

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'J' BENCH
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&**

SHRI AMARJIT SINGH, JUDICIAL MEMBER

**ITA No.1326/Mum/2014
(Assessment Year :2009-10)**

M/s. Tech Mahindra Business Services Limited Spectrum Towers, Mind Space, Chincholi Bunder Link Road Malad (W), Mumbai – 400 064	Vs.	Deputy Commissioner of Income Tax Circle 9(2), Mumbai- 400 020
PAN/GIR No.AABCH8136L		
(Appellant)	..	(Respondent)

Assessee by	Shri Harsh Kapadia
Revenue by	Shri Vatsalya Saxena
Date of Hearing	08/09/2021
Date of Pronouncement	15/ 09 /2021

आदेश / O R D E R

PER M. BALAGANESH (A.M):

This appeal in ITA No.1326/Mum/2014 for A.Y.2009-10 preferred by the order against the final assessment order passed by the Assessing Officer dated 30/01/2014 u/s.143(3) r.w.s.144C(13) of the Income Tax Act, hereinafter referred to as Act, pursuant to the directions of the Id. Dispute Resolution Panel (DRP in short) u/s.144C(5) of the Act dated 19/12/2013 for the A.Y.2009-10.

2. The ground No.1 raised by the assessee is general in nature and does not require any specific adjudication.

3. The ground Nos. 2-12 raised by the assessee are with regard to transfer pricing adjustment made in the case of the assessee.

3.1. We have heard rival submissions and perused the materials available on record. We find that assessee company is engaged in the business of providing Information Technology Enabled Services (ITES) call centre operations. The assessee is a 100% subsidiary of HWP Investment Holding (India) Ltd., and provides voice based customer contact centre services (ITES) to Hutchison 3G Australia Pty Ltd., and Hutchison 3G UK Ltd., (Associated Enterprises-AEs). The ITES services rendered by assessee are mainly in relation to handling services related queries, dealer related queries, mobile number portability related queries, handset related queries, network related queries and price plan related services. The assessee characterized the transaction in respect of provision of ITES services to its AE as a low risk service provider. The international transactions reported by the assessee are as under:-

Provision of IT enabled services to AEs	-	Rs.494,17,50,027/-
Reimbursement of cost	-	<u>Rs. 1,73,50,898/-</u>
Total		Rs.495,91,00,925/-

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3.2. The assessee benchmarked its international transactions by adopting Transaction Net Margin Method (TNMM); by adopting Profit Level Indicator (PLI) as Operating Profit / Total Cost (OP/TC); taking assessee as a tested party and having the following 8 comparables:-

Sr. No.	Name of the comparable company	PLI
1.	Aditya Birla Minacs Worldwide Ltd.,	4.14%
2.	Allsec Technologies Ltd.,	-0.55%
3.	Hinduja Global Solutions Ltd.,	17.69%
4.	Microwave Communications Ltd.,	4.11%
5.	NIIT Smartserve Ltd.,	-0.55%
6.	Optimus Global Servicer Ltd.,	-2.20%
7.	Sparsh BPO Services Ltd.,	4.71%
8.	Spanco Ltd.,	18.58%
	Arithmetic Mean	5.74%

3.3. The assessee OP/TC was 18.35% and arithmetic mean of the comparables was 5.74%. The assessee during the course of proceedings before the Id. TPO by considering the contemporaneous data re-worked the arithmetic mean of the comparables using the single year data and arrived at the arithmetic mean of the comparables at 4.76% as under:-

Sr. No.	Name of the comparable company	PLI
1.	Aditya Birla Minacs Worldwide Ltd.,	0.44%
2.	Allsec Technologies Ltd.,	-9.02%
3.	Hinduja Global Solutions Ltd.,	25.57%
4.	Microwave Communications Ltd.,	21.94%
5.	NIIT Smartserve Ltd.,	1.41%
6.	Optimus Global Servicer Ltd.,	-3.51%
7.	Sparsh BPO Services Ltd.,	1.93%
8.	Spanco Ltd.,	-0.72%
	Average Margin	4.76%

3.4. The Id. TPO by applying various filters and after, including the comparables chosen by the assessee and excluding certain comparables by the assessee and including fresh comparables, arrived at the arithmetic mean of comparable companies at 39.95%. In other words, the final list of comparables chosen by the Id. TPO are as under:-

<i>Sr. No.</i>	<i>Name of the comparable company</i>	<i>Margin</i>
1.	<i>Aditya Birla Minacs Worldwide Ltd.,</i>	<i>23.91%</i>
2.	<i>Coral Hubs Ltd.,</i>	<i>36.93%</i>
3.	<i>Cosmic Global Ltd.,</i>	<i>48.12%</i>
4.	<i>Eclerx Services Ltd.,</i>	<i>57.46%</i>
5.	<i>Genesys International Corporation Ltd.,</i>	<i>58.45%</i>
6.	<i>Infosys BPO Ltd.,</i>	<i>24.50%</i>
7.	<i>Accentia Technologies Ltd.,</i>	<i>48.93%</i>
8.	<i>Acropetal Technologies (seg)</i>	<i>21.30%</i>
	<i>Arithmetic Mean</i>	<i>39.95%</i>

3.5. Accordingly, the Id. AO made an adjustment of Rs.105,74,53,035/- to arm's length price in respect of provision of ITES services as under:-

<i>Sr. No.</i>	<i>Particulars</i>	<i>Amount in Crores</i>
1	<i>Operating Cost</i>	<i>428.66</i>
2	<i>Arm's Mean Margin</i>	<i>39.951</i>
3	<i>ALP at 39.95% on operating cost</i>	<i>599.91</i>
4	<i>Price Received</i>	<i>484.17</i>
5	<i>Shortfall being adjustment u/s.92CA</i>	<i>105.74</i>

3.6. Pursuant to the directions of the Id. DRP, the Id. AO in the final assessment order determined the transfer pricing adjustment figure at Rs.105,74,53,035/- which is nothing but the addition made in the draft assessment order.

4. Aggrieved by this, the assessee is in appeal before us.

5. The Id. AR before us stated that though the assessee has raised several grounds, it would be sufficient if inclusion or exclusion of comparables alone are adjudicated. He specifically drew our attention that out of eight comparables finally chosen by the Id. TPO, the following six comparables were directed to be excluded by this Tribunal in assessee's own case for A.Y.2008-09 in ITA No.7520/Mum/212 dated 23/01/2019 :-

<i>Sr. No.</i>	<i>Name of the comparable company</i>
1.	<i>Aditya Birla Minacs Worldwide Ltd.,</i>
2.	<i>Acropetal TechnologoesLtd.,</i>
3.	<i>Coral Hubs Ltd.,</i>
4.	<i>Cosmic Global Ltd.,</i>
5.	<i>Eclerx Services Ltd.,</i>
6.	<i>Genesys International Corporation Ltd.,</i>

5.1. If these six comparables are excluded by following the Tribunal order in assessee's own case for A.Y.2008-09 wherein it was categorically held that these comparable companies are not functionally comparable with that of the assessee company, the arithmetic mean of the comparables would be 24.21%.

5.2. The Id. AR also argued that the foreign exchange fluctuation gain earned by the assessee during the year under consideration out of re-statement of outstanding sundry debtors amounting to Rs.13,31,38,000/- as on the balance sheet date should be treated as part of operating revenue and if it is so considered together with exclusion of aforesaid six comparables based on A.Y.2008-09 Tribunal order, the assessee would be through with +/-5% range as permitted under proviso 2 to Section 92(2) of the Act. If this is done, no other grounds on transfer pricing need to be adjudicated.

5.3. The Id. DR fairly submitted that the aforesaid six comparables were found not functionally comparable with that of the assessee company by the order of this Tribunal in A.Y.2008-09. He also stated that Forex gain is to be treated as operating revenue and it should also be verified whether in the books of comparable companies also, the forex gain is treated as operating revenue. This would enable proper comparability with that of the assessee company while determining the margins.

6. On hearing both the parties and on examination of various factual and legal details on record, we find at the outset that the following six companies were held to be functionally not comparable by the order of this Tribunal in assessee's own case in ITA No.7520/Mum/2012 for A.Y.2008-09 dated 23/01/2019 which is also to be read together with corrigendum dated 30/04/2019:-

- i) **Accentia Technologies Ltd.**, - This comparable company is engaged in the field of medical transcription services and hence, functionally not comparable with the BPO operations carried out by the assessee in the field of tele-communication related services.

- ii) **Acropetal Technologies Ltd.,**- This comparable company is engaged in providing engineering design services which is functionally different from the services provided by the assessee.
- iii) **Coral Hubs Ltd.,**- This comparable company is mainly engaged in data processing services which is functionally different from the services provided by the assessee company.
- iv) **Cosmic Global Ltd.,**- This comparable company had derived major revenue from translation business which is functionally not comparable with the services provided by the assessee company.
- v) **Eclerx Services Ltd.,**- This company is data analytics knowledge process outsourcing service provider which is different from BPO services provided by the assessee company.
- vi) **Genesys International Corporation Ltd.,** - This company is a specialised geospatial service provider which is different from regular BPO services provided by the assessee company.

6.1. Hence, respectfully following the Tribunal order in assessee's own case for A.Y.2008-09, wherein the aforesaid six comparables were held to be functionally not comparable, we direct the Id. TPO to exclude these six comparables from the final list of comparables while benchmarking the international transaction of the assessee.

6.2. We find that the assessee had derived foreign exchange fluctuation gains of Rs.13,31,38,000/- only on re-statement of outstanding debtors

as on the balance sheet date. This, in our considered opinion, would certainly form part of only operating revenue of the company. Reliance in this regard has been rightly placed by the Id. AR on the Co-ordinate bench decision of this Tribunal in the case of Medtronics Pvt. Ltd., vs. DCIT in ITA No.7263/Mum/2018 dated 13/09/2019. On perusal of the financial statements, we also find that the assessee company had not resorted to any hedging transactions as wrongly reported by the Id. DRP while adjudicating this issue. Accordingly, we direct the Id. TPO to include the forex gain of Rs.13,31,38,000/- as part of operating revenue.

6.3. If the said forex gain is treated as operating revenue and the aforesaid six comparable companies are excluded, the assessee would be well within the +/-5% tolerance range as per proviso 2 to Section 92C(2) of the Act which is worked out as under:-

(Rs in '000)

Description	As per assessee	As per Id. TPO
Operating Revenue (A)	49,41,750	49,41,750
Foreign Exchange Gain as part of Operating Revenue (B)	1,33,138	0
Total Operating Revenue (C)=A+B	50,74,888	49,41,750
Total Operating Cost (D)	42,86,651	42,86,651
Operating Profit (E)= C-D	7,88,237	6,55,099
OP/OC (F=E ÷ D)	18.39%	15.28%

6.4. The assessee has also given the workings below to prove that its margins fall within +/-5% range as provided in proviso 2 to Sub Section 92C(2) of the Act as under:-

<i>Particulars</i>	<i>Amount in Thousands</i>
<i>Operating Cost (A)</i>	<i>42,86,651.00</i>
<i>Arm's length Margin of Comparables (B)</i>	<i>24.21%</i>
<i>ALP (C=A * 124.21%)</i>	<i>53,24,234.87</i>
<i>Transaction value of the assessee (D)</i>	<i>50,74,888.00</i>
<i>5% of the ALP (E=C * 5%)</i>	<i>2,66,211.74</i>
<i>Difference = C-D</i>	<i>2,49,346.87</i>

6.5. In view of the aforesaid workings and in view of our aforesaid observations and respectfully following the various judicial precedents relied upon hereinabove, we hold that there is no need to make any transfer pricing adjustment in respect of provision of IT enabled services by the assessee to its AEs. Accordingly, the grounds 2-12 are disposed of in the aforesaid manner.

7. The ground No.13 raised by the assessee is with regard to denial of deduction u/s.10A of the Act on the interest income earned by the assessee.

7.1. We have heard rival submissions and perused the materials available on record. It is not in dispute that assessee has earned interest income on fixed deposits kept with HSBC Bank. These fixed deposits was kept as a margin with the bank for issuing bank guarantee in favour of the Commissioner of Customs on behalf of the assessee for a sum of Rs.56,63,000/-. The assessee pleaded that the fixed deposits were placed with the bank as part of business purposes of the undertaking of the assessee and out of business receipts and consequently, eligible for deduction u/s.10A of the Act. The Id. AO however, held that these fixed deposits were placed by the assessee out of surplus funds lying with it and hence, the interest earned thereon would be liable to be separately

taxed under the head 'income from other sources' and consequently not eligible for deduction u/s.10A of the Act. This action was upheld by the Id. DRP.

7.2. We find that similar issue had cropped up in assessee's own case before this Tribunal in A.Y.2011-12 in ITA No.766/Mum/2016 dated 30/06/2021 wherein this Tribunal treated the said interest income as part of business receipts earned by the assessee by placing reliance on the decision of Full Bench of the Hon'ble Karnataka High Court in the case of CIT vs. Hewlett Packard Global Soft Ltd., reported in 403 ITR 453; decision of the Hon'ble Jurisdictional High Court in the case of Cybertech Systems & Software vs. DCIT reported in 91 Taxmann.com 407(Bom), wherein it was held that all profits and gains including incidental income of an Export Oriented Unit (EOU) even in the nature of interest on bank deposits or soft loans would be entitled for deduction u/s.10A or 10B of the Act. Respectfully following the said decision in assessee's own case for A.Y.2011-12, we direct the Id. AO to grant deduction u/s.10A of the Act in respect of interest income earned on fixed deposits. Accordingly, the ground No.13 raised by the assessee is allowed.

8. The ground Nos. 14-16 raised by the assessee is with regard to treatment of forex gain and re-valuation of foreign currency held in EEFC account and consequently its eligibility to claim deduction u/s.10A of the Act.

8.1. We have heard rival submissions and perused the materials available on record. During the course of assessment proceedings, the assessee was asked to furnish the break-up of foreign exchange gain credited in the profit and loss account amounting to Rs.13,31,38,000/-

for which deduction u/s.10A of the Act was claimed by the assessee. The assessee was also asked to explain the reasons for claiming such deduction. The assessee furnished a reply vide letter dated 07/02/2013 that it was maintaining Exchange Earners Foreign Currency (EEFC) bank account in foreign currency for the purpose of enabling its import payments and export receipts and avoid consequential foreign exchange fluctuations thereon. The balance in foreign currency lying in the said EEFC account as on the balance sheet date had to be re-stated by the assessee company in accordance with Accounting Standard Standard-11 issued by Institute of Chartered Accountants of India (ICAI). Pursuant to such re-translation of foreign currency into Indian currency as on the balance sheet date, the assessee earned exchange gain of Rs.5,00,32,074/- which was credited in the profit and loss account and deduction u/s.10A of the Act claimed for the same. The assessee also earned exchange gain on dollar sales of Rs.6,51,34,757/- which was duly credited in the profit and loss account and deduction u/s.10A of the Act claimed for the same. The Id. AO observed that the aforesaid two exchange gains does not fall within the ambit of the expression "derived" used in Section 10A of the Act. Hence, the assessee is not eligible for deduction u/s.10A of the Act for the same. This action of the Id. AO was upheld by the Id. DRP.

8.2. We find that this issue is also no longer res-integra in view of the decision of this Tribunal in assessee's own case for A.Y.2011-12 in ITA No.766/Mum/2016 dated 30/06/2021 wherein it was held that the action of the lower authorities in placing reliance on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Shah Originals reported in 327 ITR 19 (Bom) was totally misconceived as the said decision was rendered in the context of deduction claimed u/s.80HHC of the Act

whereas in the present case, the assessee has claimed deduction u/s.10A of the Act, wherein deduction is available on the profits derived by the assessee on the entire profits and gains derived by the undertaking engaged in the business of export of articles or things. This Tribunal had also placed reliance on the decision of the Hon'ble Karnataka High Court in the case of CIT vs, Motorola India Electronics Pvt. Ltd., reported in 46 Taxmann.com 167 wherein it was held that what is exempted is not merely the profits and gains of the export of articles but also the income from the business of the undertaking. Proceeding further, the Hon'ble High Court also observed that export profits kept in the EEFC account are the income of the business undertaking, hence the assessee would be entitled for deduction u/s.10A of the Act for the same. Respectfully following the aforesaid decision, the ground Nos. 14-16 raised by the assessee are hereby allowed.

9. Ground No.17 raised by the assessee is with regard to short grant of credit for TDS by the Id. AO. We find that this is a matter of factual verification and the Id. AO is hereby directed to grant TDS credit in accordance with law. Accordingly, the ground No. 17 is allowed for statistical purposes.

10. We find that assessee has raised an additional ground before us claiming deduction on account of education cess. We find that this additional ground deserves to be admitted as all the facts necessary for its adjudication are already on record and there is no dispute that assessee had indeed paid the education cess. Hence, respectfully following the decision of the Hon'ble Jurisdictional High Court in the case of Sesa Goa Ltd., vs. JCIT reported in 423 ITR 426, we direct the Id. AO to grant deduction on account of education cess paid by the assessee as

an allowable business expenditure. Accordingly, the additional ground raised by the assessee is allowed.

11. In the result, appeal of the assessee is partly allowed.

Order pronounced on 15/09/2021 by way of proper mentioning in the notice board.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 15/09/2021

KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai