

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'K', मुंबई ।  
IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "K", MUMBAI

Before Shri Shamim Yahya, AM & Shri Ram Lal Negi, JM

ITA No.628/Mum/2013 : Asst.Year 2008-2009

M/s.Apax Partners India Advisers Private Limited, 2 <sup>nd</sup> Floor, Devchand House, Shivsagar Estate Dr.Annie Besant Road, Worli, Mumbai – 400 018. <b>PAN : AAFCA9595A.</b>	<b>बनाम/</b> Vs.	Dy.Commissioner of Income-tax Circle 6(1) Mumbai.
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से /Appellant by : Shri Porus Kaka & Shri Manish Kanth

प्रत्यर्थी की ओर से /Respondent by : Shri S.C.Tiwari

सुनवाई की तारीख / Date of Hearing : 12.07.2017	घोषणा की तारीख / Date of Pronouncement : 12.09.2017
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**आदेश / ORDER**

**Per Shamim Yahya, AM**

This appeal by the assessee is directed against the order of Assessing Officer passed u/s 144C r.w.s.143(3) of the Income-tax Act, 1961, dated 30.11.2012 pursuant to the direction of the Dispute Resolution Panel – I, Mumbai (“DRP” for short) vide direction dated 04.09.2012 pertaining to assessment year 2008-2009.

2. The grounds of appeal read as under:-

*The grounds stated hereunder are without prejudice to one another.*

**Ground 1 - Transfer Pricing Adjustment relating to international transaction of provision of non-binding investment advisory services of Rs. 86,430,318/-**

1. On the facts and in the circumstances of the case, the learned Assessing Officer ('Ld. AO') / Transfer Pricing officer ('TPO') erred on facts and in law in making an addition of Rs. 86,430,318/- to the provision of non-binding investment advisory services transaction of the Appellant based on the provisions of Chapter X of the Income-tax Act, 1961 ('the Act').
2. The learned AO 7 TPO erred on facts and in law in not complying with the directions of the Hon'ble Dispute Resolution Panel ('DRP').
3. The learned AO/TPO under the directions of the Hon'ble DRP, erred on the facts and in law indisregarding the various submissions made by the Appellant rejecting the benchmarking analysis and most of the comparable companies selected by the Appellant without appreciating the fact that such selection was based on contemporaneous data and the transfer pricing study report prepared and maintained as per Section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ('the Rules').
4. The learned AO/TPO under the directions of the Hon'ble DRP erred on facts and in law by arbitrarily classifying the appellant's services as Knowledge Process Outsourcing ('KPO') services, without taking into consideration the differences in the functions performed, assets employed and risks undertaken between the Appellant and the set of KPO comparables.
5. The learned AO/TPO under the directions of the Hon'ble DRP erred on facts and in law in conducting a fresh benchmarking analysis using non contemporaneous data and substituting the Appellant's analysis with fresh benchmarking analysis based on his own conjectures and surmises. Thus the Appellant prays that the fresh benchmarking analysis conducted by the learned TPO is liable to be quashed.
6. The learned AO/TPO erred on facts and in law in using data obtained using powers available under Section 133(6) which was not shared with the Appellant, and which, based on the principle of 'impossibility of performance', the Appellant could

*not possibly have access to as the same was not available in public domain either at the time of carrying out the benchmarking exercise or during the assessment.*

*Further the Hon'ble DRP erred on facts and in law, in upholding the use of data obtained under section 133(6) of the Act by the TPO, on the assumption that the same was shared with the Appellant*

*7. The learned AO/TPO under the directions of the Hon'ble DRP erred on facts and in law in not allowing appropriate adjustments namely; risk adjustment to the comparables as is required to be done in accordance with the provisions of Rule 10B(1)(e)(iii) of the Income-tax Rules, 1962 to account for difference between the risk profile of the Appellant and the alleged comparables selected by the learned AO/TPO.*

*8. The learned AO/TPO under the directions of the Hon'ble DRP erred on facts and in law in upholding / confirming the action of the TPO of arbitrarily rejecting the without prejudice contention of the Appellant to provide the benefit / reduction of 5 percent from the arithmetic mean as provided in proviso to Section 92C(2) of the Act, while determining the arm's length price for the international transaction.*

*9. Without prejudice to the above, the learned AO / TPO erred on facts and in law in not excluding the expenses disallowed by the AO, from the cost base, while computing the Transfer pricing adjustment in connection with the international transaction of provision of non-binding investment advisory services.*

*The Appellant prays that the adjustment in relation to transfer pricing matters made by the learned AO/ TPO and upheld by the Hon'ble DRP in respect of the international transaction of provision of support services be deleted.*

**Ground 2 - Disallowance of Provision for Legal and Professional fees of Rs. 10,00,000**

1. *The Ld. AO has erred on facts and in law in disallowing the provision for legal and professional fees of Rs. 10,00,000 incurred by the Appellant for the purposes of taking office premises on leave and licence basis in subject assessment year.*
2. *The Ld. AO erred on facts and in law in holding that such expenditure is capital in nature and not allowable under section 37(1) of the Act despite of the clear observation of the Hon'ble DRP in its directions that such expenditure cannot be termed as capital in nature because it represents legal fees payable in relation to acquiring premises on lease.*
3. *The Ld. AO erred on facts and in law in holding that the expenses were not incurred before the end of the relevant previous year and were of provision in nature despite the observation of the Hon'ble DRP in its directions that the expenses were actually been incurred by the Appellant, the amount was correctly reflected in the form of a provision in the Profit and Loss Account in accordance with the method of accounting.*
4. *The Hon'ble DRP erred on facts and law in holding that provision for legal and professional fees is disallowable under section 40(a)(ia) of the Act due to non deduction of tax at source.*
5. *Without prejudice to the above, if such expenses are disallowed in the subject assessment year due to non deduction of tax at source, such expenses ought to be allowed in the subsequent assessment year i.e. A. Y. 2009-10, i.e. the year in which tax has been deducted at source and deposited with the Government.*
6. *Without prejudice to above, the Ld. AO has failed to appreciate that the Appellant is operating at cost plus 15 percent model. The Ld. AO has accepted the revenue returned by the Appellant in its financial statements. Since, the Ld. AO has disallowed the provision for legal and professional expenses to*

*the tune of Rs. 10,00,000 and the Ld. AO ought to have reduced the revenue of Appellant by cost plus fifteen percent i.e. Rs. 11,50,000 made by the Ld. AO and upheld by the Hon'ble DRP be deleted.*

**Ground 3 - Disallowance of Travel and Conveyance expenses of Rs. 1,50,00,000**

1. *The Ld. AO under the directions of Hon'ble DRP erred on facts and in law in disallowing the Travel and Conveyance expenses of Rs. 1,50,00,000.*

2. *The Ld. AO under the directions of the Hon'ble DRP erred in holding that the Appellant has made only general statements but has not provided the specific details, disregarding the fact that the Appellant had not only furnished the purpose for travel but also submitted the specific details in the format prescribed by the Ld. AO.*

3. *The Hon'ble DRP erred on facts and law in holding that no explanation had been forthcoming from the Appellant as to why the expenses had increased by almost 5 times during the previous year, given the fact that the Appellant was never asked to provide any explanation in this regard.*

4. *Hon'ble DRP erred on facts and law in comparing the current year's expenditure with that of the earlier year i.e. financial year 2006-07 (Rs. 4.9 million), given the fact that the Appellant was incorporated on 16 October 2006, hence the expenses incurred during that year were only for 5.5 months and therefore not comparable with financial year 2007-08 (i.e. year under consideration).*

5. *Without prejudice to above, the Ld. AO has failed to appreciate that the Appellant is operating at cost plus 15 percent model. The Ld. AO has accepted the revenue returned by the Appellant in its financial statements. Since, the Ld. AO has disallowed the travel and conveyance expenses to the tune of Rs. 1,50,00,000 and the Ld. AO ought to have reduced the*

revenue of Appellant by cost plus fifteen percent i.e. Rs. 1,72,50,000.

*The Appellant prays that the disallowance in relation to travel and conveyance expenses made by the Ld. AO and upheld by the Hon'ble DRP be deleted.*

**Ground 4 - Initiation of Penalty Proceedings under section 271(1)(c)**

1. *The Ld. AO erred on facts and in law in initiating penalty proceedings under section 271(1) (c) of the Act for furnishing inaccurate particulars of income on proposed disallowance for provision for legal and professional expenses and travel and conveyance expenses..*

*The above grounds of objections are all independent and without prejudice to one another.*

*The Appellant craves leave to add to, alter, amend or withdraw all or any of the grounds of appeal herein above and to submit such statements, documents and papers as may be considered necessary either at or before the hearing of this appeal as per law.”*

3. Ground No.1, Transfer Pricing Adjustment.

3.1 Brief facts of the case are as under:-

The assessee is engaged in providing non binding investment advisory business to its AE in the UK. During the year the total value of this transaction was declared at Rs,28.53 crores. In its TP study the assessee bench marked this transaction by the transactional net margin method using operating profit to operating cost (NCP Margin) as the profit level Indicator. The assessee selected 6 companies as comparables and computed the

mean NCP margin at 12,91%, using the earlier two year's data. In the course of proceedings before the TPO, the assessee updated these margins using single year data of the current year and found the mean margin to be 4,99% as under:-

Sr. No.	Name of the company	NCR Margin (%)
1	ICRA Management Consulting Services Ltd.	4.18
2	ICRA Online Ltd.	6.08
3	ICRA Techno Analytics Ltd.	5.41
4	IDC (India) Ltd.	15.38
5	Informed Technologies India Ltd	3.82
6	KPIT Cummins Global Business Solutions Ltd.	(-) 4.93
	Arithmetic Mean	4.99

Since the NCP margin in the case of assessee was 15.03%, it was submitted before the TPO that the international transaction should be considered as being at arm's length.

The TPO examined the functional profile of all these 6 companies and found that none of them was engaged in investment advisory services. He also observed that considering the functions performed and risks assumed by the assessee, the assessee could be characterized as a knowledge process outsourcing (KPO) entity. He accordingly carried out a fresh search for comparables using the following filters :-

- a. Only those companies were selected where data was available for the F.Y,2007-08.
- b. Companies having income from IT enabled services of less than Rs.10 crores and more than Rs.250 crores were excluded.
- c. Companies whose revenue from IT enabled services were less than 75% of total operating revenues were excluded.
- d. Companies having related party transactions of more than 25% of the operating revenue were excluded.
- e. Companies where export sales were less than 75% of operating revenues were excluded.
- f. Companies showing diminishing revenues or persistent losses were excluded.
- g. Companies that were functionally different or working in peculiar economic circumstances were excluded.
- h. Companies that are not mainly engaged in KPO services were excluded. The following 6 companies were selected by him, after applying the above filters and utilizing information gathered u/s 133(6).

Sr. No.	Name of the comparable	NCP
1	Acropetal Technologies (Seg)	35.30
2	Coral Hubs Ltd. (Formerly Vishal Information Technologies Ltd.)	50.68



3	Crossdomain Solutions Ltd	26.96
4	Eclerx Services Ltd.	65.88
5	Mold Tek Technologies Ltd.	96.66
6	Triton Corp Ltd.	23.81
	Arithmetic Mean	49.88

After considering the objections of the assessee, the TPO applied the average NCP margin of 49.88% on the total operating cost of the assessee and determined the adjustment of Rs. 8,64,30,318/-.

3.2 Upon assessee's objections, DRP considered the submissions. The DRP inter alia gave the following directions:-

*"With regard to the selection of comparables we are of the view that the fitters chosen by the TPO are all relevant and reasonable. Most of these filters are only a refinement of the search process undertaken by the assessee itself. Some of the objections of the assessee against these filters relate to the use and availability of current year's data, and these contentions have already been discussed above.*

*6.1 The specific objections raised in respect of the comparables chosen by the AQ have also been examined. These objections are broadly of the following categories -*

*\*Data not available in the public domain*

*\*Functional difference or difference in business models*

*\*Abnormal high profits*

*\*Low employee cost or other factors for falling the TPO's filters*

*\*Substantial intangible assets in asset base.*

*6.2 In the case of Acropetal Technologies Ltd. the TPO has considered the Engineering Design Services Segment and hence this company is held to be functionally comparable to the*

assessee. The contention that the company has substantial intangible assets is not evidenced from the record

6.3 In respect of Vishal Information Technologies Ltd., now known as Coral Hubs Ltd., we find that a major part of the business of the company comprises outsourcing of services. We are therefore, in agreement with the assessee that this company is functionally different and should be deleted from the list of comparables,

6.4 Cross Domain Solution Pvt. Ltd. is mainly engaged in insurance claims processing and pay roll processing services. We do not find any reason to hold that it cannot be considered to be a comparable for the purpose of TNMM.

6.5 Eclerx Services Ltd. offers various high-end services including portfolio risk management services etc. It is therefore, functionally comparable. The mere fact of high profits cannot make the company non comparable unless some other significant functional difference responsible for such profits is pointed out.

6.6 In the case of Mold-Tech Technologies Ltd. it is noted that the amalgamation actually took place in the earlier F.Y. and even the demerger of the plastics division happened w.e.f. 1.4.2007. These restructurings are therefore, not considered capable of significantly affecting the profits or the business model of the current year. The high profit margin by itself is not a relevant factor as held above.

6.7 With regard to Triton Corporation Ltd. it is stated that the company fails the export filter of 75% used by the TPO himself. The AO is directed to verify the accounts of the company and delete the company from the list of comparables if the assessee's contention is found to be correct.

6.8 We have also examined the assessee's submissions regarding the companies selected by it as comparables. Although the TPO has given valid reasons for rejecting the same

as comparables, we find that the TPO has not completely disagreed with the functional comparability in the case of IDC (India) Ltd. In fact, the TPO has observed that the company is a global provider of market intelligence advisory services for the IT, Telecom and Consumer Technology Markets. It appears from the Annual Report that the company is a market research company primarily dealing in research services and products. Considering this profile we are of the view that (DC (India) Ltd, should be included as a comparable.

6.9 Thus, the AO is directed to exclude Coral Hubs Ltd. and include IDC (India) Ltd. in the list of the comparables chosen by the TPO. Further, Triton Corporation Ltd. may also be excluded if it is found that it fails the export filter of 75% chosen by the TPO. The AO shall then compute the modified NCR margin and determine the consequential adjustment to be made.”

3.3 Pursuant to the above directions, the Assessing Officer passed the order making addition of Rs.8,64,30,318. While making the above addition, the Assessing Officer observed as under:-

“During the year, the assessee has entered into certain transaction with its associate enterprise and independent parties and since the amount of such transaction were more than prescribed limit, the case was referred to DCIT, TP - 1(6), Mumbai for determination of Arms Length Price of the International Transactions. The DCIT, TP -1(6), Mumbai vide order dated 11-10-2011 passed u/s. 92CA(3) of the Act made an adjustment of Rs. 8,64,30,318/- to the Arm's Length Price as shown below.

Description	Amount
Total Operating Cost	24,80,29,908
NCP Mark-up as per comparable @ %	49.88%
Arm's Length Revenue as per comparable (A)	37,17,47,226
Transaction Price (B)	28,53,16,908
Amount of adjustment of total Income (A – B)	8,64,30,318

*The DRP, Panel -1, Mumbai has vide its order dated 03-09-2012 has directed the AO to exclude Coral Hubs Ltd. and include IDC (India) Ltd. in the list of the comparables chosen by the TPO. Further, Triton corporation Ltd. may also be excluded if it is found that it falls the export filter of 75% chosen by the Transfer Pricing Officer.*

*Since the order was passed by the DCIT, TP 1(6), Mumbai, a letter has written to modify the order passed by him. No intimation / order were received by this office. Further, a reminder letter dated 16-11-2012 has been written to DCIT, TP 1(6), Mumbai requesting him to expedite the matter at the earliest.*

*Since no intimation /order was received from the DCJT, TP 1(6), Mumbai and the matter is getting barred by limitation on 30-11-2012, the addition of Rs.8,64,30,318/- made in the draft assessment order is added back to the total income of the assessee.*

3.4 Against this order, assessee is in appeal before us.

3.5 We have heard both the Counsel and perused the records. The learned Counsel of the assessee submitted that the TPO has not properly applied his mind to the facts of the case. He submitted that the TPO has taken an order from the file of an IT enabled service provider tax payer and has cut and paste the same in the Transfer Pricing order for the assessee. The learned Counsel of the assessee submitted that in his order the TPO has mentioned that he has gone through the comparables selected by the assessee and has found that none of the comparables were engaged in investment advisory as a captive service provider. The learned Counsel submitted that despite this finding, in later part of his order, the TPO has mentioned that there are many captive IT enabled service provider who were

in exactly similar business as the tax payer. Learned Counsel submitted that this observation of the TPO is quite contradictory to his earlier observation. He further submitted that assessee is not engaged in IT enabled services or K.P.O. He submitted that assessee is engaged in providing specialized investment advisory to its AE and is being compensated on cost plus basis. Hence, it cannot be treated as engaged in IT enabled service or engaged as K.P.O. Learned Counsel submitted that TPO in his order has applied the following filters of criteria for searching comparables:-

Companies whose data is not available for the FY 2007-08 were excluded and the data for the FY 2007-08 has been considered for the period from 01-04-2007 to 31-03-2008.

Companies whose IT enabled service income <Rs.10 cr and>250 crores were excluded

Companies whose IT enabled service revenue is less than 75% of the total operating revenues were excluded

Companies who have more than 25% related party transactions (sales as well as expenditure combined) of the operating revenues were excluded

Companies who have less than 75% of the revenues as export safes were excluded

Companies who have diminishing revenues/persistent losses for the period under consideration were excluded

Companies having different financial year ending (i.e. not March 31, 2008} or data of the company does not fall within 12 month period i.e. 01-04-2007 to 31-03-2008, were rejected

Companies that are functionally different from that of taxpayer or working in peculiar economic circumstances, after giving valid reasons, were excluded.

Companies that are not mainly engaged in KPO services were excluded.

3.6 Learned Counsel further assailed the TPO's order by observing that the TPO in para 8 has himself mentioned that his search process was carried under the sub-head Non-financial Services – Services (Other than Financial) – Information Technology – ITES. Learned Counsel submitted that this is totally not in line with the tax payer's activity which is investment advisory services. He submitted that by no stretch of imagination assessee can be considered to be engaged in a non-financial service. Learned Counsel referred to the following from the final comparables proposed by the TPO and objection thereto as under:-

Sl. No.	Name of the comparables	Functional Lines
1	Acropetal Technologies (Seg.)	The engineering design services segment of the company is engaged in engineering design services.
2.	Coral Hubs Ltd. (Formerly Vishal Information Technologies Ltd.)	The company is mainly engaged in data processing services.
3.	Crossdomain Solutions Ltd.	The company is mainly engaged in data processing, insurance claims processing and payroll processing services.
4.	Eclerx Services Ltd.	The company is mainly engaged in data analytics and data process services. Pricing analytics, bundling optimization, content operations, sales and marketing support, product data management, revenue management and data analytics are some of the offerings to Retail and Manufacturing clients. To its Financial Services clients, it offers real-time

		capital markets, middle and back office support, portfolio risk management services and various critical data management services.
5	Mold-Tek Technologies Ltd.	The company is mainly engaged in Engineering design services.
6	Triton Corp Ltd.	The company is mainly engaged in knowledge process outsourcing and legal process outsourcing services.

3.7 Learned Counsel submitted that the above comparables selection was totally incorrect. Referring to the above, learned Counsel submitted that those comparables were liable to be rejected because of functional difference in the business models, and some of the data was not available in public domain and some of them had abnormal high profits. Learned Counsel of the assessee submitted that the DRP has accepted the assessee contention and directed to exclude Coral Hubs Ltd. and include IOC India Ltd. in the comparables and has further directed that Triton Corp Ltd. may also to be excluded if it is found that it fails export filter of 75% chosen by the TPO. Learned Counsel submitted that these directions of the DRP have not been followed by the Assessing Officer.

3.8 Learned Counsel further submitted that the TPO has treated the assessee as a KPO and has hence taken comparables from KPO business. In this regard, learned Counsel placed reliance upon the decision of ITAT Mumbai Benches in the case of KGN India Advisors Pvt. Ltd. v. DCIT 70 Taxmann.com 219, wherein it was held that company providing management and advisory services of various types of industries cannot be compared with company engaged in providing KPO and Information Services. Learned Counsel further submitted that the proportion that tax payers engaged in

providing KPO cannot be compared with investment advisory service, has also been upheld by the ITAT decision in the case of Caryle India Advisors (P) Ltd. vs. ACIT [(2012) 146 TTJ 521] which has also been upheld by the Hon'ble Bombay High Court reported in 357 ITR 584. Furthermore, this proposition has also similarly been upheld in the case of Temasek Holdings Advisors India Pvt. Ltd. by ITAT Mumbai Benches in several cases. Learned Counsel further reiterated his submission that the following comparables selected by the TPO are not comparable for the service for the reasons mentioned hereinabove. He further submitted as under:-

**(i) Eclerx Services Limited.**

Referring to the said company's annual report, learned Counsel submitted that it is a KPO engaged in data analytics. It is established in a SEZ and it is engaged in risk management services. Hence, learned Counsel submitted that it is totally not comparable with the assessee.

**(ii) Mold-Tek Technologies Limited.**

This company is mainly engaged in engineering design services as per its annual report.

**(iii) Acropetal Technologies.**

This company is engaged in providing engineering design services and information technology. The AO has taken engineering design segments. Hence this comparable is also liable to the excluded.

**(iv) Crossdomain Solutions Limited.**

This company is engaged in data processing, insurance claim processing and established in an STPI.



3.9 Hence, on the basis of above submission, learned Counsel pleaded that these four comparables chosen by the TPO are liable to be rejected.

3.10 Learned Counsel further submitted that following two comparables should be included in the list of comparables as they were found comparable in case of tax payers engaged in investment advisory services. The case laws in which they were so found has also mentioned hereunder:-

(i) ICRA Management Consultancy Pvt. Ltd.

*Temasek Holdings Advisors (I) Pvt. Ltd. 160 TTJ 556*  
*Temasek Holdings Advisors (I) Pvt. Ltd. ITA No.968/Mum/2014*  
*Temasek Holdings Advisors (I) Pvt. Ltd.ITA No.776/Mum/2015*  
*TPG Capital India Pvt. Ltd. ITA NO.880/Mum/2013*  
*TPG Capital India Pvt. Ltd. ITAT Mumbai (2017) 79*  
*taxmann.com 101*  
*Warburg Pincus India Pvt. Ltd. ITAT Mumbai (2017) 78*  
*taxmann.com 273*  
*Blackstone Advisors India P.Ltd. ITA No.1581/Mum/2014*  
*AGM India Advisors (P.) Ltd. (Mumbai ITAT) (2016) 70*  
*taxmann.com 219*  
*General Atlantic Pvt. Ltd. ITA No.1019/Mum/2014*  
*Warburg Pincus India Pvt. Ltd. (Mumbai ITAT) ITA No.1612/*  
*Mum/2015*  
*Goldman Sachs India Securities Private Limited (Mumbai ITAT)*  
*ITA No.927/Mum/2016*

(ii) Informed Technologies India Limited.

*Temasek Holdings Advisors (I) Pvt. Ltd. 160 TTJ 556*  
*Temasek Holdings Advisors (I) Pvt. Ltd. ITA No.968/Mum/2014*  
*Temasek Holdings Advisors (I) Pvt. Ltd. ITA No.776/Mum/2015*  
*TPG Capital India Pvt. Ltd. (Mumbai ITAT) ITA No.880/2013*

3.11 Learned Counsel submitted that if the above four comparables are excluded and the two comparables as submitted above are included, the assessee will come within the arm's length margin. Learned Counsel further submitted that two year later on with the APA with Government of India, margin has been accepted at 20%.

3.12 Per contra, learned Departmental Representative submitted that assessee has rightly been treated as KPO by the TPO. He submitted that assessee is providing advisory services where high level of knowledge is required. The learned DR further submitted that he would not argue much about the exclusion of Acropetal Technologies and Crossdomain Solutions Limited. However, for the other two comparables, he submitted that they should be included.

3.13 Upon careful consideration, we note that out of the comparables chosen by the TPO, the DRP has itself accepted exclusion of two of the comparables namely Coral Hubs Limited and Triton Corp Limited. Furthermore, we find considerable cogency in the submission of the learned Counsel of the assessee that for the reasons mentioned hereinabove, in para 3.8 above, following four comparables cannot be taken as comparables to the assessee who is engaged in investment advisory services:-

- (i) Eclerx Services Limited
- (ii) Mold-Tek Technologies Limited
- (iii) Crossdomain Solutions Limited
- (iv) Acropetal Technologies

3.14 We further find that the learned Counsel of the assessee's submission regarding inclusion of the two comparables is also cogent and convincing for the reasons and case laws mentioned hereinabove.

- (i) ICRA Management Consultancy Pvt. Ltd.
- (ii) Informed Technologies India Limited.

As mentioned in para 3.10 hereinabove, these two companies have been accepted as good comparable to tax payers engaged in investment advising services.

3.15 Accordingly, we direct that the above four comparables which have been found by us and DRP to be not comparable should be excluded and the two comparables found by us to be comparable should be included. Thereafter the TPO shall make necessary computation.

4. Ground No.2 : Disallowance of provision for legal and professional fees.

4.1 On this issue it was noted by the Assessing Officer that assessee has debited an amount of Rs.10,00,000 on account of provision for legal and professional fees. The Assessing Officer found that the said sum is payable to M/s.Amarchand Mangaldas & Suresh A. Shroff & Co. for the advisory / professional services in relation to the following:-

- (i) Review of documents of title of Licensors in subject office premises;
- (ii) Conducting searches in Land Register;
- (iii) Reviewing letter of intent issued by Licensor;
- (iv) Attending meeting and teleconferencing on behalf of assessee with external parties; and

- (v) Advising on various Indian Laws with regard to acquisition of office on lease and license basis.

4.2 The Assessing Officer was of the opinion that the professional fees has been paid for acquiring the premises on lease which will give the assessee enduring benefits extending beyond the year under consideration. Therefore, the Assessing Officer held the same to be capital expenditure, not allowable u/s 37(1) of the Act.

4.3 Upon assessee's objection, the DRP held that the amount was disallowable u/s 40(a)(ia). The relevant portion of DRP's direction reads as under:-

*"We are of the view that such expenditure cannot be termed as capital in nature only because it represents legal fees payable in relation to acquiring premises on lease. We also accept the assessee's contention that since the expenses had actually been incurred, the amount was correctly reflected in the form a provision in the P&L A/c in accordance with the method of accounting. However, tax has not been deducted at sources u/s 194J at the time of crediting this amount in the books. The relevant provisions state that tax is deductible at the time of payment or credit, even if the credit is to a suspense account. The assessee's contention that tax was not deductible since the amount did not constitute income in the hands of the recipient, is not acceptable. The revenue nature of the expenditure is not in dispute, and the assessee has no way of knowing the method of accounting followed by the recipient which would determine whether the amount constituted income of the relevant year in its hands. The amount is therefore held to be disallowable u/s 40(a)(ia). The AO is directed to make the necessary modification in the assessment order."*

4.4 Against this order and direction, the assessee is in appeal before us.

4.5 We have heard both the Counsel and perused the records. Learned Counsel of the assessee submitted that the above is provision for legal expenses. He submitted that the said provision was reimbursed in the next year and the actual expenses booked and taxed were duly deducted at source. Learned Counsel submitted that assessee is not required to deduct tax at source on estimation of expenses i.e. for the provision made for expenses, tax deduction is not required. For this proposition, learned Counsel placed reliance upon case law from Aditya Birla NVVO Limited v. DCIT ITA [No.8427/Mum/2010 order dated 17.09.2014.

4.6 We find that the ITAT Mumbai Benches in the above said decision has duly upheld the proposition that when the provisions are made and payments are not received and in the subsequent year the provision made is offered for taxation, the impugned amount cannot be disallowed and hence cannot be brought under the ambit of taxation u/s 40(a)(ia). No contrary decision was shown to us. Hence we set aside the orders of the authorities below on this issue and decide the issue in favour of the assessee.

5. Ground No.3 : Disallowance of Travelling and Conveyance Expenses:

5.1 This issue relates to disallowance of travelling and conveyance expenses of Rs.2,42,94,545. The AO has stated that the assessee was required to furnish details of these expenses, including the details of the employees, the purpose of travelling etc. However, the assessee only

submitted a copy of the ledger account without any supporting evidence. It was stated that employees of the assessee company are required to visit various places at the request of the AE. The AO held that the company had only 9 employees and it was under an obligation to file complete details of the travelling expenses. Since the same were not filed the AO disallowed the entire expenditure of Rs.2.43 crores.

5.2 Before the DRP, the assessee has reiterated its submission that its employees were required to visit various countries to participate in conferences or events, or to carry out meaningful analysis of various companies. It is also stated that the assessee is compensated by its AE at a 15% mark up on the cost incurred and even these expenses have been considered by the AE for remunerating the assessee.

5.3 Considering the above, the DRP granted adhoc relief and upheld the disallowance amounting to Rs.1.5 crores. The DRP's direction is as under:-

*“On examining the matter we are in agreement with the AO's findings that if there are only 9 employees in the company, it should not have been difficult for the assessee to provide full details of the travelling expenses. The assessee has made only general statements but has not provided the specific details even before us. It is also seen that the corresponding expenditure in the earlier year was only Rs.0.49 crores. No explanation has been forthcoming from the assessee as to why the expenses have increased by almost 5 times this year. The fact that the assessee is compensated by the AE on a cost plus basis is not relevant for determining the allowability of expenses under the Income-tax Act. We are also of the view that considering the nature of services provided as stated by the assessee, such a huge expenditure on foreign travel or for attending conferences etc. is not justified, However, we are also*

*of the view that some expenditure for travelling and conveyance would certainly be required to be incurred. In the earlier year such expenses amounting to about Rs.49 lakhs has been allowed in the assessment. We therefore, hold that in the interests of justice the disallowance of expenses in this year should be restricted Rs.1.5 crores out of the total amount of Rs.2.43 crores.”*

5.4 Against the above order, the assessee is in appeal before us.

5.5 We have heard both the Counsel and perused the records. Learned Counsel of the assessee submitted that assessee is duly reimbursed all the cost mark up. Hence there is no basis for disallowance of travelling expenses, which are part of operational expenses. Learned Counsel submitted that no case has been made out that the expenses are not genuine. Per contra, the learned Departmental Representative submitted that disallowance in this regard has been made because the assessee has not been able to provide the details of the expenditure. Hence, learned DR submitted that disallowance has been rightly made and the same needs to be sustained.

5.6 Upon careful consideration, we find that the DRP has rightly observed that reimbursement of expenses cannot be a reason for the non-examination of the expenditure booked as expenses by the IT authorities. De hors providing necessary details assessee cannot seek full allowance of expenditure. We find that the interest of justice would meet adequately if the matter is remitted to the file of the Assessing Officer. The Assessing Officer is directed to give the assessee an opportunity to give the details and

canvass the veracity of expenses. Needless to add, assessee should be granted adequate opportunity of being heard.

6. In the result, this appeal by the assessee stands partly allowed.

Order pronounced on this 12<sup>th</sup> day of September, 2017.

Sd/-  
(Ram Lal Negi)  
JUDICIAL MEMBER

Sd/-  
(Shamim Yahya)  
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 12<sup>th</sup> September, 2017.  
Devdas\*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A), Mumbai
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