

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ , मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL “K” BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

आयकर अपील सं/ I.TA No.1019/Mum/2014

(निर्धारण वर्ष / Assessment Year:2009-10

M/s. General Atlantic Pvt. Ltd., Level 19, Birla Aurora, Dr. Annie Besant Road, Worli, Mumbai-400 030	<u>बनाम/</u> Vs.	The DCIT-3(1), Aayakar Bhavan, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCG 7917Q		
(अपीलार्थी/Appellant)	..	(प्रत्यर्थी / Respondent)
अपीलार्थी ओर से/ Appellant by:		Shri Porus Kaka
प्रत्यर्थी की ओर से/Respondent by:		Shri Shri N.K. Chand

सुनवाई की तारीख / Date of Hearing : 2.11.2015

घोषणा की तारीख /Date of Pronouncement : 06.11.2015

आदेश / O R D E R

PER N.K. BILLAIYA, AM:

This appeal by the assessee is directed against the order dated 18.12.2013 made u/s. 143(3) r.w. section 144C(13) of the Act.

2. The assessee has raised 5 substantive grounds of appeal. With ground No. 1, the assessee has challenged the additions made on account of Transfer pricing adjustment.

2.1. The main contention of the assessee is that the Revenue authorities have failed to understand and appreciate the functions performed , assets employed and risks assumed by the assessee and its Associated Enterprises, thereby comparing companies engaged in investment banking, merchant banking, securities broking, fund management, portfolio management etc. with the assessee.

2.2. Rival contentions were heard at length. We have carefully perused the orders of the authorities below and with the assistance of the Ld. Senior Counsel, we have considered the relevant documentary evidences brought on record in the form of Paper Book.

2.3. Briefly stated the facts of the case are that the assessee is a company registered in India and belongs to the General Atlantic group which is a private equity investment firm. The assessee is providing private equity investment advisory services to its AE which is General Atlantic Service Corporation USA (GASC LLC) a Delaware Limited liability company. GASC LLC is engaged by GA in providing management services to its affiliated limited partnerships globally.

2.4. The assessee is wholly owned subsidiary of GASC LLC based in India and providing information on industries alongwith information in relation to potential targets located in Indian Jurisdictional to its AE GASC LLC, as per the service agreement dated 31.10.2002 entered into between the parties.

2.5. In the Transfer Pricing report, the business of the assessee company is explained as under:

"General Atlantic Service Company, LLC, (USA) ('GASC LLC'), a Delaware limited liability company, is engaged in providing management services to its affiliated limited partnerships globally. Such services include (i) assistance in connection with the identification, investigation and analysis of potential investments and the management and disposition of investments; (ii) administrative and accounting services; and (iii) such other services as the General Atlantic may from time to time require in connection with the management of General Atlantic Limited. GASC is not engaged in funding for investment but assist GA with investment decisions.

In the process of rendering the aforesaid services, GASC LLC requires certain information on specific industries along with the information in relation to potential targets located in various jurisdictions. For the purpose of effectively identifying the potential investment opportunity, GASC LLC has entered into exclusive service agreements with General Atlantic Limited ('GAL'), a wholly owned subsidiary based in United Kingdom, General Atlantic GmbH, a wholly owned subsidiary based in Germany and General Atlantic Private Limited ('GAPL') wholly owned subsidiary of GAL based in India."

2.6. The International transactions of the assessee are summarized as under:

Sr. No.	Nature of Transaction	Amount	Method used
1.	Investment Sub-advisory Services	39,95,95,638	TNMM

2.7. As per the Transfer Pricing report, the financial analysis of the assessee company is as under:

Total income	399595638
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Total Expenses	354701791
Operating Profit	44893847
Cost Plus Ratio	12.66%

2.8. The assessee conducted a search and selected the following seven companies as comparable:

Sr. No.	Name of the Company	Cost plus ratio
1.	Credible Management & Consultants Pvt. Ltd.	9.52%
2.	Crisil Risk & Infrastructure Solutions Ltd	30.65%
3.	Future Capital Investment Advisors Ltd	34.59%
4.	ICRA Management Consulting Services Ltd.	4.69%
5.	IDC India Ltd.	13.92%
6.	IDFC Investment Advisors Ltd.	30.73%
7.	Mecklai Financial & Commercial Services Ltd.	7.48%
	Average	10.02%

2.9. During the course of the Transfer Pricing proceedings, the TPO referred to the following comparables which were considered and confirmed by the DRP in the previous years i.e. A.Yrs 2006-07 and 2007-08.

S. No.	Name of the company	Margins
1.	Centrum Capital Ltd.	35.91%
2.	Chartered Capital & Investment Ltd	86.93%
3.	Edelweiss Capital Ltd.	-61.84%

4.	Keynote Corporate Services Ltd.	/82.11%
5.	L&T Capital Co. Ltd.	340.69%
6.	S R E I Capital Markets Ltd.	-17.57%
7.	Sumedha Fiscal Services Ltd.	59.93%
8.	I D C (India) Ltd.	9.99%
	Average	67.02%

2.10. The assessee was asked to explain why these companies should not be accepted during the year under consideration also. Vide letter dated 29.10.2012, the assessee strongly objected to the inclusion of these companies as comparables stating that these companies are functionally different because they are doing investment banking as well as investment advisory. Rebutting the claim of the assessee, the TPO asked the assessee to justify the selection of comparables made by it wherein the companies are also not exclusively engaged in investment advisory. The TPO further noticed that the assessee has excluded certain companies on the ground that these are not functionally comparable. The assessee was asked to explain why the following companies have been rejected which are also into financial advisory business.

KJMC Corporate Advisors (India) Ltd.
Motilal Oswal Investment Advisors Pvt. Ltd.
AR Venture Fund Management ltd.
KLG Capital Services Ltd.
Quantum Advisors Pvt. Ltd.
Kshitij Investment Advisory Co. Ltd.
Brescon Corporate Advisors Ltd.-

2.11.The assessee strongly submitted that these companies are functionally different as these are not exclusively investment advisory services. In support of its claim, the assessee submitted the Director's report and financials of these companies. After considering the submissions made by the assessee, the TPO rejected Quantum Advisors Pvt. Ltd and Brescon Corporate Advisors Ltd and finally selected the following comparables, the margins of which are worked out as under:

Sr. No.	Name	Cost plus Margins	Selected by
1.	Crisil Risk & Infrastructure Solutions Ltd.	40.91%	Assessee
2.	ICRA Management Consulting Services Ltd.,	-1.88%	-do-
3.	IDFC Investment Advisors Ltd.	-55.69%	-do-
4.	Future Capital Investment Advisors Ltd.,	23.37%	Common
5.	IDC (India) Ltd.	10.46%	Common & confirmed by DRP
6.	Centrum Capital Ltd	35.91%	Confirmed by DRP
7.	Chartered Capital & Investment Ltd.	86.93%	- do -
8.	Edelweiss Capital Ltd.	-61.84%	-do -
9.	Keynote Corporate Securities Ltd.	82.11%	- do -
10.	L&T Capital Co. Ltd.	340.69%	- do -
11.	Sumedha Fiscal Services Ltd.	59.93%	- do -
12.	SREI Capital Markets Ltd.	-17.57%	- do -
13.	KJMC Corporate Advisors (India) Ltd.	31.03%	New Comparables from the TP Report of the assessee

14.	Motilal Oswal Investment Advisors Pvt. Ltd.	82.44%	- do -
15.	AR Venture Fund Management Ltd.	27.49%	- do -
16.	KLG Capital Services Ltd.	85.22%	- do -
17.	Kshitij Investment Advisory Co. Ltd.	27.82%	- do -
	Average	46.90%	

2.12. As the assessee has shown markup of 12.6% on cost, whereas the cost plus margins of the comparables selected for the TPO comes to 46.90%. The TPO computed the adjustment as under:

Total Expenses	35,47,01,791/-
Arm Length price @ 146.90% of total cost	52,10,56,931/-
International Transaction @ 112.6% of total cost	39,95,95,638/-
Adjustment	12,14,61,293

2.13. Finally an adjustment of Rs. 12,14,61,293/- was made to the income of the assessee on account of consultancy services.

3. The assessee carried the matter before the DRP and strongly objected to the selection of comparables made by the TPO. Once again it was strongly contended that the comparables selected by the TPO are functionally different companies where main function was that of a merchant banker whereas the assessee is an investment advisor. After considering the facts and the objections raised by the assessee, the DRP directed to accept the following comparables

which are similar in activities with the assessee for computing Arm's Length Price required for finalizing the value of international transactions:

Sr. No.	Company	Selected by
1.	Crisil Risk & Infrastructure Solutions Ltd.	Assessee
2.	ICRA Management Consulting Services Ltd.,	Assessee
3.	IDFC Investment Advisors Ltd.	Assessee
4.	Future Capital Investment Advisors Ltd.,	Assessee
5.	IDC (India) Ltd.	Assessee
6.	Chartered Capital & Investment Ltd.	TPO
7.	Edelweiss Capital Ltd.	TPO
8.	Sumedha Fiscal Services Ltd.	TPO
9.	Motilal Oswal Investment Advisors Pvt. Ltd.	Assessee
10.	AR Venture Fund Management	Assessee
11.	Kshitij Investment Advisory	Assessee

3.1. Following the directions of the DRP, the AO completed the ALP adjustment at Rs. 3,24,66,614/-.

4. Aggrieved by this, the assessee is before us.

5. The Ld. Counsel for the assessee reiterated what has been stated before the lower authorities. The Ld. Counsel strongly objected to the inclusion of following companies as comparables.

1. Chartered Capital & Investment Ltd.
2. Edelweiss Capital Ltd.
3. Sumedha Fiscal Services Ltd.
4. Motilal Oswal Investment Advisors Pvt. Ltd

5.1. The contention of the Senior Ld. Counsel is the same i.e. these companies are functionally different from the assessee as these companies are into merchant banking business whereas the assessee is only an investment advisory company. The Ld. Counsel further stated that in assessee's own case for A.Yrs 2006-07 and 2007-08, three companies mentioned at item No. 1,2 & 3 above were excluded by the Tribunal therefore, the same deserves to be excluded for the year under consideration also.

5.2. So far as the inclusion of Motilal Oswal Investment Advisors Pvt. Ltd., is concerned, the Ld. Counsel stated that firstly this company is not an investment advisor but an investment banker and secondly on this very ground, the Tribunal has excluded this company in the case of CIT Vs Carlyle India Advisors (P) Ltd. in ITA Nos. 7367/M/2012 and 2200/M/2012, Bain Capital Advisors (India) Pvt. Ltd. Vs DCIT in ITA No. 1360/M/2014, DCIT Vs Arisaig Partners India Pvt. Ltd. in ITA No. 1083/M/2014, Q India Investment Advisors Pvt. Ltd. Vs DCIT in ITA No. 923/M/2015, Wells Fargo Real Estate Advisors Pvt. Ltd. Vs DCIT in ITA No. 7722/M/2012. It is the say of the Ld. Counsel if these companies are excluded from the final list of comparables, the difference would come within the range of ±5% and therefore no TP adjustment would be required.

6. Per contra, the Ld. Departmental Representative strongly submitted that same skill set is required for investment advisory and merchant banking therefore it cannot be said that these companies are functional not comparable. It is the say of the Ld. DR that there is no error in the selection of the comparables and the same should be accepted.

7. The bone of contention is whether a merchant banker can be compared with an investment advisor. It may be like comparing apples with oranges. One may say that what is the difference, both are fruits. But on second thought except that both are fruits can they be said to be on the same level playing field? The definition of investment advisor as given in Investopedia reads as under:

“As defined by the Investment Advisors Act of 1940, any person or group that makes investment recommendations or conducts securities analysis in return for a fee, whether through direct management of client assets or via written publications.

An investment advisor who has sufficient assets to be registered with the SEC is known as a Registered Investment Advisor, or RIA. Investment advisors are prohibited from disseminating advice known to be deceitful or fraudulent, and from acting as a principle on their own accounts by buying and selling securities between themselves and a client without prior written consent.”

and the definition of merchant bank given in Wikipedia is as under:

“A merchant bank is a financial institution providing capital to companies in the form of share ownership instead of loans. A merchant bank also provides advisory on corporate matters to the firms in which they invest. In the United Kingdom, the historical term “merchant bank” refers to an investment bank.”

8. A simple perusal of the above definition would show that there is huge difference between the functions. No doubt that in both these companies Chartered Accountants and MBAs are involved but that would not make their functions similar as they are working in different filed with different risks and remuneration. It is an undisputed fact that the assessee is engaged in the business of investment advisory, therefore, the comparables relating to merchant banking cannot be accepted.

9. Let us now consider the comparables strongly objected by the assessee.

1. **Chartered Capital & Investment Ltd.**

In its Annual Report, the relevant portion is at page-8 of the Paper Book. It is mentioned that company's business operations are investment banking and at page-9 of the Paper Book, there is an exhibit of Management Discussion & Analysis which says that the company is primarily operating in the Merchant Banking Industry which totally depends on the Capital Market which further depends on the overall economic condition in the country.

Under the head Fund Raising activity by company, it is mentioned that during the financial year 2008-09, Rs. 14,908.33 crores were mobilized via Public issue, right issue & QIPs through 50 issues and under the head 'Outlook', it is mentioned that we offer comprehensive Investment Banking Solutions and transaction expertise covering equity offerings, debt and convertible instruments covering international & domestic capital markets. Thus it can be clearly seen that this company is totally functioning on different platform and cannot be used as comparable. As mentioned elsewhere, the Tribunal in assessee's own case in A.Y. 2006-07 and 2007-08 has rejected the inclusion of this company.

2. **Edelweiss Capital Ltd.**

At Page-51 of the Paper Book, it is mentioned that this company is an Investment Banking Company also providing Brokerage Services and Private Client Brokerage and Wealth

Management and Asset Management and also providing relationship-based customized funding solutions for client empowerment, focus on capital markets led loan products, Promoter funding, Loan against shares, Loan against ESOPs, IPO financing etc.

Once again it can be seen that this company is also functionally not comparable. As mentioned elsewhere, the Tribunal in assessee's own case in A.Yrs 2006-07 and 2007-08 has rejected the inclusion of this company.

3. **Sumedha Fiscal Services Ltd.**

At Page-212 of the Paper book, the Profile of this company has mentioned which says that this company is a boutique financial services and advisory solutions. It has proven expertise in analyzing and advising on various business and financial models. The investment service provided by this company are in the field of Stock Broking, Depository services, Commodity Broking and Currency Derivatives Broking and Corporate services are for equity placement, Financial Restructuring, Merchant Banking and also Mergers and Takeovers. This company has earned income from fee based activities like Loan Syndication and Project Consultancy Services at Rs. 787.63 lacs.

We have further gone through the financials of this company alongwith the auditor's report. We find that this company is also functionally not comparable with the assessee and for similar reason the Tribunal has excluded this company from the final list of comparables in A.Yrs 2006-07 & 2007-08,

4. Motilal Oswal Investment Advisors Pvt. Ltd

At the very outset, in the balance sheet abstract of this company, it is shown as Merchant Banking and Investment/business Advisory Company. Moreover, during the year, this company has shown related parties transaction of reimbursement/sharing of expenses which is 88.16%. As the RPT is more than 50%, this company was also excluded by the Tribunal in plethora of cases mentioned at para-5.2 of this order.

In our considered opinion, this company also cannot be included in the final list of comparable firstly because it is doing business on a different filed and secondly and more importantly the related party transaction is more than 50%.

10. Having said all that in respect of the 4 companies mentioned hereinabove, in our considered opinion, these companies should be excluded from the final list of comparables, we accordingly direct the AO to exclude these companies from the final list of comparables and decide the issue afresh as per the provisions of the law. Ground No. 1 is allowed for statistical purpose.

11. The second grievance relates to the disallowance of foreign travel expenditure.

11.1. During the course of the scrutiny assessment proceedings, the AO found that the assessee has debited Rs. 2,32,59,346/- as expenditure incurred on travelling, conveyance and car hire charges. The AO further found that the travelling expenditure includes Foreign Travel Expenditure. The assessee was asked to furnish the

details. The assessee filed a complete details mentioning the date, name of the employee, Airfare, sector between the flights were operated and the purpose of the travel. The complete details is incorporated at pages-6,7 and 8 of the assessment order. Without any further verification, the AO disallowed the entire expenditure stating that the meeting of potential investee is not a meeting 'for the purpose of business', addition of Rs. 24,36,150/- has been made.

12. The assessee carried the matter before the DRP but without any success.

13. Before us, the Ld. Counsel for the assessee stated that the AO has simply made the additions without going into the merits of the case. It is the say of the Ld. Senior Counsel that the AO has not understood the nature of expenditure when he says that expenditure on potential investee is not a business expenditure. The Ld. Counsel pleaded for the deletion of the addition.

14. The Ld. DR strongly supported the findings of the lower authorities.

15. We have given a thoughtful consideration to the details of expenditure which are exhibited at pages 6,7 & 8 of the assessment order. We find that the details are complete and exhaustive. The AO has not understood the nature of expenditure qua the business of the assessee. As mentioned elsewhere, the assessee is an Investment Advisory Company and for the purpose of its advisory business, it has to meet various clients across the globe for which travelling is must. It is an error to say that assessee was soliciting/seeking potential investors by taking these foreign visits. The findings of the AO are clearly erroneous on the facts of the case and the DRP further fell

into error by confirming the same. We, therefore direct the AO to delete the impugned disallowance of Rs. 24,36,150/- . Ground No. 2 is accordingly allowed.

16. Ground No. 3 relates to an incorrect adjustment on account of refund not received.

16.1. We restore this issue to the file of the AO. The AO is directed to furnish the complete adjustment sheets to the assessee explaining how the refund was adjusted after giving a reasonable opportunity of being heard to the assessee. Ground No. 3 is treated as allowed for statistical purpose.

17. Ground No. 4 relates to the levy of interest u/s. 234D of the Act. The levy of interest is mandatory though consequential. The AO is directed to levy interest as per the provisions of the law.

18. Ground No. 5 relates to the initiation of penalty proceedings u/s. 271(1)(c) of the Act. This grievance is premature and requires no adjudication.

19. In the result, the appeal filed by the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on 6th November, 2015.

Sd/-

(SAKTIJIT DEY)

न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 6th November, 2015

व.नि.स./ Rj , Sr. PS

Sd/-

(N.K. BILLAIYA)

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai