

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J" MUMBAI**

**BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 3849/MUM/2014
Assessment Year: 2007-05**

DCIT-2(3),
Room No. 552, 5th floor,
Aayakar Bhavan, M.K. Road,
Mumbai-400020.

M/s Tech Mahindra Pvt. Ltd.,
Gateway Building, Apollo
Bunder, Mumbai-400001
Vs.

Appellant

**PAN No. AAACM3484F
Respondent**

**C.O. No. 11/MUM/2015
(ITA No. 3849/MUM/2014)
Assessment Year: 2007-05**

Tech Mahindra Ltd.,
SharadaCentra Off Karve
RD, Erandwane,
Pune-411004

DCIT-2(3),
R. No. 552, 5th floor,
Vs. Aayakar Bhavan, M.K. Road,
Mumbai-400020.

**PAN No. AAACM3484F
Appellant**

Respondent

Revenue by : Mr. A. Mohan, CIT- DR
Assessee by : Mr. J.D. Mistri, Senior Advocate

Date of Hearing : 15/01/2020
Date of pronouncement : 22/01/2020

ORDER

PER N.K. PRADHAN, A.M.

The appeal by the Revenue and the cross objection by the assessee are directed against the order of the Commissioner of Income Tax (Appeals)-6 [in

short 'CIT(A)], Mumbai and arise out of the assessment order passed by the Assessing Officer (AO) u/s 143(3) r.w.s. 147 of the Income Tax Act 1961, (the 'Act').

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2. The grounds of appeal filed by the Revenue read as under:

1. The order of the CIT(A) is opposed to law and facts of the case.
2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in annulling re-assessment proceedings u/s 143(3) r.w.s. 147 of the Act, without appreciating that mere submission of material before the Assessing Officer in itself cannot establish that the assessee had disclosed all material facts before the Assessing Officer during the original assessment and hence, the same cannot constitute change of opinion.

3. Briefly stated, the facts of the case are that the assessee filed its return of income for the assessment year (AY) 2007-08 on 29.10.2007 declaring total income of Rs.23,05,46,624/- after claiming deduction u/s 10A of the Act of Rs.658,69,93,208/-. The Assessing Officer (AO) passed an order dated 18.02.2011 u/s 143(3) r.w.s. 144C(3) by making various adjustments (including adjustments to the computation of deduction u/s 10A of the Act) to the total income of the assessee. However, with regard to the upfront discount of Rs.524,93,80,079/- paid to the British Telecommunications, the AO recorded in the assessment order that though the determination of arm's length price (ALP) as Nil by the Transfer Pricing Officer (TPO) is accepted, however, no adjustment was made in respect of upfront discount as the assessee has not claimed the same as an expenditure at all in its return of income. Further, the AO verified the working of the deduction claimed by the

assessee u/s 10A as also the clarifications/explanations furnished by the assessee and after making certain adjustments i.e. reduction of expenses incurred in foreign exchange, telecommunication charges and unrealized sale proceeds from the export turnover, he granted deduction u/s 10A at Rs.578,69,80,911/- as against the claim of Rs.658,69,93,208/- made by the assessee in the return of income.

Subsequently, the AO initiated re-assessment proceedings by issuing notice u/s 148 dated 29.03.2012 by recording the following reasons :

“A)

In this case, matter was referred to the Transfer Pricing Officer (TPO) who passed the order under section 92CA(3) dated 27 October 2010. One of the adjustment suggested by the TPO was payment of upfront discount of Rs.524,93,78,079/-. However, it seems from the records that this particular adjustment was not made. As per the provisions of section 92CA(4), AO was bound by the order of TPO. Therefore the income of R.5,42,93,78,079/- i.e. adjustment as made by TPO has escaped assessment.

B)

As per the provisions of section 10A, a deduction of profit and gains which are derived by an undertaking from export of articles or things or computer software is allowed from the total income of the assessee. Further as per provisions of section 92C(4) of the Act, if total income having regard to arm's length price is enhanced, no deduction under section 10A, 10B or Chapter VI-A of the Act shall be allowed in respect of the increased quantum of the income. The Assessee had made payment of upfront discount of Rs.524,93,78,079/- to BT and debited Profit and Loss Account with the sum. The TPO, vide his order dated 27 October 2010, had made, inter-alia, adjustment of Rs.524,93,78,079/- on account of upfront payment. It is seen that the deduction under section 10A of the Act has been allowed on payment of upfront

discount of Rs.524,93,78,079/-. It has resulted in excess deduction under section 10A of the Act of Rs.457,36,49,218/-. Therefore there is under assessment resulting in escapement of income.

(2) It has been further seen from the records that the profit included a sum of Rs.6,99,92,839/- which were not derived from export of article, thing or computer software. The details are:

Interest on deposits with banks	Rs.6,34,43,558
Interest on others Total	Rs.65,49,281
Total	Rs.6,99,92,839

As the income shown above were not derived from export of articles, things or computer software, no deduction on these incomes was allowed under section 10A of the Act. Therefore there is under assessment resulting in escapement of income.”

4. In appeal, the Ld. CIT(A) *vide* order dated 17.02.2014 observed that (i) as per the computation of total income, the payment of upfront discount was not claimed by the assessee as an expense while computing taxable income, (ii) the AO, after considering the TP order and the submissions of the assessee dated 16.11.2010 and after verifying the relevant facts, has specifically recorded in the assessment order that no adjustment has been made with respect to TP adjustment on payment of upfront discount since the same was not claimed as an expense for tax purpose by the assessee and giving effect to the TP adjustment would entail double disallowance, (iii) even the re-assessment order, the AO has not given effect to the TPO's order with respect to upfront discount, (iv) section 10A deduction has been claimed by the assessee on profits before exceptional items, further exceptional items are the subject upfront discount, (v) the AO has considered the submissions made by the assessee during the course of assessment proceedings, and also applied his mind to the computation of deduction and after certain adjustments (i.e.

reduction of expenses incurred in foreign exchange, telecommunication charges and unrealized sale proceeds from export turnover) reduced the deduction u/s 10A to Rs.578,69,80,911/- as against the claim of Rs.658,69,93,208/- made by the assessee in the return of income, (vi) the AO accepted the assessee's contention that no effect could be given to the transfer pricing adjustment suggested by the TPO on the upfront discount, since it is not claimed as deduction.

On the basis of the above observations, the Ld. CIT(A) held that the re-opening of assessment on the basis of deduction u/s 10A has been done by the AO merely on change of opinion. Further stating that there was no new tangible material based on which the AO initiated the re-assessment proceedings, the Ld. CIT(A) annulled the assessment order passed u/s 147/143(3) of the Act.

5. Before us, the Ld. Departmental Representative (DR) relies on the order of the AO, whereas the Ld. counsel for the assessee supports the order passed by the Ld. CIT(A).

6. We have heard the rival submissions and perused the relevant materials on record. In the instant case, we find that the payment of upfront discount was not claimed by the assessee as an expense while computing the taxable income; the AO after considering the order of the TPO and submissions of the assessee did not make any adjustment in respect of upfront discount on the reason that the same was not claimed as an expense for tax purpose by the assessee ; even in the re-assessment order the AO has not given effect to the TPO's order with respect to upfront discount. Further, we find that the AO,

after considering the submissions made by the assessee and after certain adjustments (i.e. reduction of expenses incurred in foreign exchange, telecommunication charges and unrealized sale proceeds from the export turnover) reduced the deduction u/s 10A to Rs.578,69,80,911/- as against the claim of Rs.658,69,93,208/- made by the assessee in the return of income.

In view of the above factual matrix, we uphold the order of the Ld. CIT(A) on the above matter.

7. In the result, the appeal filed by the Revenue is dismissed.

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8. There has been a delay of 16 days in filing the cross objection by the assessee. Having gone through the affidavit dated 09.01.2015, we are convinced that there was genuine reason on the part of the assessee in filing the appeal late by 16 days. We condone the delay.

9. The cross objection filed by the assessee read as under :

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has rightly held that the reassessment proceedings are bad in law since the same were initiated pursuant to change of opinion and without any new tangible material on record.
2. Without prejudice to the above, in case it is decided that reassessment proceedings are valid in law, on the facts and in the circumstances of the case and in law, the DCIT erred in passing the final assessment order u/s 143 r.w.s. 147 of the Act, without complying with the provisions of section 144C of the Act.
3. On the fact and in the circumstances of the case and in Law, the DCIT erred in denying the deduction under section 10A of the Act of Rs.457,36,49,218 on the

Transfer Pricing adjustment of Rs.524,93,78,079 suggested by the Transfer Pricing Officer ('TPO'), ignoring the fact that the said payment was *suo-motu* disallowed by the Appellant in its Return of Income, pursuant to which the DCIT did not give effect to the transfer pricing adjustment suggested by the TPO.

4. On the fact and in the circumstances of the case and in law, the TPO erred in determining and the Assessing Officer erred in accepting that the upfront discount payment to British Telecommunication of Rs.524,93,78,079 does not meet the criteria of arm's length pricing.

10. Since we have dismissed the appeal filed by the Revenue, the above cross objection filed by the assessee becomes infructuous.

11. In the result, the appeal filed by the Revenue is dismissed. The cross objection filed by the assessee is dismissed as infructuous.

Order pronounced in the open Court on 22/01/2020

Sd/-

Sd/-

(VIKAS AWASTHY)
JUDICIAL MEMBER

(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 22/01/2020

Biswajit, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai