessive or there is no or low receipt of interest, then such interest expense/income need to be brought to its ALP. The expression 'debt arising during the course of business' in common parlance encompasses, inter alia, any trading debt arising from the sale of goods or services rendered in the course of carrying on the business. Once any debt arising during the course of business has been ordained by the legislature as an international transaction, it is, but, natural that if there is any delay in the realization of such debt arising during the course of business, it is liable to be visited with the TP adjustment on account of interest income short charged or uncharged. Under such circumstances, the contention taken by the assessee before the TPO that it is not an international transaction turns out to be bereft of any force.

In the above decision, it is further held that transaction of outstanding receivables beyond a period specified in agreement is an international transaction independent of working adjustment. The relevant paragraph is reproduced as under:

> *28. We do not approve the reasoning given by the DRP about the subsuming of such interest in the working capital adjustment. It is axiomatic that the working capital adjustment is in respect of international transaction of rendering services to the AE. Interest for the credit period allowed as per the Agreement is factored in the price charged for the rendering of services. Au contraire, the non-realization of invoice value beyond the stipulated period is a separate international transaction, whose ALP is required to be determined. Granting of working capital adjustment is confined to the international transaction of rendering of services, whose ALP is separately determinable. On the other hand, the international transaction of interest receivable from its AEs for late realization of invoices beyond such stipulated period is a separate international transaction. Allowing working capital adjustment in the international transaction of rendering services can have no impact on the determination of ALP of the international transaction of interest on receivables from AEs beyond the stipulated period allowed as per the Agreement. The amendment made by the Finance Act, 2012 in terms of insertion of Explanation to section 92B with retrospective effect from 1.4.2002 by considering `any other debt arising during the course of business' as a separate international transaction, impliedly disapproves the view canvassed by the DRP in obliterating the determination of the ALP of the separate international transaction of interest on allowing the working capital adjustment in the international transaction of rendering of services. In our considered opinion, both the transactions are separate and distinct from each other. Whereas the international transaction of rendering services contemplates comparison of the price charged for rendering services by impliedly including the interest for the period allowed for realization of invoices as per the terms of the agreement, the international transaction of charging interest on late recovery of trade receivable covers the period which starts with the termination of the period of credit allowed under the agreement, which is subject matter of the international transaction of rendering of services. There is one more*

> *fallacy in the reasoning given by the DRP about the subsuming of interest income in the working capital adjustment. It is simple that working capital adjustment is ordinarily computed by considering the average of the opening and closing values of inventories, receivables and payables. The TP adjustment on account of interest on delayed realization of invoice value has nothing to do with the closing or opening values. It depends on the period of realization on transaction to transaction basis. To put it differently, suppose an invoice is raised on 1st May; period allowed for realization is two months; and the invoice is actually realized on 31st December. Notwithstanding the fact that interest on such late realization would become chargeable for a period of 6 months (from 1st July to 31st December), but the amount of invoice will not be receivable as at the end of the financial year on 31st March. As such, this receivable would not have an impact on the working capital adjustment in any manner, but would call for addition on account of the late realization of invoice value for a period of six months. We, therefore, reject the reasoning given by the DRP in deleting the addition. However, in view of the fact that all the invoices were realized within the maximum period of 60 days allowed as per the Agreement, we hold that the charging of interest on receivables is not sustainable on the extant facts.*

Therefore, following the above decision, we hold that transaction of outstanding receivables beyond a certain period in the case of the assessee is an international transaction independent of working capital adjustment.

14.7 We find that in the agreement between the assessee and the AE no credit period has been specified. The TPO in para 11.6 of his order has held that as per prudent estimate a period of 30 days should be allowed for payments of receivables. The assessee has relied on the decisions in the case of Logix Micro System (supra) and Danio Oro Jewellery Private Ltd. (supra) and submitted that the average collection period of the assessee being 73 days, no adjustment

should be made. We have already upheld that in case of transfer pricing, facts of each and every case being different, the ratio of a decision cannot be applied without verifying the facts of the case. As the reasonable period of credit depends on the facts and circumstances of each trade, the ratio laid down in those cases can't be applied to the case in hand. We are of the opinion that since in the case of the assessee the period of credit is not specified in agreement, any receivables outstanding beyond the period of industry standard are an international transaction independent of working capital adjustment. The receivables outstanding within the industry standard period would be taken care by the working capital adjustment.

14.8 The TPO has computed interest of Rs. 51,34,308/- on outstanding receivables as on closing of the year after applying the interest rate of 15.77% for a period of 365 days. This approach of the TPO is not correct. The outstanding receivable should be examined on transaction to transaction basis and outstanding period should be computed after allowing period available as per industry standard. The calculation submitted by the assessee, without prejudice, was not examined by the TPO as well as DRP. Further, in the case of the assessee, the invoices were raised by the assessee in foreign currency and the AE has enjoyed the benefit of interest in terms of LIBOR rate of interest, the LIBOR rate of interest should be considered rather than prime lending rate of

interest of SBI. Accordingly, we restore the matter of computation of the adjustment to outstanding receivables to the TPO with the directions to compute interest for receivables on day to day basis beyond a period available as per industry standard and apply LIBOR rate of interest. The assessee is directed to provide all the required detail for computation of such adjustment. The ground is thus allowed for statistical purpose.

Adjustment for Working Capital

15. In Ground no. 8 the assessee has requested for granting benefit of working capital adjustment, which the TPO has not granted. The assessee contended that the assessee and comparable operate at different levels of trade receivables, trade payables and inventories. The ld. Ld. Counsel of the assessee submitted that there was a significant difference in the working capital of the assessee vis-a-vis the comparables and therefore appropriate adjustment for working capital should be granted to the results of the corporate to make the equitable comparison. The ld. AR placed reliance on the following decision of the Tribunals:

i. Mercer Consulting India Pvt Ltd vs DCIT [2014]150 ITD 1 (Delhi - Trib.)
ii. Mentor Graphics (Noida) (P) Ltd vs DCIT [2007]109 ITD 101 (Del)
iii. TNT India Private Limited vs ACIT [2011]45 SOT 471 (Bang)
iv. Philips Software Centre (P.) Ltd vs ACIT [2008]26 SOT 226 (Bang.)

15.1 We have heard the submission and perused the material on record including the cases cited by the ld AR. We have noticed the analysis of the working capital requirement of the assessee and the comparable, submitted by the assessee at page no.113 and 114 of the paper book. In principle we are agreed with the contention of the counsel that while making comparison of the assessee with the comparables, the economic adjustments are important in eliminating material differences in functions, assets, and risk between the assessee and the comparables to increase the comparability. As the request of the assessee seeking working capital adjustment has not been attended either by the TPO or by the DRP, we, therefore, restore the matter to the TPO and direct him to allow the adjustment for working capital from the results of the comparable after providing due opportunity of hearing to the assessee.

16. At the time of hearing, Ground Nos. 11 and 13 of the appeal were not pressed by the ld AR, hence dismissed as infractuous.

17. The ground No. 14 raised by the assessee is consequential in nature and hence not required to adjudicate by us at this point of time.

18. As, we part with the appeal, we would like to place on record the appreciation for illuminating arguments put forth by both side, which assisted us in disposing the issue. We also would like to clear that though all the cases

relied upon by the parties have been taken into consideration, reference of some of the cases have not been made either due to repetition or irrelevance.

19. In the result, the appeal of the assessee is allowed for statistical purpose.

The decision is pronounced in the open court on 22nd January, 2016.

Sd/-	**Sd/-**
(DIVA SINGH)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 22nd January, 2016.

RK/-

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi