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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI PAVAN KUMAR GADALE, JM

ITA No.2540/Mum/2011

(Assessment Year: 2005-06)

CO No.151/Mm/2012

(Arising in ITA No. 2380/Mum/2011 for A.Y. 2005-06)

Tata Consultancy Services Limited (Upon merger of TCS E-Serve Limited with Tata Consultancy Services Limited) 9th Floor, Nirmal Building, Nariman Point, Mumbai-400 020	Vs.	The Additional Commissioner of Income-tax 9(1) Aaykar Bhavan, M. Karve Road, Mumbai-400 020
(Appellant/Cross Objector)		**(Respondent)**

PAN No. AAACC4480F

ITA No.7448/Mum/2010

(Assessment Year: 2005-06)

ITA No.2380/Mum/2011

(Assessment Year: 2005-06)

The Additional Commissioner of Income-tax 9(1) Aaykar Bhavan, M. Karve Road, Mumbai-400 020	Vs.	Tata Consultancy Services Limited (Upon merger of TCS E-Serve Limited with Tata Consultancy Services Limited) 9th Floor, Nirmal Building, Nariman Point, Mumbai-400 020
(Appellant)		**(Respondent)**

Assessee by	:	Shri Niraj Sheth, AR
Revenue by	:	Shri Manoj Kumar, CIT DR

Date of hearing: 19.01.2023
Date of pronouncement : 18.04.2023

O R D E R

PER PRASHANT MAHARISHI, AM:

1) ITA number 2380/MUm/2011 is filed by The Assistant Commissioner Of Income Tax, Circle – 9 (3), Mumbai (The Learned AO) for Assessment Year 2005 – 2006 against the appellate order passed by The Commissioner Of Income Tax (Appeals) – 15, Mumbai [The ld CIT (A)] dated 14/1/2011 wherein in appeal filed by assessee against Assessment Order dated 23/12/2008 passed by The Deputy Commissioner Of Income Tax Range 9 (1), Mumbai (the learned AO) under section 143 (3) of The Income Tax Act 1961 for assessment year 2005 2006, appeal of the assessee is partly allowed.

2) The learned assessing officer is aggrieved with that and therefore has preferred an appeal raising following grounds of appeal:-

   i. on the facts and in the circumstances of the case and in law, the learned CIT (A) erred in holding that the assessee is entitled to deduction under section 10 A without appreciating the fact that the assessee company had not fulfilled all the conditions under section 10 A in respect of its STPI business.

   ii. On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in allowing deduction under section 10 A without appreciating the fact that the 10 A unit of the assessee company was formed by splitting up as well as reconstruction of business which was already in existence.

   iii. On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in deleting the disallowance to the extent of ₹ 209,751/– while computing disallowance under section 14 A, ignoring the fact that the assessee had not taken into account

the overheads another indirect cost in relation to the exempt income, for the purpose of disallowance under section 14 A of the IT act 1961.

iv. *On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in observing that there are inconsistencies in the order of the transfer pricing officer while determining the arm's-length price, without appreciating that the adjustment made by the TPO are factually and legally sound.*

v. *On the facts and in the circumstances of the case and in law, the learned CIT (A) order in granting the relief of ₹ 604,475,122/– to the assessee with regard to the adjustments pertaining to arm's-length price of specified international transactions, excluding those comparables which were accepted and relied on by the assessee in the transfer pricing study report and by including comparables which were considered by the assessee to be distinguishable during the transfer pricing proceedings.*

vi. *The appellant prays that the order of the CIT (A) be set-aside is on the grounds mentioned above and that of the assessing officer be restored.*

3) In CO 151/M/2012, in ITA number 2380/M/2011, assessee has preferred this cross objection for assessment year 2005 2006 raising following grounds of cross objections:-

i. *The Commissioner of income tax (appeals) – 15, Mumbai erred in holding that the known issue of show cause notice with regard to final selection of comparable is while determining the arm's-length price does not invalidate the assessment order, having failed to appreciate that the non-issue of such show cause notice violate the principles of natural justice, and is bad in law.*

ii. *The learned CIT (A) erred in holding that there is no mandatory requirement of law to establish the motive of tax evasion before transfer pricing provisions can be invoked without appreciating that*

the pricing of international transactions of the respondent with its associated enterprises does not lead to erosion of tax revenue as the respondent is in a position to avail tax exemptions under section 10 A of the income tax act 1961.

iii. *The CIT (A) ought to have held that the multiple year data for comparability purposes should be considered as the data for financial year 2004 – 05 was not available with the respondent at the time of determining arm's-length price.*

iv. *The CIT (A) ought to have held that the using data available beyond the specified date (October 31/2005) would not be contemporaneous in nature, resulting in non-compliance of rule 10 D (4).*

v. *The CIT (A) ought to have held that no adjustment to the arm's-length price order to be made since the earning of the respondents are higher than the other regional service centers (RSC) of Citigroup carrying out identical activities.*

vi. *The CIT (A) ought to have held that as there were several inconsistencies in the TP order the same was bad in law*

vii. *the CIT (A) ought to have held that risk adjustment is required to be made while determining the arm's-length price of the respondents as the companies selected as functionally comparable have different risk profiles viz a viz the respondent's risk profile.*

4) First, we take up above appeal of Ld AO and cross objections with respect to assessment year 2005 – 06. The fact shows that assessee is a company engaged in the business of information technology enabled services wherein assessee company provides back-office transaction processing and customer Services to various units of Citigroup worldwide. It filed its return of income on 31/10/2005 at ₹ 279,800,980/–. This return was picked up for scrutiny. The assessment was made under

section 143 (3) of the act on 23/12/2008 resulting into an assessment order determining the total income of the assessee at ₹ 12,97104070/-. Aggrieved, assessee preferred an appeal before the learned CIT – A, where the appeal of the assessee was partly allowed. Therefore, AO is in appeal and assessee has filed cross objections.

5) Coming to the appeal of the learned assessing officer, the first ground of appeal is with respect to disallowance of deduction under section 10 A as assessee has not fulfilled condition of that section and ground number 2 is with respect to the allegation that the unit of the assessee eligible for deduction under section 10 A is formed by splitting up as well as reconstruction of the already existing business.

6) Both the parties confirmed that identical issue arose in the case of the assessee for assessment year 2001 – 02, 2002 – 03, 2003 – 04 and 2004 – 05 in earlier years as well as in assessment year 2010 – 11 in subsequent year where the identical claim of the assessee was allowed by the coordinate benches in assessee's case on similar set of facts and circumstances.

7) We have carefully considered the rival contention. Assessee has made a claim of deduction under section 10 A of ₹ 407,762,943 with respect to 6 business undertaking of the assessee. The learned assessing officer looking at the assessment order of preceding year and specifically for assessment year 2004 – 05 disallowed the claim of the assessee. The fact shows that Citigroup global services Ltd is engaged in providing IT enabled services to Citigroup

entities globally. The eligible unit under section 10 A were setup in the year 2000 as an independent unit and the unit were located in entirely separate identifiable custom bond areas. It has a separate software technology Park registration for each premises. The claim of the assessee is that these are independent units located in entirely separate identifiable custom bond area, they have acquired the requisite new plant and machinery for provision of services to its clients is an independent unit, none of the assets used by the non eligible units were transferred to the eligible units and further the rent paid for each of the eligible premises is separate and distinct from rent of non eligible premises. It also claimed that there was fresh employment of the people and thus 10 A units have a separate and distinct identity of its own. It was also the claim that in first year deduction was allowable under this section for assessment year 2001 – 02 and same was allowed under section 143 (3) of the act and therefore, the claim should be allowed. The AO was of the view that new units have been formed for servicing the existing clients of the old unit, these units have been formed by utilizing the existing human resources of the old unit, assessee has reconstructed its business in order to reflect a major part of turnover in the new unit which has grown faster than the old units, the new unit relies on the key resources of the old unit at the time of its formation as well as subsequently, it uses the same data communication link, set up in the premises which are already registered under the Shop and establishment act

as part of the old unit, set up with meager capital investment, showing complete unity between the business of the old unit and the new as well as of the control, and therefore no deduction is allowable to the assessee. Therefore, it was disallowed.

8) When the matter reached before the learned CIT – A, he dealt with this in ground number 6, 7 and 8 holding that in assessment year 2001 – 02, this issue has been dealt with and therefore claim is allowable to the assessee. It is shown to us that for the same year i.e. 2001 – 02 the coordinate bench has accepted the claim of the assessee for deduction under section 10 A of the act in ITA number 3725/M/2010 for assessment year 2001 – 0 to which was reopened for disturbing the deduction under section 10 A of the act, the coordinate bench has quashed e reopening proceedings and therefore there was no decision on the merits of the case. In ITA number 3927/M/2010 in appeal of the revenue for assessment year 2002 – 03 the coordinate bench as per paragraph number 63 of the order dated 24/1/2018 upheld the order of the learned CIT – A allowing the claim of the assessee holding that same was neither formed by splitting of the existing unit but is a new unit established and satisfies relevant conditions under section 10 A of the act. For assessment year 2003 – 04 and 2004 – 05 along with assessment year 2010 – 11 coordinate bench has decided this issue wide order dated 15/11/2021 wherein on the merits this issue was decided in revenue's appeal for assessment year 2003 – 04 in ITA number 4928/M/2010 while paragraph number 10 of that

decision wherein the coordinate bench in paragraph number 10. 2 upheld the order of the learned lower authorities by following the paragraph number 63 in the order of the ITAT for assessment year 2002 – 03 in ITA number 3927/M/2010. As there is no change in the facts and circumstances of the case, the issue is squarely covered in favour of the assessee , therefore, we dismiss ground number 1 and 2 of the appeal of the learned AO.

9) Ground number 2 of the appeal is with respect to the deletion of disallowance under section 14 A the act to the extent of ₹ 209751 by the learned CIT – A. The brief facts of the case shows that assessee has claimed dividend income of ₹ 3,113,844/– which is claimed as exempt income under section 10 (35). Assessee has not disallowed any expenditure incurred with respect to earning of the exempt income. The assessee has also maintained that no expenditure is actually incurred in relation to this dividend income. The AO was of the view that the composite nature of the assessee's business shows that the activity carried on would involve some expenditure with regard to the earning of dividend income. Therefore the assessee was questioned, it was replied by letter dated 30/12/2008 that no expenses have been incurred for earning exempt income. However without prejudice to the above statement the assessee also computed the disallowance of ₹ 266,040/– on manhour and expenses basis. The assessee also submitted the disallowance computation as per rule 8D of Rs. 475,791/–. Ld AO followed rule 8D disallowance. When the matter reached before the learned

CIT – A challenging the addition of ₹ 4 75791 made by the learned assessing officer invoking the provisions of rule 8D of the act, he directed the learned assessing officer to retain the disallowance of ₹ 266,040 as computed by the assessee and deleted the balance addition of ₹ 2 09751/–. Ld AO is aggrieved. We find that that the working of disallowance of ₹ 266,040/– is based on the number of employees employed in the treasury operations for investment in mutual funds, the assessee has given their designation, their working hours required for mutual fund investments, number of man days per year and the gross salary also. The assessee has also proportionately disallowed the salary for earning of the exempt income. On careful hearing the arguments of both the parties we find that for this impugned assessment year i.e. 2005 2006, the provisions of rule 8D does not apply. The disallowance made by the learned assessing officer and accepted by the learned CIT – A of ₹ 266,040/– is based on the working of the assessee of employee -wise salary and the proportionate disallowance, added thereto of expenditure of staff welfare as well as administrative are included. We find that this is a reasonable estimate accepted by the learned CIT – A which does not have any infirmity according to us and none of them are pointed out by the learned departmental representative, and therefore we uphold the disallowance of ₹ 266,040 therefore, we dismiss ground number 3 of the appeal of the AO upholding the order of the learned CIT – A.

10) Ground number 4 – 6 is with respect to transfer pricing adjustment of ₹ 604,475,122/–. The main business activity of the assessee is rendering ITeS services to the Citigroup entities around the world. The assessee provides these IT enabled solutions for the entire gamut of banking and financial products, like cash management, trade services, securities, loans deposits etc.

11) Assessee has adopted Transactional Net Margin Method [TNMM] as the most appropriate method for the international transaction of transaction processing and technical services paid of ₹ 70,948,122/– and receipt of ₹ 4,486,556,870/– by selecting the profit level indicator of operating profit/operating cost selecting 22 comparables whose average margin is 13.98% where the assessee's margin was computed at 14.57% and thus it was stated that this international transaction of receipt and payment of transaction processing and technical services is at arm's-length.

12) During the transfer pricing assessment proceedings, several comparables were introduced by the assessee as additional comparables, the learned TPO also introduced his own comparables. After the complete analysis, 22 comparables were rejected comprising of 13 comparables in the original selection of the assessee and seven comparables introduced by the assessee during the assessment proceedings. Further two comparables introduced by the AO were also excluded. Later on, nine comparable selected by the assessee were retained, one comparable introduced by the TPO was also retained.

Thus in the final analysis 10 comparable companies were selected whose PLI for financial year 2004 – 05 was determined and average PLI was found at 29.43%. Thereafter on the total cost of Rs 406,70,61,687/–, the difference of arm's-length price was found at ₹ 604,475,122. Thus order under section 92CA (3) of the act was passed by the learned transfer pricing officer on 31/12/2007 above adjustment. This adjustment was included by the learned AO in the assessment order.

13) The addition was challenged before the learned CIT (A). Before the learned CIT (A), the assessee challenged that it should have been granted the benefit of margin of 5%, which was accepted by him in view of circular number 5 of 2010. The learned CIT – A dealt with the computation of margin of different comparables. He also permitted the working capital adjustment. He also dealt with the several comparables. Accordingly, he found that the original Arithmetic mean of the comparable companies comes to 19.43% after working capital adjustment, after considering 5% variation, the international transaction of the assessee is at arm's-length and therefore he deleted the adjustment of ₹ 604,475,122.

14) The learned assessing officer/TPO has not challenged exclusion or inclusion of any of the comparables. None is also challenged before us with respect to inclusion or exclusion. No arguments were advanced with respect to why the 5% variation should not be allowed to the assessee.

15) We have looked at the comparables selected by the assessee, accepted by the TPO and final list accepted by the learned CIT (A). There is no dispute that the post working capital adjusted margin of the comparable companies is arrived at 19.43%. According to that the ITeS revenue should be ₹ 4,857,291,773/–, after considering variation at the rate of 5%, it comes to ₹ 4,614,427,184/– against the assessee's amount of ₹ 4,659,522,819 which is higher than the above figure and therefore, no adjustment is required to be made. We do not find any infirmity in the order of the learned CIT – A in deleting the addition of ₹ 604,475,122/–. Accordingly, ground number 4 – 6 of the appeal of the AO is dismissed.

16) In the result appeal of the learned AO in ITA number 2380/M/2011 is dismissed.

17) The cross objection filed by the assessee also revolves around the transfer pricing adjustment. All these grounds of the cross objections are decided by the learned CIT – A against the assessee correctly. However, as the addition has been deleted on the merits considering the variation of 5%, these grounds of cross objection become relevant. Therefore, we dismiss the grounds of cross objections on merit also and on the ground of merely being academic. In the result, CO 151/M/12 for assessment year 2005 – 06 is dismissed.

18) Accordingly, ITA number 2380/M/2011 filed by the learned AO and CO filed by the assessee in CO number 151/M/2012 for assessment year 2005 – 06 are dismissed.

19) ITA number 2540/M/2011 is filed by the assessee for assessment year 2005 – 06 against the same appellate order raising following grounds of appeal:-

1. *the Commissioner of income tax (appeals) – 15 Mumbai ought to have directed the Asst Commissioner of income tax, range 9 (1), Mumbai (AO) that in the event, the disallowance of deduction for bad Debt of ₹ 19,843,434 and business loss of ₹ 212 lakhs relating to NEPC Micron Ltd is upheld by any of the higher appellate authority in the assessment year 98 – 99 or any other year, the same be allowed in the year under appeal.*
2. *The CIT (A) ought to have directed the AO, that in the even to the notional amount of ₹ 17,649,426/– pertaining to lease rentals due from NEPC Micon Ltd which had stopped accruing, are held to be taxable in the assessment year 98 – 99 by any of the higher appellate authority, to allow deduction for the same in the year under appeal.*
3. *The CIT (A) ought to have directed the AO, that in the event, the disallowance of deduction for bad debt of ₹ 11,865,034 and the business loss of ₹ 24,362,520 relating to broadcast industries Ltd is upheld any of the higher appellate authority in the assessment year 99 – 2000 or any other year, the same be allowed in the year under appeal.*
4. *The CIT (A) ought to have held that the transactions undertaken by the appellant is with respect to leasing of cars, computers, plant and machinery and furniture are in the nature of operating lease and not financing transactions and thereby ought to have directed the AO to allow depreciation of ₹ 10,718,068 thereon.*
5. *Without prejudice to the above, the CIT (A) ought to have held that once an asset and turns the block on which the appreciation has been allowed in the past, the depreciation thereon cannot be denied and thereby ought to have directed the AO to allow depreciation on the assets which entered the block up to and including the assessment year 98 – 99.*

6. *The CIT (A) ought to have held that the cars which were purchased after 1/10/1998 were covered by the definition of commercial vehicles and therefore eligible for depreciation at the rate of 40%. The CIT A) ought to have held that cars are covered by the definition of commercial vehicles and depreciation is allowable in accordance with sub- item 3 (iii) of item III of appendix I to the income tax rules, 1962 and also in accordance with third proviso to section 32 (1) (ii) of the act.*
7. *The CIT A) ought to have directed the AO to allow depreciation on interest expenditure pertaining to assessment year 2001 – 02 and 2002 – 03 in the event it is held as capital in nature in the respective assessment years by any of the higher appellate authorities.*
8. *The CIT (A) erred in upholding the action of AO in disallowing ₹ 15,052,439/– under section 43B being provision for the purposes of payment by way of contribution towards the gratuity fund. The CIT (A) ought to have held that provision for the purpose of payment by way of contribution towards the gratuity fund is allowable under section 40 (A) (7) of the act.*

20) We find that ground with respect to allowance of bad debt of ₹ 19,843,434 and business loss of ₹ 212 lakhs as well as notional amount pertaining to lease rental has become infructuous, as the claim has been allowed by the CIT (A) in assessment year 98 – 99 and there is no further appeal filed by the revenue against that order. Further with respect to the disallowance of deduction of bad debt of ₹ 11,865,034 and the business loss of Rs. 2,43,62,520 relating to Prakash industries Ltd is also allowed by the CIT (A) in assessment year 99 – 2000 and no further appeal as been filed by the learned assessing officer.

Therefore on all these three issues, as the grounds of appeal become infructuous, same are dismissed.

21) Coming to the issue of whether the transaction of Lease of cars, computers, plant and machinery and furniture are in the nature of operating lease or of the financing transaction. The coordinate bench in assessee's own case has decided this issue for assessment year 1999 – 2000 to 2001 – 02 wherein it has been held that these transactions are in the nature of operating lease. Therefore, we do not find any reason to allow this ground of appeal to allow the depreciation. Accordingly ground with respect to the claim of the assessee to allow depreciation if the transactions are considered to be in the nature of financing transaction does not survive. Hence dismissed.

22) With respect to the issue of depreciation on the commercial vehicle being a motor cars purchased by the assessee whether eligible for depreciation at the rate of 40% or not has already been decided by the coordinate bench in assessee's own case for assessment year 1999 – 2000 to AY 2001 – 02 wherein it has been held that the cars are covered by the definition of commercial vehicle. Therefore respectfully following the decision of the coordinate bench in assessee's own case we also hold that the motor cars are covered by the definition of commercial vehicle and are eligible for depreciation at the rate of 40%. These grounds of appeal are allowed.

23) With respect to the claim of the assessee to direct the learned assessing officer to allow depreciation on in interest expenditure pertaining to assessment year 2001 –

02 and 2002 – 03 is infructuous in view of the claim of the assessee allowed by the learned CIT – A in order dated 1/2/2010 for assessment year 2001 – 02 and wide order dated 18/1/2010 for assessment year 2002 – 03 and no further appeal as been filed by the revenue. Accordingly, this issue does not survive and relevant ground is dismissed.

24) With respect to the ground of the assessee on allowance of ₹ 15,052,439 under section 43B of The Act being provision for the purpose of payment by way of contribution towards the gratuity fund, the identical issue arose in the case of the assessee for assessment year 2003 – 04 and 2004 – 05 in the assessee's own case which has been decided in favour of the assessee by the order dated 19/9/2017 which has not been disputed by the learned departmental representative and therefore we do not find any reason to uphold the disallowance. In view of this ground of appeal of the assessee is allowed.

25) Accordingly, appeal of the assessee in ITA number 2540/M/2011 for assessment year 2005 – 06 is partly allowed.

26) ITA number 7448/M/2010 is filed by the assistant Commissioner of income tax Circle – 9 (3), Mumbai (the learned AO for assessment year 2005 – 06 against the appellate order passed by The Commissioner Of Income Tax (Appeals) – 20, Mumbai Dated 25/8/2010 wherein appeal filed by the assessee against the penalty order dated 18/1/2010 passed by the learned assessing officer under section 271 (1) (C) of the act levying penalty of ₹

678,280,691/– , was cancelled. Therefore, in this appeal the learned AO is aggrieved with the deletion of the penalty of ₹ 67,82,80,691/–.

27) Fact shows that after passing the assessment order under section 143 (3) of the income tax act on 23/12/2008 determining total income of the assessee at Rs. 129,71,04,070/- against the returned income of ₹ 279,800,980/– the penalty proceedings under section 271 (1) (C) were initiated. This culminated into passing an order levying the penalty on 18/1/2010 of ₹ 678,280,691.

28) The matter reached before the learned CIT – A, who passed an appellate order on 25/8/2010 deleting the penalty holding that in the present case the appellant had filed all particulars of expenses/deduction subject matter of various disallowances. Further there is no finding of the learned assessing officer that these particular themselves were inaccurate, incorrect, erroneous or false. It is merely claims of the appellant, which have been denied by the learned assessing officer and held to be not admissible deductions. Therefore penalty under section 271 (1) (C) cannot be levied. Therefore, the learned assessing officer is aggrieved and has preferred an appeal before us.

29) We have heard the rival contentions and perused the orders of the lower authorities. The penalty has been levied on (1) the disallowance of depreciation on lease assets, (2) the disallowance of depreciation on cars, (3) the disallowance of deduction under section 10 A of the act, (4) disallowance under section 43B of the act on provision of gratuity, (5) adjustment on account of arm's-

length price of the international transaction. We find that all these additions have been deleted and therefore there cannot be any penalty under section 271 (1) (C) of the act. As the addition itself is deleted, to that extent penalties are also required to be deleted. In view of this, we do not find any merit in the appeal of the learned assessing officer. Accordingly the order of the learned CIT – A is upheld on the ground that the original addition stands deleted on which the penalties have been levied.

30) Accordingly, ITA number 7448/M/2010 for assessment year 2005 – 06 filed by the learned assessing officer is dismissed.

Order pronounced in the open court on 18.04.2023.

Sd/-	Sd/-
(PAVAN KUMAR GADALE)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 18.04. 2023
Sudip Sarkar, Sr.PS Dragon
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.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai