Sbw

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**INCOME TAX APPEAL NO.1993 OF 2013**
**IN**
**ITA NO.8914/MUM/2010**

The Commissioner of Income Tax-3,
Mumbai ..Appellant
*Versus*
General Atlantic Private Ltd. ..Respondent

...........

Mr. Ashok Kotangale a/w Arun Nagarjun & Sunil Sonawane i/b. Padma Diwakar for the Appellant.
Mr. Porus Kaka, Senior Counsel, a/w Mr. Atul Jasani for the Respondent.

...........

**CORAM: M. S. SANKLECHA &**
**A. K. MENON, JJ.**

**DATE : 8TH MARCH, 2016**

P.C.:

1. This Appeal filed by the Revenue under Section 260A of the Income Tax Act, 1961 ( the "Act") takes exception to the order dated 31st January, 2013 passed by the Income Tax Appellate Tribunal ("Tribunal"). The impugned order dated 31st January, 2013 relates to Assessment Year 2006-07.

2. The Appellant-Revenue has re-framed the following question of law for our consideration:-

*"Whether on the facts and in the circumstance of the case and in law the Tribunal was justified in law holding that the assessee's activity of providing services is similar to the nature of services and activity of Carlyle India Advisors Pvt. Ltd. ignoring the fact that activities of the assessee's are comparable to merchant banking/investment banking activities?"*

3. The respondent-assessee is a company registered in India and is a part of the General Atlantic Group (GA). The respondent-assessee provides private Equity Investment Advisory Services to its Associated Enterprise(AE) i.e. to General Atlantic Service Corporation LLC(GASC LLC). The respondent-assessee provides information/assistance to its AE by identifying companies in India in which investment can be made by its AE i.e. GASC LLC. The consideration received by the respondent-assessee for rendering the advisory services to its AE i.e. GASC LLC is cost plus 12.5%. In view of international transaction being involved in rendering services, the Assessing Officer in exercise of his powers under Section 92CA(1) of the Act referred the above transactions to the Transfer Pricing Officer (TPO) for determination of the Arms Length Price (ALP) of the services rendered by the respondent-assessee to its AE. The TPO selected comparables on the basis of search with the key words "mercantile banking/corresponding banking and investment advisory services". The

TPO selected 8 comparables and on application of Transactional Net Margin Method (TNMM) arrived at an arithmetic mean of 39.85% as against operating profit of 13.12% of the respondent-assessee. This resulted in transfer pricing adjustment of Rs.3.48 crores.

4. As a consequence of the order of the TPO, the Assessing Officer passed a draft Assessment Order adding Rs.3.48 crores as income in view of the ALP in respect of services rendered. The respondent-assessee raised an objection before the Dispute Resolution Panel(DRP). However, the DRP rejected the respondent-assessee's objections and confirmed the transfer pricing adjustment in the draft Assessment Order passed by the Assessing Officer. This led to the Assessing Officer passing an Assessment Order dated 30th October, 2010 in line with the draft Assessment Order.

5. The respondent-assessee challenged the Assessment Order dated 30th October, 2010 of the Assessing Officer before the Tribunal. By the impugned order the Tribunal on examination of the activities held that the respondent-assessee is not a merchant/investment banker but is an investment advisor. On facts it found that the respondent-assessee rendered advice to its AE i.e. M/s. GASC LLC of the possible companies in which it could invest in and received its consideration for rendering the advice. The AE i.e. M/s. GASC LLC took a final call on which companies

to invest, if at all. In fact the Tribunal placed reliance upon its decision in M/s. Carlyle India Advisors (P.)Ltd. being ITA No.7901/Mum/2011 which was decided by it on 4th April, 2012 where it had dealt with an identical/similar nature of services as was being provided by the Assessee and had negatived seven of the Revenue's comparables of Merchant Bankers only to use one comparable in respect of an Investment Advisory viz. IDC Ltd. The Tribunal found that the eight comparables selected by the Revenue in case of M/s. Carlyle India (supra) were identical to that selected in case of the respondent-assessee and only one out of those eight i.e. IDC Ltd. was found comparable in M/s. Carlyle India (supra) and the same was applied as comparable in case of the respondent-assessee for the Assessment Year 2006-07. In fact the Tribunal in the impugned order compared the nature of services rendered by M/s. Carlyle India (supra) to its AE and the services rendered by respondent-assessee to its AE on the basis of the agreements with its respective AEs and found the same to be identical. On the aforesaid findings, the Tribunal by the impugned order determined the ALP on application of one comparable i.e. M/s. IDC India Ltd. at 14.58%.

6. Being aggrieved, the Revenue is in appeal before us. Mr. Kotangale, learned counsel for the revenue places reliance upon the order dated 30th October, 2010 of Assessing Officer. Mr. Kotangale contends that

the activity of M/s. Carlyle India (supra) is not comparable to the activity of the respondent-assessee. According to him the activities of respondent-assessee are comparable to the activities of Merchant/ Investment Banker. Thus Mr. Kotangale prays that the appeal be entertained.

7. We find that the Tribunal has on application of Function, Assets and Risk (FAR) analysis found that the functions of the respondent-assessee are similar to that of M/s. Carlyle India viz. advising its AE on the possible companies it could invest in but the final decision whether to accept the advise of the respondent-assessee or not is taken by the AE. Similarly, so far as assets are concerned, the impugned order finds that the expertise available with M/s. Carlyle India is similar to the expertise available with the respondent-assesee for the purpose of rendering advise to its AE and so far as the Risk is concerned, it is found that the consideration is received by it is on cost plus basis similar to M/s. Carlyle India Ltd. i.e. both are risk insulated.

8. On the aforesaid analysis, the Tribunal found that it had in the case of M/s. Carlyle India (supra) on detailed examination found only one of the eight comparables selected by the Revenue i.e. IDC (India) Ltd. applicable to arrive at the ALP of its services. The Revenue in the case of the respondent-assessee had selected the same eight comparables as selected in the case of M/s. Carlyle India (supra). However the Tribunal

had in this case also adopted only IDC (India) Ltd. as comparable as in its decision in Carlyle India (supra). It must be noted that the figures of IDC (India) Ltd. to arrive at the ALP were of the subject Assessment Year. It may also be pointed out that the decision of the Tribunal in case of Carlyle India (supra) was the subject matter to challenge by the Revenue before this Court. This Court by an order dated 22nd February, 2013 refused to entertain the appeal of the Revenue [(2013) 32 Taxman.com page 23].

9. We note that finding of the comparable to be adopted to determine the ALP as the basis of the activity conducted by the respondent-assesee is essentially a finding of fact. The view taken by the Tribunal is a reasonable and possible view. Moreover it has not been shown us to be in any manner perverse. Thus the question as raised does not give rise to any substantial questions of law.

10. Accordingly, appeal dismissed. No order as to costs.

**(A. K. MENON, J.)** **(M. S. SANKLECHA, J.)**