



IN THE INCOME TAX APPELLATE TRIBUNAL

"K" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA no. 928/Mum/2016
(Assessment Year : 2011-12)

Asstt. Commissioner of Income Tax
Circle-3(1)(1), Mumbai

..... Appellant

v/s

Blackstone Advisors India Pvt. Ltd.
5th Floor, Express Tower
Nariman Point, Mumbai 400 021
PAN - AACCB7376D

..... Respondent

ITA no. 1370/Mum/2016
(Assessment Year : 2011-12)

Blackstone Advisors India Pvt. Ltd.
5th Floor, Express Tower
Nariman Point, Mumbai 400 021
PAN - AACCB7376D

..... Appellant

v/s

Asstt. Commissioner of Income Tax
Circle-3(1)(1), Mumbai

..... Respondent

Assessee by : Shri Porus Kaka, Sr. Counsel
Shri Diwesh Chawla
Revenue by : Smt. Abhakala Chanda, CIT

Date of Hearing - 20.11.2018

Date of Order - 30.11.2018

ORDER**PER SAKTIJIT DEY, J.M.**

Aforesaid cross appeals arise out of assessment order dated 28th December 2015, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (for short "***the Act***"), for the assessment year 2011-12, in pursuance to the directions of the Dispute Resolution Panel (DRP).

2. Grounds no.1 to 11 in assessee's appeal and the only ground in Revenue's appeal relates to the addition made on account of transfer pricing adjustment.

3. At the time of hearing, Shri Porus Kaka, learned Sr. Counsel appearing for the assessee and Smt. Abhakala Chanda, learned Departmental Representative submitted that the dispute relating to transfer pricing adjustment is confined to selection / rejection of certain comparables. Therefore, at the outset, we propose to deal with the aforesaid issue raised by both the parties before us.

4. Brief facts relating to this issue are, the assessee is a wholly owned subsidiary of Blackstone Group of companies situated in New York, U.S.A. As stated by the Transfer Pricing Officer, the assessee is engaged in providing a range of investment sub-advisory services relating to the Indian market to its overseas Associated Enterprises

(A.E) belonging to Blackstone Group. For the assessment year under dispute, the assessee filed its return of income on 31st October 201, declaring total income of ₹ 13,25,18,104. During the assessment proceedings, the Assessing Officer noticing that the assessee has entered into international transaction of providing investment sub-advisory services to its overseas A.E. and earned revenue therefrom, made a reference to the Transfer Pricing Officer to determine the arm's length price (ALP). In course of proceedings before him, the Transfer Pricing Officer after examining the transfer pricing study report filed by the assessee noticed that the assessee has adopted Transactional Net Margie Method (TNMM) as the most appropriate method with operating profit/total cost (OP/TC) as profit level indicator (PLI) for bench marking the international transaction with the A.E. and initially selected five companies as comparable on the basis of financial data of three years with arithmetic mean of 18.40%. Subsequently, the assessee proposed three comparables on the basis of financial data for financial year 2010-11 alone with arithmetic mean of 13.90%. Since, the margin shown by the assessee @ 22.60% was higher than the arithmetic mean of the comparables, the ALP of the international **transaction was claimed to be at arm's length. The Transfer Pricing** Officer pointing out various defects and deficiencies in the transfer pricing study report rejected it and proceeded to select comparables independently. Though, he accepted TNMM as the most appropriate

method, however, he rejected all the three comparables finally proposed by the assessee. Having done so, the Transfer Pricing Officer selected the following three companies as comparable having arithmetic mean of 55.70%.

<i>Sr. no.</i>	<i>Name of the Comparable</i>	<i>OP/TC (%)</i>
1.	<i>Motilal Oswal Investment Advisors Pvt. Ltd.</i>	82.29
2.	<i>Ladderup Corporate Advisory Pvt. Ltd.</i>	52.43
3.	<i>Motilal Oswal Private Equity Advisors Pvt. Ltd.</i>	32.38
		55.70

5. By applying the arithmetic mean of the comparables selected, the Transfer Pricing Officer determined the arm's length price at ₹ 75,61,94,273. The price charged by the assessee to the A.E. being ₹ 59,41,13,931, the short fall of ₹ 16,20,80,342, was proposed as an adjustment under section 92CA of the Act. While completing the draft assessment order, the Assessing Officer added the transfer pricing adjustment proposed by the Transfer Pricing Officer. Being aggrieved of such addition, the assessee raised objections before the DRP.

6. The DRP, after considering the objections of the assessee, though, upheld the rejection of comparables selected by the assessee, however, they excluded Motilal Oswal Investment Advisors Pvt. Ltd. from the list of comparables selected by the Transfer Pricing Officer.

Being aggrieved with the aforesaid decision of the DRP, both, the assessee as well as Revenue are before us.

7. Herein after we will deal with each of the comparables disputed before us by the parties.

ICRA MANAGEMENT CONSULTING SERVICES LTD.

8. This is one of the companies selected by the assessee. The Transfer Pricing Officer rejected this comparable on the reasoning that the company is not functionally similar to the assessee on the basis functions provided, asset employed and risk undertaken. The Transfer Pricing Officer observed, while the assessee is providing investment advisory services, as per the information obtained under section 133(6) of the Act, this company provides management consultancy and advisory services to corporate banks, government, multilateral agencies, institutional agencies, etc. Whereas, the assessee is providing investment advisory services for private equity investment as well as real estate investment to the A.Es. Thus, he held that the company is not a comparable. This view of the Transfer Pricing Officer was also endorsed by the DRP.

9. The learned Sr. Counsel for the assessee submitted, functions performed by this company is more or less similar to the investment advisory services provided by the assessee to the A.Es. He submitted,

in a number of cases relating to the very same assessment year the Tribunal held this company to be a comparable to an investment advisory service provider. In this context, he drew our attention to the following decisions: –

- i) *DCIT v/s General Atlantic Pvt. Ltd., ITA no.1717/Mum./2016, dated 21.02.2018;*
- ii) *Temasek Holdings Advisors India Pvt. Ltd. v/s DCIT, [2017] 87 taxmann.com 168; and*
- iii) *Sun Ares India Real Estate Pvt Ltd. v/s DCIT, ITA no.621/ Mum./2016, dated 09.02 2018.*

10. The learned Sr. Counsel submitted, **in assessee's own case for** the assessment year 2008-09, the Tribunal has accepted this company as comparable to the assessee. Thus, he submitted, this company has to be accepted as a comparable.

11. The learned Departmental Representative relied upon the observations of the DRP and the Transfer Pricing Officer.

12. We have considered rival submissions and perused materials on record in the light of decisions relied upon. As could be seen from the facts on record, this company is providing advisory services, hence, is functionally similar to the assessee. The only reason the Transfer Pricing Officer has rejected this company as comparable is because it is providing management consultancy services to Banks, Corporates and Government, etc. However, no substantive material has been

brought on record by the Department to demonstrate that the functions performed by this company are drastically different from the assessee. In fact, in a number of decisions, the Co-ordinate Bench has held this company as a comparable to a investment advisory service provider. In this context, it is relevant to take note of the following observations of the Co-ordinate Bench in case of General Atlantic Pvt. Ltd. (supra) which is for the very same assessment year.

"14. We have heard rival submissions and perused material available on record. Insofar as ICRA Management Consulting Services Ltd. is concerned, the Transfer Pricing Officer has rejected it as a comparable basically on the reasoning that unlike the assessee this company is providing management consulting service. One more reason by the Transfer Pricing Officer to exclude this company is difference in skill set of employees. However, we find nothing new in the argument of the Department as upon consideration of the very same argument, this company has been found to be a comparable to a non-binding investment advisory service provider. It is relevant to observe, in case of AGM India Advisors Pvt. Ltd. v/s DCIT, [2017] 79 taxmann.com 86 which is for the very same assessment year, the Tribunal after considering argument advanced by the Department regarding difference in skill set held that ICRA Management Consultancy Services is a valid comparable to a company providing non-binding investment advisory services. It is also relevant to note, in assessee's own case for assessment year 2009-10, this company has been accepted as a comparable by the DRP. Even otherwise also, the observations of the Transfer Pricing Officer on difference in skill set between the assessee and the comparable company appears to be not on the basis of proper analysis of fact and more on assumption and presumption. As regards other functional differences of this comparable pointed by the learned Departmental Representative, it needs to be mentioned, neither Transfer Pricing Officer nor DRP have deliberated on those aspects. Since these issues raised by the learned Departmental Representative are completely new issues and never raised at any stage earlier, we do not consider it appropriate to deal with them as it requires verification of fresh facts. Therefore, respectfully following the decisions of the Tribunal cited before us by the learned Authorised Representative, we direct the Assessing Officer to accept this company as a comparable."

13. It is also relevant to observe, in assessee's own case for assessment year 2008-09, the Tribunal having found the company to be functionally similar to the assessee has accepted it as comparable. In view of the aforesaid, we direct the Assessing Officer to include this company as a comparable.

IDC (INDIA) LTD.

14. This company has been rejected by the Transfer Pricing Officer and the DRP on the ground that as per the information available in the website of the company, it is not engaged in providing investment advisory services, therefore, functionally different from the assessee.

15. The learned Sr. Counsel for the assessee submitted, in a number of decisions rendered by the Tribunal for the very same assessment year this company has been found to be functionally similar to an investment advisory service provider, hence, accepted as a comparable. In this context, he relied upon the following decisions: -

- i) *DCIT v/s General Atlantic Pvt. Ltd., ITA no.1717/Mum./2016, dated 21.02.2018;*
- ii) *Temasek Holdings Advisors India Pvt. Ltd. v/s DCIT, [2017] 87 taxmann.com 168; and*
- iv) *Sun Ares India Real Estate Pvt. Ltd. v/s DCIT, ITA no.621/ Mum./2016, dated 09.02.2018.*

16. He further submitted, **in assessee's own case** for assessment year 2008-09 in ITA no.1581/Mum./2014, dated 9th March 2016, the Tribunal has accepted this company as comparable.

17. The learned Departmental Representative relied upon the observations of the DRP and the Transfer Pricing Officer.

18. We have considered rival submissions and perused materials on record. It is evident, the departmental authorities have excluded this company selected by the assessee on the ground of functional dissimilarity. However, it is observed, **in assessee's own case for** assessment year 2008-09, in the order referred to above, the Tribunal having found this company to be functionally similar to the assessee has accepted it as comparable. Similar view has been expressed by the Co-ordinate Bench in case of a number of companies providing investment advisory services and many of such decisions pertain to the impugned assessment year. In this context, we may refer to the following observations of the Co-ordinate Bench in case of General Atlantic Ltd. (supra): -

"15. Insofar as IDC (India) Ltd. is concerned, it is observed, in assessee's own case for assessment year 2006-07, the Tribunal accepted this company as a comparable which was upheld by the Hon'ble Jurisdictional High Court while dismissing the appeal filed by the assessee. While upholding the decision of the Tribunal, the Hon'ble Jurisdictional High Court observed that since the non-binding advisory service provided by the assessee is similar to the service provided by Carlyle India Ltd., wherein, IDC (India) Ltd. is accepted

as a comparable there is no reason to defer with the decision of the Tribunal. It is necessary to observe, in case of other assessee engaged in providing non-binding investment advisory services akin to the assessee for the very same assessment year, the Tribunal has held that IDC (India) Ltd. is a good comparable. In this context, we refer to the decisions of the Tribunal in case of AGM India Advisory Pvt. Ltd. (supra) and Temasek Holdings Advisors India Pvt. Ltd. v/s DCIT, 87 taxmann.com 168 (Mum.). Moreover, in assessee's own case in the earlier assessment years, this company having been found to be functionally similar was accepted as a comparable. In view of the aforesaid, we direct the Assessing Officer to include this company as a comparable."

19. Since, the aforesaid observations of the Tribunal pertain to the very same assessment year, respectfully following the same, we direct the Assessing Officer to include this company as a comparable.

LADDERUP CORPORATE ADVISORY PVT. LTD.

20. This company was selected by the Transfer Pricing Officer and was also retained by the DRP.

21. Objecting to the selection of the aforesaid company by the Transfer Pricing Officer and the DRP, the learned Sr. Counsel for the assessee submitted, the company being a merchant / investment banking company, is functionally different from the assessee, hence, cannot be treated as comparable to an investment advisory service provider like the assessee. In this context, he relied upon the following decisions: –

- i) *DCIT v/s General Atlantic Pvt. Ltd., ITA no.1717/Mum./2016, dated 21.02.2018;*
- ii) *Temasek Holdings Advisors India Pvt. Ltd. v/s DCIT, [2017] 87 taxmann.com 168;*
- iii) *Sun Ares India Real Estate Pvt. Ltd. v/s DCIT, ITA no. 621/Mum./2016, dated 09.02.2018; and*
- iv) *Wells Fargo Real Estate Advisors |Pvt. Ltd. v/s DCIT, ITA no.1520/Mum./2016, dated 17.01.2018.*

22. The learned Departmental Representative relied upon the observations of the Transfer Pricing Officer and the DRP.

23. We have considered rival submissions and perused materials on record. From the functional profile of the aforesaid company it appears that it is registered as Category 1 Merchant Banking Company with SEBI and is engaged in merchant banking services w.e.f. July 2010. Considering the aforesaid factual aspect, the Co-ordinate Bench in the decisions cited by the learned Sr. Counsel for the assessee has held that this company cannot be a comparable to a company engaged in the activity of investment advisory services. Since, the aforesaid decisions are for the very same assessment year and no distinguishing fact in the present appeal was brought to our notice by the learned Departmental Representative, respectfully following the consistent view of the Tribunal, we hold that this company cannot be treated as comparable to the assessee.

MOTILAL OSWAL EQUITY ADVISORS PVT. LTD.

24. This company was selected as comparable by the Transfer Pricing Officer and such selection was also upheld by the DRP. Objecting to the selection of the aforesaid company, the learned Sr. Counsel for the assessee submitted that since the company has four different business verticals, such as, financial advisory, investment advisory, management and facilitation services and identifying investment opportunities, it is functionally different from the assessee. He submitted, though, the company has different segments, however, no segmental data is available in the annual report. Thus, he submitted, the company cannot be treated as a comparable. In support of such contention, he relied upon the following decisions: –

- i) *Temasek Holdings Advisors India Pvt. Ltd. v/s DCIT, [2017] 87 taxmann.com 168; and*
- ii) *Wells Fargo Real Estate Advisors Pvt. Ltd. v/s DCIT, ITA no.1520/Mum./2016, dated 17.01.2018;*
- iii) *Carlyle India Advisors India Pvt. Ltd. v/s ACIT, [2012] 24 taxmann.com 176.*
- iv) *IIML Assets Advisors Ltd. v/s DCIT, ITA no.4060/Mum./2016, dated 20.06.2018.*

25. The learned Sr. Counsel for the assessee further submitted, in assessee's own case for the assessment year 2008–09, the Tribunal has rejected this company as a comparable.

26. The learned Departmental Representative relied upon the observations of the Transfer Pricing Officer and the DRP.

27. We have considered rival submissions and perused materials on record in the light of the decisions relied upon. As could be seen from the facts on record, though, the aforesaid company has four business verticals, however, the segmental details are not available in the annual report. Further, in case of Temasek Holding Advisors India Pvt. Ltd. (supra), the Tribunal, while considering the comparability of the aforesaid company to an investment advisory services provider held that this company cannot be a comparable due to differences in functional profile. The same view was reiterated by the Co-ordinate Bench while deciding this particular issue in case of Wells Fargo Real Estate Advisors Pvt. Ltd. (supra). Since, the aforesaid decisions of the Co-ordinate Bench are for the very same assessment year and no distinguishing facts have been brought to our notice by the learned Departmental Representative, in our considered opinion, the ratio laid down in the above referred decisions clearly apply to the facts of the **present case. Moreover, the Tribunal in assessee's own case for** assessment year 2008-09 has passed an order in ITA no.1581/Mum./2014, dated 26th September 2018, holding that the company cannot be a comparable to the assessee. There being no dissimilarity in facts brought to our notice by the learned Departmental Representative,

respectfully following the aforesaid decisions of the Co-ordinate Bench, we hold that this company cannot be a comparable to the assessee.

MOTILAL OSWAL INVESTMENT ADVISORS PVT. LTD.

28. This company, though, was selected as a comparable by the Transfer Pricing Officer, however, the DRP excluded this company as a comparable by holding that it is a merchant banker. Being aggrieved with the aforesaid decision of the DRP, Revenue is in appeal before us.

29. The learned Departmental Representative relied upon the observations of the Transfer Pricing Officer.

30. The learned Sr. Counsel for the assessee strongly relying upon the observations of the DRP submitted that the company being a merchant banker cannot be treated as a comparable to the assessee.

In support of such contention, he relied upon the following decisions: –

- i) *AGM India Advisors Pvt. Ltd. v/s DCIT, [2017] 79 taxmann.com 86;*
- ii) *Temasek Holding Advisors India Pvt. Ltd. v/s DCIT, [2016] 67 taxmann.com 221;*
- iii) *Carlyle India Advisors India Pvt. Ltd. v/s DCIT, [2014] 43 taxmann.com 184.*

31. Further, the learned Sr. Counsel for the assessee submitted that in assessee's own case for assessment year 2008-09, the Tribunal has held that the company cannot be a comparable to the assessee.

32. We have considered rival submissions and perused materials on record in the light of the decisions relied upon. As could be seen from the functional profile of this company as revealed from the material brought on record, it is engaged in the business of investment banking, merchant banking, merger and acquisition, private equity syndication, etc., **which are no way similar to the assessee's activities** of non-binding investment advisory services. In a number of decisions including decisions relating to the impugned assessment year, as referred to above, the Tribunal has held that this company cannot be a comparable to an investment advisory service provider. In fact, in **assessee's own case for assessment year 2008-09** (supra), the Tribunal taking note of the functional differences between the activities of the assessee and this company has held that it cannot be a comparable to the assessee. Therefore, considering the overall facts and circumstances of the case, we hold that this company cannot be a comparable to the assessee. Accordingly, we uphold the decision of the DRP on this issue.

33. In view of the above, we direct the Assessing Officer to work out the arm's length price of the international transaction entered into by the assessee with its A.Es following our observations herein above.

34. Ground no.12 is against levy of interest under section 234B of the Act and ground no.13 is against initiation of penalty proceedings under section 271(1)(c) of the Act.

35. These grounds raised by the assessee being either consequential or pre-mature at this stage. We do not feel the need to adjudicate them. Accordingly, these grounds are dismissed.

36. In the result, assessee's appeal is partly allowed and Revenue's appeal is dismissed.

Order pronounced in the open Court on 30.11.2018

Sd/-
RAJESH KUMAR
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 30.11.2018

Copy of the order forwarded to:

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

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Sr. Private Secretary)
ITAT, Mumbai