

**IN THE INCOME TAX APPELLATE TRIBUNAL
"K" BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.2041/Mum/2010
(A.Y.2005-06)**

DCIT-2(3) R.No. 555, Aaykar Bhavan, Mumbai-400020	Vs.	M/s. Tech Mahindra Ltd. (Formerly Known as Mahindra British Telecome Ltd.) Gateway Building, Apollo Bunder Mumbai-400001
स्थायी लेखा सं./जीआइआर सं./ PAN/GIR No: AAACM3484F		
Appellant	..	Respondent

**ITA No.1035/Mum/2010
(A.Y.2005-06)**

M/s. Tech Mahindra Ltd. (Formerly Known as Mahindra British Telecome Ltd.) Gateway Building, Apollo Bunder Mumbai-400001	Vs.	DCIT-2(3) R.No. 555, Aaykar Bhavan, Mumbai-400020
स्थायी लेखा सं./जीआइआर सं./ PAN/GIR No: AAACM3484F		
Appellant	..	Respondent

Appellant by :	Shri. Jahangir D. Mistri & Shri. Harsh Kapadia
Respondent by :	Shri Azhar Zain Vayal Parambath

Date of Hearing	23.05.2023
Date of Pronouncement	20.06.2023

आदेश / O R D E R

Per Amarjit Singh (AM):

Both these appeals filed by the assessee and the revenue arised from the order of CIT(A)-15, Mumbai dated 01.01.2010. Both these appeals were adjudicated by the ITAT vide combined order ITA No. 1035/Mum/2022 and ITA No. 2041/Mum/2010 on 23.03.2022.

2. Thereafter, the assessee company filed miscellaneous application vide MA No. 327/Mum/2022 on the issue of transfer pricing adjustment with respect of charging interest for extended credit period to the associated enterprises of the assessee and on the issue relating to claim of deduction u/s 10A of the act. The assessee submitted that in respect of transfer pricing adjustment with respect to charging interest on credit period extended to AE, the assessee has relied on the decision of Hon'ble Jurisdictional High Court as well as ITAT Mumbai in the case of CIT-9 Vs Indo American Jewellery Ltd. ITA No. 1053 of 2012 dated 08.01.2013 and decision of Hon'ble Bombay High Court in the case of CIT-16 v/s Livingstone ITA 887 of 2014 dated 28.11.2016 and decision of ITAT Mumbai in the case of Hiracco Jewellery (Ind) Ltd. v/s DCIT (ITA No. 7297/Mum/2014) dated 21.03.2016 were not considered by the ITAT while adjudicating the aforesaid grounds of appeal filed by the assessee.

3. The ITAT vide order MA No. 277/Mum/2022 and 327/Mum/2022 dated 30.04.2023 has recalled the order dated 23.03.2022 to adjudicate the aforesaid issues by allowing the miscellaneous application filed by the assessee.

4. Both the issues are adjudicated as followed.

5. ***Ground of appeal as per the revenue's appeal as under.***

On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing relief to the assessee to the extent impugned in the grounds enumerated below:

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 CIT(A) erred in holding that the adjustment to arm's length price should be only to the extent of Rs.89,04,156 as against Rs.1.35.68,237/- made by the assessing officer in conformity with Section 92CA(3)/92CA(4) of the I.T.Act, 1961.*

3. *On the facts and in the circumstances of the case and in law, the CIT(A) erred in holding that consideration relating to expenditure incurred in foreign currency on telecommunication charges and provision of technical service outside India, amounting to Rs.3,63,59,691/- and Rs.3.03.52.68.901/- respectively; should not be excluded from export turnover for the purpose of computing deduction u/s 10A disregarding the provisions of 2(iv) to Sec. 10A of I.T. Act, 1961.*

4. *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 Assessing Officer be restored.*

6. Grounds of appeal as per the assessee's appeal as under.

1. *On the facts and in the circumstances of the case and in law the learned CIT(A) erred confirming addition of Rs. 89,04,156 towards interest at a rate of 4.20% [as against Rs. 1,35,68,237 by the Assessing Officer pursuant to the order of the Pricing Officer passed u/s 92CA(3)] to the total income of the Appellant*

2. *On the facts and in the circumstances of the case and in law the learned CIT(A) having accepted the submissions of the Appellant for not charging interest while extending credit to its USA-Associated Enterprise for payment of sale consideration by the AE, ought to have desisted from partially confirming the adjustment to total income made by the AO-TPO and ought to have deleted the said addition in its entirety*

In any event the rate of interest adopted by the learned CIT (A) while partially confirming the addition as aforesaid is excessive and contrary to facts

The addition of 89,04,156/- confirmed by the learned CIT(A) be deleted

3. On the facts and in the circumstances of the case and in law for the purposes of computing deduction u/s 10A the learned CIT(A) ought to have directed the Assessing Officer not to do any adjustment to Export Turnover and to Total Turnover in respect of expenditure incurred in foreign currency on telecommunications and on rendering technical services outside India, as the adjustment is required to be done only if such expenditure is, in the first place, included in the Export Turnover and Total Turnover.

Grounds no 1 and 2 of appeal of the assessee and ground no 2 of the revenue (not charging interest while extending credit to the Associates Enterprises)

7. The TPO has made adjustment in respect of granting extended credit periods to the associated enterprises of the assessee without charging any interest on delayed payments. The TPO has made adjustment to the amount of Rs 1,35,68,237/- on account of arms length price in respect of credit period extended by the assessee to its associates Enterprises in USA. The TPO had taken the stand that for extending credit period to its associated enterprises the assessee was required to charge the interest. The TPO has taken the LIBOR rate of 3.40% and the amount loaded on it was plus 300 points (6.40%).

8. The assessee has filed appeal before the CIT(A) . The CIT(A) has partly allowed the grounds of appeal of the assessee, holding that USD LABOR rate at that point of time being 3.40% with a mark up of 80 basis point would be adequate for determining ALP interest for trade credit which can reasonable to charged to the Associates Enterprises.

9. During the course of appellate proceedings before us the Ld. Counsel referred Para No. 3.1 of the order of CIT(A) and submitted that assessee has also extended credit period to its non-associate enterprises without charging any interest for delayed payment and on the same issue on similar facts, the TPO has not made any adjustment for assessment year 2002-03 and assessment year 2003-04. The Ld. Counsel has referred the decision of ITAT Mumbai in the

case of Hinduto Pvt Ltd. v/s DCIT (ITA No. 7297/Mum/2014) and decision of the Hon'ble Jurisdictional High Court in the case of CIT-9 v/s Indo American Jewellery Ltd. vide ITA No. 1053 of 2012 dated 08.01.2013. He also referred the decision Hon'ble Bombay High Court in the case of CIT-16 v/s Livingstone ITA No. 887 of 2014. By referring the aforesaid Judicial Pronouncement, the Ld. Counsel submitted that no TPO adjustment shall be made in respect of extended credit period granted by the Assessee to its associated enterprises as assessee has also not charged any interest on such credit period extended to its non-associated enterprises. On the other hand Ld. DR supported the order of AO.

10. Heard both the sides and perused the material on record, without reiterating the facts as discussed above in this order, this fact that no interest has been charged by assessee to its non associated enterprises also has been referred by the ld. AO and the ITAT in their findings. The ITAT in the order dated 23.03.2002 at Para 9 of the order has also mentioned that the assessee granted extended credit periods to non-associated enterprises without charging any interest on delayed payment.

10.1 In this regard we have perused the decision of Hon'ble Bombay High court in the case of CIT v/s M/s Indo American Jewellery Ltd. as referred Supra, relating operating part is reproduced as under:

"However, in the facts of the present case, the specific finding of the ITAT is that there is complete uniformity in the act of the assessee in not charging interest from both the Associated Enterprises and Non Associated Enterprises-debtors and the delay in realisation of the export proceeds in both the cases is same. In these circumstances the decision of the Tribunal in deleting the notional interest on outstanding amount of export proceeds realised belatedly cannot be faulted..."

10.2 We have also perused the decision of Hon'ble Bombay High in the case of CIT-16 v/s Mr Livingstone Ltd. as (supra)

“.....4. The Tribunal by the impugned order rendered a finding of fact that the respondent-assessee has not charged any interest from third parties i.e. Non Associated Enterprises on delayed payments exceeding more than 300 to 400 days from the sale of goods. Consequently, it holds that once such delayed payment in respect of sale of goods made to third parties carries no interest, then adding of notional interest to delayed payments made by the Associated Enterprises is not called for. 6. In the present case also the Tribunal has rendered a finding of fact that the interest is not being charged in case of sales made to Non- Associated Enterprises for delayed payment just as in the case of Associated Enterprises. These finding of fact rendered by the Tribunal is not shown to be perverse in any manner...”

11 Considering the undisputed fact that assessee has also extended credit period to its non-associated enterprises without charging any interest on delayed payment, therefore, after following the decision of Hon’ble Jurisdictional High court as referred (supra) this ground of appeal of the assessee is allowed that in such circumstances the AO/TPO is not required to make the adjustment on notional basis.

12. **Claim of deduction u/s 10A (Grounds of appeal No. 3 of the Assessee and Revenue.**

12.1 The assessee submitted that for the purpose of computing the export turnover u/s 10A of the Act, the assessing officer has incorrectly reduced the expenditure incurred in foreign currency on telecommunication charges amounting to Rs 3,63,59,691/- and expenses incurred in foreign currency in providing technical services outside of India amounting to Rs 303,52,68,901/-

12.2 During the course of appellate proceedings the assessee has specifically submitted that the foreign currency expenses were never recovered from the customer, therefore same were not formed part of export turnover or total turnover. Therefore the question of any adjustment from either of the component does not arise. It was also submitted that if any adjustment of such

foreign currency has to be made from the export turnover, the corresponding adjustment from total turnover also need to be made by the following the principle of parity.

12.3 During the course of appellate proceedings before us, the Ld. Counsel vehemently submitted that assessee has not recovered any foreign currency expenses from the customers and it was not included in the export turnover and total turnover of the assessee company. He also placed reliance on the decision of Hon'ble Bombay High Court in the case of assessee itself (2015) 54 taxmann.com 385 and the decision of Hon'ble High Court of Karnataka in the case of M/s Tech Mahindra Ltd. vide ITA No. 205-206/2011 and the decision of ITAT Chennai in the case of ITO v/s Sak Soft Ltd. vide ITA no. 691/MAD/1953 and 2477 (Mad) of 2007, on the proposition that if the adjustment of foreign currency expenses has to be made from export turnover then the corresponding turnover from the total adjustment also need to be made.

13. Heard both the sides and perused the material on record. The assessee has submitted before the lower authority and before the ITAT, during the course of appellate proceedings that it has not recovered any foreign currency expenses from the customers and it was not made part of the turnover. In this regard we have perused the decision of Jurisdictional High Court of Bombay in the case of assessee/Tech Mahindra Ltd. as referred (Supra) wherein held that expenses incurred in foreign currency on telecommunication charges and providing technical services outside India should be excluded from total turnover for the purpose of computation of deduction u/s 10A of the Act. We have also perused the decision of Hon'ble high Court of Karnataka in the case of Tech Mahindra Ltd. in ITA No. 205-206/2011 wherein also on the similar proposition it has been held that the impugned expenditure has to be excluded from the total turnover. During the course of assessment proceedings, assessee has also placed on record written submission that it has not separately recovered any freight telecommunication charges or insurance attributable to the delivery of the article or computer software outside of India or expenses, if any incurred in

foreign exchange in providing the technical services outside India from its customer. The assessee has also furnished the annexure 1 along with written submission showing working of deduction u/s 10A of without including the above referred expenses. After considering the above facts and submissions of the assessee that it has never recovered foreign currency expenses from the customers and it was not part of its total turnover, therefore, following the decision of Hon'ble Jurisdictional High Court as referred supra, we allow the appeal of the assessee that expenditure incurred on foreign currency on telecommunication charges and provision of technical services outside of India should not be excluded from export turnover for the purpose of computing u/s 10A, since this expenditure were not included in the export turnover of the assessee. In the result the appeal of the assessee is allowed and the appeal of the revenue is dismissed.

Pronounce in the open court on 20.06.2023

Sd/-

(Amit Shukla)
Judicial Member

Place: Mumbai

Date 20.06.2023

Aniket Singh Rajput: Steno

Sd/-

(Amarjit Singh)
Accountant Member

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.