IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1125 OF 2017

Pr. Commissioner of Income Tax - 6,
R. No. 507, 5th Floor, Aayakar Bhavan,
M.K. Road, Mumbai - 400 020. ...Appellant

Versus

M/s. Eight Roads Investment Advisors Pvt. Ltd.
(Formerly known as FIL Capital Advisors India
Pvt. Ltd.), 304, 3rd Floor, Tower – A,
Peninsula Business Park, G.K. Marg,
Lower Parel, Mumbai – 400 013. ...Respondent

Mr. A.R. Malhotra a/w. Mr. N.A. Kazi, Advocate for Appellant.
Mr. Nishant Thakkar a/w. Ms. Jasmin Amalsadwala i/b. PDS Legal, Advocate for the Respondent.

CORAM : UJJAL BHUYAN, &
MILIND N. JADHAV, JJ.

RESERVED ON : 24th January 2020.
PRONOUNCED ON : 27th February 2020.

JUDGMENT (PER MILIND N. JADHAV, J.) :-

1. This appeal has been preferred under Section 260A of the Income Tax Act 1961 (for short 'the said Act') for the assessment year 2010 – 2011, against the order dated 25th October 2016 passed by the Income Tax Appellate Tribunal "K" Bench, Mumbai (hereinafter referred to as "Tribunal").

2. The respondent / assessee entered into an international

transaction of non-binding investment advisory services with its Associate Enterprises (for short 'A.E.') and earned revenue of Rs.25.83 crores during the assessment year 2010 - 2011. The assessee for the purpose of bench marking the transaction adopted Transnational Net Margin Method (for short "TNMM") as an appropriate method under the provisions of Section 92C of the Act and identified seven comparable companies as comparables with their three years average weighted margin of 18.23% and operating margin being at 19.67% for the purpose of claiming the international transaction to be at arm's length.

2.1 The Assessing Officer (for short "AO") framed a draft assessment order dated 26th February 2014 making an upward revision of transfer pricing adjustment of Rs.4,96,42,540.00. The assessee approached the Dispute Resolution Panel (for short "DRP") against the draft assessment order with its objections. The DRP vide order dated 7th October 2014 rejected the contentions and objections raised by the assessee in relation to upward revision of transfer pricing adjustment and directed the AO to finalize the draft assessment, resulting in passing of the impugned assessment order. The AO / Transfer Pricing Officer (for short "TPO") by his final order dated 31st October 2014 rejected the transfer pricing study of the assessee on the basis of various defects and deficiencies and rejected six out of seven comparables selected by the assessee while retaining one comparable on the basis of single year data. However in the said order the TPO proceeded and selected six new comparable companies as comparables with an arithmetic mean of 42.66% of

operating margin. The TPO applied the aforesaid arithmetic mean to be operating cost of the assessee and determined the arm's length price of Rs.30,79,92,412.00 as against the international transaction price of Rs.25,83,49,872.00 resulting in a short fall of Rs.4,96,42,540.00. This short fall was treated as transfer pricing by the TPO.

3. The above order was assailed by the assessee before the Tribunal. Tribunal by the impugned order dated 25th October 2016 allowed the appeal filed by the assessee in elaborate detail with respect to selection of each comparable company by the TPO and DRP and directed the AO / TPO to determine the arm's length price afresh in terms of fresh directions given by the Tribunal in respect of each comparable company. Being aggrieved by the order passed by the Tribunal the revenue is in appeal before us.

4. The revenue has projected the following substantial questions of law :-

> *"6.1 "Whether on the facts and circumstances of the case and in Law, the Hon'ble ITAT was justified in directing to exclude for functionally comparable companies from the list of comparables selected by the TPO viz. M/s IDFC Investment Advisors Pvt. Ltd, M/s ICRA Online Ltd., M/s Motilal Oswal Investment Advisors Pvt. Ltd. and M/s Kshitij Investment Advisory Co.Ltd., on the ground of functional dissimilarity ?"*
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> *6.2 "Whether on the facts and circumstances of the case and*

in Law, the Hon'ble ITAT was justified in directing to consider four companies viz. M/s ICRA Management Consulting Services Pvt. Ltd., M/s IDC India Limited, M/s Informed Technology Ltd. and M/s Kinetic Trust Ltd. as comparable even though these companies are not functionally comparable to that of the assessee ?"

6.3 "Whether on the facts and circumstances of the case and in Law, the Hon'ble ITAT was justified in directing not to consider M/s IDFC Investment Advisors Ltd as a comparable, without appreciating the fact that the said company has earned Rs.13.42 crores from Investment Advisory Services out of total revenue of Rs.26.29 crores ?"

6.4 "Whether on the facts and circumstances of the case and in Law, the Hon'ble ITAT was justified in directing not to consider M/s ICRA Online Ltd. as a comparable without appreciating the fact that TPO has used segmental results of "outsourced services" of the said company for comparatively purpose and that segment is functionally similar to that of assessee ?"

6.5 "Whether on the facts and circumstances of the case and in Law, the Hon'ble ITAT was justified in directing not to consider M/s Motilal Oswal Investment Advisors Pvt. Ltd. as a comparable without appreciating the fresh facts brought on record by the TPO in respect of functions performed and assets employed by the said company u/s 133 (6) such as employee profile and income received from top clients of the said company ?"

6.6 "Whether on the facts and in the circumstances of the case and in Law, the Hon'ble ITAT was justified in directing not to consider M/s Kshitij Investment Advisory Co. Ltd. as a comparable on account of peculiar economic circumstances arising as a result of realignment with another company, simply relying on the decision of Hon'ble ITAT in the case of Carlyle India Advisors Pvt. Ltd., ITA No.1040/Mum/2015 and AGM Advisors India Pvt. Ltd., ITA No.4757/Mum/2015, without appreciating the fact that the realignment has not resulted in any change of activity of the business of the said company ?"

6.7 "Whether on the facts and in the circumstances of the case and in Law, the Hon'ble ITAT was justified in directing not to consider M/s Kshitij Investment Advisory Co. Ltd. as a comparable without appreciating the fresh facts brought on record by the TPO in respect of functions performed and assets employed by the said company u/s 133 (6) such as employee profile and income received from top clients of the said company ?"

6.8 "Whether on the facts and circumstances of the case and in Law, the Hon'ble ITAT was justified in directing to consider M/s ICRA Management Consulting Services Pvt. Ltd. as a comparable without appreciating the fact that the said company is not into Investment Advisory services and the assessee company has also itself submitted in the course of TP proceedings that the functions performed by this company are not exactly similar to the assessee company ?"

6.9 "Whether on the facts and circumstances of the case and in Law, the Hon'ble ITAT was justified in directing to consider M/s ICRA Management Consulting Services Pvt. Ltd. as a comparable without appreciating the fresh facts brought on record by the TPO in respect of functions performed and assets employed by the said company u/s 133 (6) to substantiate that the services provided to top ten clients of the said companies and its employee profile are different from that of assessee during the year under consideration ?"

6.10 "Whether on the facts and circumstances of the case and in Law, the Hon'ble ITAT was justified in directing to consider M/s IDC India Ltd. as a comparable without appreciating the fact that the said company is not into Investment Advisory Services and the assessee company has also itself submitted in the course of TP proceedings that the functions performed by this company are not exactly similar to the Assessee company ?"

6.11 "Whether on the facts and circumstances of the case and in Law, the Hon'ble ITAT was justified in directing to consider M/s Informed Technology Ltd. as a comparable without appreciating the fact that the said company is not into Investment Advisory Services and the assessee company has also itself submitted in the course of TP proceedings that the functions performed by this company are not exactly similar to the Assessee company ?"

6.12 "Whether on the facts and circumstances of the case and

in Law, the Hon'ble ITAT was justified in directing to consider M/s Kinetic Trust Ltd. as a comparable without appreciating the fact that the said company is not into Investment Advisory Services and its turnover is less than Rs.1 crore ?"

5. We may now advert to the relevant facts necessary for appreciating the controversy in question :-

5.1. The assessee company filed return of income on 11.10.2010 declaring a total income of Rs.7,00,51,101/- for the assessment year 2010 – 2011. The case of the assessee was selected for scrutiny and statutory notice under Section 143 (2) of the Act was issued, also notice under Section 142 (1), *inter alia*, calling for various details in connection with scrutiny assessment proceedings. The assessee company through its authorized representative furnished the details called for. Thereafter the AO discussed the case. Reference was made to the TPO for computation of arm's length price in relation to the international transaction. The TPO by his draft order dated 26th February 2014 reported an upward adjustment of Rs.4,96,42,540.00 in respect of the value of the international transaction made by the assessee with its Associate Enterprises (A.E.) with regard to arm's length price. The assessee was given a fair chance to explain as to why the addition should not be made on the transfer pricing adjustment of Rs.4,96,42,540.00. The TPO after hearing the assessee passed order under Section 92CA (iii) of the said Act making an upward adjustment to the tune of Rs.4,96,42,540.00.

5.2. The assessee chose the following seven comparable companies for the purposes of bench marking :-

S. No.	Name of the Company
1	Access India Advisors Limited
2	Future Capital Investment Advisors Limited
3	ICRA Management Consulting Services Limited
4	IDC (India) Limited
5	Informed Technologies Limited
6	Integrated Capital Services Limited
7	Kinetic Trust Limited

The TPO after considering various aspects of the comparable companies rejected six out of the aforesaid seven comparables chosen by the assessee. The TPO accepted only one company which was Future Capital Investment Advisors Limited and after undertaking a further detailed analysis of the entire matrix of acceptance and rejection based on profit and operating margin proposed to include five fresh / new comparables as under :-

S. No.	Name of the Company
1	Future Capital Holdings Limited (Segmental)
2	ICRA Online Limited (Segmental)
3	IDFC Investment Advisors Private Limited
4	Kshitij Investment Advisors Limited
5	Motilal Oswal Investment Advisors Private Limited

The TPO included the above five comparable companies in the set of comparables and thus finalised a set of six comparables for the purpose of bench marking the international transaction of the assessee. The TPO

considered the financial data and annual reports of the six comparables for the financial year 2009 - 2010 as per Rule 10B(4) and with the arithmetic mean of their operating margin being at 42.66% arrived at an upward adjustment of Rs.4,96,42,540.00 in his order.

5.3. The assessee filed its objection against the order of TPO before the DRP, III, Mumbai. Before the DRP assessee summarized that it had entered into an international transaction with its A.E. to provide investment advisory services of Rs.25.83 crores. The assessee for the purpose of bench marking the international transaction had chosen TNMM as the most appropriate method and identified seven comparable companies with their three years average weighted margin of 18.23% and operating profit margin being 19.67%, for providing investment advisory services to be at arm's length.

5.4. The DRP considered the submissions of the assessee citing functional details as also related party transactions in the case of comparables which were rejected by the TPO and returned a finding that for the reasons given by the TPO in his draft order which were in substantial detail regarding non submission of financials and other details of the A.E., rejected the comparables adopted by the assessee and included the new comparables suggested by the TPO. DRP held that draft order passed by the TPO was sustainable and did not require any interference in the bench marking done by

the TPO. Accordingly, AO vide his final order dated 31st October 2014 completed the assessment in terms of order dated 07th October 2014 passed by the Dispute Resolution Panel (DRP) – III, Mumbai.

5.5. The assessee approached the Tribunal against the order of the DRP. The Tribunal after a thorough analysis of each comparable offered the following reasons for inclusion of the six rejected comparables which were excluded by the TPO and DRP. For the sake of completeness, we would like to dwelve into the scrutiny and reasons given by the Tribunal in respect of each of the comparables which came to be included by the Tribunal as comparables.

NEW COMPARABLES SELECTED BY TPO / DRP WHICH WERE REJECTED BY TRIBUNAL

5.6 **IDFC INVESTMENT ADVISORS PVT. LTD.**

Before the Tribunal the assessee objected to the selection of this company as a comparable by the TPO on the ground that the said company was primarily engaged in providing Portfolio Management Services (PMS). The assessee submitted that PMS and investment banking services were functionally different from investment advisory services undertaken by the assessee. The assessee company was an investment advisory service company as stated in its annual report in relation to IDFC which was actually a PMS. The assessee submitted that, functions performed by this company

such as investment and brokerage were performed by an Investment Advisor (IA). After a detailed scrutiny of the profit and loss account of this company, it was revealed that this company was engaged in a number of activities as reported by the revenue under one segment. Unlike the assessee, the functions performed, assets employed and risks undertaken by this company were totally different than the functions performed by the assessee company. Therefore it could not be treated as a comparable. In support of the above propositions to challenge the inclusion of IDFC Investment Advisors Pvt. Ltd as comparable by the TPO / DRP, assessee relied upon the following judgments.

> *"i) AGM India Advisors Pvt. Ltd. v/s DCIT, ITA no.4757/Mum./2015, A.Y. 2010-11, order dated 18th May 2016;*
>
> *ii) Carlyle India Advisors Pvt. Ltd. ITA no.1040/Mum./2015, A.Y. 2010-11, order dated 18.11.2015;*
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> *iii) Bain Capital Advisors (India) Pvt. Ltd. v/s DCIT, ITA no.413/Mum./2015, A.Y. 2010-11, order dated 15.5.2015;*
>
> *iv) Sparkles Dhandho Advisors P. Ltd. v/s ITO, ITA no.1047/ Mum./2015, order dated 31.12.2015;*
>
> *v) CIT v/s Carlyle India Advisors Pvt. Ltd., 32 taxmann. Com 23, A.Y. 2007-08;*
>
> *vi) General Atlantic Pvt. Ltd. v/s ACIT, ITA no.7638/Mum./2011 order dated 17.5.2013;*
>
> *vii) Goldman Sachs India Securities Pvt. Ltd. v/s CIT, 69 taxmann.com 19;"*

The Tribunal after considering the submissions and more specifically findings expressed by the Tribunal, Mumbai Bench in the case of AGM India Advisors Pvt. Ltd. (supra) concluded that as seen in the case of Carlyle India Advisors Pvt. Ltd. (supra) after perusing the annual report of this company, the Tribunal had arrived at a finding that the said company was engaged in providing PMC and such services were fee based and the said company had earned revenue from different segments such as portfolio management fee, performance fee, advisory fee etc. On this basis, the Tribunal arrived at a finding that in the above scenario, where a company was remunerated on cost plus basis, it was risk insulated and therefore, on application of FAR analysis, it could be compared with other companies if there is any difference in its functions. The Tribunal refered to the observation of the Hon'ble High Court in the case of General A*tlantic Pvt Ltd*. (supra) while approving the view expressed in Carlyle India Advisors Pvt. Ltd. (supra), rejected this company i.e. IDFC Investment Advorse Pvt. Ltd as a comparable.

5.7 **ICRA Online Limited (Segmental)**

The assessee objected to the selection of this company as a comparable selected by the TPO as this company had three lines of business verticals viz. Outsource Service, Information Service and Software Products / Service. The assessee submitted that the financials of this company did not indicate the kind of service rendered by the outsource service segment and its

annual report was silent thereon. The assessee submitted that information provided on the web site of this company showed that it had two strategic lines of business namely Knowledge Process Outsourcing (KPO) and Information Service and Technology Solutions. The assessee submitted that performance of the aforesaid activities made this company financially different from the assessee and hence, it could in no way be treated as comparable with the assessee company. The Tribunal on perusal of the information submitted in the annual report of this company as well as its financials, returned a finding that the functions undertaken by this company were totally different from the assessee company and therefore the company failed in the FAR analysis itself. Thus, the Tribunal rejected this company i.e. ICRA Online Limited (Segmental) as a comparable.

5.8 **Motilal Oswal Investment Advisors Pvt. Ltd. (MOIAPL)**

The assessee objected to this company as a comparable selected by the TPO as it derived its business verticals from equity capital market, mergers and acquisition, private equity syndication and structural debts. The assessee submitted that as per this company's annual report, the company advised Indian Corporates on cross border acquisitions and this company was a SEBI regulated merchant Banker which provided investment banking services in the nature of acquisition equity placements, IPOs, syndication, etc. and had undertaken activities as lead manager / arranger / sole book runner etc. for various portfolios and earned investment banking fee for the same.

The assessee therefore submitted that, this company was not comparable to a non-binding investment advisory and related service provider like the assessee. The Tribunal after going through the annual report of this company returned a finding that, this company was functionally different from the assessee because of the functions performed, assets employed and risk undertaken and failed in the FAR analysis. Thus, the Tribunal rejected this company i.e. MOIAPL as a comparable.

5.9 **Kshitij Investment Advisory Company Limited**

The assessee objected to this company as a comparable selected by the TPO as this company had entered into an agreement with another company namely Everstone Investment Advisors Pvt. Ltd. to realign its investment advisory activities with effect from 01st January 2010 and as a result of such joint venture, its entire business was restructured. The assessee submitted that, the profit and loss account of this company for the financial year 2010 – 2011 revealed that no revenue was earned from investment advisory business. The assessee submitted that this company had operated only for nine months during the financial year 2009 - 2010 and hence could not be compared to the assessee. The Tribunal after considering the material available on record and the decisions in Carlyle India Advisors Pvt. Ltd (supra) followed by AGM India Advisors Pvt. Ltd. (supra) returned a finding that this company could not be treated as a comparable. The Tribunal based its finding on the decisions given in the aforesaid two cases, in respect of this

company pertaining to the very same assessment year and followed the decisions of the co-ordinate bench in excluding this company from the list of comparables.

6. The assessee had suggested the following companies as comparables which were originally rejected by the TPO / DRP, but were accepted by the Tribunal as comparables after a detailed scrutiny.

6.1 **ICRA Management Consulting Service Pvt. Ltd.**

This company was rejected by the TPO / DRP as comparable. This company offered consulting / advisory services through different business groups and practice areas pertaining to strategy, risk management, operations improvement, corporate advisory etc. On the basis of the profit and loss account statement of this company, the assessee submitted that this company derived its revenue from consulting fees. It was the assessee's case that the functions performed by this company with respect to management consultancy service involved analysis of business and operations of a company, its profitability, operational efficiency, future outlook, etc. based on which consultancy or advise is given to the management of a company. Such functions were similar to that of a non-binding investment advisory and related services rendered by the assessee. The assessee submitted that this company had undertaken activities in other fields like business and operations, geographic research discussing the regulations laid out in the bio-generics globally, market research in respect of various products, business and

operation analysis and therefore, this company ought to have been accepted as a comparable in the assessee's own case by the TRO / DRP. The case of the DR was that this company operated in various verticals as also conducted its business through various practice divisions such as Government and infrastructure practice, energy practice, banking and financial service, corporate advisor practice etc. The assessee however on the basis of documentary evidence which were placed on record submitted that the service provided by this company covered a wide spectrum of activities which were essentially advisory service. Hence, this company could be determined as a comparabale. The Tribunal considered these submissions and in view of the above, following the decisions of the co-ordinate bench in the case of AGM India Advisor Pvt. Ltd. (supra) and in the decision of Temasec Holdings Advisors India Pvt. Ltd. (supra) included this company as a comparable.

6.2 **IDC India Limited**

This company was rejected by the TPO / DRP as comparable. This company was engaged in the business and research and certificate globally, it was provider of market intelligence advisory services and events for information technology, telecom and consumer technology markets. The assessee submitted that, this company was engaged in research and survey functions which were functionally comparable to advisory support services rendered by the assessee. The assessee submitted that, in the assessee's own case for the assessment year 2009 – 2010, this company had been accepted as

a comparable by the TPO / DRP and therefore there was no reason to exclude the same in the related assessment year. The Tribunal after considering the materials available on record with reference to this company rejected the submission of the DR for exclusion, by referring to a similar submission made by the department in the case of Temasec Holdings Advisors India Pvt. Ltd. (supra) and relying upon the co-ordinate bench decision in the case of AGM India Advisors Pvt. Ltd. (supra) included this company as comparable.

6.3 **Informed Technologies Limited**

This company was rejected by the TPO / DRP as comparable. This company collected and analysed data on financial fundamentals, corporate governance, director / executive compensation and capital market and this was similar to work done by the assessee who was involved in data analysis of potential clients, analyzing market conditions, conducting research in various sectors, markets, companies etc. After perusal of the annual report of the company and relying on the decisions passed in the case of Temasek Holdings Advisors India Pvt. Ltd. (supra), the Tribunal held that since the TPO / DRP had accepted it as a comparable in the assessee's own case for assessment year 2009 – 2010, this company should not be excluded from the list of comparables.

6.4 **Kinetic Trust Limited**

This company was rejected by the TPO / DRP as comparable.

On the basis of annual report of this company, the fact of this company was accepted as a comparable to the asssessee by the TRO / DRP for the assessment year 2009 – 2010 was considered by the Tribunal. Referring to the decision of Temasek Holdings Advisors India Pvt. Ltd. (supra), as also the decision of the Tribunal, Delhi Bench, in Nortel Network India Pvt. Ltd. (supra) which was affirmed by the Delhi High Court in Nortel Network India Pvt. Ltd., ITA No.3043/2015, the issue of application of "Turnover filter" was analysed and the Tribunal concluded that if this company was functionally similar, only because of low turnover filter it could not be rejected. The Tribunal included this company as a comparable.

6.5 The Tribunal by the impugned order directed the AO / TPO to determine the arm's length price afresh in terms of the directions contained in the order.

7. We have perused and considered the draft assessment order dated 26th February 2014, the assessment order under Section 143 (3) of the Act dated 31st October 2014, DRP order under Section 144C(1) of the Act dated 07th October 2014, and the Tribunal's order dated 25th October 2016 with the assistance of Shri. Malhotra and Shri. Thakkar appearing on behalf of the respective parties.

8. At the outset, we would like to state that, the findings arrived at by the Tribunal are entirely one of facts and the revenue has failed to show as

to how the said findings are perverse in any manner whatsoever. Delhi High Court in Pr. CIT v. WSP Consultants India Pvt. Ltd. reported (2018) 253 Taxman 58/ (2017) 87 taxmann.com 266 (Delhi) observed thus :

> *"10. Any inclusion or exclusion of comparables per se cannot be treated as a question of law unless it is demonstrated to the Court that the Tribunal or any other lower authority took into account irrelevant consideration or excluded relevant factors in the ALP determination that impact significantly."*

Though the revenue says that the questions projected in paragraph Nos.6.1 to 6.12 are not just questions of law but substantial questions of law, the assessee disagrees with the same and submits that the Tribunal's order has been rendered on purely factual questions which are consistent with the materials placed on record and hence, in the submission of the assessee, the appeal deserves to be dismissed.

9. We would state that before the Tribunal one of the principal submissions was that in the assessee's own case similar questions had been dealt with for the previous assessment year in respect of the same comparable and therefore, heavy reliance was placed on the earlier order of the Tribunal in the assessee's own case for accepting the comparables (which were excluded in the present year).

10. At this stage, we would like to refer to the judgment passed by

the Karnataka High Court in I.T.A. No.536 of 2015 along with I.T.A. No.537 of 2015, in the case of Principal Commissioner of Income Tax v/s. M/s. Softbrands India Pvt. Ltd., delivered on 25th June 2018, which has been relied upon by the assessee. The special provisions relating to Avoidance of Tax in Chapter X of the Act comprising of Sections 92 to 94 - B with regard to assessment to be done for computation of income from international transactions on the principles of arm's length price and perspective of international trade and transactions are enumerated in paragraph Nos.3 to 6 therein which read thus :

> *"3. The Indian Income Tax Act, 1961 contains Special Provisions relating to Avoidance of Tax in Chapter X of the Act comprising of Sections 92 to 94-B with regard to assessment to be done for computation of income from international transactions on the principles of 'Arm's Length Price' (ALP) and the relevant Rules for computation of such income under the aforesaid provisions of Chapter X are enacted in the form of Rule 10-A to 10-E in the Income Tax Rules, 1962.*
>
> *Perspective of International Trade and Transactions:*
>
> *4. With the ever increasing international Trade and transactions, particularly, in the Software Industries and Bangalore, being the Silicon Valley of India where many big, small and medium size Software Industries have their Offices and Units in this Software Industry, and Bengaluru is a hub of this Service Industry and essentially the Indian Companies have business linkages with large Companies spread*

worldwide particularly in the Western Hemisphere of the Globe.

5. The implementation of the Tax laws in this field in a smooth, clear and quick manner is of utmost importance to build an image of an efficient Tax Administration both at Departmental level and in Judicial Courts so that the economic activity in such borderless trade thrives and enures to the benefit of the Indian economy at large and Software Industry in particular.

6. While the special provisions have been made for computation of 'Arm's Length Price' to arrive at a fair assessment of income taxable in the hands of the Indian Resident Companies and these special provisions also provide for an elaborate and in-depth analysis of huge data of the comparable cases of other similarly situated Companies to arrive at a fair 'Arm's Length Price' and for that, Special Cells and designated Authorities have been created under the Income Tax Act, 1961, but still retaining the normal provisions for assessments of appeals in the Indian Income Tax Act about the remedial Forums or the appeal mechanisms and the Income Tax Appellate Tribunal constituted under Section 253 of the Act continues to be the final fact finding body under the Act even with regard to the assessments of the international transactions under the Special Chapter X as aforesaid and the appeal to the Constitutional Courts as provided in Section 260-A to High Court and Section 261 to the Hon'ble Supreme Court are applicable to these special assessments under Chapter X as well."

11. Now we would like to refer to the findings, reasons, analysis and scrutiny under taken / given by the Tribunal in its order for excluding the comparables suggested by the TPO on the touchstone of comparability to match with the functions performed by the assessee.

11.1 Paragraph Nos. 4 and 5 of the Tribunal's order pertaining to exclusion of IDFC Investment Advisors Pvt. Ltd. reads thus :

> *"4. We have considered the submissions of the parties and perused the material available on record in the light of the decisions relied upon. On a perusal of the annual report of this company, it is very much clear that the company is engaged in providing PMS and such service is fee based. That apart, reference to the Profit & Loss account does indicate that the company, though, has earned revenue from different segments such as portfolio management fee, performance fee, advisory fee, etc., but the segmental details are not available Further, we have also noted from the annual report of the company that it has made investment and also incurred brokerage expenses. If we compare the assessee's activities with the comparable, it could be seen that the assessee is only providing advisory service to its A.E. which is non–binding in nature, therefore, is totally different from the functions performed by IDFC. Considering the aforesaid aspect, the Tribunal, Mumbai Bench, in Carlyle India Advisors Pvt. Ltd. (supra), has held that this company is not comparable to an investment advisor service provider. Same view has also been expressed by the Tribunal, Mumbai Bench, in AGM India Advisors Pvt. Ltd. v/s DCIT, ITA no.4757/Mum./2015, A.Y.*

2010–11, order dated 18th May 2016, and 7 FIL Capital Advisors India Pvt. Ltd. other decisions of the Tribunal, Mumbai Bench, relied upon by the learned Sr. Counsel. The Bench in the case of AGM Advisors India Pvt. Ltd. (supra), ultimately concluded as under:–

"7. We find that the assessee objected to the inclusion of ICRA–0 and IDFC on the ground that the TPO had applied no scientific method in arriving at the said two companies that the companies had been cherry – picked by the TPO and he had not furnished the process applied by which he had come to select the said two companies, that such an approach to select comparables was impressible in law and on that count alone the said two companies should be rejected, that the FIRST APPELLATE AUTHORITY had rejected ICRA–O as comparable on investment advisory servies rendered by the assessee and had stated assessee's knowledge process outsourcing division provided financial and analytical services and support of clients in the areas of Data Extraction, Aggregation, Electronic Conversion of Financial Statements, Validation and Analysis, Accounting and Finance, Research and Analytics, that the company was not engaged in investment advisory or consultancy services, that the A.O. was directed to exclude ICRA–O from the final set of comparable companies, that he had held that it was functionally not comparable to the assessee. Charging of fees by ICRA–O did not mean that it was a valid comparable to the assessee. As per the settled principles of TP for a company to be treated as a valid comparable the functions performed, assets employed and risks assumed have to be comparable and not nomenclatures in the annual accounts. We would like to refer

to Pg.507 of the PB in case of ICRA–O and it reads as under:– "ICRA Online Limited is a leading information services, outsourcing and technology solutions provider and caters for some of the biggest names in the financial services sector in (India) and abroad, which is a testimony to its product quality, commitment and credibility."

From the above description it is clear that ICRA–O operated in two strategic lines of business, i.e., knowledge process outsourcing and information services and technology solutions, with a list of reputed global and domestic clients. Note c (iii) on Pg.507 of the PB also proves that the activities performed by the company under the business line "Outsourced Services" were in the nature of "maintenance and management of data" and therefore cannot be compared with the assessee. As far as IDFC is concerned, we would like to mention that a portfolio manager is a body corporate who pursuant to a contract or arrangement with the client would advises or direct or undertake on behalf of the client–whether as a discretionary portfolio manager or otherwise. FAR analysis of a portfolio manager cannot be compared with an assessee engaged in the business of providing investment advisory services. The Tribunal has in the cases discussed at paragraph 6.d.a. held that IDFC was not a valid comparable. Considering the above discussion, we are of the option that the order of the FIRST APPELLATE AUTHORITY and exclude both the comparables does not suffer from any legal or factual infirmity. So, confirming his order, we decide the issue against the AO."

5. It is also relevant to observe, the Hon'ble Jurisdictional High Court in General Atlantic Pvt. Ltd. (supra), while approving the view expressed in Carlyle India Advisors Pvt. Ltd. (supra) has observed that where a company is remunerated on cost plus basis, it is risk insulated, therefore, on application of FAR, it cannot be compared with other companies if there is any difference. Therefore, respectfully following the decision of the co–ordinate bench of the Tribunal referred to above as well as the principle laid down by the Hon'ble Jurisdictional High Court, we reject this company as a comparable."

11.2 Paragraph No.8 of the Tribunal's order pertaining to exclusion of ICRA Online Limited reads thus :

"8. We have considered the submissions of the parties and perused the material available on record in the light of the decisions relied upon. On a perusal of the information submitted in the annual report of this company as well as its financials, we have noted that the functions undertaken by the company are totally different from the assessee. Therefore, the company fails in the FAR analysis itself. For this reason, in the cases relied upon by the learned Sr. Counsel, the Tribunal has held the aforesaid company not comparable to an investment advisory service provider. In this context, we refer to the observations of the Tribunal in AGM India Advisors Pvt. Ltd. (supra) reproduced in Para–4 herein above. Accordingly, we hold that this company is not comparable to the assessee."

11.3 Paragraph Nos.12 and 13 of the Tribunal's order pertaining to exclusion of Motilal Oswal Investment Advisors Pvt. Ltd. (MOIAPL) reads thus :

> *"12. We have considered the submissions of the parties and perused the material available on record in the light of the decisions relied upon. Having gone through the annual report of MOIAPL, we have noted that the company is engaged in a number of activities including investment banking activities. Thus, the company is functionally different from the assessee because of functions performed, assets employed and risk undertaken. Therefore, it fails in the FAR analysis itself. It is pertinent to observe, in case of Temasec Holding Advisors India Pvt. Ltd. (supra), Mumbai Bench of the Tribunal, after considering almost similar argument put forward by the parties excluded this company as a comparable to a non–binding investment advisory service provider holding as under :–*
>
> *"25. This comparable has been included by the TPO and while including the said comparable he has observed that its income is only from Advisory fees during the year and it is performing advisory services in that field of investment like assessee. Before us, Ld. CIT DR arguing for its inclusion submitted that, if the ICRA Management Services can be included for having revenue from advisory services then on same analogy this company should also be given the same treatment. From the perusal of the directors' report, it is seen that this company derives its business income from four different business verticals, i.e., equity capital markets, merger and acquisitions, profit equity syndications and*

structured debt. It also given advises on cross boarder acquisition. Its core competence is in the field of merchant banking. It also provides comprehensive investment banking solutions and transaction expertise covering private placement of equity, debt and convertible instruments in international and domestic capital markets, monitoring mergers and acquisitions and advising M&A as professional and restructuring advisory and implementations. It is also involved in various professional activities of the merchant banking. A merchant banker provides capital to companies in the form of share ownership instead of loans. It also provides advisory on corporate matters to the companies in which they invest. The focus is on negotiated private equity investment. The wide range of activities include portfolio management, credit syndication, counseling on M&A, etc. This whole range of functions and activities carried out by Motilal Oswal is definitely are far wider and much different from investment advisory services where core functions is to give advices for making the investments in diversified fields. A company which is engaged in merger and acquisitions, private equity syndication, loan/credit syndication and performing most of the function of a merchant banker, then the entire functions and transactions affects the generation of revenue and margins. Such functions are entirely different from investment advisory services. Mere classification of revenue as "advisory fees" will not put the company in a comparable basket sans functional similarity and transactional analysis. In case of Carlyle India Advisors Pvt. Ltd. (supra), it has been held that, the merchant banking functions are entirely different from investment advisory services and this decision of the Tribunal

has been upheld by the Hon'ble Jurisdictional High Court. Thus, in view of plethora of functional differences as discussed as above, we hold that Motilal Oswal cannot be put into the comparability list and is directed to be excluded."

13. Following the aforesaid decision, the Tribunal, Mumbai Bench, expressed similar view in case of AGM India Advisors Pv.t Ltd. (supra). In fact, in host of other decisions cited by the learned Sr. Counsel, the Tribunal has held MOIAPL not to be a comparable to a company involved in investment advisory service as it is an Investment Banker. The Hon'ble Jurisdictional High Court also in the decisions relied upon by the learned Sr. Counsel, held that a company engaged in investment banking activity cannot be compared to a company providing investment advisory services. Respectfully following the view taken by the Hon'ble Jurisdictional High Court as well as different Benches of the Tribunal, we exclude this company from the list of comparables."

11.4 Paragraph Nos.16 and 17 of the Tribunal's order pertaining to exclusion of Kshitij Investment Advisory Company Limited reads thus :

"16. We have considered the submissions of the parties and perused the material available on record in the light of the decisions relied upon. The fact that there is restructuring of the business of the comparable as a result of realignment with another company is evident from the annual report of the company. Considering the aforesaid aspect, the Tribunal, Mumbai Bench, in Carlyle India Advisors Pvt. Ltd. ITA no.1040/Mum./2015, order dated 18 th November 2015 (supra) for the very same assessment year held that this

company cannot be treated as a comparable on account of peculiar economic circumstances arising out of its realignment. Relevant observation of the Tribunal is extracted hereunder for the sake of convenience:–

"22. We have carefully considered the rival stands on the issue of exclusion of Kshitij Investment Advisory Co. Ltd. from the final set of comparables. The first and the foremost resistance articulated by the Revenue to oppose the exclusion of the said concern from the final set of comparables is the fact that such concern was included by the assessee itself as a comparable in its transfer pricing study. As per the Revenue, since the said concern has been adopted by the assessee as a comparable, it is impermissible for the assessee to raise a plea asking for its exclusion in the process of determination of average margins under the TNM method. In our considered opinion, the proposition being canvassed by the Revenue is not absolute, but it has to be considered in the facts and circumstances of each case. No doubt in a situation of the type before us, the burden lies on the assessee to justify exclusion of Kshitij Investment Advisory Co. Ltd., considering the fact that initially assessee had taken it as a good comparable. Our aforesaid approach is founded on a well accepted proposition that in the course of determination of correct tax liability, it is impermissible for the Revenue to take advantage of an ignorance or mistake of the assessee in offering certain amount as income, which is more than the legally due amount. Notably, there cannot be a estoppel against the statute and it is a trite law that no tax can be levied or collected from a subject except by an authority of

law. We may hasten to add here that we are not staying that on each and every aspect of the assessment declared in the return of income, an assessee is entitled to turn around and argue differently before the income tax authorities; rather, there has to be justifiable reasons shown by the assessee, duly supported by law or facts, whereby the change in stand is marited. In the present case, what the assessee is claiming is that there has been a restructuring / realingment of investment advisory business being carried out by Kshitij Investment Advisory Co. Ltd. which has impacted the financial results thereby rendering the said concern as an unfit comparable. The proposition being canvassed by the assessee is supported by the decision of Hyderabad Bench of the Tribunal in the case of Capital IQ Information System (India) Pv.t Ltd. (supra). In fact, it is quite well understood that in a year where realignment / restructuring of business takes place, such year is often a peculiar economic year in the history of a concern and in such a situation, it would be in the interest of justice and fair play that such a concern is not treated as a comparable. In fact, in principle, we do not find any disagreement on the part of the TPO also on this aspect. However, what the TPO has stated is that in the present case, the realignment / restructuring is in the same line of business and, therefore, such restructuring / realignment does not result in any change in the activity of business. Therefore, according to the Revenue, there would be no impact on the financial results so as to make it incomparable with the tested transactions. We have carefully considered the aforesaid plea set up by the Revenue and in this context, we may briefly refer to the "Business Review" outlined in the Directors Report of

the said concern, placed at page 536 of the paper book. It is stated therein that the investment advisory business has been realigned and all the employees have been transferred to Everstone Investment Advisors Pvt. Ltd. during the year under consideration to Everstone Investment Advisors Pvt. Ltd. during the year under consideration w.e.f. 1.1.2010. The note also suggests that the said concern did not enter into any non– compete agreement with Everstone Investment Advisors Pvt. Ltd. but was free to pursue any activity, including the activity in relation to investment advisory services. The aforesaid aspect has been highlighted by the Revenue to say that the said concern continues to be in the business of rendering investment advisory services and, therefore, the restructuring does not impact the comparability of the concern. In our considered opinion, the approach of the Revenue in this context is quite flawed. Firstly, it is not disputed that the activity of investment advisory services has been realighed which included the transfer of all employees to Everstone Investment Advisory Pvt. Ltd. The averments in the Director's Report suggest that post realignment, the concern is only evaluating its options to commence business operations either in some other line or in the similar line of investment advisory services. What we are trying to emphasize is that there is no averment in the Directors Report to suggest that the said concern has actually carried out any investment advisory services post–realignment w.e.f. 1.1.2010. In fact, in the course of hearing before us, the ld. Representative for the assessee pointed out that a perusal of the annual report for subsequent financial year of 2010–11 showed no such operations by the said concern. Therefore,

considering the aforesaid fact situation, the instant financial year of the said concern is containing peculiar economic circumstances and the same has to be taken into consideration while evaluating the rationale for its inclusion as a comparable. Before us, the Ld. Representative also pointed out that the said restructuring / realignment which has taken place w.e.f. 1.1.2010, did impact the financial results inasmuch as the income from operations of the said concern for the year under consideration reduced to Rs.17,23,10,815 from Rs.26,47,96,102 in the immediately preceding year. Considering the entire conspectus of facts and circumstances, in our view, the assessee company is justified in asserting that Kshitij Investment Advisory Co. Ltd. deserves to be excluded from the final set of comparables on account peculiar economic circumstances during the year under consideration. Thus, on this aspect also, assessee succeeds."

17. Following the aforesaid decision, the Tribunal again in case of AGM India Advisors Pvt. Ltd. (supra) held that this company cannot be treated. As a comparable as these decisions pertain to the very same assessment year and the facts on the basis of which the decisions were rendered by the Tribunal remains same in the case of the present assessee further, as no contrary decision was brought to our notice by the learned Departmental Representative, respectfully following the aforesaid decisions of the co–ordinate bench, we exclude this company from the list of comparables."

11.5 Paragraph Nos. 24 and 25 of the Tribunal's order pertaining to exclusion of ICRA Management Consulting Service Pvt. Limited reads thus :

"24. We have considered the submissions of the parties and perused the material available on record in the light of the decisions relied upon. From the documentary evidences brought on record by the assessee, we have observed that the assessee is also providing non binding investment advisory service in various sectors such as infrastructure, retail, telecommunication and networking equipment, health care, financial intermediaries, design and engineering related to infrastructure, media and communication. Thus, as could be seen, though, the service provided by the assessee covers the wide spectrum of activities, however, the nature of service is virtually one viz. advisory services. The same is the case with the comparable. Though, it is alleged by the learned Departmental Representative, the comparable is providing service through various sectors, however, the nature of service is advisory. We have also noted that absolutely similar argument was advanced by the learned Departmental Representative in relation to this comparable in case of Temasec Holdings Advisors India Pvt. Ltd. (supra) in A.Y. 2010–11. The Tribunal, after considering the submissions of the learned Departmental Representative and also the proposition advanced by him in relation to the principles of res judicata and the decision of Kalpetta Estates Ltd. (supra) relied upon by him in this regard, ultimately treated this company as a good comparable observing as under:–

"20. At the outset, this comparable was subject matter of consideration before the Tribunal in AY 2008-09 & 2009-10, wherein this company was held to be good comparable both on the ground of functional similarity and in view of

principles of consistency as it was held to be a good comparable by the TPO in the earlier years. From the perusal of the annual report, which is appearing from pages 156 to 187 of the paper book, we find that it is essentially providing consultancy services in diversified areas, like in government sectors, infrastructure, energy, corporate advisory, banking and financial services, etc. It focuses on consultancy and advisory which is its core area and competency. The revenue generation is purely from consultancy fees which is evident from profit and loss account as on 31st March 2010 (appearing at page 176 of the paper book). The TPO in his order has noted that its consultation or advisory operations ranges in various fields which have been tabulated by him at pages 9 to 11 of the order, which according to him assessee is not performing. On the perusal of the directors' report and also the remarks of the TPO, we find that the ICRA Management is providing consultancy services in a myriad areas ranging from development, transportation, urban infrastructure, energy sector, banking and financial services and advising cross border M&A transaction etc. Some other observation made by the TPO is that ICRA has participated in various international forums, partnered with foreign company in multiple projects and has a very big client base unlike assessee. However all these facts do not affect the core competency and functions of the said company, which is advisory, because in all the fields it is rendering only advisory and consultancy services. The whole revenue is again from consultancy/advisory fees. In the instant case also, the assessee is providing Investment Advisory Services to its AE in diverse industries like, infrastructure, telecom, media,

banking etc. to enable the AE to take decision for making investments. The functions of consultancy/advisory have to be seen as its core competence area and not in the field in which such consultancy is given. Under the TNMM, one has to see the transaction undertaken are comparable or not and whether any adjustment is required to obtain a reliable result, because under TNMM the net margin are less affected by transactional differences and is more tolerant to some minor functional differences between controlled and uncontrolled transactions. However, if any unique function or property significantly affects the operating costs or net margin or has a bearing in the generation of revenue itself, then it cannot be considered to be a fit comparable for benchmarking the net margins. Here it is not the case where there is any unique functions materially affecting the revenue or net margins vis-à-vis the functions performed by ICRA. Hence on functional level it is a good comparable. As stated earlier, in the earlier years, the Transfer Pricing Officer has accepted ICRA to be a comparable and in later years the Tribunal in AY 2008-09 & 2009-10 has held ICRA Management to be good comparable qua the functions of the assessee and there being no material change on facts, functional profile or any other factor in this year, then as matter of consistency, we do not want do deviate from our findings given in the earlier years. There cannot be a pick and choose of comparables every year unless there are some material difference in facts and circumstances compelling to take a different conclusion. Thus, we hold that ICRA Management is a good comparable and should be included in the list of final comparables."

25. Again, in the case AGM India Advisor Pvt. Ltd. (supra), the Tribunal, after considering almost similar argument of the learned Departmental Representative, followed the decision in Temasec Holdings Advisors India Pvt. Ltd. (supra) upholding the company as a comparable. While doing so, the bench also took note of the decision relied upon by the learned Departmental Representative which were also cited before us. Undisputedly, the aforesaid decisions of the co–ordinate bench assessment year are for the very same assessment 2010–11. Therefore, respectfully year i.e., following the aforesaid decisions of the co–ordinate bench, we include this company as a comparable."

11.6 Paragraph Nos.30 and 31 of the Tribunal's order pertaining to exclusion of IDC India Limited reads thus :

"30. We have considered the submissions of the parties and perused the material available on record in the light of the decisions relied upon. On a perusal of the information available in the website and annual report of the company, we have noted that it is primarily engaged in the business of market research and management consultancy. Therefore, the contention of the learned Departmental Representative that it is a product company may not be correct. Further, we have noted that in case of Temasec Holdings Advisors India Pvt. Ltd. (supra), the very same argument of IDC India Ltd. being a product company and provides go to market service was advanced by the learned Departmental Representative. However, rejecting such contentions of the learned Departmental Representative, Tribunal included this company

as a comparable holding as under:–

"22. This comparable though accepted by the TPO as a good comparable, however, the DRP has additionally rejected this comparable. In assessment year 2008-09, the Tribunal has held to be a good comparable, firstly, on the ground that this company is also engaged in the advisory and consultancy services for the purpose of investment made in various sectors and secondly, it has been found to be good comparable by the TPO in the assessment year 2007-08 and 2009-10. Once company has been held to be good comparable consistently for three years then without any change in the material facts, it cannot be held that this comparable could be rejected in this year. Moreover, in the case of Carlyle Advisory India Ltd., ITAT Mumbai Bench, reported in 43 taxman.com 184, the Tribunal held that this company is a good comparable with the companies rendering investment advisory services. This decision of the Carlyle Advisors have also upheld by the Hon'ble Bombay High Court. Moreover, we have already discussed the functions performed by the IDC India Ltd while dealing with Ld. Counsel's argument that functions of advisory services are quite similar to the functions of the assessee and, therefore, we accept the assessee's contention that this comparable cannot be rejected. Accordingly, same is directed to be included in the comparability list."

31. In case of AGM India Advisors Pvt. Ltd. (supra), the co–ordinate bench after considering the very same argument advanced by the learned Departmental Representative and following the decision rendered in Temasec Holdings Advisors

India Pvt. Ltd. (supra), held that the company is a good comparable. While doing so, the Tribunal had given a categorical finding that IDC India Ltd. is not a product company. Since the aforesaid decisions of the Tribunal are for the very same assessment year, they will squarely apply to the facts of the present case. Moreover, we have noted the fact that in assessee's own case for the assessment year 2009–10, this company has been accepted as a comparable by the Transfer Pricing Officer / DRP. That being the case, we do not see any justifiable reason for excluding this company. As far as the decision rendered in case of Tevapharm Pvt. Ltd. (supra), after carefully reading the said order, we have noted that nowhere the Tribunal has held that IDC India Ltd. is a product company. On the contrary, it was excluded since the Tribunal found it functionally dissimilar to that assessee. The decision of Actis Advisors Pvt. Ltd. (supra) is also factually distinguishable, hence, would not be apply. Therefore, respectfully following the decisions of the Co–ordinate Bench of the Tribunal referred to above, we hold that IDC India Ltd. is a comparable to the assessee."

11.7 Paragraph Nos.35 and 36 of the Tribunal's order pertaining to exclusion of Informed Technologies Limited reads thus :

"35. We have considered the submissions of the parties and perused the material available on record in the light of the decisions relied upon. On a perusal of the material on record, we have noted that this company is basically engaged in providing data management service to the financial sector. Considering the aforesaid fact, the Tribunal in Temasek

Holdings Advisors (I) Pvt. Ltd. (supra), while including the company as a comparable has observed as under:–

"(v) Informed Technologies Ltd. This company mostly offers range of data management services to the financial sector in USA. It collects and analyses data of financial fundamentals, corporate governance and capital market. It outsource services i.e., BPO services consisting of financial data base and back office activities for research and advisory reports. Thus, the data outsourcing charges are mostly related to analysing of data based on which advise is given for the investment purpose in India. Moreover, this company has been accepted by the TPO in the year 2009–10. Thus, it is a good comparable."

36. We do not find any material difference between the facts in assessee's case and in case of Temasek Holdings Advisors (I) Pvt. Ltd. (supra) on the basis of which the Tribunal included it as a comparable. Moreover, there is no dispute that the Transfer Pricing Officer has accepted this company as a comparable in assessee's own case for assessment year 2009–10. That being the case, in our considered opinion, the company should be treated as comparable to the assessee."

11.8 Paragraph Nos.41 and 42 of the Tribunal's order pertaining to exclusion of Kinetic Trust Limited reads thus :

"41. We have considered the submissions of the parties and perused the material available on record in the light of the decisions relied upon. The major thrust of argument of the

learned Departmental Representative for excluding this company is on account of its low turnover. However, as it appears from the material on record, though, in the show cause notice the Transfer Pricing Officer proposed to apply a low turnover filter of less than Rs. 1 crore, following the same logic, he should have applied a high turnover filter. Further, in the order passed under section 92CA(3), the Transfer Pricing Officer has not emphasized the filter finally applied by him and the selection process undertaken, therefore, it cannot be said with any degree of certainty that he applied low turnover filter. Even, assuming that such filter was applied, following the same logic, he should have applied high turnover filter to exclude companies. We have further noted that the Tribunal, Delhi Bench, in Mckinsey Knowledge Centre India Pvt. Ltd. (supra) has held that if a company is functionally similar, only because of its low turnover, it cannot be rejected if such turnover filter was not applied either by the assessee or by the Transfer Pricing Officer. The aforesaid observations of the Tribunal, Delhi Bench, was affirmed by the Hon'ble Delhi High Court in its judgment referred to above. It is also noteworthy that in the case of Temasek Holdings Advisors India Pvt. Ltd. v/s DCIT, ITA no.776/Mum./2015, A.Y. 2010–11, order dated 25 th February 2016, the co–ordinate bench after considering virtually identical argument advanced by the Department accepted this company as comparable. The relevant observations of the Bench is reproduced hereunder for the sake of convenience:–

"(ii) Kinetic Trust Ltd. (Rejected by the TPO):-Mr. Porus Kaka, submitted that the TPO has observed that in the annual

report of the Kinetic Trust, does not specify that the said company is engaged in the investment advisory; further the said company is NBFC registered with RBI; and lastly, its turnover is only Rs. 20 lakhs. To counter this TPO's observation, Mr. Kaka pointed out that firstly, Directors' report for financial year 2009-10 specifically mentions that the company has concentrated on its main activity of a corporate consultancy services and financial services. This is evident from Directors' report given at page 193 of the paper book. Merely because the said company is NBFC, the same does not change the nature of activities undertaken by the company i.e., Consultancy Services. Secondly, while selecting the list of comparables in search criteria, the assessee has not considered the turnover criteria as one of the factor in determining or streamlining the selection of the companies. It has not cherry picked the comparables by inserting any kind of lower or higher turnover filter. The reliance placed by the TPO on the decision of Tribunal in the case of Trilogy E Business Software P Ltd vs DCIT (ITA No.1054/Bang/2011) is not correct as the Tribunal's decision was based on the facts and in that context it has highlighted the importance to apply the turnover over filter ranging between Rs.1 crore to Rs.200 crores. The said decision does not implicate that the range of Rs.1 crore to Rs.200 crores is to be applied essentially in all the cases. Thus, the decision of the said Tribunal cannot be applied to the facts of the present case. On the contrary in the case of Nortel Networks India P Ltd, reported in [2014] 44 taxman.com 46 the Delhi Tribunal has held that, if the functional profile of the comparable is the same with that of the assessee then, it cannot be excluded from the list of the

comparables merely for the reason of low turnover. He submitted that the said decision of the Tribunal has been now been upheld by the Hon'ble High Court vide order dated 24.02.2015 in ITA No. 3043/2015, wherein, the Hon'ble High Court observed that, whether the turnover filter is appropriate one and applicable, cannot be answered in the abstract and is entirely fact dependent. Lastly, the Tribunal in assessee's own case for the assessment year 2008-09 & 2009-10 has accepted the Kinetic Trust Ltd as a comparable company so far as the functions performed by the assessee. The Ld. TPO in utter disregard to the Tribunal's order has stated that the said decision of the ITAT cannot be accepted, because the finding was given on the ground that the TPO has accepted this comparable in the earlier years. This cannot be the ground for rejection, rather the Kinetic Trust Ltd is to be included as the comparable company following judicial precedence and consistency in view of the Tribunal orders for two consecutive earlier years."

42. Facts on the basis of which the co–ordinate bench in Temasek Holdings Advisors India Pvt. Ltd. (supra) accepted this company as comparable are more or less similar to the facts involved in the case of present assessee as undisputedly in assessment year 2009–10, the Transfer Pricing Officer / DRP have accepted this company as a comparable. Thus, applying the rule of consistency as well as following the decisions referred to above, we direct the Assessing Officer / Transfer Pricing Officer to include this company as a comparable. In view of the aforesaid, we direct the Assessing Officer / Transfer Pricing Officer to determine the arm's

length price afresh in terms of observations made by us herein above."

12. In view of the above detailed reproduction of the reasonings given by the Tribunal we find that, while undertaking the exercise to arrive at the arm's length price which is essentially a matter of estimate of the fair value which the Indian Company had paid or had received from its Associate Enterprise (A.E.), such exercise is required to be undertaken by the TPO on the basis of the facts and figures relating to comparable cases of other similarly placed entities, whose relevant data is available in the public domain. As per the provisions of the Act and the Rules, the assessee company is required to furnish its own Transfer Pricing Analysis and the list of chosen comparables which may or may not be agreed to by the Revenue Authorities and they would introduce some more comparables rejecting the comparables given by the assessee company by applying certain filters like Related Party Transactions (RPT) filter, turnover filter, export earnings filter, employee cost filter, etc to bring them within the comparable range of the cases of such comparables and generally there would be a tug of war between the assessee and the revenue in such a situation. We would state that the assessee company would normally choose comparables, whose operating profit margins are less or only little more than the assessee, but the revenue would bring in comparables with higher profit margins. The TPO, may in the case of an assessee introduce and suggest comparables whose operating margins

are higher than the assessee company so as to make transfer pricing adjustments in the declared income of the assessee, resulting in fetching of more revenue. From the aforesaid quoted paragraphs from the Tribunal's order, it is evident that, individual cases of such comparables have been juxtaposed with the functionality of the assessee considered, analyzed and discussed by the Tribunal in respect of comparables which were excluded by the TPO as also in the case of those comparables which were included by the TPO. It is quite common to note that, while some comparables are found to be appropriate and really comparable to the facts of the assessee company, some are not and it would ultimately result in whether the correct filters have been properly applied or not or whether the most appropriate method of determination of arm's length price has been adopted or not to make fair and reasonable transfer pricing adjustments in the hands of the assessee. However, the entire exercise of making transfer pricing adjustments on the basis of comparables is nothing but a matter of estimate of a broad and fair guess-work of the authorities based on factual relevant materials brought before the authorities i.e. the TPO, the DRP and the Tribunal, which are the fact finding authorities.

13. We would also like to quote paragraph Nos.16 to 22 from the judgment in the case of Principal Commissioner of Income Tax and another Vs. M/s. Softbrands India Pvt. Ltd. (supra), which refers to comparative analyses of Section 260A of the said Act and Sections 100 and 103 of the

Code of Civil Procedure in order to justify what would be a substantial question of law in such a case :

> *"16. We would analyze the provisions of Section 260-A of the Act in a little more detail but we are of the firm opinion that the entry into the High Court under Section 260-A of the Act is locked with the words "Substantial questions of law" and the key to open that lock to maintain such appeal can only be the perversity of the findings of the Tribunal in these type of cases and the perversity in the findings not only averred by the appellant before this Court but, established on the basis of cogent material which was available before the Authorities below including the Tribunal and the findings arrived at by the Tribunal can be so held to be perverse within the well settled parameters for determining the same as perverse. It is not allowed to either of the parties, i.e. the Assessee or the Revenue to invoke the jurisdiction of this Court under Section 260-A of the Act merely because the Tribunal comes to reverse or modify the findings given by the lower Authority, viz. Transfer Pricing Officer (TPO) or Dispute Resolution Panel (DRP) which comprises of three Commissioners and the Revenue or the assessee may feel dissatisfied, because of the reversal or modification of such findings by the Tribunal resulting in leaving out of certain comparables or adding on of certain comparables for determining the 'Arm's Length Price' in the hands of the Assessee Company.*
>
> *17. Unless such perversity in the findings of the Tribunal is established we are of the opinion that the appeals under Section 260-A of the Act cannot and should not be entertained*

at the instance of either of the parties and the present cases before us, we find that the Tribunal has given cogent reasons and detailed findings upon discussing each case of comparable corporate properly and therefore, we find ourselves unable to call such findings of the Tribunal perverse in any manner so as to require our interference under Section 260-A of the Act.

18. We now take up the analysis of Section 260- A of the Act which we have already said is in pari materia with Sections 100 and 103 of the Civil Procedure Code.

19. The said provisions are quoted below for ready reference and comparison.

Section 260-A of the Income Tax Act, 1961 reads as under:

"260A - Appeal to High Court:

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal [before the date of establishment of the National Tax Tribunal], if the High Court is satisfied that the case involves a substantial question of law.

(2) [The [Principal Chief Commissioner or] Chief Commissioner or the [Principal Commissioner or] Commissioner or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be-]

(a) filed within one hundred and twenty days from the date

on which the order appealed against is [received by the assessee or the [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner];

(b) [*******]

(c) in the form of a memorandum or appeal precisely stating therein the substantial question of law involved.

[(2A) The High Court may admit an appeal after the expiry of the period of one hundred and twenty days referred to in Clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.]

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub- section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which -

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

[(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this Section.]

Sections 100 and 103 of the Code of Civil Procedure, 1908 read thus:

"Section 100 - Second Appeal.

(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex- parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate the question.

(5) The appeal shall be heard on the question so formulated

and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub- section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

Section 103 - Power of High Court to determine issues of fact -

In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal, -
(a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or
(b) which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred to in section 100."

What is a Substantial Question of Law?

20. From a bare comparison of the provisions quoted above and as discussed in various judgments of the Constitutional Courts, which we will refer in brief herein below, it is clear that the Scheme of both Section 260-A in Income Tax Act, 1961 and Section 100 r/w. Section 103 of the Code of Civil Procedure are in pari materia and in same terms.

21. The existence of a substantial question of law is sine qua non for maintaining an appeal before the High Court. While the appeal to High Court under Section 260-A of the Act may be a First appeal in the sense from the order of final fact finding by the Tribunal under the Income Tax Act, whereas the Second Appeal on substantial question of law before High Court under Section 100 would lie against the Judgment and Decree of the first Appellate Court disposing of an appeal against the Judgment and Decree of a Trial Court, but nonetheless it is the third round of consideration at the level of the High Court, where the facts and law both have been screened, discussed and analyzed by the Authorities or the Courts below and therefore the tenor and color of the words "substantial question of law" in both these enactments remains the same.

22. The High Court has power to not only formulate the substantial questions of law and rather it has the duty to do so and can also frame additional substantial questions of law at a later stage, if such a substantial question of law is involved in the appeal before it under these provisions and the appeal should be heard and decided only on such substantial questions of law after allowing the parties to address their arguments on the same. The extended power given to the High Courts to decide even an issue under Sub- section (6) of Section 260-A of the Income Tax Act, which is in pari materia with Section 103 of the Civil Procedure Code and which says that the High Courts may determine any issue which (a)has not been determined by the Tribunal or (b) has been wrongly determined by the Tribunal, can be so determined by the High Court, only if the High Court comes to the conclusion that 'by

reason of the decision on substantial question of law rendered by it', such a determination of issue of fact also would be necessary and incidental to the answer given by it to the substantial question of law arising and formulated by it."

14. Section 92-A defines an Associated Enterprise (A.E.) in relation to another enterprise to mean an enterprise which participates directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise by holding not less than 26% of the voting power in the other enterprise and satisfies the other criteria as stated in Section 92-A of the Act.

14.1. Relevant portion of Section 92-B of the Act reads thus :

""international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises."

14.2. Section 92-C (1) of the Act reads thus :

> *"(1) The arm's length price in relation to an international transaction (or specified domestic transaction) shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe, namely :—*
>
> *(a) comparable uncontrolled price method;*
> *(b) resale price method;*
> *(c) cost plus method;*
> *(d) profit split method;*
> *(e) transnational net margin method;*
> *(f) such other method as may be prescribed by the Board."*

14.3. Section 92-CA deals with reference to Transfer Pricing Officer where an assessee has entered into an international transaction a specified domestic transaction and the Assessing Officer considers it necessary or expedient, he may with the previous approval of the Principal Commissioner or Commissioner refer the computation of the arm's length price in relation to the said international transaction or specified domestic transaction to the Transfer Pricing Officer.

14.4. Section 92-F (ii) of the Act defines "arm's length price" and reads thus :-

> *"(ii) "arm's length price" means a price which is applied or proposed to be applied in a transaction between persons other*

than associated enterprises, in uncontrolled conditions;"

15. In the case before us the TNMM method appears to have been the most popular and widely adopted method for determining the Arm's Length Price in which the operating profit margin of comparable companies are considered by the authorities and applied to the case of the assessee to determine the Arm's Length Price to make transfer pricing adjustments. Rules 10-A, 10-AB, 10-B, 10-C and 10-CA of the Income Tax Rules, 1962 prescribe the manner for working out Arm's Length Price under the prescribed methods. From the aforesaid scheme of assessment, it is clear that the process of determination of Arm's Length Price has to be undertaken by the Expert Wing of the Income Tax Department which is manned by TPO and at the higher level by a collegium of three Commissioners in the form of DRP whose orders are appealable before the Appellate Tribunal. In the above backdrop, in so far as the present case is concerned the TPO had rejected six comparable companies chosen by the assessee for bench marking namely i) Access India Advisors Limited; ii) ICRA Management Consulting Services Limited; iii) IDC (India) Limited; iv) Informed Technologies Limited; v) Integrated Capital Services Limited and vi) Kinetic Trust Limited. The Transfer Pricing Officer (TPO) only accepted one company as a comparable company being Future Capital Investment Advisors Limited but undertook a further detailed analyses and proposed to include the following five more companies as comparables namely i) Future Capital Holdings Limited

(Segmental); ii) ICRA Online Limited (Segmental); iii) IDFC Investment Advisors Private Limited; iv) Kshitij Investment Advisors Limited and v) Motilal Oswal Investment Advisors Private Limited.

16. The submissions advanced on behalf of the respective parties are mostly based upon the filters which have been applied which are essentially related to turnover filter, the comparable entities being functional entities, higher transfer pricing adjustments, transfer pricing analyses and profits declared by the companies. We have quoted the specific findings given by the Tribunal and would therefore, not like to dwelve deeper or reiterate the same. We would however like to say that the Tribunal has considered the case of each comparable company and discussed the parameters of comparables for the purposes of including the same as a comparable and / or excluding the same as comparable on the basis of the functionality of the said companies in the public domain. We find that such a detailed exercise having been undertaken by the Tribunal qua each and every comparable company, the reasons given by the Tribunal cannot be faulted with in respect of the comparable companies. The Tribunal has referred to and relied upon the order passed by this Court in the case of Principal Commissioner of Income Tax - 14 Vs. Temasek Holdings Advisors India Pvt. Ltd. in Income Tax Appeal No.304 of 2017 delivered on 16th April 2019, wherein the following substantial questions of law were framed.

"(a) Whether on the facts and in the circumstances of the case,

the Tribunal is correct in law in directing the Assessing Officer to include ICRA Management Consultancy Services Ltd., Kinetic Trust Limited in the set of comparable companies while determining the TP adjustment of international transaction ?

(b) Whether on the facts and in the circumstances of the case, the Tribunal is correct in law in striking down the additional markup margin of 3% to the average PLI of the comparable companies selected by the TPO ?"

17. In the said order, this Court after referring to another order dated 17th November 2016 passed in Income Tax Appeal No.1051 of 2014 dismissed the revenue's appeal raising objection to the Tribunal's decision to include ICRA Management Consultancy Services Ltd. and Kinetic Trust Limited which were both rejected by the TPO. So also in the present case, the comparables suggested by the assessee which were excluded by the TPO / DRP were in fact adopted as comparables by the TPO for the financial year 2009 - 2010 in the case of the assessee itself. This aspect was also considered in the aforesaid order.

18. The assessee has placed before us a copy of the judgment delivered by this Court in the case of Principal Commissioner of Income Tax - 3 V/s. M/s. Bain Capital and Advisors (I) P. Ltd. in Income Tax Appeal No.541 of 2016, dated 24th November 2018, wherein the revenue had urged the following question for consideration.

"Whether on the facts and in the circumstances of the case

and in law, the Tribunal was justified in holding that Motilal Oswal Investment Advisors Pvt. Ltd. and M/s. IDFC Ltd. were not comparables for the purpose of Rule 10B of the Income Tax Rules ?"

19. This Court after due consideration dismissed the appeal of the revenue holding that no substantial question of law arose from the order of the Tribunal.

20. On a thorough consideration we find that the rational for inclusion of the six comparables excluded by the TPO have been dealt with in extensive detail by the Tribunal and we are in agreement with the reasons recorded by the Tribunal. Further the reasons given for inclusion of the five new comparables by the TPO have been decidedly set aside by the Tribunal on the basis of decisions rendered by this Court either in the case of the assessee itself and / or in other cases after proper consideration.

21. At this stage we would like to refer to paragraph No.54 in the judgment of Principal Commissioner of Income Tax Vs. M/s. Softbrands India Pvt. Ltd. (supra), which reads thus :

"54. The procedure of assessment under Chapter X relating to international transactions as indicated above is already a lengthy one and involves multiple Authorities of the Department. A huge, cumbersome and tenacious exercise of Transfer Pricing Analysis has to be undertaken by the

Corporate Entities who have to comply with the various provisions of the Act and Rules with a huge Data Bank and in the first instance they have to satisfy that the profits or the income from transactions declared by them is at 'Arm's length' which analysis is invariably put to test and inquiry by the Authorities of the Department and through the process of Transfer Pricing Officer (TPO) and Dispute Resolution Panel (DRP) and the Tribunal at various stages, the assessee has a cumbersome task of compliance and it has to satisfy the Authorities that what has been declared by them is true and fair disclosure and much of the Transfer Pricing Adjustments is not required but the Tax Authorities have their own view on the other side and the effort on the part of the Tax Revenue Authorities is always to extract more and more revenue. This process of making huge Transfer Pricing Adjustments results in multi- layer litigation at multiple Fora. After the lengthy process of the same, the matter reaches the Tribunal which also takes its own time to decide such appeals. In the course of this dispute resolution, much has already been lost in the form of time, man-hours and money, besides giving an adverse picture of the sluggish Dispute Resolution process through these channels. If appeals under Section 260-A of the Act were to be lightly entertained by High Court against the findings of the Tribunal, without putting it to a strict scrutiny of the existence of the substantial questions of law, it is likely to open the flood-gates for this litigation to spill over on the dockets of the High Courts and up to the Supreme Court, where such further delay may further cause serious damage to the demand of expeditious judicial dispensation in such cases."

22. From the above, it is clear that the appeal filed under Section 260A of said Act is required to be entertained only on "substantial question of law" arising out of the order of the Tribunal, keeping in mind that we can not disturb findings of fact under Section 260A of the said Act unless such findings are shown to be ex-facie perverse and unsustainable and exhibit a total non-application of mind. We are therefore of considered opinion that the present appeal filed by the Revenue does not give rise to any substantial question of law. The appeal filed by the Revenue is found to be devoid of merit and the same is liable to be dismissed.

23. In view of the above findings, the appeal filed by the Revenue is therefore dismissed with no order as to costs.

(MILIND N. JADHAV, J.) **(UJJAL BHUYAN,J.)**