

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI ' K ' BENCH
MUMBAI BENCHES, MUMBAI**

BEFORE SHRI P M JAGTAP, AM & SHRI VIJAY PAL RAO, JM

ITA No. 8914/Mum/2010
(Asst Year 2006-07)

General Atlantic Pvt Ltd 151-152 Maker Chambers VI 220 Nariman Point Mumbai 20	Vs	The Dy Commr of Income Tax Cir 3(1), Mumbai
(Appellant)		(Respondent)

PAN No.	AABCG7917Q
Assessee by	Shri Porus Kaka
Revenue by	Shri Ajeet Kumar Jain/Smt Sasmild Misra
Dt.of hearing	20 th Dec 2012
Dt of pronouncement	31 JAN 2013

ORDER

PER VIJAY PAL RAO, JM

This appeal by the assessee is directed against the assessment order dt 13.10.2010 passed u/s 143(3) r.w.s 144C(13) of the I T Act in pursuant to the directions of the Dispute Resolution Panel (DRP) passed u/s 144(5) of the I T Act for the AY 2006-07.

2 The assessee has raised he following grounds in this appeal:

Based on the facts and circumstances of the case, the Appellant respectfully submits that the learned Deputy Commissioner of Income-tax, Circle 3 (1), Mumbai ('DCIT') along with the Dispute Resolution Panel ("DRP") erred in passing an order under section 144(3) read with 144C of the Income Tax Act, 1961 ("ITA") for Assessment Year 2006-07, on the following grounds:

1. The order passed by the learned DCIT under section 143(3) of the ITA (Impugned Order") and the directions issued by the Dispute Resolution Panel ("the DRP") under section 144C (5) of the ITA ("Impugned Direction") are bad in law and on facts and against the principles of natural justice

2. That the learned DCIT along with the DRP grossly erred in failing to appreciate the invalidity of assessment proceedings initiated against the Appellant, on account of the following grounds:

- a. Passing of the Impugned Order without the issuance of a valid notice under section 143(2) of the ITA ("Impugned Notice");
- b. Failing to appreciate the need to use "reasonable effort" before service of a notice through affixture;
- c. Failing to appreciate the legal provisions permitting the Appellant to raise objections questioning the validity of the Impugned Notice at any time before the completion of assessment

3. That the learned DCIT along with the DRP erred in confirming the adjustment proposed by the Transfer Pricing Officer without understanding the business of the Appellant and facts and circumstances of the case

4. That the learned DCIT grossly erred in drawing factually incorrect inferences from information! news items which appeared on the Appellant's website and also erred in disregarding the corresponding documentary evidence presented before it. Consequentially, though argued before the DRP, the DRP has failed to consider the same in its Impugned Direction

5. That the learned DCIT along with the DRP grossly erred in failing to provide any reasons for holding! confirming that the activities of the Appellant are comparable to merchant banking! investment banking activities 6. That the DRP erred in facts in confirming that the comparability analysis conducted by the TPO, without having regard to the functions performed, assets employed and the risks assumed by the Appellant

7. That the TPO erred in not sharing the fresh comparability analysis conducted by him at the time of assessment and the DRP consequentially erred in not commenting on the same, though pointed out during the course of the hearing, in the Impugned Direction

8. That the DRP erred in first requesting and then failing to consider the revised benchmarking analysis undertaken by the Appellant in the Impugned Direction

9. That the order of the DRP is against the principles of natural justice as the DRP erred in disregarding the request of the Appellant to examine the authorized representatives of the comparable companies to understand their business model, strategy and other relevant factors to distinguish them from the Appellant's business

10. That the order of the DRP is against the principles of natural justice as the Appellant was denied an opportunity to examine / cross-examine necessary persons

11. That DRP grossly erred, both in law and on facts of the case, in holding that the TPO could conduct a fresh comparability analysis at the time of assessment, using data which is not contemporaneous as per Rule 1 OD(4) of the Income Tax Rules, 1962

12. That the learned DCIT along with the DRP erred in arriving at a presumption that the Appellant was exposed to a risk in the form of a single customer risk

13. That the DRP erred in law in failing to grant the benefit of +1- 5 per cent variance as per proviso to section 92C(2) of the ITA

14. That the DCIT erred in granting short credit for the advance tax paid by the appellant

15. That the DCIT erred in levying interest of Rs. 7,493,198 under section 234B of the ITA

16. That the DCIT erred in levying interest of Rs. 277,298 under section 234C of the ITA as against interest of Rs. 155,079 computed by the appellant as per the return of income

3 First we take up the issue in respect of transfer pricing adjustment as raised in ground nos 3 to 13

3.1 Briefly stated facts of the case are that the assessee is a company registered in India and belongs to the General Atlantic Group (GA), which is a private equity investment firm. The assessee is providing private equity investment advisory services to its AE i.e. General Atlantic Service Corporation (GASC LLC) a Delaware limited Liability Company. GASC LLC is engaged by GA in providing management services to its affiliated limited partnership globally. The hierarchical structure chart of GA group is as under:

GA Atlantic PE investment firm - investment Committee

GASC LLC Investor Manager (AE)

General Atlantic Pvt Ltd – GAPL (Assessee)

3.1 GASC LLC is rendering the services to GA which includes (i) assistance in connection with the identification, investigation and analysis of potential investments and the management and disposition of investment; (ii) administration and accounting services; and (iii) such other services which GA may from time to time require in connection with the management of General Atlantic Ltd Partnerships .

3.2 The assessee is a wholly owned subsidiary of GASC LLC based in India and providing information on industries along with information in relation to potential targets located in Indian jurisdictional to its AE namely GASC LLC as per the service agreement dated 31.10.2002 entered into between the parties.

3.3 The assessee is charging cost plus 12.5% margin for the services provided to the AE. Since the assessee is having international transactions therefore, the Assessing Officer referred the same u/s 92CA(1) to the Transfer Pricing Officer(TPO) for determination of arms length price . The international transactions of the assessee are summarized as under:

S.No.	Nature of Transaction	Amount	Method used
1	Consultancy Services	14,75,18,590	
2	Reimbursement of expense	89,77,378	CUP
3	Recovery of expens incurred	74,273	CUP
4	Receipt of share application money	6,00,00,000	CUP
	Total	21,65,70,241	

3.4 In the TP report, the assessee has explained its services to be similar to a support provider rather than a marketing agent looking out for investment opportunities. The assessee has finally selected 7 comparables for benchmarking of its international transactions by adopting the TNMM as the most appropriate method

and submitted that the assessee earned mark up on its operating cost at 13.11% with respect to the services rendered to its AE in comparison to the arithmetic mean of the operating profit (OP/TC) of the comparables at 10.67%. Thus, the assessee claimed that its margin with respect to the services rendered is at arms length price, which is more than the benchmarking, being the average of operating profit of the comparables.

3.5 The assessee has used multi year data of the comparables for determining the arms length price. The TPO has rejected the comparables selected by the assessee on the ground that the activities of the assessee are akin to that of investment advisory services and not a routine business support services. The TPO was of the opinion that the arms length price determined by the assessee is not as per the provisions of sec. 92C(1) of the I T Act . Accordingly, the TPO proceed to determine the arms length price by selecting its own comparables companies. For this purpose, the TPO has carried out search with the key words; merchant banking/corresponding banking and investment advisory services". The TPO finally selected 8 comparable companies and worked out the arithmetic mean by taking into consideration the single year data at 39.85% as against assessee's operating profit at 13.12% which resulted in TP adjustment of ₹. 3,48,59,293/-

3.6 After receiving the order passed by the TPO, the Assessing Officer sent a draft assessment order to DRP proposing an addition towards upward adjustment made by TPO at ₹. 3,48,59,293/-. The assessee raised the objections against the draft order of the Assessing Officer before the DRP including the objection against the validity of the notice issued u/s 143(2) through affixation.

3.7 The main objection of the assessee against the TP adjustment made by the TPO was the comparables selected by the TPO are not acceptable to the assessee because these are related to the merchant banking/investment banking whereas the assessee is providing advisory services only which is in the nature of support services and not an investment or mercantile banking.

3.8 The DRP has rejected the objections of the assessee and agreed with the view of the TPO that the activities of the assessee are very near to the merchant banking/investment and the comparison made by the Assessing Officer with such companies is justified comparisons. Hence, the DRP has confirmed the TP adjustment proposed by the Assessing Officer in the draft assessment order. Consequently, the Assessing Officer has passed the impugned assessment order whereby an addition on account of TP adjustment of ₹. 3,48,59,293/- has been made to the income of the assessee.

4 Before us, Mr Porus Kaka the Id Sr counsel has submitted that the TPO has grossly erred in comparing the assessee with the investment/merchant banking. The assessee's activity of investment advisory services to its AE is without any involvement of actual investment funding, marketing or risk in the said activities. The assessee has entered into an agreement with the AE and as per the said agreement; the assessee subsidiaries are required to collect the necessary information to be provided to the AE which pertains to (i) the economic and the political conditions of the UK, Germany, Europe, and India; (ii) the information technology sectors of the economy of the UK, Germany, Europe and India; (iii) particular information technology enterprises in the UK, Germany, Europe and India; (iv) possible investment opportunities involving information technology and growth business in the UK,

Germany, Europe and India ;(iv) such other matters as requested by GASC LLC. He has further submitted that the process flow of activities performed by the assessee to AE for facilitating the entire investment process is as under:

- "1. GASC LLC instructs GAPL India to provide information on specific industries or companies;*
- 2. GAPL India carries out research on specific industries or companies*
- 3. Based on the information collected, GAPL India identifies opportunities for investment;*
- 4. The details are sent to GASC LLC;*
- 5. GASC LLC professionals analyse the information provided in detail and participates in the evaluation of the potential investments;*
- 6. GASC LLC's professionals hold discussions via conference call or by way of personal visit with the management of investee companies. GASC LLC may involve select GAPL India staff during the said meetings;*
- 7. GASC LLC professionals discuss with the potential investee's management the potential of entering into a non-binding term sheet or letter of intent with respect to investment;*
- 8. GASC LLC professionals share observations and conclusions of their discussion with the management of the investee companies with other GASC LLC professionals;*
- 9. GASC LLC professionals further analyse any new information provided to aid in the decision of whether the investee company is a suitable for presentation to the investment committee of General Atlantic;*
- 10. when an investee company is finalized for evaluation by the investment committee, GASC LLC provides guidance to GAPL India staff to prepare the information memorandum for submission to the investment committee*
- 11. GAPL India provides the draft information memorandum to GASC LLC;*
- 12. GASC LLC edits the information memorandum and prepares presentation materials and determines the logistics for presentation to the investment committee;*
- 13. The investment committee decides not only on India specific investments but all the investments to be made anywhere in the world;*
- 14. If an Indian company is on the investment committee agenda then GAPL India staff will be invited to participate via teleconference;*
- 15. The role of GAPL India staff will be to clarify any questions on the investment memorandum and elaborate any other aspect of the investment prospect;*
- 16. The decision is made by the investment committee during a closed session with no GAPL India and GASC LLC staff other than GASC LLC's staff that serves on the investment committee."*

4.1 Thus, the Id Sr counsel for the assessee has submitted that it can be seen from the nature of the activities, as explained above that that the role of the

assessee is limited to providing support to GASC LLC (AE) by way of collating information and providing other research and support services. He has further emphasized that the assessee is not involved in the final decision making process and therefore, the assessee is very limited risk service provider in the nature of support services to the AE from India.

4.2 On the contrary, the business model and functionality of investment banking and merchant banking is entirely different which are directly concerned with the activity of investment deals and transactions; whereas the assessee is not concerned with such type of deal or transactions. The assessee is getting remuneration irrespective of any deal across the world. The assessee is not involved in the merger and acquisition transaction; whereas the role of investment banking and merchant banking are investment and merger/acquisition etc., The Id Sr counsel has submitted that the assessee's role is limited to furnish/provide the required information to the GASC LLC which has to take recommendatory decision and forward the same to the GA Investment committee, who has to take final decision of investment.

4.3 During the year under consideration, the assessee has identified number of companies as suitable for investment and 27 presentations were made to the investment committee out of which only 2 companies were finally selected for investment. Apart from this, there are other similar companies working under different jurisdiction of GA-UK, GA Germany who are also processing their representation/report. The investment committee considered all the companies globally for investment. Thus, out of 13 investments were approved and made worldwide during the year, only two companies were related to investment in India.

These details clearly show that the role of the assessee is nowhere connected with the final decision taken by the investment committee and therefore, the risk of identifying and converting a potential investee company into a favourable deal for its investor is the primary responsibility of GASC LLC. Even there is no guarantee that such an offer made by GASC LLC will be accepted by the Investment committee.

4.4 The Id Sr counsel has submitted that the role of the assessee starts by carrying out research on specific industry or company. On the basis of the information collected, the assessee provides recommendation and advice on the viability of the proposed investment to GASC LLC. Once the investee company is finalised by the GASC LLC for evaluation by the investment committee, GASC LLC would provide guidelines to the assessee's staff. Therefore, it was contended that the primary role of the assessee is limited to collecting information, providing recommendations and advice on the basis of information collected. In addition to this primary role, the assessee renders certain services to GASC LLC., which is merely consequential to the advice already provided. He has further submitted that there is no market risk, credit risk, risk of loss on underperforming of investment, risk of time sent for research activity, risk of identifying suitable business opportunities, risk of failure in executing the transactions, reputational risk, Fiduciary risk, etc., in the activity of the assessee. All these risk are attached to the GASC LLC

4.5 The assessee provides the relevant information to the AE so as to enable the overseas affiliates to decide on the further strategies for investments in India. The decision to invest in any particular enterprise lies exclusively with the overseas affiliates. Further, as per the agreement, assessee received a fee of cost plus 12.5% mar up, irrespective of the fact whether the overseas affiliates actually make any

investments on the basis of information provided by the assessee. Therefore, the assessee has no functional, asset and business risk. The GA is distinguished within the investment community because of exclusive focus on the information technology, process outsourcing and communications industries; long term investment perspective, ability and commitment to add value to the portfolio companies. The Id Sr counsel has pointed that the TPO has also taken note that the entire activity of the GA group on a global basis; whereas the assessee's activity is limited to support services to the AE but still the TPO has compared the assessee with the investment banking and merchant banking. The Id Sr counsel has referred various reports which prepared/presented by the assessee to its AE and submitted that these reports pertain to **potential information** giving presentation on Indian educational sector including market opportunity, emerging business models, potential investment opportunities of GA.

4.6 He has further pointed out that various reports on the education sector now available in public domain or can be obtained by paying subscription. These reports are prepared by various committees, to advice and a recommendation to government is on higher education. The reports/presentation of the assessee are with reference to market opportunity, emerging business models and potential investment opportunities for GA and no direct involvement of the assessee in finalising the investment decision or actual investment. The assessee has no role in transfer of funds or investment in India. Therefore, the assessee's reports are independent to be considered by the investment committee. That is why, out of several presentations, only 27 reached to the investment committee and out of 27 only two companies were found suitable for investment and actual investment.

Only GASC LLC has to decide on the advice to be forwarded to the Investment Committee.

4.7 The Id Sr counsel has further submitted that for the calendar year ended Dec 2005, GASC LLC has incurred an operating loss of US \$ 1922940; therefore, the group as a whole along with its subsidiaries has incurred loss for the year under consideration. Whereas India, being a low risk service provider, has earned an assured cost plus mark up for rendering certain advisory services which should be considered at arm length price.

4.8 The Id Sr counsel has submitted that it would also be important to note that quite often leads for investment opportunities, may come from GASC LLC or from entities/affiliates out side India. An example of this scenario is GA's investment in GenPact. A managing director of GASC received a phone call from an industry colleague who alerted the managing director of this potential investment opportunity. The managing director, after consultations with other GASC executives, then instructed the assessee to investigate the company which later on led ultimately to an investment by the fund in GenPact. Therefore, the assessee's role is limited to support GASC LLC in performance of aforesaid significant functions without the assumption of any risks. It is also important to mention that the assessee operates under the guidance and supervision of GASC LLC and the assessee cannot commit any fund and finalize a deal on its own. GASC LLC continuously guides the assessee to specific markets, companies or other points of interest and has specific requirements about the form and content of information to be provided by the assessee. All this is done through regular support from GASC LLC which provides professional support to the assessee in many areas.

4.9 The assessee has located the comparables which are in similar activity of advisory/support services whereas the TPO took the wrong comparables by selecting the investment banking and merchant banking. Even the search of comparables of the TPO is not related to the investment and advisory. The TPO's decision to select the comparables who are investment banking and merchant banking is contrary to the facts and submissions explained by the assessee.

4.10 The Id Sr counsel has thus submitted that an identical issue has been considered and decided by the Tribunal in the case of Carlyle India Advisors Private Ltd in ITA 7901/Mum/2011 vide order dated 4.4.2012. The Id Sr counsel has explained that the business model and the activity of Carlyle India Advisors Private Ltd are identical to that of the assessee as recorded by the Tribunal in the said order. He has further pointed out that in the said case, the TPO selected 8 comparables which are common to the comparables as selected by the TPO in the case of the assessee. Out of 8 comparables, this Tribunal, in the case of Carlyle India Advisors Private Ltd., found that only one comparable i.e. IDC(India) Ltd was chosen by the assessee as well as the TPO and therefore, the Tribunal has rejected all other 7 comparables selected by TPO on the ground of functional incomparability. The Id Sr counsel has thus submitted that having identical facts, the issue of ALP is covered by the decision of the coordinate Bench of the Tribunal in the case of Carlyle India Advisors Private Ltd. (supra). He has referred the nature of the activity of Carlyle India Advisors Private Ltd., and submitted that it is similar to the assessee's activity and therefore, the comparable considered by the TPO for determination of ALP are not sustainable as held by the Tribunal.

4.11 The Id Sr counsel for the assessee has submitted that since the operating margin of IDC Ltd., is at 14.58%, which is within + - 5% of the assessee's margin at 13.12%; therefore, no adjustment can be made. He has further submitted that even for comparisons of non risk entity like assessee with much high risk entity, multiyear data must be taken into consideration.

4.12 On the other hand, the Id DR has relied upon the orders of the authorities below and submitted that the functional comparability has to be for the same year. The order in the case of Carlyle India Advisors Private Ltd.(supra) pertains to AY 2007-08 whereas the AY in the assessee's case in question is 2006-07; therefore, the company found as functionally comparable for the AY 2007-08 need not be necessarily be a suitable comparable for a different Assessment Year.

5 We have considered the rival contention as well as the relevant material on record. The assessee has selected 7 comparables for benchmarking ALP of its international transactions. The companies selected by the assessee are as under:

S.No.	Name of the comparable	OP/TC%
1	Crisil Research & Information Services Ltd	0.11
2	KJMC Global Markets (India) Ltd	16.38
3	MCS Ltd	5.54
4	Networth Stock Broking Ltd	16.32
5	Relic Technologies Ltd	19.34
6	Shanthi Sales Ltd	1.61
7	TSR Darashw Ltd	15.42
	Average (Arithmetic mean)	10.57

5.1 Thus, the assessee has arrived at the operating profit mean of the comparable at 10.67% and claimed that the assessee's mark up on the operating cost at 13.11% with respect to services rendered to AE is at ALP. The TPO did not accept the comparables selected by the assessee on the ground that the activities of the assessee are akin to the investment banking and merchant banking.

Accordingly, the TPO on the basis of the research contended on the keywords "merchant banking/investment banking" and advisory services, selected 9 comparables as under:

S.No	Name of Company		Nature of service	Revenue	Cost	Op.Profit	OP/OC
1	M/s. Centrum Capital Ltd.	Segmental	Investment Banking	11.82	8.57	3.25	37.92%
2	M/s. Chartered Capital & Investment Ltd.	Overall	Investment Consultancy	1.33	0.99	0.34	34.34%
3	M/s. Edelweiss Capital Ltd.	Segmental	Advisory	24.3	13.54	10.76	79.47%
4	M/s. Khandwala Securities Ltd.	Segmental	Fee based Operations	8.66	4.71	3.95	83.86%
5	M/s. Keynote Corporate Services Ltd.	Segmental	Services	3.58	2.12	1.46	68.87%
6	M/s. L & T Capital Co. Ltd.	Overall	Investment Consultancy	3.96	2.72	1.24	45.59%
7	M/s. Sumedha Fiscal Services Ltd.	Segmental	Consultancy	2.89	2.34	0.55	23.50%
8	IDC (India) Ltd.	Overall	Survey & Research	12.18	10.63	1.55	14.58%
9	SFE Capital Mkts. Ltd.	Overall	Business consultancy	3.31	2.89	0.42	14.53%
ARITHMETIC MEAN							44.74

5.2 After considering the submissions of the assessee the TPO finally arrived at 8 comparables as under;

S.No	Name of Company		Nature of service	Revenue	Cost	Op.Profit	OP/OC
1	M/s. Centrum Capital Ltd.	Segmental	Investment Banking	11.82	8.57	3.25	37.92%
2	M/s. Chartered Capital & Investment Ltd.	Overall	Investment Consultancy	1.33	0.99	0.34	34.34%
3	M/s. Edelweiss Capital Ltd.	Segmental	Advisory	24.3	13.54	10.76	79.47%
4	M/s. Keynote Corporate Services Ltd.	Segmental	Services	3.58	2.12	1.46	68.87%
5	M/s. L & T Capital Co. Ltd.	Overall	Investment Consultancy	3.96	2.72	1.24	45.59%
6	M/s. Sumedha Fiscal Services Ltd.	Segmental	Consultancy	2.89	2.34	0.55	23.50%
7	IDC (India) Ltd.	Overall	Survey & Research	12.18	10.63	1.55	14.58%
8	SFE Capital Mkts. Ltd.	Overall	Business consultancy	3.31	2.89	0.42	14.53%
ARITHMETIC MEAN							39.85%

The TPO determined the arithmetic mean of operating profits of the comparables at 39.85%. Accordingly, by comparing the ALP, being arithmetic mean operating profit of comparables with the assessee operating margin at 13% an adjustment of ₹ 34,89,5293 was made.

5.3 It is clear from the record that the assessee providing only advisory services and support services to its AE, who in turn takes a decision for potential investment and further recommends for potential opportunities of investment to the investment committee which in turn takes a final decision of investment so recommended by the GASC LLC.

5.4 Thus, it is manifest from the record that the assessee's role is only to furnish the requisite information and not to participate in the actual decision making process which is taken by an independent body on the basis of the information provided by the assessee and so selected by GASC LLC .

5.5 In the case of Carlyle India Advisors Private Ltd (supra), the Tribunal has noted the facts and scope of services in para 6 as under:

"6. As already stated, Carlyle Hong Kong gives investment advisory related support services to the GPs. To primarily identify and evaluate potential investee companies in India, Carlyle Hong Kong engaged the services of the Assessee. Carlyle Hong Kong had entered into a Services Agreement with the Assessee effective from April 1, 2006 read with letter dated April 1, 2006 exchanged between the two ('Services Agreement') for rendering services.

Scope of Services:

As per the terms of the Advisory Agreement, Assessee inter-alia provides following services ('the said Services') to Carlyle Hong Kong:

- a. Analysis of investments opportunities and the provision of general advice in relation thereto, as per Carlyle Hong Kong's instructions*
- b. Analysis of information to Carlyle Hong Kong on the merits, timing, structure, and appropriate terms of any acquisition or disposal of investments and general advice in relation thereto;*
- c. Monitoring of all investments by the Funds from time to time under the instructions of Carlyle Hong Kong, and the provisions of reports thereon to Carlyle Hong Kong;*
- d. Provision of information in relation to the economic and political developments in India having a bearing on investment opportunities;*
- e. To assist Carlyle Hong Kong in identifying external advisors and consultants, to assist them in identifying or investigating any commercial, legal, regulatory or tax matters in relation to a potential investment opportunity or divestment;*
- f. Assistance and support in relation to potential investment opportunities and providing related information to Carlyle Hong Kong as required.*
- g. Provision of such other support services incidental or related to the foregoing services, as requested by Carlyle Hong Kong from time to time.*

Fees:

In consideration for the said support services provided under the Services Agreement. Carlyle Hong Kong compensates the Assessee, a monthly service fee, which is equal to 115% of actual operating expenses (including depreciation on capital assets), incurred by and for the account of Carlyle India in connection with the provision of the said Services"

5.6 It is clear from the facts as recorded by the coordinate Bench of this Tribunal in the case of Carlyle India Advisors Private Ltd (supra) that the assessee's activity of providing services is similar to the nature of services and activity of Carlyle India Advisors Private Ltd (supra). In the said case, the TPO rejected the comparables selected by the assessee except one company. The Tribunal has examined the comparables selected by the TPO and found that except one comparable, i.e. IDC India Ltd., all other comparables cannot be taken into consideration in para 27 to 30 as under:

"27. We will now consider 8 comparable cases selected by the TPO and see whether they can be functionally compared with that of the assessee.

(1). M/s. Chatered Capital & Investment Ltd

(2). M/s. Khandwala Securities Ltd.

(3). M/s. Sumedha Fiscal Services Ltd.

As far as these companies are concerned the TPO himself has selected these company as a comparable companies in his earlier correspondence with the assessee in the course of proceedings before him. We have already seen that the TPO conducted three different searches and while doing search No.1 he arrived at a set of list of 18 companies out of which he has selected only 10 comparables. In Search -2 the TPO selected 124 companies and rejected all those companies as not comparable. The list of comparables rejected by the TPO is at page 75 of the Paper Book. In this list the above three companies which were included in the final list of eight comparable companies selected by the TPO and which were earlier rejected by him have been listed. The reasons given by the TPO for rejecting these companies are comparable in his earlier correspondence were as follows:

(i) M/s. Chatered Capital & Investment Ltd., on the ground that the company on a qualitative review and for the reason that its income is from merchant banking services.

ii) M/s. Khandwala Securities Ltd., on the ground that the company on a qualitative review and for the reason that its income is from acting as Security and stock brokers.

iii) M/s. Sumedha Fiscal Services Ltd. on the ground that the company on a qualitative review and for the reason that its income is from loan syndication and project consultancy services.

5.7 As it is clear from the comparables selected by the TPO in the case of the assessee before us that all these comparables are common to the comparables selected by the TPO in the case of Carlyle India Advisors Private Ltd (supra). In the said case, the Tribunal has found that only one comparable i.e IDC India has to be considered for determination of ALP.

5.8 Since the facts and the nature of activities are identical; therefore, we follow the order of the Tribunal in the case of (supra) and accordingly, the ALP has to be taken as operating profit in the case of IDC Ltd at 14.58%. In the absence of any change in the business profile and other facts and circumstances as exist in the Assessment Year 2006-07 and 2007-08 as well functions of the sole comparable company the contention of the Id DR that the comparable found for the Assessment Year 2007-08 can't be a suitable comparable for Assessment Year 2006-07 is devoid of any merit and substance. Thus, when the functional environment and other facts remain same for both the AYs then a comparable found suitable for one Assessment Year can't be rejected for the immediate precedent or subsequent year.

5.9 The assessee has claimed that assessee's operating margin is within +_5% of the comparables; therefore, no addition can be made in view of the proviso to sec. 92C(2). It is to be noted that option under the said proviso is given to the assessee to take a price, which may varies from arithmetic mean by an amount not exceed 5%

of such arithmetical mean. We quote the proviso to sec. 92C(2) as exists at the relevant point of time as under:

"Provided that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices, or, at the option of the assessee, a price which may vary from the arithmetical mean by an amount not exceeding five percent of such arithmetical mean."

The proviso has been substituted by Finance Act (no.2) Act 2009 and further a explanation has been inserted by Finance Act 2012 with retrospective effect from 1.10.2009 as under:

[Provided] *that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices:*

Provided further *that if the variation between the arm's length price so determined and price at which the international transaction [or specified domestic transaction] has actually been undertaken [does not exceed 2[such percentage of the latter, as may be notified] by the Central Government in the Official Gazette in this behalf], the price at which the international transaction [or specified domestic transaction] has actually been undertaken shall be deemed to be the arm's length price.]*

[Explanation.—*For the removal of doubts, it is hereby clarified that the provisions of the second proviso shall also be applicable to all assessment or reassessment proceedings pending before an Assessing Officer as on the 1st day of October, 2009.]*

5.10 The language of this proviso makes it clear that selecting a price within the range of +-5% of such arithmetic mean if more than one price is determined by the most appropriate method. Therefore, the ALP shall be taken to be in the range of +-5% of arithmetic mean of more than one price. Since in this case, one comparable is considered as ALP; therefore, the benefit under the said proviso would not be available.

5.11 As far as the multiyear data of the comparable are considered by the assessee is concerned, this issue is now settled and the current year data are taken into consideration until and unless some exceptional circumstances are brought on record to show that one year data of comparable do not give true picture being influenced by such circumstances. As per Rule 10B (4) for determining the ALP u/s 92C, the data to be used in analysing any comparability of uncontrolled transaction with an international transaction shall be the data relating to the Financial Year in which the international transaction has been entered into. Thus, it is manifest from the sub rule (4) of Rule 10B that the data of the financial year in which the international transaction has been entered into to be used for analysing comparability of uncontrolled transaction in order to determine the ALP. The proviso to sub. rule (4) of Rule 10B provides the option for considering the data relating to the period other than the financial year in which the international transaction has been entered into; but not being more than two years prior to such financial year.

5.12 The proviso to sub. Rule 4 of Rule 10B does not mandate that always consider two more years' data of comparables in such analysis; but has a limited role only when the data of earlier years reveal facts which could have influenced on determination of the TP in relation to the transaction being compared.

5.13 When the assessee has not made out a case taking the data for only current financial year does not present the correct and fair financial result of the comparables then there is no mistake in considering the data for the financial year in which the international transaction has been entered into. There is a rationale for using the data of the comparables pertaining to the same period during which the international transactions took place because it will rule out the effect of difference

in economic and market conditions prevailing/exist at different time period. Therefore, we do not find any error or illegality by taking into consideration only the data of the financial year in which the international transaction has been entered into. Therefore, we do not find merits in the contention of the Id AR that due to risk data, multiyear data should be taken into consideration because by reason of difference in the risk the adjustment required to be made as per the Rule 10B and not by substituting the current year data by multiyear data.

5.14 As regards to the adjustment on account of differences in asset employed and risk assumed between the assessee and the comparables is concerned, the assessee, though raised this issue; but no quantification of such adjustment by comparing actual quantitative difference of the assessee and the comparables has been brought on record. Even otherwise, the adjustment on this account can be made when some real and accurate effect of such differences are brought on record. When the assessee has not properly quantified the alleged adjustments on account of differences in asset employed and risk assumed viz-a-vis the comparable, then we do not find any merit and substance in the claim of the assessee for adjustment in respect of risk, asset and functional differences.

5.15 Since the issue of ALP is principally decided in favour of the assessee as far as comparable are concerned, therefore, we do not propose to go into the validity of notice issued u/s 143(2) as raised in para 1 & 2.

6 Ground no.14 is not arising out of the impugned order and the assessee may seek remedy available under the law.

7 Ground no.15 & 16 are regarding levy of interest u/s 234B, C which is consequential in nature and no specific finding is required.

8 In the result, the appeal filed by the assessee is partly allowed

Order Pronouncement in the Open Court on this 31st day of Jan 2013

Sd/-

Sd/-

(P M JAGTAP) Accountant Member	(VIJAY PAL RAO) Judicial Member
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Place: Mumbai : Dated: 31st Jan 2013

Raj*

Copy forwarded to:

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

/TRUE COPY/
BY ORDER

Dy /AR, ITAT, Mumbai