

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES : I : NEW DELHI

BEFORE SHRI R.S. SYAL, AM AND SHRI I.C. SUDHIR, JM

ITA No.5840/Del/2012  
Assessment Year : 2008-09

Xander Advisors India Pvt. Ltd., Vs.	ACIT,
111, The Taj Palace,	Circle-18(1),
Sardar Patel Marg,	New Delhi.
New Delhi.	

PAN : AAACX0403B

(Appellant)

(Respondent)

Assessee By	:	S/Shri Mukesh Bhutani, Vishal Kalra, & Ms Vrinda Tulshan, Advocates
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Department By	:	S/Shri Yogesh Verma, CIT and N.K. Chand, CIT
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ORDER

PER R.S. SYAL, AM:

This appeal by the assessee arises out of the order passed by the Assessing Officer (AO) on 03.09.2012 u/s 143(3) read with section 144C of the Income-tax Act, 1961

(hereinafter also called 'the Act') in relation to the assessment year 2008-09.

2. The only issue contested in this appeal by the Id. AR *qua* the addition on account of transfer pricing adjustment is selection of three companies as comparable. Briefly stated, the facts of the case are that the assessee was incorporated in August, 2005 for rendering advisory services in relation to the real estate and infrastructure sector in India. During the year in question, it entered into international transaction of 'Provision of Investment advisory services' worth ₹98,90,66,951/- to Xander Investment Management Ltd., Mauritius, its associated enterprise. Functional profile of the assessee, as set out by the Transfer Pricing Officer (TPO) on page 2 of his order, divulges that the assessee maintains an advisory relationship with its AE by sourcing and evaluating potential investment opportunities in India. Such opportunities are sourced by the assessee through direct proprietary relationship, intermediaries, electronic media and

magazines, etc. Once a potential investment opportunity is sourced, the broad contours are discussed with its AE. On the basis of such discussion, the assessee is directed to either pursue the proposal or reject the same. If the opportunity is to be pursued, a detailed research exercise is conducted spreading over primary research including site visits for understanding demand-supply scenarios benchmarking of existing projects, *vis-a-vis* the opportunity, gauging competition, etc. to secondary research and, thereafter, engaging in discussions with the Indian counterparts in joint venture situations. Research for various analyses as conducted by the assessee above are presented in the form of an investment memo to its AE for suitable decision making. Once investments are made, the assessee is required to provide support services including maintenance of books of account, preparation of quarterly/annual financial statements and such other similar support services as may be mutually agreed upon from time to time. The assessee is remunerated at actual costs incurred with 20% mark-up. The

Transactional Net Margin Method (TNMM) was employed by the assessee to demonstrate that its international transaction was at arm's length price (ALP). The assessee chose 17 companies as comparables which have been listed on pages 4 to 7 of the TPO's order. By considering the assessee's submissions and other relevant material, the TPO reduced the number of comparables to 7 out of the 17 chosen by the assessee. These 7 companies finally chosen by the TPO with their PLI of OP/TC, are as under:-

Sl.No.	Name	OP/TC (%)
1.	Access India Advisors Ltd.	45.96%
2.	Brescon Corporate Advisors Ltd.	87.4%
3.	ICRA Management Consulting Services Ltd.	5.35%
4.	IDC India Ltd.	13.88%
5.	Khandawala Securities Ltd.	80.79%
6.	Sumedha Fiscal Services Ltd.	9.14%
7.	Kinetic Trust Ltd.	3.54%
Average		35.15%

3. On the basis of the average OP/TC of the above seven comparable companies at ₹35.15%, the TPO proposed transfer pricing adjustment of ₹1,28,37,664/-. The AO

proposed to make addition in his draft order dated 18.11.2011 on account of the above referred transfer pricing adjustment. The assessee remained unsuccessful before the Dispute Resolution Panel (DRP). The addition, vide the impugned order, on this score amounting to ₹1.28 crore was made by the AO.

4. At the outset, we want to make it clear that the scope of the dispute in the present appeal on this issue, as argued by the Id. AR, is confined only to the selection of three companies as comparable, which have been listed at serial nos. 2, 5 and 6 of the above table.

5. We have heard the rival submissions and perused the relevant on record. Before espousing these three companies for ascertaining their comparability with the assessee, we consider it expedient to highlight the argument of the Id. AR that the assessee is a private equity fund and hence these three companies chosen by the TPO, which are basically merchant banks, are not comparable. To bolster this

submission, he relied on certain decisions in which it has been so held. At this juncture, it is pertinent to note the difference between a merchant banker and a private equity fund.

6. A merchant bank, apart from helping businessmen in raising finance, also renders consultancy services. It helps its clients in raising finance through issue of shares, debentures, bank loans, etc., from the domestic and international market. The term “Merchant Banker” has been defined in the Rule 2 (e) of SEBI (Merchant Bankers) Rules, 1922, to mean : ‘any person who is engaged in the business of Issue Management either by making arrangements regarding selling, buying or subscribing to Securities as Manager, Consultant, Adviser or rendering Corporate Advisory Service in relation to such Issue Management’. Its activities also include project counseling, corporate counseling in areas of capital restructuring, amalgamations, mergers, takeovers, discounting and rediscounting of short term papers in money market and

acting as brokers in stock exchange and advisers on port folio management. On the other hand, a Private equity firm also known as a Private equity fund (hereinafter also called the 'PE fund'), is a group of investors, which collects money from wealthy individuals or institutions etc. for the purposes of investing in or buying companies. PE fund is managed by a Fund Manager. Thus, PE Fund is overall responsible for managing the money taken from its investors. PE Fund oversees its day-to-day operations including making investment decisions and managing the acquired companies, which, after acquisition, are known as portfolio companies. PE Funds earn income by charging an annual management fee as some percentage of the money under their management and then some percentage of the profits when they sell portfolio companies. Simply put, whereas, a merchant banking is a capital raising/ advisory service, a private equity is an investment business. To put succinctly, PE Funds are investors and not advisors.

7. Turning to facts of the instant case as stated by the Id. AR and those culled out from the material on record, the position which emerges is that there are three investors. Xander Master Fund, a Mauritius limited liability company (Fund), is responsible for private equity investment. It appointed Xander Investment Management Ltd., Mauritius (Manager) for providing overall investment advice. The Manager sub-contracted specific activities to the assessee (Indian Sub-Advisor). The Manager and the Indian Sub-Advisor entered into an Agreement on 10.10.2005, under which the assessee (Indian Sub-Advisor) undertook to provide general advisory services to the Manager in relation to real estate sector in India. Such services, as discussed above include providing feedback to the Manager in relation to the real estate investment opportunities in India; identifying the potential vendors; negotiating with the vendors as an agent of the Manager, finalizing deals, if the Manager is satisfied, and; to provide actual support services, if the investment is made by the Manager. In this three-tier hierarchy, Xander

Master Fund is 'the PE Fund', Xander Investment Management Ltd., Mauritius, is the 'Manager' and the assessee is simply 'Sub-Advisor to the Manager'. From an overview of the nature of activities discussed above, it is noticed that the contention of the Id. AR that the assessee acted as a PE Fund in India, is not tenable. The Manager sub-contracted specific activities to the assessee, which were in the nature of advisory to him. By no stretch of imagination, the assessee can be described as PE Fund, who, in present facts is, Xander Master Fund. The name by which a transaction is coined is not decisive of its character. It is the real nature of a transaction which is always relevant and conclusive. A bare perusal of the nature of activities carried out by the assessee in the extant international transaction abundantly proves that these are not that of a PE Fund. *Ex consequenti*, the decisions cited by the Id. AR seeking to canvass the exclusion of three companies on the strength of the assessee in those cases acting as PE Funds, do not advance his case any further. As such, we are desisting from

considering such decisions, which were rendered drawing distinction between a merchant banker and a PE Fund and holding that a merchant banker cannot be considered as comparable to a PE Fund. Be that as it may, a company cannot be considered as comparable or incomparable on the generality of mere description of its overall category. This assumes more significance when a company is otherwise entitled to pursue several lines of activities. One needs to verify the nature of activity actually carried on for deciding its comparability or otherwise. No nomenclature can superimpose the real character of a transaction.

8. Now, We will take up these three companies, one by one, for ascertaining their comparability. At this stage, it is significant to mention that the assessee included these three companies in its list of comparables and the TPO simply accepted them as comparable. The assessee is now assailing their wrongful *suo motu* inclusion in the list of comparables.

Brescon Corporate Advisors Ltd:

9. The assessee requested the TPO to exclude this company from the list of comparables by stating that it was a merchant banking company with its main source of income from recapitalization advisory and debt syndication. The TPO did not accept this argument on the ground that the search criteria included companies providing investment advisory services and there was no need to go into further verticals.

10. We have perused the Annual accounts of this company, a copy of which has been placed on record. This company is engaged in carrying on merchant banking and investment activities along with providing project advisory services. A look at the Annual accounts of Brescon Corporate Advisors Ltd. indicates that it has two streams of income, namely, 'Fee based financial services' and 'Other income'. Details of the revenue under 'Fee based financial services' is given at page 324 of the paper book, which is as under:-

Financial Restructuring & Recapitalisation	₹10.00 crore
Syndication of Debt	₹2.18 crore
Equity Related Advisory/M&A Advisory	₹2.03 crore
Due diligence advisory to Arcil	Nil
Total	₹14.23 crore

The second stream of its income totaling ₹6.04 crore includes Dividend, Interest received, Profit/loss on sale of investments and Profit/loss arising out of dealing in shares and securities. A close look at the composition of the gross revenue from 'Fee based financial services' transpires that some component of 'Equity related advisory/M&A advisory' *prima facie* partly resembles with the services rendered by the assessee. The Id. DR himself candidly accepted, and rightly so, that the other components of this stream of the revenue are of no match with that of the assessee. Now, the question arises as to whether Brescon Corporate Advisors Ltd., under these circumstances can be considered as comparable? At this stage, it is pertinent to mention that the gross revenue of this company amounts to ₹20.27 crore and there is no

segmental data available either in respect of net profit from 'Fee based financial services' or 'Other income'. As 'Other income' also includes income from Investment activity, being profit/loss on sale of investment and dealing in shares and securities, the impact of such profit/loss on the overall net profit of the company on entity level, cannot be determined. Even though some component of 'Equity related advisory/M&A Advisory', with the gross revenue of ₹2.03 crore, partly resembles with the assessee, still in the absence of any segmental data of such composition, there can be no valid comparison. Revenue from this component accounts for around 10% of the total gross revenue of this company and if we further examine this 10% component in itself, it turns out that the same also includes M&A advisory, which is obviously not akin to the services rendered by the assessee. The assessee's activity, in a nutshell, is to tender advice to the Manager about the avenues for making investment in real estate, and, if the Manger agrees to go ahead with such investment opportunity, then, to get involved in the process

of finalization of the deal and then provide support services, including maintenance of books of account etc., on the clicking of the deal. Taking a holistic view of the factual matrix, we do not find any rationality in including this company in the list of comparables since no segmental data of the advisory services by this company is available, which component is very small *vis-a-vis* the entity level operations. Availability of separate data of this segment could have possibly made it comparable with the assessee. This company is, therefore, directed to be excluded from the list of comparables.

Khandawala Securities Ltd.

11. Next comes Khandawala Securities Ltd. The assessee contended before the TPO that this company was engaged in merchant banking activities and hence should be excluded from the list of comparables. The TPO repelled this contention by observing that this company was providing, *inter alia*, corporate advisory services relating to real estate

and infrastructure. That is how, this company found its way in the list of comparables drawn by the TPO.

12. We have gone through the Annual accounts of this company, which are available in the paper book. A perusal of its Profit & Loss Account transpires that its income comprises of Brokerage amounting to ₹7.96 crore, Corporate advisory services amounting to ₹8.32 crore, Income from capital market operations at ₹56.75 lac and Profit on sale of long-term investments at ₹4.81 lac. Apart from these, it has other incomes amounting to ₹1.10 crore, which are in the nature of interest on fixed deposits and dividends, etc. It can be observed from the bifurcation of the gross revenue of this company that brokerage component is 44.21%, whereas corporate advisory services account for 46.23% of total gross revenue. The most crucial factor is that the accounts of this company are again available on entity level alone. It goes without saying that the brokerage income is totally alien to the assessee's composition of income. If there is some

commonality, that can be traced to the income from 'Corporate advisory services', which accounts for 46.23% of the gross revenue. There is no data of net income of this component on segment level, except for its gross revenue. When we further examine the break-up of 'Corporate advisory services', which is available at page 369 of the paper book, it comes to the fore that it includes equity capital markets transaction execution, mergers and acquisitions advisory, capital raising advisory and transaction execution relating to structured finance, real estate and infrastructure. Thus, out of total of 46% of the gross revenues of this company lying under the overall 'Corporate advisory services division', it is manifest that only some of the activities undertaken by it bear some similarity to those carried on by the assessee. However, if one may have to answer it as comparable or incomparable in totality, we can't term it as comparable because of the absence of any bifurcation of the income from advisory services in this overall segment. The fact that apart from entity level, no details of this overall

segment of 'Corporate Advisory Services' are available, further cements our viewpoint. On the overall perspective, this company on an entity level cannot be considered as comparable with the assessee because of lack of any segmental data. We, therefore, order for the exclusion of this company from the list of comparables.

Sumedha Fiscal Services Ltd.

13. The assessee argued before the TPO that this company could not be considered as comparable because its segment for Consultancy services also included income from merchant banking activity. The TPO rejected this contention by holding that it was providing advisory services which included loans syndication, equity placement and project consultancy services.

14. We find from the Annual accounts of this company that it has segmental data. Its 'Income from operations' is to the tune of ₹7.58 crore, which has two components, namely, 'Income from Loan syndication & consultancy services'

amounting to ₹4.47 crore and 'Income from capital market operation' amounting to ₹3.11 crore. Page 436 of the paper book divulges that the component titled as 'Loan syndication and consultancy services' comprises 'Loan Syndication, Merchant Banking, Restructuring & Other related advisory services'. Obviously, the consultancy services of this company, to some extent, can be characterized as comparable with the assessee company. However, it can be observed that *albeit* the segmental data is available but such segment with the caption 'Consultancy services' also encompasses loan syndication, merchant banking, restructuring and other related advisory services apart from consultancy services. The composition of consultancy services simpliciter in this overall segment, which is akin to that of the assessee, is not ascertainable. Since the advisory services are not separately identifiable from this broader segment of consultancy services, we hold that the overall consultancy segment of this company cannot be considered

as comparable with the assessee. We, therefore, order for the exclusion of this company from the list of comparables.

15. Before parting with this issue, we would like to deal with the contention raised on behalf of the Revenue that since these three companies were originally considered by the assessee as comparable, it should not be allowed to resile from its earlier stand by demanding their exclusion. In our considered opinion, this contention deserves to be jettisoned. Just like a situation in which the assessee chooses a company as comparable, which can be excluded by the TPO on finding it as incomparable, there can be no fetters on the assessee requesting for the exclusion of a company, originally considered by it comparable by inadvertence. After all, it is for the TPO to examine and evaluate such contention and then decide about its comparability on merits. To foreclose the raising of such a contention by the assessee for further appraisal at the TPO's end, is impermissible. The Department cannot approbate and reprobate at the same time. The

Special Bench of the Tribunal in *DCIT vs. Quark Systems (P) Ltd., (2010) 132 TTJ (Chd) (SB)* has allowed the assessee to claim exclusion of certain companies from the list of comparables which were inadvertently included by it in its transfer pricing study. We, therefore, reject this contention advanced on behalf of the Revenue.

16. To sum up, we direct the exclusion of the afore referred three companies from the list of comparables. The impugned order is set aside pro tanto and the matter is sent back to the TPO/AO for determining the ALP of the international transaction by considering the remaining four companies as comparable. It is made clear that on all other aspects, the order of the TPO is final and unchanged.

17. The only other ground argued by the Id. AR is against the disallowance of ₹2,48,589/- made by the AO u/s 14A of the Act read with rule 8D of the I.T. Rules, 1962. The facts apropos this ground are that the assessee earned dividend income from mutual funds to the tune of ₹10.32 lac, which

was claimed as exempt. The AO, on perusal of the balance sheet, observed that the assessee made investments during the year to the extent of ₹9.95 crore. It was opined that the provisions of section 14A were attracted in this case inasmuch as the assessee had incurred some expenditure for making investment, which was not offered for disallowance. Applying the mandate of rule 8D(2)(iii), the AO worked out disallowance at 0.5% of the average value of investment as on the first and last days of the previous year, which resulted into an addition of ₹2.48 lac. The assessee is aggrieved against this addition.

18. After considering the rival submissions and perusing the relevant material on record, it is seen that the assessee earned exempt income and did not offer any disallowance u/s 14A. The AO recorded proper satisfaction that the provisions of section 14A were attracted as the assessee had incurred some expenditure for making investment, which was not offered for disallowance. The Hon'ble jurisdictional High

Court in the case of *Maxopp Investment Ltd. Vs. CIT (2012) 347 ITR 272 (Del)* has held that the provisions of section 14A are attracted in such situations. As the assessment year under consideration is 2008-09, obviously, the prescription of rule 8D would apply. In our considered opinion, the AO was fully justified in making disallowance under clause (iii) of rule 8D at 0.5% of the average value of investments. This ground is not allowed.

19. In the result, the appeal is partly allowed.

The order pronounced in the open court on 07.11.2014.

Sd/-

[I.C. SUDHIR]  
JUDICIAL MEMBER  
Dated, 07<sup>th</sup> November, 2014.

Sd/-

[R.S. SYAL]  
ACCOUNTANT MEMBER

dk

Copy forwarded to:

1. Appellant
2. Respondent
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AR, ITAT, NEW DELHI.