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

INCOME TAX APPEAL (IT) NO. 406 OF 2016

Pr. Commissioner of Income Tax - 3]
Aaykar Bhavan, Mumbai - 400 020] ...Appellant.

Vs.

M/s NVP Venture Capital India Pvt. Ltd.]
701/705m Dalamal House, Nariman]
Point, Mumbai - 400 021] ...Respondent.

.....

Mr Suresh Kumar for the appellant.
Mr P.J.Pardiwala, Sr. Advocate a/w Mr Paras Savla, Mr Harsh Shah
I/b Atul K. Jasani for the Respondent.

**CORAM : S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.**

RESERVED ON : 5th September, 2018

PRONOUNCED ON : 18th September, 2018

JUDGMENT [PER B. P. COLABAWALLA J.]:

1. By this appeal filed under Section 260A of the Income Tax Act, 1961 (for short the "**I. T. Act, 1961**"), the revenue takes exception to the Judgment and Order dated 30th April, 2015 passed by the Income Tax Appellate Tribunal - "K" Bench, Mumbai (for

short the **“ITAT”**), in so far as the ITAT directed the Assessing Officer (for short the **“A.O.”**) to recompute the adjustment of the Arm's Length Price (for short **“ALP”**) in respect of the Investment Advisory Services rendered by the assessee to its Associated Enterprise. In a nutshell, the ITAT has directed that the ALP ought to be recomputed after excluding one of the comparable companies (for arriving at the ALP), namely, Motilal Oswal Investment Advisors Pvt. Ltd. This was done by the ITAT in view of the fact that according to it, Motilal Oswal Investment Advisors Pvt. Ltd. was engaged in a qualitatively different and diversified business from that of the assessee which was confined only to rendering non-binding investment advisory services to its Associated Enterprise.

2. According to Mr. Suresh Kumar, the learned advocate appearing on behalf of the appellant – revenue submitted before us that the impugned order gives rise to the following two substantial questions of law which read thus:

- “(1) Whether on the facts and in the circumstances and in law, the Hon'ble ITAT was justified, in directing not to consider the case of Motilal Oswal Investment Advisors Pvt. Ltd. as a comparable, when the same was within the terms of Rule 10B(2)?.**
- (2) Whether on the facts and in the circumstances and in law, the Hon'ble ITAT was justified, in directing not to consider the case of Motilal Oswal Investment Advisors Pvt. Ltd. as a comparable, when it's P & L**

showed operational income from advisory fees, the same as that of assessee and instead to place reliance on Director's Report which had categorized activities engaged by said company as Equity Capital Markets Mergers & acquisitions, Private Equity syndication and structured debt, would not make such reliance against the ambit of Rule 10B(2)? ”

3. Before we deal with these questions and the submissions made in relation thereto, it would be apposite to make note of a few necessary facts.

4. The assessee is a company incorporated under the provisions of the Companies Act, 1956 which is singularly engaged in providing non-binding investment research and related services to M/s Norwest Venture Partners Advisory-Mauritius (for short **“NVP - Mauritius”**). NVP - Mauritius is an Associated Enterprise of the assessee. In fact, the assessee is a 100% owned subsidiary of NVP - Mauritius and in terms of its arrangement with it, the assessee provides investment research and related services to NVP - Mauritius in a wide range of sectors in India. The advisory services given to NVP - Mauritius *inter alia* involves providing reports on a timely basis containing news and information on investment areas, industries, companies and/or other specified areas that may interest NVP - Mauritius. Over and above this, the assessee also provides

non-banking advisory services to NVP – Mauritius in respect of potential investment and dis-investment opportunities in India or elsewhere and includes advising on structuring of such opportunities etc. If specific instructions are given by NVP – Mauritius to the assessee, the assessee conducts due diligence of such opportunities and thereafter reports to NVP – Mauritius.

5. During the year under consideration (A.Y. 2010-11) the assessee earned a revenue of Rs.20,56,64,037/- on account of investment advisory services given by the assessee to NVP – Mauritius, its Associated Enterprise. On the basis of its Transfer Pricing Study (for short “TPS”) the assessee asserted that the stated value of the aforesaid international transactions was at an ALP. The assessee had undertaken benchmarking value of its international transactions by selecting the Transactional Net Margin method (“TNM”) as the most appropriate method and adopted the Operating Profit / Total Cost (for short “OP/TC”) as its Profit Level Indicator (for short “PLI”). The margin of the assessee was determined at 20.10% and the assessee compared it with the weighted average mean of 15.68% of six other comparable companies selected by it in its TPS. On this basis, the assessee asserted that the international transaction of providing investment advisory services to its Associated

Enterprise was at an ALP.

6. The Transfer Pricing Officer(TPO), in his order, did not differ with the assessee either on the adoption of the TNM method as the most appropriate method or on considering OP/TC as the PLI formula. However, the TPO disagreed with the assessee on adoption of the multiple years financial data of the comparables and instead considered the single year financial data of the comparables relating to the financial year under consideration. The TPO selected the following final set of comparable companies which read thus:

Sr.No	Company Name	OP/TC F.Y 2009-10(%)
1	Future Capital Investment Advisors Ltd.	16.75
2	Kshitji Investment Advisors Co. Ltd.	31.59
3	Future Capital Holdings Ltd.	15.21
4	Motilal Oswal Investment Advisors P.Ltd.	97.67
	Arithmetic Mean	40.31 %

7. By considering the assessee's margin at 20.10% and the arithmetic mean of the comparable companies as set out in the table of 40.31%, the TPO determined an adjustment of Rs.4,84,81,561/- vide its order dated 27th January, 2014 under Section 92CA(3) of the I.T.Act, 1961. According to TPO this was necessary to bring the

stated value of the international transaction to its ALP. Subsequently, the TPO vide its order dated 6th February, 2014, passed under Section 154 of the I.T.Act, 1961 rectified such adjustment to Rs.3,46,06,210/-. This formed the basis for the A.O. to pass a draft assessment order under Section 143(3) read with Section 144C(1) of the I.T.Act, 1961 dated 26th February, 2014. We must mention that the objections raised by the assessee even before the Dispute Resolution Panel did not elucidate in favour of the assessee and instead the DRP, vide its order dated 28th November, 2014, affirmed the adjustment that was determined by the TPO. In these circumstances, the A.O. thereafter passed an order dated 28th January, 2015 under Section 143(3) read with Section 144C of the I.T.Act, 1961 making the addition of Rs.3,46,06,210/- to the returned income on account of determination of the ALP. This was the subject matter of the appeal before the ITAT.

8. Before the ITAT, the assessee raised a solitary contention to the effect that the Income Tax Authorities had erred in including Motilal Oswal Investment Advisors Pvt. Ltd. in the final set of comparables. In this regard, the plea set up by the assessee was that the activities of the said concern (Motilal Oswal Investment Advisors Pvt. Ltd.) were functionally in-comparable to the activity of

investment advisory services rendered by the assessee to its Associated Enterprise, and therefore, could not be included in the list of comparables to arrive at the arithmetic mean of 40.31%, which in turn, was used to determine the ALP. In this regard, the assessee brought to the attention of the ITAT the business profile of Motilal Oswal Investment Advisors Pvt. Ltd. as emerging from the annual report and in particular to the contents of the Directors Report which *inter alia* indicated that the business income of Motilal Oswal Investment Advisors Pvt. Ltd. had been derived from four business verticals, namely, Equity Capital Markets, Mergers & Acquisitions, Private Equity Syndications and Structured Debt. In the Directors Report it was further stated that Motilal Oswal Investment Advisors Pvt. Ltd. was engaged in advising Indian Corporates on cross border acquisitions and that its Private Equity business had also resulted in a good pipeline of IPOs in the ensuing year. It was on the basis of all this that the assessee sought to justify that the aforesaid set of activities undertaken by Motilal Oswal Investment Advisors Pvt. Ltd. were not comparable to the assessee's international transaction with its Associated Enterprise which was confined only to providing non-binding investment advisory services. It was reiterated by the assessee before the ITAT that it was not engaged in any advisory services in relation to Equity Capital Markets, Mergers &

Acquisitions, Private Equity Syndications or Structured Debt. The assessee also further pointed out that no separate segments had been drawn in the Annual Financial Statements of Motilal Oswal Investment Advisors Pvt. Ltd., and therefore, also it was not possible to cull out the financial results of each segment of activity which is relatable to the activity undertaken by the assessee for its Associated Enterprise. For all these reasons the assessee contended that including M/s Motilal Oswal Investment Advisors Pvt. Ltd. in the list of comparable companies was wholly wrong and unjustified.

9. Before the ITAT, the revenue contended that these very arguments were pointed out by the assessee to the Dispute Resolution Panel which had dealt with them adequately. According to the DRP, the services which were rendered by Motilal Oswal Investment Advisors Pvt. Ltd. were in the areas of structural and financial services which were quite comparable with the investment advisory services rendered by the assessee to its Associated Enterprise. On this basis, it was contended by the Revenue that Motilal Oswal Investment Advisors Pvt. Ltd. was correctly included in the list of comparable companies for determining the ALP for the international transaction entered into between the assessee and its Associated Enterprise (NVP - Mauritius).

10. After hearing both the parties and going through the entire material on record, the ITAT (in paragraph 8) came to the conclusion that Motilal Oswal Investment Advisors Pvt. Ltd. was engaged in qualitatively different and diversified business from that of the assessee which was only confined to rendering non-binding investment advisory services to its Associated Enterprise. The ITAT, being the last fact finding authority, stated that it was revealed from the Annual Statement of Motilal Oswal Investment Advisors Pvt. Ltd. that the said concern was engaged in rendering the services in the advisory fields as mentioned above. In fact, in a similar case which came up before the Tribunal in the case of Carlyle India Private Limited (for the A.Y. 2008-09), the Tribunal concluded that though Motilal Oswal Investment Advisors Pvt. Ltd. was declaring a solitary stream of operating income under the head "advisory fee", but undisputedly it was engaged in diversified fields and the financial results for each segment were not available. It was further recorded in that case that Motilal Oswal Investment Advisors Pvt. Ltd. was registered with SEBI as a Merchant Banker. Considering all these factual aspects, the ITAT was of the opinion that the case in hand was not different than in the case before the Tribunal in relation to Carlyle India Pvt. Ltd. It, therefore, came to the conclusion that M/s

Motilal Oswal Investment Advisors Pvt. Ltd. was not a concern which was comparable to an entity which was rendering non-binding advisory investment services alone. It is in these circumstances, the ITAT *inter alia* held that Motilal Oswal Investment Advisors Pvt. Ltd. was liable to be excluded from the final set of comparable companies and directed the A.O. to recompute the adjustment, if any, after excluding Motilal Oswal Investment Advisors Pvt. Ltd. from the final set of comparables. It is, this Judgment of the ITAT, that has been challenged before us under Section 260A of the I.T.Act, 1961.

11. In this factual backdrop, Mr Suresh Kumar submitted that the ITAT had gone completely wrong in deleting Motilal Oswal Investment Advisors Pvt. Ltd. as a comparable company especially considering that the same was within the terms of Rule 10B(2) of the I.T.Act, 1961. He submitted that Motilal Oswal Investment Advisors Pvt. Ltd. in its Profit & Loss Account showed its operational income from the advisory field which was the same as that of the assessee. According to Mr Suresh Kumar, the reliance placed by the ITAT on the Directors Report of Motilal Oswal Investment Advisors Pvt. Ltd. and which had categorized the activities engaged by it such as Equity Capital Markets, Mergers & Acquisitions, Private Equity Syndications and Structured Debt was wholly irrelevant. In these

circumstances, he submitted that the TPO had correctly included Motilal Oswal Investment Advisors Pvt. Ltd. in the list of comparable companies and thereafter determined the adjustment of Rs.3,46,06,210/- which finally formed the basis of the assessment order passed by the A.O. under Section 143(3) read with 144C of the I.T.Act, 1961. For all these reasons Mr Suresh Kumar submitted that the impugned order gave rise to the substantial questions of law as reproduced by us above.

12. We have heard the learned counsel for parties at length and have gone through the papers and proceedings in this appeal including the impugned order passed by the ITAT. We are unable to agree with Mr Suresh Kumar that the above questions of law as projected by him to be substantial, are indeed substantial questions of law requiring our consideration. On going through the order of the ITAT it is quite clear that the findings given therein are purely based of the facts placed before it. The facts, as placed before the ITAT, have not been controverted or denied by the revenue before us. The ITAT, after considering all these factual aspects, came to a categorical finding that Motilal Oswal Investment Advisors Pvt. Ltd. was engaged in a qualitatively different and diversified business than that of the assessee which was confined to rendering only non-

binding investment advisory services to its Associated Enterprise (NVP – Mauritius). In coming to its conclusion, the ITAT also relied upon another decision of the Tribunal in the case of Carlyle India Pvt. Ltd. (ITA 2200/MUM/2014) dated 22nd August, 2014. In this case also the Tribunal concluded that though Motilal Oswal Investments Advisory Pvt. Ltd. was declaring a solitary stream of operating income under the head “advisory fee”, but un-disputedly it was engaged in diversified fields and the financial results for each segment were not separately available. Considering that it engaged in many diversified fields and not only in the field of rendering non-binding advisory services, the ITAT came to a finding that Motilal Oswal Investments Advisory Pvt. Ltd. was not a concern which could be included in the list of comparable companies. We do not think that these findings of fact are in any way perverse or vitiated by any error apparent on the face of the record which, in turn, would give rise to any substantial question of law. We are in full agreement with the findings given by the ITAT. In fact, looking to the facts as narrated by the ITAT in the impugned order, we would have no hesitation in holding that by comparing Motilal Oswal Investments Advisory Pvt. Ltd. to the assessee company (for the purposes of determining the ALP) would be like comparing apples and oranges. This being the case, we do not find any infirmity in the order of the ITAT excluding

Motilal Oswal Investments Advisory Pvt. Ltd. from the final list of comparables which would give rise to any substantial question of law.

13. In view of the foregoing discussion, we are of the opinion that the impugned order does not give rise to any substantial question of law which would require our consideration as the matter solely revolves around factual matters. Having found that the findings given thereon by the ITAT are certainly plausible and possible, no interference is called for by us under section 260A of the I. T. Act, 1961. In these circumstances, the appeal stands dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

(B.P.COLABAWALLA J.)

(S.C.DHARMADHIKARI J.)

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

INCOME TAX APPEAL NO. 609 OF 2016

Pr. Commissioner of Income Tax-2 } Appellant
versus
M/s. Arisaig Partner India Pvt. Ltd. } Respondent

Mr. Suresh Kumar for the appellant.

Mr. Jeet Kamdar I/b. Mr. Atul K. Jasani
for the respondent.

CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.

DATE :- OCTOBER 10, 2018

P.C. :-

1. This appeal challenges the order passed by the tribunal dated 25th March, 2015 for assessment year 2009-10. Mr.Suresh Kumar submits that the Revenue proposes the questions at page nos. 4 and 5 of the paper book as substantial questions of law. They squarely arise from the order of the tribunal.

2. To appreciate this argument, we must refer to the basic facts. A return of income was filed by the assessee. The case was selected for scrutiny. A notice was issued and thereafter, the assessing officer discovered that an international transaction with associate enterprise entered into by the assessee exceeded

the threshold limit of Rs.15 crores. The assessing officer, therefore, made a reference to the Transfer Pricing Officer after seeking approval of the Commissioner of Income Tax-2, Mumbai. The Transfer Pricing Officer made an order under section 92CA(3) of the Income Tax Act, 1961 on 26th November, 2012, based on which, the assessing officer made his order. The Transfer Pricing Officer considered certain instances as comparables. The assessee was aggrieved by this exercise carried out by the Transfer Pricing Officer as also the assessing officer and filed objections before the Dispute Resolution Panel. The Dispute Resolution Panel deleted certain comparables from the Transfer Pricing Officer's order, but maintained the rest. In terms of the directions of the Dispute Resolution Panel, the assessing officer passed the assessment order dated 20th October, 2013.

3. The Revenue being aggrieved thereby, filed an appeal to the tribunal and the assessee also filed cross objections. The Revenue, in the appeal, challenged the deletion of certain comparables, whereas, the assessee challenged the upholding of the Dispute Resolution Panel's view insofar as a comparable in the form of Motilal Oswal Investment Advisors Pvt. Ltd. That could not have been, in the submission of the assessee, taken as comparable for determining an arms length price.

4. By the impugned order, the tribunal dismissed the appeal of the Revenue. However, it allowed the cross objections of the assessee. Aggrieved thereby, the Revenue has proposed the above referred questions as substantial questions of law.

5. In the case of Motilal Oswal Investment Advisors Pvt. Ltd., a view has been taken by this court in its order dated 18th September, 2018 in Income Tax Appeal No. 406 of 2016. There, the assessee was a venture capital company. For a similar international transaction, the arms length price was to be determined and the Transfer Pricing Officer, *inter alia*, included Motilal Oswal Investment Advisors Pvt. Ltd. as a comparable. The aggrieved assessee approached the Dispute Resolution Panel, which deleted the instance of Motilal Oswal Investment Advisors Pvt. Ltd. as comparable. That is how maintaining of that view by the tribunal triggered Income Tax Appeal No. 406 of 2016 and proposing identical questions as substantial questions of law.

6. In a detailed order passed by this court, it has been held that there is a difference between services and business of comparable like Motilal Oswal Investment Advisors Pvt. Ltd. and the assessee. The Division Bench held that the activities of Motilal Oswal Investment Advisors Pvt. Ltd. were functionally

incomparable to the activities of investment advisory services rendered by the assessee to its associate enterprise.

7. Here as well, similar is the factual position. Once the factual findings rendered in the impugned order are based on the materials before the tribunal, then, it is not permissible for us to re-appraise and re-appreciate the same and arrive at a different conclusion. No perversity has been demonstrated in the view taken by the tribunal nor is it vitiated by an error of law apparent on the face of the record. Consequently, none of the questions proposed before us can be treated as substantial questions of law. The appeal fails and it is dismissed. There would be no order as to costs.

(B. P. COLABAWALLA, J.)

(S.C.DHARMADHIKARI, J.)