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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision : 05.05.2025

+ **ITA 5/2025**AMERICAN EXPRESS BANKING
CORPORATION (INDIA BRANCH)

.....Appellant

Through: Mr Nageshwar Rao with Mr Pratik
Rath, Advocates.

versus

ASSISTANT DIRECTOR OF INCOME TAX, CIRCLE 1(1),
INTERNATIONAL TAXATION, NEW DELHI

.....Respondent

Through: Mr Anant Mann, JSC for Mr Ruchir
Bhatia, SSC with Mr Abhishek
Anand, Advocate.**CORAM:****HON'BLE MR. JUSTICE VIBHU BAKHRU****HON'BLE MR. JUSTICE TEJAS KARIA****VIBHU BAKHRU, J. (ORAL)**

1. The appellant [**Assessee**] has filed the present appeal under Section 260A of the Income Tax Act, 1961 [**the Act**], *inter alia*, impugning an order dated 07.08.2024 [**impugned order**] passed by the learned Income Tax Appellate Tribunal [**ITAT**] in ITA No.6253/Del/2017 in respect of Assessment Year [**AY**] 2009-10.

2. The impugned order is a common order passed by the learned ITAT in respect of cross appeals preferred by the parties (ITA No.6253/Del/2017



preferred by the Assessee and ITA No.6455/Del/2017 preferred by the Revenue) against the order dated 31.07.2017 passed by the learned Commissioner of Income Tax (Appeals), Delhi -38 [**CIT(A)**]. The present appeal filed by the Assessee is confined to the impugned order insofar as it relates to the Assessee's Appeal [ITA No.6253/Del/2017].

3. The Assessee is a company incorporated under the laws of the United States of America and is engaged in the business of banking. The Assessee had set up its Branch in India during the financial year [**FY**] 2007-08 after obtaining the licence from the Reserve Bank of India [**RBI**] for following activities:

- (i) credit card business;
- (ii) services in relation to travellers cheque; and
- (iii) acceptance of institutional deposits as defined by the RBI.

4. The Assessee filed its return of income for AY 2009-10 declaring total income of ₹52,74,06,080/-. The same was selected for scrutiny.

5. The Assessee had entered into international transaction with its Associate Enterprises [**AEs**] of a value of ₹320 Crores (Rupees 3.2 Billion). In view of the same, the Assessing Officer [**AO**] made a reference under Section 92CA(3) of the Act to the Transfer Pricing Officer [**TPO**] for determining the Arms' Length Price [**ALP**] of the international transactions.

6. The TPO passed an order dated 23.01.2013 and made the transfer pricing adjustment amounting to ₹24,30,24,147/- on account of the ALP of the international transaction as determined by it. The break-up of the said



adjustment is set out below:-

Sl. No	Nature international transaction	ALP determined by the assessee (INR)	ALP determined by TPO (INR)	Adjustment u/s 92CA(INR)
1	Provision of IT enable services	19,95,90,000	21,60,72,808	1,64,82,808
2	Receivable	NIL	453	453
3	Intra Group services	22,65,40,886	NIL	22,65,40,886
Total				24,30,24,147

7. Pursuant to the above adjustment, the AO passed the final assessment order dated 15.05.2013 under Section 143(3) read with Section 144C of the Act making the adjustment of the amount as determined by the TPO – ₹24,30,24,147/-.

8. The Assessee appealed the final assessment order dated 15.05.2013 before the CIT(A). The CIT(A) referred to the decisions of this court in **Commissioner of Income Tax v. EKL Appliances Limited: (2012) 345 ITR 241**, as well as in **Commissioner of Income Tax v. Cushman and Wakefield India Pvt Ltd : Neutral Citation No.: 2015:DHC:4171-DB** and held that the TPO could not question the commercial wisdom of an assessee in entering into any international transaction; his jurisdiction was limited to determining the ALP of the international transaction as referred to him. Notwithstanding the observations to the aforesaid effect, the CIT(A) also held that it was not possible to quantify the value of the intra group services availed by the Assessee in absence of any third party documentation and directed that the adjustment on account of the international transactions



relating to intra group services, be restricted to 50% of the adjustment as directed by the TPO.

9. The CIT(A) also considered the Assessee's challenge to the inclusion/exclusion of certain entities as comparables for determining the ALP of international transactions relating to provision of IT enabled services.

10. The Revenue appealed the CIT(A)'s decision before the learned ITAT essentially, on the ground of inclusion of Cepha Imaging Private Limited and R Systems International Limited as comparables for determining the ALP. The Revenue also assailed the decision of the CIT(A) to direct the exclusion of Coral Hub Ltd., Cosmic Global Ltd., E Clerx Services Ltd. and ICRA Online Ltd. as comparables on account of their functional dissimilarities.

11. The Assessee challenged the order of the CIT(A), *inter alia*, on the ground that it erred in not considering that the conditions as specified under Section 92C(3) of the Act were not satisfied and, therefore, the TPO could not have proceeded to determine the ALP on the basis of the material available with it. The Assessee also questioned the CIT(A)'s decision to determine ALP for intra group services at 50 per cent of the value as without any basis. The Assessee also challenged the exclusion of M/s. CG VAK Software and Exports Ltd. as a comparable.

12. The learned ITAT did not find any fault with the CIT(A)'s decision regarding exclusion / inclusion of the companies as comparable asserted by the Revenue or the Assessee. However, insofar as the intra group services is



concerned, the learned ITAT faulted the TPO for determining the ALP for intra group services as nil and concluded that some intra group services had been received by the Assessee and, therefore, ALP of such services could not be determined as nil.

13. Although, the CIT(A) had also faulted TPO for considering the ALP of intra group services as nil, it had held that same should be determined as 50 per cent of the said value. In view of the above, the learned ITAT remanded the matter to the TPO for determining the ALP afresh.

14. The Assessee has projected the following questions of law for consideration of this court: -

“I. Whether Hon’ble Tribunal ought to have finally, and conclusively deleted adjustment made to transfer price paid by Appellant for intra group services provided by Associated Enterprise?

II. Whether impugned order is perverse, unlawful and illegal to the extent it does not follow principle laid down by this Hon’ble Court viz, that without rejecting transfer pricing study submitted by taxpayer arm’s length price cannot be substituted by Respondents?

III. Without prejudice to above, whether impugned order is unlawful and invalid to the extent it does not finally and conclusively delete transfer pricing adjustment made to payment towards intra group services by arbitrarily choosing CUP as Most appropriate method and further in declaring ALP as NIL without application of CUP as prescribed under the Act?

IV. Whether Hon’ble Tribunal erred in not deleting determination of ALP by first appellate Authority at *ad hoc* 50 % and erred in exercising its power of remand in facts and circumstances of present case?

V. Whether impugned order is perverse in remanding the determination of arm’s length price of intra group services received without considering material and



submissions on appeal record?”

REASONS AND CONCLUSION

15. During the FY 2008-09, the Assessee had undertaken the following international transactions: -

S. No.	Nature of international transaction	Value (in Rs.)	Method Used
1.	Provision of back office support services	199,590,588/-	TNMM
2.	Receipt of intra group services	226,540,886/-	TNMM

*TNMM: Transactional Net Margin Method

16. The Assessee submitted transfer pricing study to establish that the payments made for the services received (international transactions) were at ALP. The Assessee benchmarked the international transactions by using the Transactional Net Margin Method [TNMM] with operating profit margin as the profit level indicator [PLI]. The Assessee had identified comparable entities from the commercial information databases namely Prowess and Capital Line.

17. The TPO did not concur with the analysis undertaken by the Assessee and undertook a fresh economic analysis. It rejected some of the comparable companies identified by the Assessee on the following factors: (i) unavailability of the data for FY 2008-09; (ii) different accounting year filter; (iii) turnover filter of revenue for the relevant activity for less than ₹5 Crores; (iv) diminishing revenue filter; service income less than 75 per cent of the total operating revenues; (v) persistent loss for the last three years; (vi) related party transactions being greater than 25 per cent of the operating



revenues; and (vii) export revenue being less than 75 per cent of the total sales.

18. The TPO computed the average net margin of comparable companies at 29.91 per cent on operating cost as against 18.12 per cent determined by the Assessee, in respect of the back office support services. The TPO also did not concur with the Assessee's cost allocation of expenses by AEs was at ALP. The TPO held that the Assessee had not established that it had received any service and, therefore, determined the ALP for allocation of cost of back office services as nil.

19. There is no cavil that the TPO's finding that the ALP of back office services provided by the AEs was nil, is unsustainable. The CIT(A) as well as the learned ITAT had returned concurrent findings to the effect that the Assessee received the services and therefore the ALP of such services could not be determined as nil.

20. As noted above, pursuant to the aforesaid finding, the learned ITAT has remanded the matter to the TPO for consideration afresh.

21. Mr Rao, the learned counsel appearing for the Assessee contended that the learned ITAT had failed to appreciate that the Assessee's economic analysis could not be rejected unless any of the grounds as set out in Section 92C(3) of the Act are satisfied.

22. Sub-section (3) of Section 92C of the Act is set out below:-

“92C. Computation of arm's length price.

- | | | | |
|-----|-----|-----|-----|
| (1) | *** | *** | *** |
| (2) | *** | *** | *** |



(3) Where during the course of any proceeding for the assessment of income, the Assessing Officer is, on the basis of material or information or document in his possession, of the opinion that-

(a) the price charged or paid in an international transaction has not been determined in accordance with sub-sections (1) and (2); or

(b) any information and document relating to an international transaction have not been kept and maintained by the assessee in accordance with the provisions contained in sub-section (1) of section 92-D and the rules made in this behalf; or

(c) the information or data used in computation of the arm's length price is not reliable or correct; or

(d) the assessee has failed to furnish, within the specified time, any information or document which he has required to furnish by a notice issued under sub-section (3) of section 92-D,

the Assessing Officer may proceed to determine the arm's length price in relation to the said international transaction in accordance with sub-sections (1) and (2), on the basis of such material or information or document available with him:

Provided that an opportunity shall be given by the Assessing Officer by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the arm's length price should not be so determined on the basis of material or information or document in the possession of the Assessing Officer."

23. The order passed by the TPO indicates that it did not concur with the determination of the transfer pricing study furnished by the Assessee. For one, the TPO found that the filters used by the Assessee to select the comparables are inapposite.

24. The TPO also issued the show cause notice dated 21.12.2012. In the



said notice, the TPO had recorded the filters used by the Assessee and had recorded his comments in respect of such filters. The relevant extract of the show cause notice dated 21.12.2012 is set out below: -

Sl. No	Particular	Remarks of TPO
1.	Companies for which sufficient financial or descriptive information was not available to undertake analysis:	This is an appropriate filter.
2	Companies that were declared sick or had persistent negative net worth	This may be seen from case to case basis.
3	Companies that have ceased business operations or inactive	This is an appropriate filter.
4	Companies that undertook significantly different functions compared to the taxpayer.	An appropriate filter will be rejecting Companies whose services revenue is less than 75% of the total operating revenues.
5	Companies that did not have significant (<25%) foreign exchange earnings	The appropriate threshold limit in this regard is 75% considering the ratio of your exports earnings to total income.
6	Companies that had substantial (>25%) transactions with related parties	This is an appropriate filter.
7	Companies which had been incurring persistent operating losses	This is an appropriate filter.
8	Companies that had exception year(s) of operation	This is an appropriate filter.

1.1 Proposed filters: As can be seen, that some of the filters that you have used to select your comparables are inappropriate. This means that your economic analysis is inadequate. After a careful



study, it is found that following filters or criteria which include some of filters applied by you and those considered appropriate by the TPO may lead towards selecting proper comparables functionally similar to that of the tested party. These filters and the rationale for applying these filters is as follows.”

25. The TPO also examined the comparables selected by the Assessee and furnished his comments on the same. Some of the comparables were rejected whereas some of the comparable entities were accepted. In addition, the TPO also included certain comparable entities, which according to the TPO had qualified the filters as determined by it. The adjustment regarding the provision of IT enabled services were based on the ALP determined on the aforesaid basis.

26. Insofar as the intra group services is concerned, the TPO had concluded as under: -

“19.4 In view of the foregoing, the discussion already made above is summed up as follows:

- In this case, the assessee has failed to substantiate that services have actually been rendered to it and benefit has actually been derived by it on the basis of documentary evidence. In support of its contention, the assessee has merely furnished copies of certain mails exchanged between the personnel of the Group. None of the above reproduced e- mail exchanges between the employees establish the requirement/specific need of the assessee for their services, the benefit which has accrued to the assessee, or that an independent party would have been willing to pay another independent party for the services purported to be received by the assessee.
- The services received are incidental being in nature of long association.
- It is evident from facts stated above that the assessee did not file any evidence to support a claim



that these services were actually provided to the assessee at its request to meet the specific need of the assessee and that certain tangible and concrete benefits have actually accrued to the assessee.

- Under uncontrolled circumstances any independent enterprise having skilled and sufficiently trained manpower would, not have been willing to pay any third party to do so. In my opinion, services which are incidental or mere duplicity do not fall in the category of Intra group services.
- However, without prejudice to the above discussion, it may not be impossible, however, for a group member to benefit incidentally from services being provided to one or more fellow affiliates. For example in this case, the assessee might be benefited from services rendered by AE in general to its other AEs. However, such incidental benefits do not give rise to Intra Group Services and cannot be regarded as giving rise to arrangement subject to arm's length pricing as stipulated in OECD TP guidelines paragraph 7.13 under Chapter VII. These findings lead to an irresistible conclusion that payments for liaison services allegedly provided by the AEs are not at arm's length price.
- Moreover, it is seen from the details contained in the transfer pricing report of the assessee submitted under Rule 10D that the assessee had not conducted FAR analysis in regards to these alleged services and had failed to justify the functions performed by the AE for these payments. This is probably a reason that the receipt of alleged services have not been benchmarked under any of the five method prescribed under the Act in the Transfer Pricing report.
- Furthermore, the assessee has at the time of requisitioning the so-called services, not carried out any cost- benefit analysis at its end. No independent party would agree to incur expenditure without independently ascertaining the value of the goods/services intended to be availed, in the market and that too at the best negotiated prices. No such effort has been demonstrated to be made at the end of



the assessee, which weighs heavily against the normal practises of business prudence.

In view of above findings, I am of the considered opinion that the assessee had made payments of Rs. 226,540,886/- to its AE for intra-group services which are not found to exist in this case. The arm's length price of these alleged services is held to be nil on application of CUP method as no uncontrolled enterprise would have paid any amount for services which do not tantamount to Intra group services with demonstrable benefits. The assessing officer shall consequently increase the taxable income of the assessee by an amount of Rs. 226,540,886/-."

[emphasis added]

27. Additionally, the TPO also was of the view that the adjustment of Rs. 453 was also required to be made on account of receivables. The tabular statement setting out the break-up of the adjustment as determined by the TPO is reproduced below: -

S.N	Nature of international transaction	ALP determined by assessee (INR)	ALP determined by the TPO (INR)	Adjustment u/s 92CA (INR)
1	Provision of IT enabled services	199590000	216072808	16,482,808
2	Receivable	Nil	453	453
3	Intra Group Services	226,540,886	Nil	226,540,886
Total				24,30,24,147

28. There is no cavil that in the present case, the controversy essentially revolves around the amount paid by the Assessee for intra group services.



29. As noted above, the Assessee had benchmarked the said international transaction in relation to the allocation of such services by using TNMM as the most appropriate method. However, the TPO held that the alleged services were nil on an application of the Comparable Uncontrolled Price [CUP] method.

30. As noted above, the CIT(A) as well as the learned ITAT had found that the Assessee had received services and, therefore, it was necessary that the ALP be determined. Undeniably, the transfer pricing study of the Assessee could not be rejected unless the conditions as set out in Section 92C(3) of the Act were satisfied. It is the Assessee's case that such conditions are not satisfied and, therefore, the TPO cannot make any adjustment on account of intra group services. However, the TPO had proceeded on the basis that the Assessee has been unable to establish that it had derived any benefits from such services and therefore, no independent entity would pay for such services without any cost benefit analysis.

31. In the aforesaid circumstances it does not appear that the TPO had examined the transfer pricing analysis furnished by the Assessee regarding the value of the services received. The CIT(A) as well as the learned ITAT had concurrently found that the Assessee had received intra group services. It is thus, necessary for the TPO to examine the transfer pricing studies furnished by the Assessee in that perspective.

32. There is no cavil that if the conditions as specified under Section 92C(3) are not satisfied, the TPO cannot proceed to make any adjustment. In the present case, the learned ITAT has remanded the matter to the TPO to



consider afresh as the TPO's fundamental premise that the Assessee had not received any services, has been rejected.

33. In the circumstances, we find no infirmity in the learned ITAT's decision in remanding the matter to the TPO to consider afresh. Needless to state the TPO is also required to consider whether any of the conditions under Section 92C(3) of the Act are satisfied before proceeding to make transfer pricing adjustment on account of intra group services.

34. In view of the above, we do not find that any substantial question of law arises for consideration of this court. The appeal is, accordingly, dismissed.

VIBHU BAKHRU, J

TEJAS KARIA, J

MAY 05, 2025

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Click here to check corrigendum, if any