

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'I-1' NEW DELHI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

ITA No. 2316/Del/2018
Assessment Year: 2003-04

JCIT, Special Range-1, New Delhi	Vs.	M/s. American Express (India) Pvt. Ltd., 7 th Floor, MGF Metropolitan, Saket District, New Delhi
PAN :AAACA8163F		
(Appellant)		(Respondent)

Appellant by	Sh. Nageshwar Rao, Advocate Sh. S. Chakarborty, Advocate
Respondent by	Sh. Mrinal Kumar Das, Sr. DR

Date of hearing	08.12.2021
Date of pronouncement	21.12.2021

ORDER

PER SAKTIJIT DEY, JM:

This appeal by the Revenue is against order dated 26.12.2017 of learned Commissioner of Income Tax (Appeals) - 44, New Delhi, pertaining to assessment year 2003-04.

2. Only effective ground raised by the Revenue, reads as under:

“1. The learned CIT(A) has erred in law and on facts in directing the Transfer Pricing Officer (TPO) to exclude M/s. Karvy Consultants Limited from the final list of comparables on account of TP adjustment in arm's length price as the Ld. CIT(A) has failed to appreciate the fact that in service sector, turnover has no impact on profit margin more so when TNMM has been selected as the most appropriate method.”

3. As could be seen from the ground raised, the dispute in the present appeal is confined to comparability of M/s. Karvy Consultants Ltd.

4. Briefly the facts are, the assessee, a resident company, is a wholly owned subsidiary of M/s. American Express International Inc. (AEII), USA. As stated by the Transfer Pricing Officer (TPO), the assessee is engaged in providing Information Technology Enabled Services (ITeS) to its Associated Enterprises (AE). The services provided by the assessee are in the nature of transaction processing, data management, information analysis and control etc. In course of proceeding under section 92CA of the Income-tax Act, 1961 (hereinafter referred to as 'the Act'), the TPO while examining the material on record, noticed that the assessee had benchmarked the provision of ITeS adopting Transactional Net Margin Method (TNMM). For comparability analysis, the assessee has selected six comparables with adjusted arithmetic mean of 11.83%. The margin shown by the assessee at 7% being within

the tolerance range, the assessee claimed the transaction with the AE to be at arm's length. Having perused the economic analysis of the assessee, the TPO, though, accepted the comparables selected by the assessee, however, he was of the view that certain companies which are otherwise comparable to the assessee have been deliberately left out. Thus, he introduced five fresh comparables, including M/s. Karvy Consultants Ltd. as comparables. As a result, the arithmetic mean of the final set of comparables worked out to 16.70%. This resulted in an upward adjustment to the ALP.

5. The assessee contested the selection of certain comparables by the TPO in appeal preferred before learned Commissioner (Appeals). While deciding assessee's appeal, learned Commissioner (Appeals) following the order passed by the Tribunal in assessee's own case in assessment year 2002-03, directed the TPO to exclude some of the comparables, including M/s. Karvy Consultants Ltd. from the list of comparables, since, their annual turnover from the ITeS segment was less than Rs.5 crores. Being aggrieved with the aforesaid decision of learned first appellate authority, the Revenue preferred an appeal before the Tribunal. Of course, the assessee also preferred an appeal before

this Tribunal, challenging some other observations of learned Commissioner (Appeals).

6. Be that as it may, while deciding both the appeals, the Tribunal in ITA Nos. 4240/Del/2009 and 4295/Del/2009 dated 18th May, 2012, upheld the decision of learned Commissioner (Appeals) to exclude the comparables having annual turnover of less than Rs.5 crores in the particular segment. While giving effect to the order of the Tribunal, the TPO, though, excluded some of the comparables having annual turnover of less than Rs.5 crores in the particular segment, however, he again included M/s. Karvy Consultants Ltd. as a comparable. While deciding the appeal of the assessee, learned Commissioner (Appeals) having found that the annual turnover of M/s. Karvy Consultants Ltd. from ITeS segment is less than Rs. 5 crores, excluded it as a comparable. Being aggrieved, the Revenue is before us.

7. Drawing our attention to the ground raised and the observations of the TPO in his original order dated 03.02.2006, learned Departmental Representative submitted, M/s. Karvy Consultants Ltd. was included as comparable, since, as per the available data, it was functionally similar to the assessee. Further, he submitted, since, in service sector turnover does not

have much impact, M/s. Karvy Consultants Ltd. can be treated as comparable as TNMM requires broad comparability.

8. Per contra, learned counsel for the assessee submitted, the TPO has exceeded his jurisdiction while giving effect to the direction of the Tribunal. He submitted, once the Tribunal has upheld the decision of learned Commissioner (Appeals) in excluding the comparables having annual turnover of less than Rs. 5 crores in ITeS segment, the TPO cannot include the comparable again. Thus, he submitted, the decision of learned Commissioner (Appeals) should be upheld.

9. We have considered rival submissions and perused the materials on record. Undisputedly, in the first round of transfer pricing proceeding, the TPO had proposed M/s. Karvy Consultants Ltd. as a comparable. Though, the assessee has objected to its inclusion on the ground that financial data of the company is not available in public domain, however, rejecting assessee's objection, the TPO included the company on the reasoning that it is functionally similar to the assessee. While deciding the comparability of M/s. Karvy Consultants Ltd. along with some other comparables in the appeal preferred by the assessee, learned Commissioner (Appeals) had directed exclusion

of all comparables having annual turnover of less than Rs. 5 crores, including M/s. Karvy Consultants Ltd. Undisputedly, the aforesaid decision of learned Commissioner (Appeals) was upheld by the Tribunal while deciding Revenue's appeal in ITA No. 4295/Del/2009, dated 18th May, 2012. Surprisingly, while giving effect to the directions of the Tribunal, the TPO in order dated 11.03.2013, though, had excluded some other comparables having annual turnover of less than Rs. 5 crores in ITeS segment; however, he again included M/s. Karvy Consultants Ltd. as a comparable. Learned Commissioner (Appeals) in the impugned order has given a categorical factual finding that the turnover of M/s. Karvy Consultants Ltd. from ITeS segment is much less than Rs.5 crores.

10. On a specific query from the Bench, learned Departmental Representative could not controvert the aforesaid factual position. Thus, when the Tribunal had given a specific direction in the first round of litigation to exclude all comparables having annual turnover of less than Rs.5 crores in ITeS segment, in our view, the TPO has exceeded his brief in including M/s. Karvy Consultants Ltd. as comparable in spite of the fact that its turnover from ITeS segment is below the threshold limit of Rs.5 crores. Pertinently,

while deciding assessee's appeal in assessment year 2002-03, the Tribunal in ITA No. 1338/Del/2009, dated 13.01.2012 had excluded M/s. Karvy Consultants Ltd. as a comparable since its turnover from ITeS segment was less than Rs. 5 crores. Thus, in view of the aforesaid, we do not find any infirmity in the decision of the learned Commissioner (Appeals) in excluding M/s. Karvy Consultants Ltd. as a comparable. Ground raised is dismissed.

11. In the result, the appeal is dismissed.

Order pronounced in the open court on 21st December, 2021

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 21st December, 2021.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi