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

BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND SHRI RAHUL CHAUDHARY, HON'BLE JUDICIAL MEMBER

ITA.NO.9004/MUM/2010 (A.Y: 2006-07)

Tech Mahindra Limited Gateway Building Apollo Bunder, Mumbai - 400001 **PAN: AAACM3484F**	*v.*	DCIT – Circle– 2(3) Aayakar Bhavan Maharshi Karve Road Mumbai - 400020
(Appellant)		**(Respondent)**

Assessee Represented by	**:**	**Shri Jahangir.D. Mistri, Shri Pranay Gandhi & Shri Harsh M. Kapadia**
Department Represented by	**:**	**Shri Vachaspati Tripathi**
Date of conclusion of Hearing	**:**	**08.08.2023**
Date of Pronouncement	**:**	**18.10.2023**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against the order of final Assessment Order and directions of the Dispute Resolution Panel – II,

Mumbai [hereinafter in short "Ld.DRP"] dated 06.09.2010 for the A.Y.2006-07 passed u/s. 144C(5) of Income-tax Act, 1961 (in short "Act").

2. At the time of hearing, both the counsels fairly agreed that the issues raised in this appeal are covered and adjudicated by the Coordinate Bench of the Tribunal in assessee's own case for the previous Assessment Years. Copies of the orders are placed on record.

3. Assessee has raised following grounds in its appeal: -

> *" 1. On the facts and circumstances of the case and in law, the learned TPO erred in and the Hon'ble DRP further erred in confirming the action of TPO, inspite of the fact that the TPO could not prove that the conditions mentioned in clauses (a) to (d) of section 92C(3) of the Act were satisfied for warranting an adjustment to the income of the Appellant.*
>
> *2. (a) On the facts and in the circumstances of the case and in law the learned TPO erred in and the Hon'ble DRP further erred in confirming adjustment of Rs.1,09,76,788 on account of not charging interest for delay in realization of debts and ought to have deleted the said addition in its entirety.*
>
> *(b) On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in applying the provisions of Chapter X to the credit extended by the assessee.*
>
> *(c) Without prejudice, on the facts and in the circumstances of the case and in law, the learned TPO erred in and the Hon'ble DRP further erred in upholding confirming the rate of 7% (i.e. LIBOR of 4% plus 3%) as arbitrarily determined by the TPO without any basis.*

3. (a) On the facts and in the circumstances of the case and in law, the learned TPO erred in and the Hon'ble DRP further erred in confirming the proposed addition of Rs.4,088,003 without appreciating the commercial and business reasons for providing loan to Tech Mahindra Americas Inc.

(b) On the facts and in the circumstances of the case and in law the learned TPO erred in and the Hon'ble DRP further erred in confirming addition of Rs. 40,88,003 to the total income of the Appellant over and above 4% Interest which the Appellant had charged on the loan advanced by the Appellant...

(c) On the facts and in the circumstances of the case and in law, the learned TPO erred in and the Hon'ble DRP further erred in upholding / confirming the rate of 7% (i.e. LIBOR of 4% plus 3%) as arbitrarily determined by the TPO without assigning any basis.

(d) On the facts and in the circumstances of the case and in law, the learned TPO erred in and the Hon'ble DRP further erred in disregarding the US Federal Fund Rate prevalent at the time of extending the inter-company loan which ought to have been considered taking into account the geographical region of operation.

(e) Assuming without admitting, on the facts and in the circumstances of the case and in law, the learned TPO erred in and the Hon'ble DRP further erred in disregarding the rate of interest that an independent party would have charged for providing the loan despite the fact that the said rate was brought to the notice of the TPO and Hon'ble DRP.

The total addition of Rs. 1,50,64,791 confirmed by the learned DRP be deleted.

4 (a) On the facts and in the circumstances of the case, the learned Assessing Officer (AO) has erred in proposing and the learned Hon'ble DRP has further erred in confirming the proposed reduction of expenditure incurred on telecommunication charges and expenditure incurred in foreign exchange outside India from the 'export turnover while computing deduction under section 10A of the Act.

(b) On the facts and in the circumstances of the case, the learned AO and Hon'ble DRP have erred in not appreciating the submissions made by the Appellant that the expenditure incurred on telecommunication charges and expenditure incurred in foreign exchange outside India not being recovered by the Appellant, are not required to be reduced from the 'export turnover' while computing deduction under section 10A of the Act.

(c) Without prejudice to the above, on the facts and in the circumstances of the case, the learned AO has erred in not accepting and the learned Hon'ble DRP has further erred in not adjudicating on the ground that the expenditure incurred on telecommunication charges and expenditure incurred in foreign exchange outside India, if reduced from 'export turnover should also be reduced from the 'total turnover' while computing deduction under section 10A of the Act.

5. The (AO) at the time of giving effect to the DRP's order erred in allowing relief of Rs. 14,34,543 instead of Rs. 2,77,04,614 under section 90 of the Act with reference to the taxes paid in UK.

6. The learned Assessing Officer erred in directing levy of interest under sections 234B.

The Appellant reserves the right to add to, alter or amend the grounds of appeal"

4. We proceed to adjudicate the issues raised by the assessee ground wise.

5. Ground No.1 is general in nature, accordingly, specific adjudication is not required.

6. With regard to, Ground No. 2 which is in respect of interest adjustment on delayed AE receivable for an amount of ₹.1,09,76,788/-. Ld. AR of the assessee submitted that it is an undisputed fact that the

extended credit period was allowed by the assessee to its non-AEs without charging any interest as well and hence, the adjustment made by the TPO and confirmed by the Ld. DRP is unwarranted and unsustainable. He submitted that the issue is settled by the Hon'ble Bombay High Court on numerous occasions and deleted the TP adjustment under similar circumstances. Further, Ld. AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this Tribunal and decided the issue in favour of the assessee and against the department. He brought to our notice order of the Coordinate Bench in assessee's own case in ITA.No. 2041/Mum/2010 dated 20.06.2023 (Para No. 10 and 11). Copy of the order is placed on record.

7. On the other hand, Ld. DR has fairly accepted the submissions of the Ld.AR.

8. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2005-06. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 2041/Mum/2010 dated 20.06.2023 held as under: -

> *" 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 Enterprisesdebtors 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."

9. Respectfully following the above decision and following the principle of consistency, the view taken by the Coordinate Bench in the preceding assessment year i.e., A.Y. 2005-06 is respectfully followed, ground raised by the assessee is accordingly allowed.

10. With regard to, Ground No. 3 which is in respect of interest on loan to AE for an amount of ₹.40,88,003/-. Ld. AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this Tribunal and decided the issue in favour of the assessee and against the department. He brought notice order of the Coordinate Bench in assessee's own case in ITA.No. 1176/Mum/2010 dated 30.06.2011 (Para No. 7). Copy of the order is placed on record.

11. On the other hand, Ld. DR has fairly accepted the submissions of the Ld.AR.

12. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2004-05. While deciding the issue, the Coordinate

Bench of the Tribunal in ITA.No. 1176/Mum/2010 dated 30.06.2011 held as under: -

> *" 7. The view taken by us also finds support from these observations of the co-ordinate Bench. When there is a choice between the interest rate of a currency other than the currency in which transaction has taken place and the interest rate in respect of the currency in which transaction has taken place, in our considered view, the latter should be adopted. In Siva Industries & Holdings Ltd's case (supra), co-ordinate Bench was making a choice between the PLR (Prime Lending Rate in India) and the LIBOR (London Inter Bank Offered Rate). The co-ordinate Bench held that "once the transaction between the assessee and the Associated Enterprises is in foreign currency and the transaction is an international transaction, then the transaction would have to be looked upon by applying the commercial principles in regard to international transactions", and accordingly proceeded to take into account interest rate in terms of LIBOR basis. We have adopted the same approach by taking into account the commercial principles and practices with regard to a US Dollar denominated extended credit for arriving at the benchmark rate, and take LIBOR as the base. Accordingly, the LIBOR (US Dollar) has to be as benchmark for US Dollar transactions rather than the rate of interest on domestic borrowings, even which is lower than the interest rate of 10 per cent taken as ALP by the TPO, or, for that purpose, rate of interest on any other currency loans. Having said that, we may also reiterate that as we hold so, we are not giving any decision on whether the ALP adjustment can be made, on the basis of LIBOR plus mark up, in respect of extended credit because we are dealing with a very limited issue in this appeal which does not require adjudication on the broader question as to whether an extended credit period can anyway be compared with a loan, much less a loan in some other currency which will have distinct lending rates depending on the peculiarities relating that currency, since it does not involve the lending period commitment as a loan necessarily involves. Be that as it may, the CIT(A) cannot thus be said to be in error in adopting the US Dollars LIBOR rate, with mark-up which is not in dispute for its being too low, as a basis for ALP adjustment - as long as he can be said to*

be justified in upholding the ALP adjustment. There is thus no justification in grievance raised by the Assessing Officer against the relief granted by the CIT(A). As we uphold the relief given by the CIT(A), we refrain from making any observations on whether or not such an ALP adjustment could have been made in the first place. The mere fact that the relief granted by the CIT(A) is upheld, it does not imply that the CIT(A)'s action of confirming the ALP adjustment on the facts of this case, in principle, is upheld too. That remains an open question and need not be adjudicated in this appeal. With these observations, and to the extent the grievance of the revenue is concerned, we confirm the order of the CIT(A) and decline to interfere in the matter at the instance of the revenue authorities. Ground No. 2 is thus dismissed.

13. Respectfully following the above decision and following the principle of consistency, the view taken by the Coordinate Bench in the A.Y. 2004-05 is respectfully followed, the Assessing Officer is directed to follow the ratio laid down in the above A.Y. 2004-05, hence, ground raised by the assessee is accordingly allowed.

14. With regard to, Ground No. 4 which is in respect of corporate tax adjustment i.e., expenditure in foreign currency on tele-communication fees and technical services outside India. Ld. AR of the assessee submitted that no adjustment is required to be made from the "export turnover" and / or "total turnover" as it is an undisputed fact that the subject expenses were not recovered from the customers by the assessee and thus does not form part of the turnover of the assessee at the first place. Further, Ld.AR of the assessee brought to our notice that the issue in appeal has been

considered by the Co-ordinate Bench of this Tribunal and decided the issue in favour of the assessee and against the department. He brought notice order of the Coordinate Bench in assessee's own case in ITA.No. 2041/Mum/2010 dated 20.06.2023 (Para No. 13). Copy of the order is placed on record.

15. On the other hand, Ld. DR has fairly accepted the submissions of the Ld.AR.

16. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2005-06. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 2041/Mum/2010 dated 20.06.2023 held as under: -

> *" 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."

17. Respectfully following the above decision and following the principle of consistency, the view taken by the Tribunal in the preceding assessment year i.e., A.Y. 2005-06 is respectfully followed, ground raised by the assessee is accordingly allowed.

18. With regard to Ground No. 5, Ld. AR of the assessee submitted that this ground is not pressed, accordingly, the same is dismissed as not pressed.

19. With regard to Ground No. 6 which is in respect of interest u/s. 234B of the Act, we observe that this ground is consequential in nature accordingly the same is not adjudicated at this stage.

20. Assessee has raised additional grounds which is reproduced below: -

> *"Assessment order passed by the learned Assessing Officer under Section 143(3) read with Section 144C(13) is barred by limitation under the provisions of Section 153 of the Act."*

21. The additional ground raised by the assessee is not pressed and Ld.AR argued on the merits on the main grounds of appeal. Therefore, the additional ground raised is dismissed as not pressed.

22. In the result, appeal filed by the assessee is partly allowed as indicated above.

Order pronounced in the open court on 18th October, 2023.

Sd/-	Sd/-
(RAHUL CHAUDHARY)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated 18/10/2023
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum