

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “H”,MUMBAI**

**BEFORE SHRI AMIT SHUKLA (JUDICIAL MEMBER)
AND
MS. PADMAVATHY S. (ACCOUNTANT MEMBER)**

I.T.A. No.1034/Mum/2022
(Assessment year : 2004-05)

Tech Mahindra Limited (Formerly known as Mahindra British Telecom Limited), Gateway Building, Apollo Bunder, Mumbai- 400 001 PAN : AAACM3484F	vs	Assistant Commissioner of Income- tax, Circle-1, Thane Ashar IT Park, Wagle Estate, Thane 400 604
APPELLANT		RESPONDENT

Present for the Assessee	J.D. Mistry & Harsh Kapadia
Present for the Department	Shri Ashok Kumar Ambastha

Date of hearing	19/10/2023
Date of pronouncement	27/10/2023

ORDER

Per Padmavathy S (AM):

This appeal was originally filed against the order of the Commissioner of Income-tax (Appeals)-15 dated 08/12/2009 for A.Y. 2004-05. The Tribunal, vide order dated 23/03/2022 in ITA No.1034/Mum/2010 has remanded the issue back to the file of the Assessing Officer/ TPO. The assessee filed a Miscellaneous Application on the said order of the Tribunal and the Tribunal has vide order in

M.A.No.276/Mum/2022 dated 04/09/2023 recalled the appeal in ITA No.1034/Mum/2010. Thus, the appeal is before us for hearing for adjudicating the grounds as given below –

Being aggrieved by the order passed by the CIT(A) 15, Mumbai the Appellant submits the following grounds of appeal for your sympathetic consideration

1. On the facts and in the circumstances of the case and in law the learned CIT(A) erred confirming addition of Rs. 37,50,475 towards interest at a rate of 2% [as against Rs. 1,87,52,378 made by the Assessing 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 Rs. 37,50,475 confirmed by the learned CIT(A) be deleted.”

2. The assessee is engaged in the business of software services in the field of telecom, internet technology, engineering, etc. The assessee is a joint venture between Mahindra & Mahindra Ltd (57%) and M/s British Telecom (43%). The assessee, for the assessment year 2004-05, filed a return of income on 30/10/2004 declaring total income of Rs.4,39,59,203/- after claiming deduction under section 80HHE of Rs.94,016/-, deduction under section 80G of Rs.23,18,590/- and an exemption under section 10A of rs.105,50,58,391/-. The case was selected for scrutiny and the notice under section 143(2) was duly served on the assessee. Since the assessee had international transactions, a reference was made to the Transfer Pricing Officer (TPO) in order to determine the arm's length price of the

transactions, the assessee had with its AE. The TPO vide order dated 18/12/2006 made an adjustment of Rs.1,87,52,378/-. The Assessing Officer, while passing the assessment order made additions towards disallowance of advances written off amounting to Rs.22,33,489/- and a short term capital loss of Rs.6,82,889/-. The Assessing Officer also revised the 10A exemption of the assessee to Rs.66,57,276/-. Aggrieved, the assessee filed appeal before the CIT(A). the CIT(A) gave partial relief to the assessee.

3. The assessee and the revenue filed appeals before the Tribunal. In the appeal filed by the assessee (ITA 1034/Mum/20210), the only issue contended by the assessee was with regard to the TP adjustment made by the Assessing Officer to the tune of Rs.1,87,52,378/- which was revised by the CIT(A) to Rs.37,50,475/-. The Tribunal, vide order dated 23/03/2022, has remanded the issue back to the file of the Assessing Officer/ TPO to verify the period of credit as well as the interest paid which is available at that particular point of time in the open market and as per the practice on. The assessee moved a miscellaneous application stating that the Tribunal has not applied the ratio laid down by the jurisdictional High Court in the case of CIT vs Indo American Jewellery Ltd (ITA No.1053 of 2012 dated 08th January, 2013) and also in the case of CIT vs M/s Living Stones (ITA No.887 of 2014 dated 28th November, 2016). The Tribunal, while disposing of the miscellaneous application, vide order dated 4/9/2023 and recalled the order in assessee's case to decide the matter afresh by directing the registry to list the appeal in the due course. Accordingly, the current appeal is before us.

4. Brief facts pertaining to the issue under consideration. During the course of transfer pricing proceedings, the TPO called on the assessee to provide details of receipts such as Invoice number & date, Amount of invoice, stipulated credit

period, actual date of receipt, delay in receipt over the stipulated period etc. On perusal of the details filed by the assessee, the TPO was of the view that the assessee has provided excess credit period to its US AE over and above the stipulated credit period and called on the assessee to explain why an adjustment should not be made on account of excess grace period. The TPO also observed that the assessee has charged 10% interest from its German AE for Euro denominated loan granted by the assessee and called on the assessee to also explain as to why interest @10% should not be charged on the delayed receipts on account of software services provided to the US AE. From the details filed by the assessee, the Assessing Officer noticed that the average dates of delay in the case of US AE is 138.37 days on the invoice amount of Rs.49,46,60,540/-. The assessee submitted that the extended credit period was granted to the US AE so as to enable it to tide over its liquidity situation. The assessee also submitted that it does not charge interest from third parties for extended credit period allowed to them and therefore no adjustment is required to be made towards interest for delayed receipts from US AE.

5. The TPO did not accept the submissions of the assessee for the reason that the third parties from whom the assessee claims to have not charged any interest for extended credit period, are having very low level business with the assessee and the delay may not be material. However, in the case of the AE, the extended credit period is allowed to the assessee is for managing the liquidity situation. Accordingly, the TPO held that by not charging interest on such extended credit period granted to the AE, the assessee has not carried out transaction at arm's length. Accordingly, the TPO computed the TP adjustment to arrive at an amount of Rs.1,87,52,378/- (Rs.49,46,60,540/- x 138.37 days ÷365 days x 10%). Aggrieved, the assessee filed appeal before the CIT(A).

5. Before the CIT(A), the assessee submitted that extension of credit period cannot be equated with a loan for the reason that there are many differences such as, tenor, purpose, funding, security, etc. between a trade credit and a loan. The assessee further submitted that the credit period extended to third party transactions is 150 days which is more than the credit period allowed to the US AE and that the assessee is not charging any interest on the credit period extended to third party. Therefore, the assessee submitted that there should not be any interest charged on the extended credit period to the AE. The assessee also made a without prejudice submission that a six months USD LIBOR prevailing at that time plus a mark up of not more than 75 – 80 points may be considered for the purpose of charging interest. The CIT(A), after considering the submission of the assessee held that –

“4.1. Coming to the merits of the addition, it is observed that TPO has equated normal trade credit with the loan. The loan invariably and compulsorily will carry an interest amount while there is no compulsion in charging trade credit. The appellant has very succinctly pointed out the difference between trade credit and interest loan and so the very basis of adopting 10% interest rate by comparing it with Euro denominated loan extended to its AE in Germany is questionable. Only like can be compared with the like and the nature of both the transaction is not the same.

4.2 Besides the above core issue, it is observed that the TPO has ignored the economics related to the transaction in as much as AE in USA was incurring losses at that point of time. Charging interest on that extension of credit was to enable the AE to tide their temporary liquidity problem of the AE at USA is backed by the subsequent results as has shown profits from A.Y.2005-06 onwards. This reinforces the economic rationale of not charging any trade credit. In any case, since the AE was having net losses, there was no business consideration to shift profits, as there cannot be any tax liability on account of such losses.

4.3. The appellant has also demonstrated that it has extended credit profit to its non-AE without charging any interest for delayed payment proving that it has been even handed and consistent in this area. It is relevant to add that there was no adjustment on this issue in the TPOs order for A.Y.2002-03 and

A.Y.2003-04 implying thereby that transaction was held to be at ALP. There is no change whatsoever on the nature of transactions or time thereof this year.

4.4. However, a Transfer Pricing regime normally judges the Transfer Pricing of the tax payer based on the results rather than on the intent to shift income from one side to another. So it is felt that in the normal ALP an element of implied interest would always have been there so as to compensate for the opportunity cost and notional financial cost associated with account receivable/ adjustments so called for.

4.5. As such taking all the facts and circumstances, USD LIBOR rate at that point of time was 1.22% with markup of 80 basis point would be appropriate for determining ALP interest for trade credit which can be charged to thecae. This comes to around 2%. In monetary terms, the adjustment at this comes to Rs.37,50,475/-. Thus, the appellat get partial relief on this account.”

6. Before us, the Ld.AR submitted that it is an admitted fact that the credit period extended to third parties (non AE) is more than the credit period extended to AE. It is also an accepted fact that the assessee is not charging interest on non AE transactions. Therefore, no interest is to be charged towards credit period extended to AE. The Ld.AR further submitted that similar view has been held by the jurisdictional High Court in the case of Indo American Jewellery Ltd (supra) and M/s Living Stone (supra). The Ld.AR also drew our attention to the facts that in assessee's own case for A.Y. 2005-06 (ITA No.2041/Mum/2010 dated 20.06.2023) on similar issue, the co-ordinate bench has held that no adjustment is required on notional basis by relying on the above two decisions of the jurisdictional High Court.

7. The Ld.DR, on the other hand, vehemently agued that the case laws relied on by the assessee are not applicable in assessee's case. The Ld.DR submitted that case laws relied on is with regard to the company being engaged in the business of diamond industry, whereas the assessee is engaged in the business of software services. The Ld.DR also pointed out that the assessee himself has submitted

before the CIT(A) that the extension of credit period is given order to help the AE to manage the liquidity situation and therefore the lower authorities have correctly charged interest on the same. The Ld.DR also submitted that the assessee's claim that no interest is charged to third parties, cannot be accepted as it is without going into the details of what is the amount involved between AE and non AE transactions, delay, etc. Accordingly, the Ld.DR submitted that the CIT(A) has correctly applied the LIBOR rate to compute the arm's length price of the impugned transaction.

8. We heard the parties and perused the materials on record. We notice that the co-ordinate bench in assessee's own case in ITA No.1035/Mum/2010 for .Y. 2005-06 dated 20/06/2023 has considered a similar issue and held that –

“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.”

9. The facts for the year under consideration being similar, respectfully following the above, we hold that no adjustment is required to be made towards interest on the delayed receipts from US AE.

10. Before parting, it is relevant to note that the department had filed a cross appeal for AY 2004-05 in ITA No.1176/Mum/2010 on the same issue against the decision of CIT(A) to apply LIBOR rate as against 10% rate charged by the TPO. The coordinate bench vide order dated 30.06.2011, though has dismissed the revenue's appeal on the issue of rate to be applied had made a specific observation that though the CIT(A)'s action with regard to rate is upheld, it does not imply that the ALP adjustment in principle is upheld too. Accordingly the issue of determination of ALP by imputing interest on the delayed receipts from US AE is left open which we have adjudicated in the current appeal.

11. In the result, appeal is allowed in favour of the assessee.

Order pronounced in the open court on 27/10/2023

Sd/-

sd/-

(AMIT SHUKLA)	PADMAVATHY S.
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt :27th October, 2023

Pavanan

प्रतिलिपि अग्रेषित Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

Asstt. Registrar / Senior Private Secretary
ITAT, Mumbai