

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'I' : NEW DELHI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER  
and  
SHRI SUDHIR KUMAR, JUDICIAL MEMBER**

**ITA No.1973/DEL/2014  
(Assessment Year: 2009-10)**

American Express (India) Private Ltd.,  
Metropolitan Saket,  
7<sup>th</sup> Floor, Office Block,  
District Centre, Saket,  
New Delhi.

vs. ACIT, Circle 1 (1),  
New Delhi.

**(PAN : AAACA8163F)**

(APPELLANT)

(RESPONDENT)

**ITA No.2577/DEL/2014  
(Assessment Year: 2009-10)**

ACIT, Circle 1(1)  
Room No.392, C.R. Building,  
I.P. Estate, New Delhi-110002

Vs American Express (India) Private  
Ltd.,  
Metropolitan Saket,  
7<sup>th</sup> Floor, Office Block,  
District Centre, Saket,  
New Delhi.

**(PAN : AAACA8163F)**

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Nageswar Rao, Advocate  
Ms. Viyushti Aggarwal, Advocate  
REVENUE BY : Shri Rajesh Kumar, CIT DR

Date of Hearing : 22.04.2024  
Date of Order : 26.04.2024

**ORDER****PER SHAMIM YAHYA, ACCOUNTANT MEMBER :**

These appeals were earlier disposed off by this Tribunal vide combined order dated 03.08.2018. Subsequently in Misc. Application No.146/Del/2019 vide order dated 15.02.2023, the combined order was recalled only to consider ground no.15. The said ground no.15 in ITA No.1973/Del/2014 read as under :-

“That on facts and in law, the TPO/AO have grossly erred in re-determining the arm’s length price of the purchase of fixed assets.”

2. In this case, on internal page 92, the TPO has made the following computation :-

“20. The cumulative adjustments made in this case are tabulated below :-

S.No.	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	439257548	501331395	62,073,847
2	Receivable	Nil	5,98,083	5,98,083
3	Purchase of fixed assets	4434339	2527872	Refer Para 19.2
Total				6,26,71,930

The assessing will accordingly enhance the income of the assessee by Rs.6,26,71,930/-. This shall be treated as the cumulative adjustment u/s 92CA. No adverse inference is drawn in respect of the other international transactions undertaken by the assessee during the F.Y. 2008-09. The assessee was afforded reasonable opportunity of being heard, as mentioned on page 1 of this order. The Assessing Officer may examine issue of initiation of penalty u/s 271(1)(c) of the Act in accordance with Explanation 7 of the same.”

3. Referring to the above, Id. Counsel for the assessee contends that no transfer pricing adjustment has been suggested for fixed assets. On the contrary, Id. DR for the Revenue submits that in the column for adjustment, TPO has clearly mentioned para 19.2 and in the said para 19.2, the TPO has commented as under :-

“19.2 The assessee has merely relied on the report of valuation expert to substantiate the cost of assets purchased by its from its AE for Rs.4434339. The assessee has failed to substantiate the creditability/ authenticity of the valuation report provided by it. No third party would have purchased similar assets on a value which is more than the written down value of those assets. Therefore, in an arm’s length scenario the written down value assets is taken as the arm’s length price of the aforesaid assets which works out to Rs.2527872 as submitted by the assessee in its submission dated 29.10.2022.”

4. Further, in order passed by the TPO under section 92CA (5) r.w.s. 154 at pages 2 & 3, following is mentioned :-

“3. The final cumulative adjustment proposed in the case is as under :-

S.No.	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	7841698577	8550499977	708,801,400
2	Receivable	Nil	5,353,573	5,353,573
3	Purchase of fixed assets	4434339	2527872	As per Para 19.2 of order u/s 92CA(3) dated 16.01.2013 in the assessee’s case
Total				71,41,54,973

The Assessing Officer will accordingly enhance the income of the assessee by Rs.71,41,54,973/-. This shall be treated as the cumulative adjustment u/s 92CA. No adverse inference is drawn in respect of the other international

transaction undertaken by the assessee during the F.Y. 2008-09 as already stated in the order u/s 92CA(3) dated 16.01.2013. The assessee was afforded reasonable opportunity of being heard, as mentioned earlier. The Assessing Officer may examine issue of limitation of penalty u/s 271(1)(c) of the Act in accordance with Explanation 7 of the same as already stated in the order u/s 92CA(3) dated 16.01.2013.”

5. Referring to the above, again Id. Counsel for the assessee submits that there is no adjustment for purchase of fixed assets. However, Id. DR for the Revenue reiterates that detail is duly mentioned and it is only an error that amount involved has not been mentioned in the chart. Further, it is seen that in the draft assessment order also, the adjustment in this regard is said to be addition of Rs.71,41,54,973/- made to the income of the assessee between difference in arm's length price. Here, there is also no mention of fixed assets. In this scenario, it is the submission of the Id. Counsel for the assessee that no adjustment was made in the draft assessment order and assessee did not file any objection before the Id. DRP. He further submits that while giving effect to DRP directions, TPO for the first time made addition towards ALP of fixed assets which is invalid and not in conformity with the DRP directions as mandated under section 144C(10) and 144C(13). He further submitted that adjustment recommended of Rs.67,05,58,495/- included adjustment of Rs.19,60,467/- for purchase of assets. Referring to the above, Id. Counsel for the assessee submitted that addition/adjustment is not made in the draft assessment order and same cannot be included in the final assessment order. In this regard, reliance is placed on order passed by

Hon'ble Gujarat High Court in the case of PCIT vs. Woco Motherson Advanced Rubber Technologies Ltd. (2018) 406 ITR 375 wherein this principle was laid down and further upheld by Hon'ble Supreme Court in SLP(C) Diary No.34962/2017 dated 24.11.2017.

6. Ld. DR for the Revenue submits that the adjustment for purchase of fixed assets has been clearly mentioned in words by referring to it and he pleaded that the matter may be remanded to DRP to consider the issue.

7. Upon careful consideration, we find that it is undisputed fact that in the draft assessment order, the adjustment for purchase of fixed assets was not done. Ld. Counsel for the assessee submitted that in computation, only reference to para 19.2 is given and no figure for the same was given. Further, in the final computation, columns also did not show the figure for adjustment for purchase of fixed assets. In these circumstances and in our considered opinion, since the final assessment order is not in conformity with the draft assessment order, the adjustment for purchase of fixed assets is not legally permissible and ground no.15 is decided in favour of the assessee and against the Revenue.

**Order pronounced in the open court on this 26<sup>th</sup> day of April, 2024.**

**Sd/-  
(SUDHIR KUMAR)  
JUDICIAL MEMBER**

**Sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER**

**Dated the 26<sup>th</sup> day of April, 2024  
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A)
- 5.CIT(ITAT), New Delhi.

**AR, ITAT  
NEW DELHI.**