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

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Date of Decision : 16.12.2025

+ **ITA 750/2025**

PRINCIPAL COMMISSIONER OF INCOME TAX, DELHI-1

.....Appellant

Through: Mr. Indruj Singh Rai, SSC, Mr. Sanjeev Menon, Mr. Rahul Singh, JSCs and Mr. Gaurav Kumar and Mr. Siddharth Burman, Advs.

versus

BORGWARNER EMISSIONS SYSTEMS INDIA PRIVATE LTD.

.....Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE VINOD KUMAR

V. KAMESWAR RAO , J. (ORAL)

CM APPL. 79168/2025 (Delay)

1. For the reasons stated in the application, delay of 310 days in re-filing the appeal is condoned.
2. The application is disposed of.

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3. This appeal has been filed with the following prayers:-

“1. Frame the substantial Questions of Law mentioned in Para 3 of the appeal;

2. Frame any other substantial Questions of Law which may arise from the Impugned Order dated 29.08.2024;



3. *Set aside the impugned order dated 29.08.2024 of the Ld. ITAT in ITA No. 2015/Del/2022; and*
4. *Pass any other relief which this Hon'ble Court may deem fit and proper be also awarded in favour of the appellant in the facts and circumstances of the case."*

4. The assessee company is engaged in manufacturing and marketing of Exhaust Gas Recirculation (EGR) System and its component for use by automotive industry with a registered office at New Delhi and a manufacturing facility at Manesar, Haryana.

5. The present appeal assails the decision of the Income Tax Appellate Tribunal (ITAT) dated 29.08.2024 (impugned order) wherein the assessee company had challenged the order dated 28.07.2022 pertaining to Assessment Year (AY) 2013-14 passed by the Assessing Officer (AO). The issue that had arisen was with regard to the application of the Transfer Pricing provision as available under the Income Tax Act, 1961 (the Act). The challenge before the ITAT was that the AO had assessed the total income of the assessee for AY 2013-14 at Rs.29,67,93,105/- after making certain additions namely; difference in TDS reconciliation at Rs.2,297/-; and adjustment proposed by the Transfer Pricing Officer (TPO) at Rs.9,09,43,495/-. Thereafter, additions to the said amount were made on the directions to charge interest under Sections 234A(a), 234B, 234C and 234D of the Act. Even penalty proceedings under Section 271(1)(c) of the Act, were also directed to be initiated separately. The two additions which were made pertain to international transactions regarding payment for Business Support Services (BSS), payment for Technical Support Services (TSS) and royalty payments.



6. In this regard the ITAT framed the following issues:-

- “(a) Whether any Technical Support Service was availed of by the assessee from its AE(s)?*
- (b) Whether any Business Support Service was availed of by the assessee from its AE(s)?*
- (c) Whether the transactions were to be treated while Adopting aggregative approach or segregative approach?*
- (d) Whether transaction pertaining to Royalty payment was intertwined with other transactions?*
- (e) Whether the approach adopted in the previous years in the case of the assessee in respect of said transactions was required to be followed or could be deviated for any reason?*
- (f) Which of the prescribed methods needed to be applied for determination of arm’s length price?*
- (g) Whether Dispute Resolution Panel conducted proceedings in accordance with law and as per the directions issued by the Co-ordinate Bench of Appellate Tribunal in the first round of litigation?”*

7. The ITAT noted that the parties had come before it in a second round of litigation since the initial order under Section 92CA(3) of the Act, was passed in pursuance to the direction issued by the Dispute Resolution Panel (DRP) on 13.09.2017 vide assessment order under Section 143(3). The ITAT vide order dated 04.09.2018 set aside the assessment order dated 13.09.2017 and restored the matter before the TPO/AO in respect of all three issues which had led to the assessment. These proceedings ultimately led to the final assessment order dated 28.07.2022 wherein adjustment of Rs.9,09,41,198/- came to be added to the total income of the assessee in addition to directions for initiation of penalty proceedings because of concealment of income by the assessee.

8. The assessee claims to have availed of TSS and BSS from its AEs-



BorgWarner Emission Systems Spain S.L. and BorgWarner Emission Systems of Michigan Inc., USA. It had further claimed to have been providing TSS to its customers in relation to EGR system and its components.

9. On the issue of TSS the assessee had stated before the ITAT that the same were provided by its AEs in USA and Spain. The BSS had included a number of services for which support from the AE was alleged to have been received. On the issue of TSS the ITAT upheld the decision of the TPO and stated that the assessee had the right to receive Know-How and technical training as part of the license agreement with its AE for which royalty had been paid, but the assessee failed to prove that it required additional training to run its business and for that the assessee paid additional amount as TSS fee. The TPO had concluded that in the given facts if the buyer was not getting any real service the assessee would not have paid anything if it were not controlled by the payee.

10. The ITAT after considering the evidence provided and the records, held that the rejection of the claim, of the assessee wherein it had explained the need of entering into engineering agreement even after having entered into license agreement and availing TSS and BSS subsequently, was said to be done without proper inquiry and application of mind.

11. On the issue of whether the case was bench marked as per aggregation or segregation approach, the ITAT had differed with the findings of the TPO and stated that the conclusion of the TPO in holding that the Arms' Length Price (ALP) of TSS and BSS services was nil, was an erroneous conclusion. The ITAT also observed that in the earlier round of litigation the ITAT had



given certain directions to the DRP to consider and discuss the additional evidence but the same were not looked into by the DRP on the objection pertaining to TSS or BSS.

12. Mr. Indruj Singh Rai, learned SSC appearing on behalf of the appellant/Revenue would submit that the said impugned judgment of the ITAT be set aside. He also prays that this court frame the following questions of law for decision:-

“A. Whether on the facts and in the circumstances of the case and in law, the Ld. ITAT is justified in quashing the TPO’s order without providing adequate reasons for overturning the well reasoned findings made by the TPO, especially in light of the fact that the TPO’s findings were consistent with the principles laid down under the Transfer Pricing provisions?”

B. Whether on the facts and in the circumstances of the case and in law, the Ld.ITAT is justified in not appreciating the scope and nuances of determinations of the arm’s length price under Section 92CA of the Income Tax Act, particularly with respect to transfer pricing adjustments in intra-group transaction?”

C. Whether on the facts and in the circumstances of the case and in law, the Ld. ITAT is justified in quashing the TPO’s order by ignoring the relevant judicial precedents which support the TPO’s approach in applying the segregation method for determining arm’s length price in multi-faceted intra-group transactions during the AY under consideration?”

D. Whether on the facts and in the circumstances of the case, the Ld. ITAT is justified in not making an independent finding and determination on facts on the merits of the case and applicable law by choosing to rely on the “rule of consistency” based on determinations of previous and subsequent AYs for purported “payment of royalty & Intra Group Services” while not distinguishing the facts of the case involved in various years vis-a-vis the subject AY, and not appreciating that the Principle of resjudicata is not applicable on income tax



proceeding.?

E. Whether on the facts and circumstances of the case, the Ld. ITAT is justified in deleting the transfer pricing adjustment made for purported “Intra Group Services” towards “Technical Support Services and Business Support Services” to AE despite proven failure of the assessee to prove the actual receipt of such services and use thereof by the assessee in the subject AY for its business purposes?

F. Whether on the facts and circumstances of the case, the Ld. ITAT is justified in deleting the addition made on account “Royalty” by reasoning that landed cost of goods were not included while calculating royalty rates for comparables while not appreciating that royalties should be based on contribution of the Intellectual Property to the product’s sales price, not on the cost incurred in importing or delivering the product?”

13. Mr. Rai contends that the ITAT had erroneously rejected the finding of the TPO and failed to appreciate that the TPO has passed a detailed order after taking into account all the facts and submissions. The DRP failed to add its own reasoning and had upheld the finding of the TPO and the ITAT ought to have considered the findings of the TPO. It is his case that it is a well settled principle that while determining ALP of the intra-group services requires evidence of requisition, rendition, cost and benchmarking of mark up. Through the order under Section 92CA(3) of the Act, the ALP of the transaction was determined as nil since the assessee failed to provide break up of intra group services. According to him in respect to the services alleged to be availed from the AE, the ITAT held wrongly that the invoices submitted by the assessee provide the requisite evidence in respect to rendition of services to the assessee. He has also objected to the fact that the copies of the agreement entered with the AEs is unsigned and stated that



there is no evidence to suggest that the assessee availed any service from its AEs. In this regard even the emails received during the relevant year do not provide an adequate proof that these services were actually used by the assessee. Similarly, the inter company invoices cannot be deemed to be adequate evidence to prove this fact. Additionally, he states that insofar as the right to receive technical training which is a part of the license agreement for which the assessee had paid royalty to the AE company is concerned, the assessee failed to prove that it required this additional training to run its business, for which an additional amount of Rs.1,73,61,018/- as TSSfee was paid. He states that the services are duplicate in nature and already covered in the royalty agreement. Accordingly, the ITAT had not appreciated the lack of evidence in that regard that the licensing agreement only allowed for limited support of 20 days in a year and to the extent of manufacturing and sale of parts only and that these services were beyond the agreement.

14. Mr. Rai, has stated that merely because there were intra company agreements it cannot be assumed that there is a related party transaction since the same requires to be supported by actual facts. Once the assessee failed to establish that there was rendition of service by the AE, the question of finding a comparable for the alleged transaction became otiose. Hence the TPO had rightly applied 'Other Method' and determined the ALP transaction as nil. It is the case of Mr. Rai that royalty payments are typically made for use of intellectual property and as such including the landed cost in the royalty calculation would inaccurately mix physical goods-related costs with intangible IP-related compensation and in many



cases royalty agreements are specifically structured to exclude direct product cost. He further added that royalty is typically calculated as a percentage of revenue generated from sales of goods or services that utilize some intellectual property, and in this regard transfer pricing rules and OECD guidelines ought to be followed and as such these royalties are not the cost incurred to bring goods into the market.

15. Mr. Rai states that the ITAT had committed an error while relying on the assessments of the previous years and thereby rejecting the segregated approach of the TPO on the sole reason that the principle of consistency was being violated in the case of the assessee. He also states that the ITAT has not considered the fact that principles of *res judicata* are not applicable in income tax proceedings. In this regard, he has relied upon judgments in the cases of :

- i. ***Krishak Bharti Cooperative Ltd v. Deputy CIT, [2012] 23 taxmann.com 265 (Delhi),***
- ii. ***Honey Enterprises v. CIT, ITA 163/2002.***
- iii. ***Sony Ericsson Mobile Communications India (P.) Ltd. v. CIT, [2015] 55 taxmann.com 240 (Del).***

16. Having noted the averments in the appeal and the submissions made by Mr. Rai, suffice to state that his primary submission is that, the ITAT could not have set aside the conclusion of the TPO, more so when it has been approved by the DRP. The other submissions can be summed up as under:-

- i. The TPO has rightly determined the ALP of the transaction as 'NIL' since the assessee failed to provide a break up of intra group services.



- ii. The ITAT has wrongly held that the invoices submitted by the assessee provide evidence in respect of rendition of services.
 - iii. The copies of the agreement entered with the AE's are unsigned and there is no evidence that the assessee availed any service from the AE's.
 - iv. The emails received do not show enough proof that the services were actually provided.
 - v. With regard to the right to additional technical training which is part of the license agreement for which the assessee paid royalty to the AE, the assessee failed to prove that it required additional training to run its business.
 - vi. Mere intra company agreement cannot be the basis to assume a related party transaction since they require to be supported by actual facts.
 - vii. That royalty payments are made for use of intellectual property and as such including landed cost in the royalty calculation would inaccurately tax physical goods' valid costs with intangible IP related compensation.
 - viii. The ITAT has also erred in relying on the assessment of the previous years and thereby rejecting the segregated approach of the TPO.
17. Having noted the submissions, we state in the facts of this case, the DRP, except approving the conclusion of the TPO had not given its findings on the same which was incumbent upon it. Having said that, we may refer to paragraphs 44 to 48 of the impugned order, containing the reasoning of the ITAT, which read as under:-



“44. In the given facts and circumstances, as regards TSS and BSS, Learned TPO was not justified in arriving at the conclusion that in this matter the assessee was not getting any real service and that it would not have paid anything if it were not controlled by the payee. Consequently, Learned TPO erred in opining that holding the arm’s length price of TSS and BSS services to be NIL.

45. It is noteworthy that in the first round of litigation, the Appellate Tribunal also noticed that certain additional evidence was submitted on behalf of the assessee before Ld. DRP, but there was no finding recorded by Ld. DRP to suggest if said additional evidence was or was not considered.

46. Appellate Tribunal also observed that in the given facts and circumstances and in the interest of justice, it was necessary that the issue with respect to determination of ALP of the international transaction of Business Support Services and Technical Support Services fee be remitted back to the file of Ld. TPO for determination of their ALP.

At the same, the assessee was also directed to produce relevant details with respect to rendition of services with credible and contemporaneous evidence for impugned assessment year and also to demonstrate as to how said transactions were required to be aggregated.

47. As noticed above, Learned DRP has not discussed in para 4.2.2 and 4.2.3 any of the objections raised by the assessee, what to say of any giving any reason for confirming the views expressed and observations made by Learned TPO.

48. From the order passed by Learned DRP, it transpires that one of the objections or contentions raised there on behalf of the assessee was that TPO had been unable to provide sufficient data of comparability in the case of TSS and BSS.

In this regard, Learned DRP simply observed in the order that the same was well taken, but, surprisingly, at the same time opted to direct the TPO to consider said contention raised by the assessee.

Firstly, Ld. DRP itself was to deal with and decide said contention raised by the assessee. The Panel had no



jurisdiction to issue direction to the TPO to consider said contention.

Secondly, by simply mentioning that the panel had taken the contention well, it cannot be said that said contention was discussed or dealt with.

When there were specific directions from the Appellate Tribunal to consider said contention in addition to the additional evidence, Learned DRP was required to consider and discuss the additional evidence.

But, as noticed above, learned DRP nowhere discussed any of the objections pertaining to TSS or BSS or even the contention that the TPO had not been able to provide sufficient data of comparability in the case of TSS and BSS.

Adoption of approach by the Revenue as regards the assessee, in the Previous years.”

18. On the issue relatable to the previous years and about the factum of rendering the service, the ITAT has in paragraph nos. 49 to 53, held as under:-

“49. One of the contentions raised on behalf of the appellant is that as regards payments of TSS, BSS and Royalty, TPO has passed orders ignoring the earlier orders pertaining to AYs 2011-12 and 2012-13, passed by the TPOs in the case of the assessee itself and as such the principle of consistency stands violated in this matter.

As regards payment of Royalty, contention raised by Learned AR for the assessee is that as regards AY 2018-19, Learned TPO has concluded the transactions to be at Arm's Length in entirety and has not drawn any adverse inference against the assessee. In this regard, reliance has been placed on pages 863 to 901(PB-II).

For the period from AYs 2014-15 to 2017-18, learned AR has submitted that the matters were not selected for TP assessment.

In support of his contentions, learned AR for the assessee has placed reliance on decision in Radhasoami Satsang v. CIT, 193 ITR 321.



50. On the other hand, Learned DR has submitted that the onus of establishing rendering of services is to be discharged by the assessee on year to year basis, and that this is a case where the assessee has failed to establish rendering of services, and as such there is no merit in this contention raised on behalf of the assessee. On this point, learned DR has placed reliance on decision in *AT Kearney Ltd.'s case (supra)*, wherein reliance was placed on a decision by Delhi Bench of ITAT, in the case of *Akzo Nobel India Pvt. Ltd.'s case (supra)*.

In *Avery Dennison (India) Pvt. Ltd. V. ACIT*, reported in 145 taxmann.com 468, it was held that each year is a separate unit and governed by its peculiar facts. Even otherwise, assessee's claim in respect of each assessment year has to be decided in view of the evidence produced regarding rendering or receipt of services to or from AE.

51. In the case of *Akzo Nobel India Pvt. Ltd.'s case (supra)* relied on by Learned DR, assessee could not prove receipt of Intra Group Services, by producing requisite documents, and further that each year is based on different facts and the issue involved is to be decided on the basis of evidence produced.

In *Safran Engineering Services India Pvt. Ltd., 1989 taxmann.com 77 (Bengaluru)*, referred to in *AT Kearney Ltd.'s case (supra)* relied on behalf of the Revenue, it was held that before the authorities below, the assessee had not discharged the onus of proving the receipt of services, and further that each assessment year is separate and distinct. Therein, on this point, reliance was also placed on decision in *Lintas India Pvt. Ltd. v. ACIT*.

It is settled law that the principles of *res judicata* have no application to income-tax assessment proceedings.

52. It is significant to note that when the matter came up before Co-ordinate Bench of ITAT in the first round, it was observed that with respect to the transaction by transaction approach v. aggregation of the transaction for subsequent year as well as in the earlier year, Learned TPO had accepted the aggregation approach adopted by the assessee. Learned Co-ordinate Bench also observed that it was not disputed that for AY 2011-12 and



2013-14, Learned TPO had accepted the aggregation approach; and further that following the principle of consistency, where there is no change in the facts and circumstances of the case for this year, Learned TPO should have followed the same approach; and even further that if for any reason, Learned TPO wanted to deviate from the same, he should also give a detailed reason as to why he was deviating, but in the order passed by Ld. TPO, the Co-ordinate Bench did not find any such discussion.

Herein, Ld. TPO was of the view that the three type of transactions are to be benchmarked at segregate level. The main ground for arriving at this view was that the assessee had failed to prove factum of rendering of services.

53. As discussed above, the factum of rendering of said services stands proved. Therefore, there is merit in the contention raised on behalf of the assessee that TPO has passed orders ignoring the earlier orders pertaining to AYs 2011-12 and 2012-13, passed by the TPOs in the case of the assessee itself as regards payments of TSS, BSS and Royalty, and that the principle of consistency stands violated in this matter.

ALP as regards Royalty transactions”

19. Similarly as regard to the royalty transaction we refer to the ITAT order in paragraph no. 54 and 55 which read as under:-

“54. As regards Royalty transactions, in the first round, the Appellate Tribunal observed that Learned TPO had proceeded to benchmark the transaction related to Business Support Services, related to payment for Technical Support Service and payment related to Royalty separately.

However, Ld. DRP had confirmed whatever ALP regarding said three transactions were determined by Ld. TPO.

Arm’s Length price has been defined in section 92F (ii) of the Act. It means the price which is applied or proposed to be applied in a transaction between persons other than associated enterprises in uncontrolled conditions.

The factors and methods incorporated in this section are not exhaustive. CBDT has been empowered to prescribe further



factors and methods. Most appropriate method is to be adopted in relation to an international transaction for determination of ALP.

In this regard, nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors, as prescribed by CBDT, may be taken into consideration.

Expression “other method” as provided under this provision may be used while taking into consideration the price which has been charged or paid or the price which would have been charged or paid fr[sic] the same or similar uncontrolled transactions with or between non-associated enterprises, under similar circumstances.

In the first round of litigation, said issue was also remitted back to the file of Ld. AO with the direction to the assessee to show to how payment of royalty was inextricably linked with the manufacturing activities and as to why it ought to be aggregated and benchmarked together with other international transactions under transactional net margin method.

On remand, ALP of royalty paid by the assessee was determined at 1.24% of sales made by the assessee. The ALP of royalty was determined at Rs. 92,81,625/- and adjustment of Rs. 3,27,73,603 was made on this account. In so determining, Ld. TPO observed that the most appropriate method to determine ALP of royalty is the “other Method” mentioned in section 92C(1)(f) and rule 10B(1)(f), taking average of royalty rates paid by the comparables selected by the assessee in the transfer pricing study filed by the assessee.

Learned TPO was of the view that the assessee had failed to discharge its primary onus to file details in respect of differentiating the services for any royalty from the technical support services.

Learned DRP upheld this view while taking into consideration that contention raised on behalf of the assessee regarding inclusion of 3 companies, which had not been paid any royalty, and then excluding said companies while arriving at average for the determination of ALP of royalty.



55. It has been contended on behalf of the assessee that the comparability analysis made by Ld. TPO without any appropriate basis, and that Aggregation approach deserves to be adopted for determining ALP.

56. It finds mentioned in para 15 of the order passed by Ld. TPO that there were six comparables (taken by the assessee for benchmarking at TNM method, and even as the original order by the TPO).

Ld. TPO determined ALP of royalty at 1.24% of sales made by the assessee, as described in the table available in para 11 of the order.

Notably, one of the contentions on behalf of the assessee is that Ld. TPO incorrectly computed ALP as regards royalty, without taking into consideration landed cost of imported components in the case of comparables.

In the first round of litigation, same argument was put forth on behalf of the assessee before the Appellate Tribunal, and noticing this infirmity and others as pointed out by the assessee, the matter was remitted.

In those proceedings, in the first round, it was submitted that assessee had paid royalty in terms of the agreement where royalty was payable @ 5% of the net sales of licensed products in India, and @ 8% of net sales of licensed products outside India.

There, it was also submitted that in case of comparables, Ld. TPO had taken the rate of comparable @ 0.63 for both transaction. The assessee also stated that rate of 0.63% in case of comparables was incorrect calculation without considering the landed costs of imported components.

57. However, record does not reveal, nor any has been pointed out, to suggest that landed cost of imported components in the case of comparables was also taken into consideration in the 2nd round. Even Ld. DRP did not consider this aspect.

Therefore, there is merit in the contention raised on behalf of the assessee even on this point.

Result

58. In view of the above discussion and findings, the impugned



*assessment based on the observations and findings recorded by Ld. TPO and by Ld. DRP deserves to be set aside.
59. Consequently, this appeal is allowed.”*

20. The above reveals that, there is some basis for the ITAT to come to the conclusion as it has done in the impugned order. We are of the view that the reasoning given by the ITAT is justified.

21. In the given facts, as no substantial questions arise in the petition, the same is liable to be dismissed. We order accordingly.

V. KAMESWAR RAO, J

VINOD KUMAR, J

DECEMBER 16, 2025

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