IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.3033/Mum./2014
(Assessment Year : 2008–09)

Dy. Commissioner of Income Tax
Circle–2(3), Mumbai ……. Appellant

v/s

M/s. Tech Mahindra Pvt. Ltd.
(Formerly known as
Tech Mahindra R&D Services Ltd.)
Gateway Building, Apollo Bunder
Mumbai 400 001 PAN – AABCA4342H .....Respondent

ITA No.301/Bang./2014
(Assessment Year : 2008–09)

M/s. Tech Mahindra Ltd.
(Formerly known as
Tech Mahindra R&D Services Ltd.)
Gateway Building, Apollo Bunder
Mumbai 400 001 PAN – AABCM3484F
(Erstwhile PAN – AABCA4342H) ……. Appellant

v/s

Dy. Commissioner of Income Tax
Circle–12(4), Bangalore .....Respondent

Assessee by : Shri H.P. Mahajani
Revenue by : Shri Chandra Vijay

Date of Hearing – 19/05/2022	Date of Order – 26/07/2022

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present cross appeals have been filed by the assessee and Revenue challenging the impugned order dated 14/02/2014, passed

under section 250, of the Income Tax Act, 1961 (‘*the Act*’) by the learned Commissioner of Income Tax (Appeals)–IV, Bangalore [‘*learned CIT(A)*’], for the assessment year 2008–09.

2. In its appeal, assessee has raised following grounds:

“The grounds stated here are independent of and without prejudice to one another.

Aggrieved by the order passed by the Commissioner of Income-tax (Appeals)-IV, Bengaluru [hereinafter referred to as 'the learned CIT(A)], under section 250 of the Income-tax Act, 1961 (the Act) and based on the facts and circumstances of the case, Tech Mahindra Limited (Tech Mahindra (R&D) Services Limited now merged with Tech Mahindra Limited) (hereinafter referred to as the Appellant], respectfully submits that the learned CIT(A) erred in confirming the additions proposed by the Deputy Commissioner of Income-tax-Range 1214) (hereinafter referred to as "the learned AO'] and the Deputy Commissioner of Income-tax (Transfer Pricing), Range V (hereinafter referred to as "the learned TPO) on the following grounds:

Ground No. 1-Transfer Pricing adjustments

1.1 Addition to total income of Rs. 99,509,950.

On the facts and in the circumstances of the case and in law, the learned Transfer Pricing Officer (TPO) and the learned Assessing Officer (AO) erred in making and the learned Commissioner of Income-tax (Appeals) - IV. Bangalore ['CIT(A)), erred in upholding the addition of Rs. 99,509,950 to the Appellant's total income based on the provisions of Chapter X of the Income-tax Act, 1961 (the Act).

1.2 Tax evasion motive not demonstrated.

On the facts and in the circumstances of the case and in law, the learned TPO / AO erred in and the learned CIT(A) erred in upholding the action of the learned TPO / AO in failing to appreciate that the Appellant was claiming tax deduction under Section 10A of the Act and accordingly had no intention to shift profits outside India by manipulating the prices charged in the international transactions which is a pre-requisite condition to make any adjustment under the provisions of Chapter X of the Act.

1.3 Incorrect rejection of Appellant's Transfer Pricing Study and benchmarking analysis.

On the facts and in the circumstances of the case and in law, the learned TPO AO med and the learned CIT(A) further erred in upholding / confining the action of the learned TPO / AO of arbitrarily rejecting the detailed and methodical benchmarking analysis undertaken by the appellant and contemporaneous Transfer Pricing documentation maintained by the appellant as per the provisions of Section 2D of the Act read with Rule 100 of the Income tax Rules, 1962 (the Rules" without providing any cogent reasons for the same or pointing out any material deficiencies therein.

1.3.1 Incorrect rejection of AE us the tested party

On the facts and in the circumstances of the case and in law, the learned TPO / AO erred in and the learned CIT(A) erred in upholding the rejection of selection of the Associated Enterprise as the tested party in the Transfer Pricing documentation maintained by the appellant, arrived at after detailed functional and economic analysis of the transacting parties and the international transaction under consideration as mandated by the Rule 108(2) of the Rules.

1.3.2 Premeditated application of own set of comparables by the learned TPO.

On the facts and in the circumstances of the case and in law, the loamed TPO / AO erred using and the learned CIT(A) red in upholding the application of a standard benchmarking set without conducting a Function Assets and Risk Analysis ("FAR Analysis") of the same in order to prove its applicability to the case by specious comparison of the international transaction of availing of service with the alleged comparable companies carrying out the business of provision of services and with premeditated objective of making an adjust to the income of the appellant.

1.3.3 Incorrect selection of comparables by the learned TPO by not considering the FAR analysis pertaining to the international transaction under consideration.

On the facts and in the circumstances of the case and in law, the leased TPO earned in and the learned CIT(A) further erred in upholding confirming the action of TPO in selection of the companies which are functionally not comparable to the appellant's business.

The appellant prays that aforesaid action of the learned TPO and learned CIT(A) is factually incongruent and against the principles of comparability enshrined in Rule 10B(2) of the Income-tax Rules 1962 ("the Rules") and hence liable to be rejected or alternatively set aside.

1.4 Inconsistency in applicability of principle of impossibility of performance.

On the facts and in the circumstances of the case and in law, the learned TPO / AO erred and the learned CIT(A) erred in applying the principle of impossibility of performance.

The appellant prays that the learned TPO's action and learned CIT(A)'s confirmation of rejection of the appellant's benchmarking analysis conducted by using foreign i.e., COMPUSTAT database citing unavailability of the same and hence impossibility of performance and learned CIT(A)'s prime s action of rejecting appellant's objection to learned TPO's use of data exercising powers u/s 133(6) citing impossibility of performance, being inconsistent is liable to be rejected.

1.5 Incorrect use of comparables using the data obtained under section 133(6) of the Act.

The learned TPO / AO erred in using and the learned CIT(A) erred in confirming the use of data obtained under Section 133(6) of the Act which was against the principles of natural justice as the data could never have been considered by the appellant at the time of preparation of the Transfer Pricing documentation. The learned TPO AO and the learned CIT(A) further erred in rejecting the right of the assessee to cross examine the information gathered by the TPO by resorting to section 133(6) of the Act.

The appellant prays that aforesaid action of the learned TPO / AO and the learned CIT(A) is against the basic tenets of transfer pricing regulations, and is only with a premeditated objective of making an adjustment to the international transaction of the appellant.

1.6 Incorrect calculation of adjustment to the international transaction

The learned TPO / AO erred in computing and the learned CIT(A) erred in upholding the computation of the adjustment on the entire cost of the appellant and also erred in not restricting adjustment only to the extent of the international transaction under consideration which formed only 26.91% of the appellant's total costs.

Ground No. 2- Disallowance of custom duty paid as revenue nature.

The learned CIT(A) erred in confirming the action of the learned AO in making disallowance of Rs.11,78,884/– being Custom duty paid by the Appellant on de–bonding of fixed assets belonging to STPI unit and customs duty for assets shifting treating the same as capital expenditure.

Ground No. 3-Disallowance under section 14A of the Act

3.1 The learned CIT(A) erred in confirming the action of the leaned AO in disallowing expenditure of Rs.8,78,823/- under section 14A of the Act read with Rule 8D of the Income-tax Rules, 1962, as expense incurred in relation to earning of exempt income.

3.2 The leaned CIT(A) further erred in not restricting disallowance under section 14A Act to Rs.4,65.916/-, being direct expense incurred by it.

Ground No. 4- Disallowance of foreign exchange loss

The learned CIT(A) erred in confirming the action of the learned AO in not allowing deduction of Rs.47,97,489, being foreign exchange loss incurred by Bangalore non-10A Unit on entering into forward contract as "Speculative Transaction" within the meaning of Section 43(5) of the Act."

3. In its appeal, Revenue has raised following grounds:

"1. On the facts and in the circumstances of the case and in law, the Ld. Commissioner of Income Tax (Appeals) erred in not demonstrated how high turnover comparable companies effect profitability of the assessee company and ignoring the decision of the Hon'ble Tribunal, Mumbai in the case of Natel Network Pvt. Ltd, and Maersk Global Centuries (I) Pvt. Ltd. dated 07.3.2014, which are in favour of the revenue.

2. On the facts and in the circumstances of the case and in law, the Ld. Commissioner of Income Tax (Appeal) erred in not demonstrated how high turnover comparable companies effect profitability of the assessee company and ignoring the decision of the Hon'ble Tribunal, Delhi, in Navisite (I) Pvt. Ltd. where it was held that for a 'services company's turnover has no relevance.

For these and other grounds that may be urged at the time of hearing, the decision of the CIT(A) may be set aside and that of the AO be restored."

4. As common grievance in the cross appeals is pertaining to transfer pricing adjustment, therefore, issues pertaining to same are dealt first by us.

5. The issue arising in ground No. 1, raised in assessee's appeal, is pertaining to transfer pricing adjustment of Rs. 9,95,09,950 in respect of international transaction pertaining to 'onsite development and project coordination fee'.

6. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee is engaged in telecom software development services and hardware solutions for telecom equipment manufacturers, carriers and service providers. For the year under consideration, assessee filed its return of income on 13/08/2009 declaring total loss of Rs. 8,50,23,793 after claiming deduction under section 10A of the Act. During the relevant financial year, assessee made payment of Rs. 25,80,52,805 to its wholly in subsidiary in USA (i.e. its associated enterprise) for on-site software and offshore support services rendered by the associated enterprise to the assessee. Based on the functions, asset and risk analysis, nature of international transaction and availability of comparable data, assessee selected the Transactional Net Margin Method (*'TNMM'*) as most appropriate method with Profit Level Indicator (*'PLI'*) of net cost plus markup. Further, associated enterprise was selected as a tested party on the basis that functions performed by it are less complex than as performed by the assessee. After search on international database, 11 USA based companies were selected as comparable to the associated enterprise having three-year weighted average margin of 7.13%. As, associated enterprise computed its own PLI at 6.16%, accordingly, the international transaction of 'onsite development and project coordination fee' was claimed to be at arm's length price.

7. The Assessing Officer made reference to the Transfer Pricing Officer (*'TPO'*) for determination of arm's length price of the aforesaid

international transaction. The TPO vide order dated 31/10/2011 passed under section 92CA(3) of the Act rejected the benchmarking analysis conducted by the assessee. The TPO, inter-alia, treated assessee as the tested party and accordingly benchmark the international transaction by searching Indian comparables. The TPO selected a set of 20 companies as comparable having average margin of 23.65%. After granting working capital adjustment, the arm's length mean margin on sales was arrived at 17.97%. Accordingly, the TPO made an adjustment of Rs. 9,95,09,950 to the aforesaid international transaction. In conformity, the Assessing Officer passed the order under section 143(3) read with section 144C of the Act. In appeal, learned CIT(A) vide impugned order treated assessee as a tested party, by observing as under:

> *"17.1.2. It is evident that the assessee's TP study is based on a database i.e., unavailable to the TPO here in India. Thus in my view, the assessee company's AE cannot be taken as a tested party. Hence I find no infirmity in the TPO's action in substituting the assessee company as a tested party as well as introducing her own comparables from a database available to her herein India. Moreover, the assessee relied on multiple year data without demonstrating its impact in the current year, whereas the TPO was in a position to determine ALP on the basis of current year data. As mentioned earlier, use of current year data has been upheld by the Hyderabad Bench of the Hon'ble Tribunal as well as the Delhi Beach in various decisions referred to by the TPO. Hence no interference is called for."*

Being aggrieved, the assessee is in appeal before us.

8. During the course of hearing, learned Authorised Representative ('learned AR') submitted that the associated enterprise was considered as a tested party as the same is least complex as compared to the assessee in respect of functions performed, assets employed and risks assumed.

The learned A.R. further submitted that, in the present case, the data of companies considered as comparable to the associated enterprise is also available on public domain, therefore, there is no impediment in considering associated enterprise as the tested party for the purpose of benchmarking the international transaction.

9. On the other hand, learned Departmental Representative (*'learned D.R'*) vehemently relied upon the orders passed by the lower authorities.

10. We have considered the rival submissions and perused the material available on record. In the present case, assessee develops software development services and hardware solutions for telecom equipment manufacturers, carriers and service providers. While, the associated enterprise has been set up primarily for the purpose of front end support for offshore business, liaison with clients and prospective clients, client interaction and limited project support. As per the transfer pricing study report, assessee provides following services with respect to development of software in different area of telecom industry:

- *TMRDS India specialises in the development of toll tandem Switching system Software supporting Class IV services.*
- *Access Product (brand Name Litespan) Software Development, Customer Support, Verification and Validation of Software.*
- *Cellular Switch Software development.*
- *Wide Band Digital Cross Connect (Transmission) Switch Development.*
- *Adjunct Element Software Development for Telecom Network Elements.*
- *Signal Transfer Point (STP) development for Telecom Signaling Network.*

11. On the other hand, services provided by associated enterprise could be classified broadly into following service lines:

(a) Offshore Business – In respect of offshore services, assessee essentially executes the work in its offshore delivery centres located in India. The role of associated enterprise is limited to performing customer relationships for assessee. For its USA business, assessee directly enters into a contract with the US clients for execution of offshore work in India. All contracts entered into by the assessee directly with the US clients. Assessee also maintains close involvement in all activities and decisions relating to the contract. The assessee later compensates associated enterprise on a cost plus basis for the support services. The associated enterprise also facilitates communication between the assessee and the US clients regarding inquiries, orders, delivery schedules, quality, service, administrative and other matters.

(b) On-site business - Assessee has appointed associated enterprise as a contract service provider for providing on-site software development services in relation to its on-site business in USA. The contractual arrangements for on-site business are also directly entered into by the assessee with the US client. For such on-site work, assessee compensates associated enterprise on a cost plus basis. Assessee is overall responsible for the performance of the on-site software development services rendered by the associated enterprise. Assessee shall also be overall responsible for the programming, designing and developing the specifications of the project at the request by the US clients. In relation to on-site services performed in US, associated enterprise shall be responsible for undertaking following functions:

- *"Send engineers to client's location to gather information on the existing technology and the technology that needs to be developed*

undertake preliminary scoping of the project and assess the client's software requirements and forward the same to TMRDS India.

- *Designate one of its employees as the project manager for onsite work to liaise and interact with the client for the purposes of getting approvals, progress reports, resolving issues etc.*
- *Provide software and related services at the client's site, undertake development and delivery of software solutions, install, implement, test and validate the new software solutions or technology at the client's site.*
- *Keep the client and TMRDS India updated on the status of the project.*
- *Provide any other similar, allied or incidental service in the US."*

12. Further, from the perusal of risk profile of the assessee and associated enterprise, forming part of the transfer pricing study report, it is evident that assessee has assumed much more risk (i.e. market, credit, quality, timely delivery, technology obsolescence etc.) than the associated enterprise. As regards the assets employed, assessee has the technological capabilities, physical assets and trained manpower to undertake the offshore software development work. Further, it is pertinent to note that assessee develops and owns all the intellectual property (technical and marketing) relating to provision of software services to the clients. The assessee also employs routine tangible assets such as land and building, plant and machinery, furniture and fixtures etc., for the purpose of business.

13. It is pertinent to note that Revenue has not disputed any of the aforesaid aspects while rejecting the transfer pricing analysis conducted by the assessee by treating associated enterprise as the tested party. The

learned CIT(A) has upheld the benchmarking done by the TPO, by considering assessee as a tested party, on the basis that transfer pricing study is based on database which is unavailable here in India. In this regard, assessee has submitted that comparables were selected using COMPUSTAT database, which is available in public domain on subscription basis just like PROWESS and CAPITALINE as used by the TPO. The assessee further submitted that the database is based on financials filed with USA SEC, and therefore is as reliable as PROWESS and CAPITALINE for selecting comparable to the assessee.

14. It is settled that tested party is the one to which the transfer pricing method can be applied in the most reliable manner and for which most reliable comparables can be found, i.e., it will most often be the one that has the less complex functional analysis. In this regard, it is relevant to note the following observations of the coordinate bench of Tribunal in Ranbaxy Laboratories Ltd. vs a ADIT, [2008] 110 ITD 428 (Delhi):

> *"58. …..The tested party normally should be the party in respect of which reliable data for comparison is easily and readily available and fewest adjustments in computations are needed. It may be local or foreign entity, i.e., one party to the transaction. The object of transfer pricing exercise is to gather reliable data, which can be considered without difficulty by both the parties, i.e., taxpayer and the revenue. It is also true that generally least of the complex controlled taxpayer should be taken as a tested party. But where comparable or almost comparable, controlled and uncontrolled transactions or entities are available, it may not be right to eliminate them from consideration because they look to be complex. If the taxpayer wishes to take foreign AE as a tested party, then it must ensure that it is such an entity for which the relevant data for comparison is available in public domain or is furnished to the tax administration. The taxpayer is not then entitled to take a stand that such data cannot be called for or insisted upon from the taxpayer."*

15. In the present case, it is also not the plea of the Revenue that relevant data in respect of comparables selected in transfer pricing study report was not furnished by the assessee. The TPO even after noting that assessee has received software development services from its subsidiary located in US, has selected comparables who are software development service providers. Thus, having considered the function, asset and risk profile of the foreign associated enterprise and the assessee, we are of the considered opinion that, in the present case, foreign associated enterprise is the least complex entity vis-à-vis the assessee. Further, the relevant and reliable data for comparison with the associated enterprise is also available in public domain, which was also used by the assessee for benchmarking the international transaction. Thus, we are of the view that associated enterprise can be considered as a tested party, in the present case. Accordingly, we direct the TPO to conduct fresh benchmarking analysis after considering foreign associated enterprise as the tested party and arrive at the arm's length price for the international transaction pertaining to 'onsite development and project coordination fee'. We also direct the assessee to provide all the data as may be required by the TPO for conducting the aforesaid exercise. In view of the above directions, the transfer pricing adjustment made by the TPO and upheld by the learned CIT(A) is set aside. We order accordingly. As a result, ground No. 1 raised in assessee's appeal is allowed for statistical purpose.

16. As, we have directed the TPO to conduct fresh benchmarking analysis with the above directions, the grounds raised in Revenue's

appeal pertaining to selection of comparables by treating assessee as a tested party, have become infructuous and are accordingly dismissed.

17. The issue arising in ground No. 2, raised in assessee's appeal, is pertaining to disallowance of custom duty paid.

18. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee company has reflected an amount of Rs. 11,78,884 towards custom duty. During the course of assessment proceedings, details of same were sought by the Assessing Officer. In reply, assessee submitted that the custom duty is towards debonding and shifting assets and is in the nature of revenue expenditure. The Assessing Officer vide order dated 24/01/2012 passed under section 143(3) read with section 144C of the Act did not agree with the submissions of the assessee and held that said expenses are to be factored towards the block of assets and cannot be debited to profit and loss account. In appeal, the learned CIT(A) dismissed the appeal filed by the assessee on this issue. Being aggrieved, the assessee is in appeal before us.

19. During the course of hearing, learned AR submitted that custom duty was paid towards debonding and shifting of the assets and therefore be allowed as revenue expenditure. On the other hand, learned DR vehemently relied upon the orders passed by the lower authorities.

20. We have considered the rival submissions and perused the material available on record. In the present case, the plea of the assessee is that

these assets were purchased during the period 1996 – 2000 and have been completely depreciated in the books of account and life of these assets has since expired. Further, these assets had to be shifted out of the STPI premises on debonding and the expenditure was not for acquiring any asset or for adding value to any asset, as same was compulsory on debonding from STPI unit. From the perusal of record, we find that claim of the assessee was denied by the lower authorities without examining details pertaining to these assets as well as details of the debonding. Thus, we deem it appropriate to remand this issue to the file of the Assessing Officer for *de novo* adjudication. Further, assessee is directed to provide complete details of the assets and demonstrate the debonding of the assets to the Assessing Officer. We further direct that upon examination if it is found that custom duty was paid for debonding of the assets, which were earlier brought in STPI premises, relief be granted to the assessee to that extent. As a result, ground No. 2 raised in assessee's appeal is allowed for statistical purpose.

21. The issue arising in ground No. 3, raised in assessee's appeal, is pertaining to disallowance under section 14A of the Act.

22. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the course of assessment proceedings, it was observed that the assessee company has claimed exempt income of Rs. 3,75,75,083, from dividends and profit on sale of shares. It was further observed by the Assessing Officer that assessee has not

considered any expenditure for earning the aforesaid exempt income. Accordingly, the Assessing Officer vide order passed under section 143(3) read with section 144C of the Act disallowed Rs. 8,78,823 as expenditure under section 14A read with Rule 8D of the Income Tax Rules, 1962 ('*the Rules*'). In appeal, learned CIT(A) vide impugned order dismissed the appeal filed by the assessee on this issue and upheld the disallowance made by the Assessing Officer under section 14A read with Rule 8D. Being aggrieved, assessee is in appeal before us.

23. During the course of hearing, learned AR submitted that for making any disallowance under section 14A of the Act only the investment which yields exempt income should be considered. On the other hand, learned DR vehemently relied upon the orders passed by the lower authorities.

24. We have considered the rival submissions and perused the material available on record. The Assessing Officer computed the disallowance under section 14A read with Rule 8D, as under:

a.	*Expenditure directly relating to income which does not form part of Total Income*	*Nil*
b.	*Expenditure incurred by way of interest, not attributable directly to any particular income or receipt*	*Rs.56,140/–*
c.	*Half Percent of Average Investment*	*Rs.8,22,683/–*
		Rs.8,78,823/–

25. Thus, from the above it is evident that the Assessing Officer has agreed that there is no direct expenditure which was incurred by the assessee for earning the exempt income. Further, the Assessing Officer

has treated Rs. 56,140 as an expenditure incurred by way of interest which is not directly attributable to any particular income or receipt under Rule 8D(2)(ii) of the Rules. In this regard, from the perusal of financial of the assessee, forming part of the paper book, it is pertinent to note that assessee had a source of funds (share capital and reserves & surplus) of Rs. 102,19,37,575, while the total investments, during the year, were Rs. 7,76,23,021. Thus, from the above it is evident that assessee had sufficient funds available for making the investment and in such a case, it can only be presumed that the investments were made out of such available funds. Thus we direct the Assessing Officer to delete the disallowance of Rs. 56,140, made under Rule 8D(2)(ii) of the Rules.

26. Further, the Assessing Officer by treating half percent of average investment made disallowance of Rs. 8,22,683, under Rule 8D(2)(iii) of the Rules. In this regard, it is the claim of the assessee that only investments which yield dividend income during the year should be considered. We find that claim of the assessee is supported by decision of Special Bench of the Tribunal in ACIT vs Vireet Investment (P) Ltd., [2017] 165 ITD 27 (Delhi – Trib), wherein it was held that only those investments are to be considered for computing average value of investment, which yields exempt income during the year. Accordingly, we direct the Assessing Officer to only considered those investments, for purpose of computation of disallowance Rule 8D(2)(iii) of the Rules, which yield dividend income during the year. As a result, ground No. 3, raised in assessee's appeal is allowed for statistical purpose.

27. The issue arising in ground No. 4, raised in assessee's appeal, is pertaining to disallowance of foreign exchange loss.

28. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the assessment proceedings, it was observed that amount of Rs. 47,97,489, is debited as foreign exchange loss. It was found that the said amount is towards the loss on forward contract. The Assessing Officer vide order passed under section 143(3) read with section 144C of the Act treated loss on forward contract as a speculative transaction under section 43(5) of the Act and disallowed the same. The Assessing Officer also noted that the contract entered into by the assessee is not in respect of raw material or merchandise in the course of its manufacturing or merchandising business to guard against loss through future price fluctuation in respect of its contract for actual delivery of goods manufactured or merchandise sold by it. In appeal, learned CIT(A) vide impugned order dismissed the appeal filed by the assessee on this issue. Being aggrieved, assessee is in appeal before us.

29. During the course of hearing, learned AR submitted that the assessee uses foreign currency forward contracts to hedge its risk associated with foreign currency fluctuations relating to certain firm commitments and forecasted transactions and therefore loss arising on account of forward contract is allowable. On the other hand, learned DR vehemently relied upon the orders passed by the lower authorities.

30. We have considered the rival submissions and perused the material available on record. As per the assessee, forward contracts were entered into in the ordinary course of business to safeguard against exchange rate fluctuations because it was an enterprise which had only export earnings. The assessee further claimed that it was a protective contract to provide for fluctuations in currency in respect of receivables by the assessee and thus the purpose of entering into this contract was to hedge its risks associated with foreign currency fluctuations relating to certain foreign exchange billings and contracts, so as to not suffer losses on account of foreign exchange fluctuations. In the present case, we find that lower authorities have not examined the claim of the assessee that the purpose of the forward contract entered into by the assessee was in fact hedging against the foreign exchange fluctuation risk and the claim of the assessee was rejected merely by treating it as a speculative transaction under section 43(5) of the Act. In view of the above, we considered it appropriate to remand this issue to the file of Assessing Officer for *de novo* adjudication after examination of the details regarding the hedging as alleged by the assessee. Further, the assessee is directed to provide the complete details to the Assessing Officer regarding its claim of hedging against exchange fluctuation risk. Upon examination, if the claim of the assessee is found to be correct then the loss on account of forward contract to the extent same pertains to hedging against the risk of foreign exchange fluctuation be allowed to the assessee. As a result, ground No. 4 raised in assessee's appeal is allowed for statistical purpose.

31. In the result, appeal by the assessee is allowed for statistical purpose, while the appeal by the Revenue is dismissed.

Order pronounced in the open court on 26/07/2022

Sd/-	**Sd/-**
PRAMOD KUMAR	**SANDEEP SINGH KARHAIL**
VICE PRESIDENT	**JUDICIAL MEMBER**

MUMBAI, DATED: 26/07/2022

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai