

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES: BENCH "I-2" NEW DELHI

BEFORE SRI R.K.PANDA, ACCOUNTANT MEMBER  
AND  
SMT. BEENA A PILLAI, JUDICIAL MEMBER

ITA No. 458/Del/2016  
A.Y. 2011-12

ChrysCapital Investment Advisors ( India) Pvt.Ltd.) Vs. ACIT, Circle 6(1)  
Suite 101, The Oberoi New Delhi  
Dr.Zakir Hussian Marg  
New Delhi 110 003

PAN: AABCC4609H

**(Appellant)**

**(Respondent)**

**Appellant by:** Sh. Vikas Srivastava, Adv.  
Sh. Mayank Aggarwal, Adv.  
Ms. Rashi Gupta, C.A.

**Respondent by:** Sh. H.K.Choudhary, CIT, DR

**Date of hearing** : 19/02/2019

**Date of Pronouncement** : 17/05/2019

**ORDER**

**PER BEENA A PILLAI, JUDICIAL MEMBER**

Present appeal has been filed by assessee against final assessment order dated 30/11/15 passed under section 143 (3) read with section 144C of the Income Tax Act, 1961 (the Act) by

Ld.Dy.CIT, Transfer Pricing Officer 1 (2) (1), New Delhi, for assessment year 2011-12, on following grounds of appeal:

"1. The order dated November 30, 2015, passed by the Learned Assistant Commissioner of Income Tax, Circle 6(1), New Delhi (hereinafter referred as 'Ld.AO') under section 143(3) read with section 144C of the Income Tax Act, 1961 (hereinafter referred as '**the Act**') is bad in law and on the facts and circumstances of the case.

2. The Ld. AO as well as the Learned Transfer Pricing Officer ("**Ld. TPO**") and the Hon'ble Dispute Resolution Panel ("**Hon'ble DRP**") have erred in law as well as facts of the case in not accepting the Arm's Length Price (hereinafter referred as '**ALP**') determined by the appellant.

3. The Ld. AO / Ld. TPO / Hon'ble DRP have erred in determining the ALP on the basis of data for Financial Year ('FY') 2010-11 only and ignoring the data for two ' prior financial years i.e. FY 2009-10 and FY 2008-09.

4. The Ld. AO / Ld. TPO / Hon'ble DRP have erred in treating the foreign exchange gains as non-operating in nature while computing the operating margin of the appellant.

5. The Ld. AO / Ld. TPO / Hon'ble DRP have erred in applying the filter of rejecting companies having more than 25% of the related party transactions in an incorrect manner i.e. sales as well as expenditure combined as a percentage of the sales.

6. The Ld. AO / Ld. TPO / Hon'ble DRP have erred in rejecting the quantitative filters adopted by the appellant, and adopting

*inappropriate quantitative filters for carrying out a fresh comparability analysis.*

*7. The Ld. AO / Ld. TPO / Hon'ble DRP have erred in arbitrarily rejecting certain companies selected by the appellant as comparables and in accepting certain companies which are not comparable to the appellant, while determining ALP.*

*8. The Ld. AO / Ld. TPO / Hon'ble DRP have erred in considering the reimbursement of expenses as part of operating revenue and operating expenses /for the purpose of determining ALP.*

*9. The Ld. AO as well as Ld. TPO has erred in not allowing risk adjustments in the case of Brescon Corporate Advisors Limited and Keynote Corporate Services Limited ignoring the order of the Hon'ble High Court of Delhi in the case of the appellant for the AY 2008-09 and ignoring the specific directions given by the Hon'ble DRP.*

*10. The Ld. AO / Ld. TPO / Hon'ble DRP have erred in not allowing any risk adjustments to the appellant as it is remunerated on a cost plus mark-up basis.*

*11. The Ld. AO / Ld. TPO / Hon'ble DRP have erred in re-characterizing the delay in receiving the advisory fees by the appellant as deemed loan given by it to associated enterprises and making an adjustment on account of interest receivable on such delayed receipts.*

*12. The Ld. AO / Ld. TPO / Hon'ble DRP have erred in making additions on the basis of notional interest by comparing it with LIBOR ignoring that the said comparison is none of the 5 prescribed methods under the Indian transfer pricing regulations.*

13. *The Ld. AO / Ld. TPO / Hon'ble DRP have erred in ignoring the judicial pronouncements relied upon by the appellant.*

14. *The Ld. AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act.*

15. *The above grounds of appeals are independent and without prejudice to one another.*

16. *The appellant craves leave to add / withdraw / amend any ground of appeal at 1/ the time of hearing."*

**2. Brief facts of the case are as under:**

Assessee filed its return of income on 28/11/11, declaring total income of Rs.11,95,43,841/-. The case was selected for scrutiny and notice under section 143 (2) of the Act was issued. Subsequently questionnaire was also issued along with notice under section 142 (1) of the Act. Ld.AO observed that assessee is engaged in business of rendering financial research and advisory services.

**2.1.** Ld.AO observed that assessee has entered into international transaction with its associated enterprise (AE), and accordingly a reference was made to Transfer Pricing Officer (TPO) under section 92CA(3) for computing arm's length price of international transactions.

**2.2.** Upon receipt of reference, Ld.TPO issued notice under section 92C and representatives of assessee appeared before him from time to time and filed requisite details as called for.

**2.3.** Ld.TPO from TP documentation observed that, assessee is engaged in performing following services for ChrysCapital

Management Companies being ChrysCapital Management Company III, LLQ; ChrysCapital Management Company, IV LLC; ChrysCapital Management Company, V LLC (being associated enterprises) :

- collection and dissemination of financial information of prospective entities;
- setting up meetings with officials of concerned entities to obtain relevant information;
- obtaining relevant background information of such entity;
- advising the management companies of investment and disposition opportunities;
- investigation and advise on structuring potential investment and exit opportunities; and
- other services in relation to the above services.

2.4. Ld.TPO observed that, associated enterprises are engaged in business of managing private equity funds and they are basically investment funds where general focus is on investment in incubation ventures. Ld.TPO observed that, assessee is required to make AEs aware about investment/disinvestment opportunities, however, ultimate decision of whether to use or not to use such recommendations of assessee lies exclusively with AEs.

He observed that during year, assessee undertook following international transactions, which was recorded in Form 3 CEB, filed by assessee.

Sl. No.	Description of the transaction	Value in Rs.	Method
1.	Payment of fees by CMC-III	2,42,53,815	TNMM
2.	Payment of fees by CMC-IV	14,54,86,331	TNMM
3.	Payment of fees by CMC-V	31,52,35,631	TNMM

4.	Reimbursement of expenses from CMC-III	2,34,064	No separate analysis has been done
5.	Reimbursement of expenses from CMC-III	6,65,991	No separate analysis has been done
6.	Reimbursement of expenses from CMC-III	1,12,04,298	No separate analysis has been done

**2.5.** Assessee used TNMM as most appropriate method to arrive at arm's length price. Assessee computed its operating margin at 25.84%, where four (4) comparables selected by assessee earned average margin of 6.28% by using PLI as OP/OC. Assessee thus held international transaction undertaken by it with its associated enterprises to be at arm's length.

**2.6.** Ld.TPO while analysing arm's length price of international transactions entered into by assessee with its AE's, rejected comparables selected by assessee by applying various filters and considered following 13 comparables which had average margin of 43.01%. Ld.TPO thus proposed adjustment of Rs.13,79,85,005/-.

S.No.	Comparables	OP/OC (%)
1.	Aditya Birla Capital Advisors Pvt.Ltd.	38.50%
2.	Ajcon Global Services Ltd.	29.22%
3.	Axis Private Equity Ltd.	39.74%
4.	Ladderup Corporate Advisory Pvt.ltd.	51.10%
5.	Portfolio Financial Services Ltd.	32.63%
6.	SREI Venture Capital Ltd.	12.26%
7.	Motilal Oswal Investment Advisors Pvt.Ltd.	82.60%
8.	IM+Capital (Brescon Corporate Advisors Ltd.)	92.00%
9.	Keynote Corporate Services Ltd.	123.00%
10.	ICRA Management Consultant Services Ltd.	15.71%
11.	Cyber Media Research Ltd.	10.72%
12.	IDFC Investment Advisors Ltd.	8.34%

13.	Khandwala Securities Ltd.	23.31%
	AVG.	43.01%

2.7. Further, assessee claimed working capital adjustment which was rejected by Ld.TPO. Ld.TPO considered reimbursement expenses to assessee from its AE's to be operating expenditure and reimbursement as part of operating revenue. Ld.TPO also computed interest on receivables, by applying Safe Harbour Rules, and made addition of Rs.2,14,403/-.

3. Aggrieved by adjustment proposed by Ld.TPO, assessee raised objections before DRP, who upheld adjustments proposed by Ld. TPO.

4. Upon receipt of DRP directions, Ld. AO passed final impugned order, against which, assessee is in appeal before us now.

5. Ld.Counsel submitted that **Ground No. 1-3** are general in nature and therefore do not require any adjudication.

6. **Ground No. 4** has been raised by assessee against treating foreign exchange gains as non-operating in nature while computing operating margin of assessee.

6.1. Ld.Counsel submitted that assessee received its fees in foreign exchange, and thus foreign exchange gain/loss derived by it is in relation to such advisory fees, and is directly linked to business activity. He submitted that authorities below have incorrectly relied on Safe Harbour Rules, which is applicable from assessment year 2013-14 onwards. It was submitted that exchange fluctuation income/expenses is an integral part of sales made or

expense incurred by assessee during course of its business and accordingly should be considered as operating income/expense. It was further submitted that application of TNMM involves comparison of net profit i.e. operating profit margin, being ratio of operating profit to sales as an indicator of total return of business activity of tested party, viz., assessee and comparable uncontrolled entities.

Reliance was placed on following decisions:

- *Pr.CIT vs Ameriprise India Pvt. Ltd., reported in*
- *Fiserv India (P.) Ltd. v. ITO [2015] 60 taxmann.com 48 (Delhi - Trib.)*
- *Techbooks International (P.) Ltd. v. Asstt. CIT [2014] 45 taxmann.com 528 (Delhi);*
- *SAP Labs India (P.) Ltd v. Asstt. CIT (2010) 8 Taxmann.com 207 (BAG)*
- *Trilogy E Business Software India (P.) Ltd. v. Dy. CIT (2011) 12 taxmann.com 464*

**6.2.** It has been submitted that in aforesaid decisions and many more passed by various Benches of Tribunal & Hon'ble High Courts, foreign exchange fluctuation has been considered as operating item, while computing operating profit. Ld.CITDR however supported action of DRP and Ld.TPO in treating foreign exchange fluctuation as non-operating item.

**6.3.** Ld.CIT DR placed reliance on orders of authorities below.

**7.** We have perused submissions advanced by both sides in light of records placed before us.

**8.** We find merit in contention raised on behalf of assessee about inclusion of foreign exchange gain/loss in operating revenue/costs of assessee as well as that of comparables. When we advert to nature of such foreign exchange gain earned by assessee, it has not been controverted by Ld.CIT DR that same is in relation to trading items emanating from international transactions. If foreign exchange gain/loss directly results from trading items, we fail to appreciate as to how such foreign exchange fluctuation loss can be considered as non-operating.

**8.1.** Special Bench of this Tribunal in *ACIT v. Prakash I. Shah* reported in (2008) 115 ITD 167 (Mum) (SB) held that, gain due to fluctuations in foreign exchange rate emanating from exports is integral part and cannot be differentiated from export proceeds simply on ground that foreign currency rate has increased subsequent to sale but prior to realization. It went on to add that when goods are exported and invoice is raised in currency of country where such goods are sold and subsequently when amount is realized in that foreign currency and then converted into Indian rupees, entire amount is relatable to exports. In fact, it is only translation of invoice value from foreign currency to Indian rupees. The Special bench further held that exchange rate gain or loss cannot have a different character from transaction to which it pertains. The Bench found fallacy in submission made on behalf of Revenue that, exchange rate difference should be detached from exports, and be considered as an independent transaction. Special Bench further held that such exchange rate fluctuation gain/loss

arising from exports cannot be viewed differently from sale proceeds.

**8.2.** Further, in terms of Rule 10B(1)(e), of Rules for purpose of undertaking benchmarking analysis applying TNMM, net profit from international transaction is to be considered and there is no scope for arbitrarily excluding any item of income or expense for purpose of making comparison of net profit from such international transaction with that of unrelated parties. Reference in this regard is made to OECD Guidelines on transfer pricing, wherein, it has been held that foreign exchange gains and losses should be included or excluded for determination of net profit that depends on whether, foreign exchange gain or losses are of a trading nature and whether or not tested party is responsible for them.

**8.3.** Respectfully following decisions referred hereinabove, we are of considered opinion that foreign exchange gain deserves to be treated as operating item for computing net profit of assessee.

**8.4. Accordingly this ground raised by assessee stands allowed.**

**9. Ground No. 5** has been raised by assessee in respect of method of computing percentage of related party transaction.

**9.1.** Ld.Counsel submitted that, Ld.TPO computed percentage of RPT by using sales, as well as expenditure collectively as percentage of sales. Ld.Counsel submitted that in order to compute percentage of RPT, sales should be compared with sales and expenses should be compared with expenses.

**9.2.** He placed reliance upon decision of this Tribunal, in case of *American Express India private limited vs JCIT*, reported in (2014) 44 *Taxmann.com* 389.

**9.3.** On the contrary Ld. CIT DR placed reliance upon submissions as under:

*"Hon'ble ITAT in assessee's case for A.Y. 2009-10 in ITA No. 4294/Del/2014 in para 13 has relied on the decision of Hon'ble Pune-Trib. in the case of Sun Guard Solution (India) Pvt. Ltd. vs DDIT (Intl. Tax - I)-(2014) 51 Taxmann.com 339 where Hon'ble Tribunal has held that TPO has considered only related party revenue as numerator and operating revenue and expenses i.e. sum as denominator which resulted into distorted picture. It is a case specific finding where TPO in numerator has taken only RPT revenue only and not RPT expenses. It is submitted that the rationale for taking denominator for sum of operating revenue and expense is that numerator of RPT should also contain RPT revenue and expense. Otherwise if we consider only related party operating revenue in numerator and total revenue in denominator then, relevance of related party expense will loose sight of, which will effect the neutrality of a comparable. Therefore in general in all case RPT is computed taking numerator as well as denominator Related Party Revenue and expense as numerator and total revenue and expense as denominator. Therefore general computation of RPT should not be facts of this case."*

**10.** We have perused submissions advanced by both sides in light of records placed before us.

**10.1.** For purposes of computing RPT percentage, one should know and analyze what all items will form part of numerator and denominator in arriving at RPT percentage. This is very important in a case where a company has entered into purchase and/or sale transaction with related party. The question that arises is, whether total of RPT purchase and sales needs to be clubbed and then divided by total turnover, or only RPT purchases needs to be divided by total purchases and similarly RPT sales needs to be divided by total sales.

**10.2.** This issue has been addressed by this Tribunal in case of *Nokia India (P) Ltd vs DCIT* reported in (2014) 52 Taxmann.com 492, wherein, this Tribunal observed as under:

*"17. Now, we take up the second argument of the composition of numerator and denominator. Ratio of the RPTs represents the proportion of transactions with the associated enterprises (numerator) vis-a-vis the total of transactions (denominator). In order to decide that what should constitute the contents of numerator and denominator for the purposes of finding out the percentage of RPTs, it is relevant to note the logic behind applying this filter. It is manifest that the aim of the transfer pricing regime is to ensure that the international transactions are recorded at arm's length price. This is done under the TNMM by comparing the profit earned from the international transaction with that earned by the comparable independent parties in an uncontrolled situation. Thus, while choosing comparables, it must be ensured that the profit earned by them correctly reflects true profit as is earned by an enterprise from an independent third party. If such a chosen company, though functionally comparable, has also entered into international transactions beyond a particular percentage with the related parties, it is quite possible that its overall profit may have been distorted due to such transactions rendering it as incomparable. That is why, this filter is applied to make certain that a company sought to be*

*considered as comparable should have its profit uninfluenced by the impact of the related party transactions.*

*18. In view of the foregoing discussion, it is manifest that the transactions which do not impact the profitability, such as loan given or taken or other items finding place in the balance sheet, can have no place either in the numerator or the denominator of this formula. However, any income or expenditure resulting/relating from/to or likely to result/relate from/to such items of assets or liabilities, should not be confused with the per se international transactions finding place in the balance sheet of the company calling for exclusion.*

*19. The numerator of this formula consists of all the related party transactions of a company sought to be chosen as comparable which affect the profit earned directly from operations. If, however a related party transaction is of such a nature which does not directly affect or insignificantly affects the profit earned from the bare profit producing activity, then it should not be taken into consideration. The reason for the exclusion of such related party transactions from the numerator is that they have not at all or very insignificantly affected the operating profit of such a company, which is the driving force for the purposes of making a comparison under the TNMM. To cite an example, the RPT of rent paid by a company which is engaged in the business of trading or manufacturing cannot constitute a part of the numerator, because transaction of rent payment has no direct bearing on the trading or manufacturing activity.*

*20. Now, we take up the contents of the denominator of this formula. The percentage of numerator to denominator can be calculated only when the contents of a part representing the RPT of a particular nature is seen with reference to the contents of whole of that nature. Both the numerator and denominator have to have the same nature of contents."*

**10.3.** Further *Hon'ble High Court* in assessee's own case for assessment year 2008-09, vide order dated 12/03/18 in ITA No. 286/2018 has observed as under:

*“With respect to the inclusion of Moti Lal Oswal Investment Advisers Pvt.Ltd, the tribunal was of the opinion that for application of appropriate filter (of 25% profits as threshold) the entity had to be excluded since it returned more than that percentage of total expenditure. The revenue’s complaint is that in doing so the ITAT appears to have ignored that in respect of other transactions, the formula adopted that is percentage of related parties transaction (being sales to related parties plus expenses paid to such parties over sales turnover) was not adopted only in the case of this entity (Motilal was investment advisers private limited). The ITAT appears to have adopted the formula of percentage of RPT being equal to expenses paid to related parties divided by total expenditure multiplied by hundred, only in the case of this entity. While doing so the ITAT followed its previous ruling in SunGard solutions (India) (P) Ltd vs Dy.DIT, (2014) 51 taxman com 339 (Pune). This court is of the opinion that adopting one procedures for only one entity and adopting another for all other entities or comparables, can lead to a distorted picture. In these given circumstances this issue too is remanded to the ITAT for fresh consideration.”*

**10.4.** It is observed that Ld.TPO while analysing comparability of assessee with comparables for exclusion/inclusion of companies, computed RPT by applying ratio of sales as well as expenditure combined, off sales. In our considered opinion, based on above reproduced observations by *Hon’ble High Court* in assessee’s own case, a consistent approach regarding components to be included in

numerator and denominator of the ratio must be adopted in case of all comparables. As held by this Tribunal in case of *Nokia India Pvt. Ltd vs DCIT (supra)*, transactions which do not impact profitability, that finds place in balance sheet should not be included, either in numerator or denominator of this formula. However any income or expenditure relating/relating from/to or likely to result/relate from/to such items of sets or liabilities, should not be confused with *per se* international transaction, finding place in balance sheet of the company calling for its inclusion/exclusion. In the considered view the issue that would rightly determined the said date of related party transaction of a comparable would be percentage of related party transaction sale to the total sales.

**10.5.** In such circumstances, we deem it proper to restore this issue to file of Ld.TPO/AO to re-adjudicate comparables by applying formula being percentage of related party transactions of sales to total sales. Needless to say that, functional similarities must be made out between comparables *vis-a-vis* assessee.

**10.6. Accordingly this ground raised by assessee stands allowed for statistical purposes.**

**11. Ground No. 6** has been raised by assessee regarding quantitative filters adopted by Ld.TPO to exclude comparables. It has been submitted that Ld. TPO/AO has applied turnover filters by increasing the filter from 3 crores to Rs. 5 crore. Ld.TPO has applied different year ending filter and persistent loss/diminishing revenue filter for excluding certain comparables from the list. It has been submitted that Ld.TPO applied turnover less than Rs. 5 crore,

instead of Rs.3 crore, without any upper cap, thereby including companies having huge turnovers, and excluding certain comparables which were less than 5 crores.

**11.1.** It has been submitted by Ld.Counsel that Ld.TPO has wrongly used different year ending filter.

**11.1.** Ld.Counsel submitted that assessee applied turnover filter of less than Rs.3 crores, being 1/5<sup>th</sup> of total turnover of assessee. He placed reliance upon following decisions of Coordinate benches of this Tribunal:

- Nokia India Pvt. Ltd., Vs DCIT (2014) 52 Taxmann.com 492;
- DCIT vs M/s Quark Systems Pvt.Ltd (2010) TIOL-31-ITAT CHD-SB;

**11.2.** It has also been submitted that Ld.TPO used different year ending filter for rejecting certain comparables that were best suited to assessee and rejected certain comparables on ground of persistent loss filter and diminishing revenue filter. It has been submitted that application of diminishing revenue filter or persistent loss filter is contrary to the filter applied by Ld.TPO by including comparables which has extraordinary profit margin. He submitted that in the event comparables that are functionally comparable with assessee are excluded on ground that these are loss-making companies or have diminishing revenue, then companies that made extraordinary profit margin should also be excluded.

**11.3.** Ld.CIT DR submitted that in decisions relied upon by Ld. Counsel hereinabove, comparable has been claimed to be excluded

on account of non-application of upper filter. It has been submitted that the turnover filter has not been arbitrarily applied as contended by Ld. Counsel. He submitted that comparables that has been alleged by assessee for its inclusion for example SREI has a turnover of 4.71 crores whereas in transfer pricing study companies having turnover of less than 3 crores were rejected by assessee itself as such companies were held to be engaged in low sale operations vis-a-vis that of assessee.

**11.4.** Ld. CIT DR placed reliance upon following decisions:

- *Sony India Pvt. Ltd. vs DCIT reported in 114 ITD 448 (del)*
- *ITO vs. CRM services India Pvt. Ltd. reported in (2011) 14 taxmann.com 96*
- *Exion M Company India Pvt. Ltd. reported in (2011) 15 taxmann.com 353 (Mum)*
- **11.5.** Ld. CIT DR submitted that *Hon'ble Delhi High Court* in assessee's own case for assessment year 2008-09 has held that profit/loss cannot be a criteria for rejection of comparables reported in *(2015) 232 taxman 20*.

**11.6.** It has been submitted that quantitative filters applied by Ld. TPO should be upheld.

**12.** We have perused submissions advanced by both sides in light of records placed before us.

**13.** The Transfer Pricing Officer himself having rejected loss making companies as comparables, there must also be an upper limit. A big company would be in a position to bargain the price and attract more customers. It would also have a broad base of skilled

employees able to give better output. A small company may not have these benefits and therefore, turnover also would come down reducing profit margin. Thus, for purpose of classification of companies on basis of net sales or turnover, a reasonable classification has to be made. The turnover filter is important and assessee having turnover of about Rs.20 crores, companies having turnover of Rs. 1 crore to Rs. 200 crores should be taken into consideration for purpose of comparability analysis. On this basis, the TPO is directed to exclude comparable companies having turnover of more than Rs. 200 crores.

**13.1.** Ld.Counsel has further argued that entities earning "super normal" or "abnormal" profits should be excluded from list of comparables. In support, he relied on several rulings of various Benches of the ITAT. These are *Adobe Systems India (P.) Ltd. (Supra)*; *Teva India (P.) Ltd. (Supra)*; *Sapient Corpn. (P.) Ltd. (Supra)*; *Maersk Global Services Centre (India) (P.) Ltd. (Supra)*; *Symantec Software Solutions (P.) Ltd. (Supra)* and a Division Bench ruling of this Court in *Agnity India Technologies (P.) Ltd. (Supra)*. Besides, this Court notices that a similar reasoning - of applying what is known as the "turnover" filter or the exclusion of "superprofit" making companies reasoning was applied in *Continuous Computing India (P.) Ltd. v. ITO [2012] 52 SOT 45 (URO)/21 taxmann.com 137 (Bang.)*; *Centillum India (P.) Ltd. v. Dy. CIT [2012] 23 taxmann.com 34/53 SOT 145 (Bang.)* and *Addl CIT v. Frost and Sullivan India (P.) Ltd sic (supra)*.

**13.2.** The revenue has on the other hand, relied on contrary views in *Actis Advisers (P.) Ltd. v. Dy. CIT* [\[2011\] 10 taxmann.com 24 \(Delhi\)](#); *24/7 Customer.Com. (P.) Ltd. v. Dy. CIT* [\[2012\] 28 taxmann.com 258/\[2013\] 140 ITD 344 \(Bang.\)](#) and *Willis Processing Services (I) (P.) Ltd. v. Dy. CIT* [\[2013\] 30 taxmann.com 350/57 SOT 339 \(Mum.\)](#). Such views are echoed in *Trilogy E-Business Software India (P.) Ltd. v. Dy. CIT* [\[2013\] 29 taxmann.com 310/140 ITD 540 \(Bang.\)](#) and *Stream International Services (P.) Ltd. v. Asstt. DIT (International Taxation)* [\[2013\] 31 taxmann.com 227 141 ITD 492 \(Mum.\)](#).

**13.3.** It is observed that Hon'ble Delhi High Court in assessee's own case for assessment year 2008-09 has dealt with this plea and has held that, mere fact that an entity makes high/extremely high profits/losses does not, *ipso facto*, lead to its exclusion from list of comparables for purposes of determination of ALP. In such circumstances, an enquiry under Rule 10B(3) ought to be carried out, to determine, as to whether, material differences between assessee and comparable could be eliminated. If such differences can be eliminated, the entity should be included as a comparable. Further, while determining comparability of transactions, multiple year data can only be included in the manner provided in Rule 10B(4). As a general rule, it is not open to assessee to rely upon previous year's data.

**13.4.** We are accordingly inclined to set aside this issue back to Ld. TPO/AO for applying the quantitative filters as has been indicated hereinabove for election of comparables. Needless to say

that FAR analysis of comparables vis-a-vis assessee must be strictly adhered to for final selection of comparables.

**13.5. Accordingly, this ground raised by assessee stands allowed for statistical purposes.**

**14. Ground No. 7** has been raised by assessee in respect of arbitrarily rejecting certain companies selected by assessee as comparables and accepting certain companies which according to assessee were not comparable for determining arm's length price of international transaction.

**14.1.** Before starting the compatibility analysis, it is *sine qua non* to understand functions performed by assessee, assets owned and risk assumed, for providing services to its AE.

Functions:

In TP study Ld.TPO observed that, assessee provides identical advisory services to CMC-III, CMC-IV and CMC-V being its AEs. The services rendered by assessee includes:

- collection and dissemination of financial information of prospective entities;
- setting up meetings with officials of concerned entities to obtain relevant information;
- obtaining relevant background information of such entity is;
- advising CMC of investment and disposition opportunities;
- investigation and advise on structuring potential investment and exist opportunities; and
- other services in relation to above services.

**14.2.** In the process of providing aforesaid services, assessee maintains database regarding consultancy services being major activity that provides access to industry specific and sector specific data. Thus assessee is required to maintain various database as it is required to analyse data and provide consultancy services to its AE. It has been observed by Ld. TPO that assessee collects data from various sources to carry out research activities for purposes of and evaluating investment opportunities in India related to industry and sector identification from multiple sources.

**14.3.** Assessee is to provide market research by systematically gathering recording and analysing general market conditions which would include identification and subsequent in-depth analysis of potential investment opportunities. These reports are then subsequently appraised to AE's for carrying out investment/disinvestment opportunities. The final decision to carry out investment/disinvestment is taken by the AE's.

**(A) Assets owned:**

The types of assets that is employed for carrying out aforesaid functions by assessee is basically employees being human capital, office equipment and machinery like computer furniture and other equipment etc.

**(B) Risks assumed:**

It has been observed by Ld.TPO that assessee undertakes several operational layer risks like market risk. It has been observed that assessee is not free from risk of losing business entirely or losing volume of business. It is also observed that assessee only have a

single customer and therefore is dependent heavily on its AE's. Thus it can be concluded that assessee was undertaking various risk while providing advisory services to its AE's. It was not operating in a risk-free environment.

**14.4.** Based upon above FAR analysis we shall now undertake compatibility of comparables objected for inclusion by assessee.

**15.** Ld.Counsel submitted that Ld.TPO erred in including following comparables which were not functionally similar with that of assessee.

- Axis Private Equity Ltd.,
- Ladderup Corporate Advisory Private Limited
- Motilal Oatwal Investment Advisors Pvt.Ltd
- IM+ Capitals Ltd (formerly known as Brescon Corporate Advisory Limited)
- Keynote Corporate Services Ltd

**Motilal Oatwal Investment Advisors Pvt.Ltd**

It has been submitted that assessee objected for inclusion of Motilal Oatwal Investment Advisors Pvt.Ltd., due to substantial RPT filter.

It is also submitted by Ld.CIT DR in his submission that said company has been excluded in assessee's own case for assessment year 2009-10.

**16.** We have perused the same and are of opinion that assessee has objected ratio adopted by Ld.TPO for determining RPT in case of comparable which has already been set aside to Ld. AO with appropriate direction for reconsideration while deciding ground No.

5 hereinabove. We accordingly direct Ld.TPO to carry out computation of RPT as per formula indicated hereinabove. Needless to say that functional profile of comparable for year under consideration with that of assessee must also be analysed once again by giving proper opportunity to assessee.

**16.1.** Accordingly this comparable is set aside to Ld.TPO for re-computation of RPT in respect of this comparable.

**17. IM+ Capitals Ltd (formerly known as Brescon Corporate Advisory Limited) And Keynote Corporate Services Ltd.,**

It is observed that *Hon'ble Delhi High Court* in assessee's own case for assessment year 2008-09 had directed DRP to carry out comparability analysis in case of these 2 companies by observing as under:

*42.....As regards Khandwala Securities and Brescon, the matter is remitted to the DRP to carry out the analysis under rule 10B(3) and determine whether the material differences arising out of their exceptionally high profits can be eliminated. If not, the said entities cannot be included as comparables. For Keynote, firstly, enquiry is to be carried out by the DRP, preceding the analysis under rule 10B(3), as to its functional similarity with the assessee; thereafter, the exercise of determining if there are material differences on account of exceptionally high profits which are capable of elimination has to be carried out."*

**17.1.** We direct Ld. TPO to follow analysis carried out by DRP as has been conducted for assessment year 2008-09 for determining

whether these company could be included in the list of comparables or not.

**17.2.** Accordingly we set aside these comparables to Ld.TPO.

**17.3.** It has been submitted by Ld.Counsel that it does not wish to object the comparables Ladderup Corporate Advisory Pvt. Ltd and Portfolio Financial Services Ltd.

**17.4.** Accordingly we hold these 2 comparables to be retained in the final list.

**18.** The only comparable now that is left is in respect of Axis Private Equity Ltd.,

**18.1.** Assessee objects for inclusion of this comparable due to difference in functional profile. It has been submitted that this company is engaged in managing directly or indirectly investments, mutual funds, venture capital funds and share funds, pension funds, provident fund, insurance funds or any other funds and to promote manage and carry out any venture capital fund operation.

Ld. CIT DR submitted that assessee is also carrying out advising the management companies of fund investment and disposition opportunities. He submitted that assessee focuses on investment in companies either located in orbit significant business activity in Indian subcontinent. Ld. CIT DR thus submitted that the company is carrying out with similar functions as that of assessee and should be retained as a comparable.

**19.** We have perused submissions advanced by both sides in light of records placed before us.

**19.1.** In our considered opinion functions performed by assessee is similar to that performed by this company. It is observed that this company is into advising management companies of fund investment and disposition opportunities which is what assessee is also doing in present case. We therefore hold this company to be a comparable and direct Ld. AO to include it in the finalist.

**19.2. Accordingly this ground along with Ground No. 9 raised by assessee stands allowed partly as discussed hereinabove.**

**20.** In regards to **Ground No. 8** Ld.Counsel submitted that assessee do not wish to press this ground.

**Accordingly this ground raised by assessee stands dismissed as not pressed.**

**21. Ground No.10** is in respect of risk adjustment disallowed to assessee.

**21.1.** At the outset Ld. CIT DR admits to risk/working capital adjustment to be granted to assessee as DRP has directed Ld.TPO to provide the same. It has also been submitted that in preceding assessment years working capital adjustment was allowed by Ld. TPO himself which has been placed on record before us.

**21.2.** We therefore direct Ld. AO to provide risk adjustments to comparables while computing ALP of international transaction. Assessee is directed to provide details of risk profiles of comparable companies.

**21.3. Accordingly this ground raised by assessee stands allowed.**

**22. Ground No.11-12** are in respect of re-characterising delayed advisory fees received by assessee as deemed loan, given to AE by assessee and accordingly proposing an adjustment on account of interest on receivables on such delayed payments.

**22.1.** From balance sheet it can be seen that receivables for invoices raised by assessee has not been received as per service agreement with AE. Ld.TPO accordingly re-characterised delayed payment of advisory fees as deemed loan to AE by assessee and charged interest on receivables at arm's length beyond a period of 30 days. Ld.TPO applied CUP for benchmarking transaction of receivables. During DRP proceedings assessee was called upon to show time period within which payment is to be made by ADB or which credit period has also been mentioned or invoices where period of payment would be mentioned. Assessee replied to query raised by stating that as respective service agreement is between AE and assessee, no specific collections period has been mentioned. Under such circumstances DRP upheld action of Ld.TPO in charging interest for delayed payments beyond 30 days of invoice.

**23.** Aggrieved by such observations, Ld.Counsel submitted that method applied by Ld.TPO is not prescribed method under section 92C. He further submitted that even if adjustment is required to be made, same should be made on basis of LIBOR.

Ld. Counsel placed reliance upon decision of *Hon'ble Delhi High Court* in case of *Cotton Naturals India Pvt.Ltd. vs CIT* reported in *231 Taxmann 401*.

**23.1.** Ld.CIT DR on the contrary, supported the view taken by authorities below.

**29.** We have perused submissions advanced by both sides in light of records placed before us.

**29.1.** It is observed that details of invoices raised and payments received thereupon with outstanding receivables has been reproduced in order passed by Ld.TPO at page 128-130. It is observed that certain payment has not been received at all which Ld. AO has considered for computing interest at 11.69% p.a.

**29.2.** *Hon'ble High Court* in case of Cotton Naturals (supra) has observed as under:

*"43. Normally there would be a difference between the lending rate and borrowing rate in each country. Some authors and writers suggest that the average or mid-point between the two should be taken. However, others like Klaus Vogel, have suggested that economic purpose and substance of the debt-claim or debt for which granting of credit calls for the lending rate would be determinative. Thus, in case of a capital investment, the borrowing rate will apply, whereas in case of credit allowed to a customer on sale of goods, the lending rate would apply. We do not deem it necessary to enter into this controversy and express our view as regards the same.*

**29.3.** In present case of assessee, receivables are outstanding due to excess credit allowed to AE on sale of services. Accordingly as per view expressed by *Hon'ble Delhi High Court* hereinabove, lending rate would be applicable. We are accordingly setting aside this issue to Ld. AO to verify lending rate during year under

consideration for computing interest on outstanding receivables beyond a period of 30 days.

**Accordingly this ground raised by assessee stands allowed for statistical purposes.**

**30. Ground No. 13, 15-16** have been stated to be general in nature and therefore do not require any adjudication.

**30.1. Ground No. 14** is premature in nature.

**30.2. Accordingly these grounds do not call for any adjudication.**

**31. In the result appeal filed by assessee stands allowed for statistical purposes.**

Order pronounced in the open court on 17<sup>th</sup> May,2019.

Sd/-

**(R.K.PANDA)**  
**ACCOUNTANT MEMBER**

Dt. 17<sup>th</sup> May, 2019

*\*gmv*

Sd/-

**(BEENA A PILLAI)**  
**JUDICIAL MEMBER**

Copy forwarded to: -

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

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By Order,

**ASSISTANT REGISTRAR**  
ITAT Delhi Benches

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	<i>Date</i>
<i>Draft dictated on Dragon</i>	<i>16.5.19</i>
<i>Draft placed before author</i>	<i>16.5.19</i>
<i>Draft proposed &amp; placed before the second member</i>	<i>16.5.19</i>
<i>Draft discussed/approved by Second Member.</i>	<i>17.5.19</i>
<i>Approved Draft comes to the Sr.PS/PS</i>	<i>17.5.19</i>
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<i>Date on which file goes to the AR</i>	
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