

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

**BEFORE SH. SHAMIM YAHYA, AM &
SH. SANDEEP GOSAIN, JM**

आयकरअपीलसं./ I.T.A. No. 859/Mum/2015
(निर्धारणवर्ष / Assessment Year: 2011-12)

Mckinsey& Company, Inc. Switzerland, C/o S R B C & Associates LLP, 14th Floor, The Ruby SenapatiBapat Marg, Dadar (W), Mumbai- 400028.	बनाम/ Vs.	DCIT (IT)-3 (2)(1), Scindia House, Ballard Estate, Mumbai- 400038.
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AAACM7228F		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Porus Kaka Sr Advocate with Sh. Divesh Chawla
प्रत्यर्थीकीओरसे/Respondentby	:	Shri Samuel Darse, CIT(DR)

सुनवाईकीतारीख/ Date of Hearing	:	02/11/2017
घोषणाकीतारीख / Date of Pronouncement	:	10/01/2018

आदेश / ORDER

Per Sandeep Gosain, Judicial Member:

The present Appeal filed by the assesseeis against the order of DCIT (Intl. Tax.) – 3(2)(1), Mumbai dated 26.11.14

passed u/s 143(3), r.w.s 144C(13) of the I.T. Act for AY 2011-

12 on the grounds mentioned herein below:-

1. The learned AO/ Hon'ble Dispute Resolution Panel ('DRP') has erred in concluding that borrowed services rendered by the Appellant are in the nature of 'fees for included services' under Article 12 of the India-US Double Taxation Avoidance Agreement ('India-US Tax Treaty').

2. The learned AO's order and finding on the evidence submitted is contrary to the details filed before him and also the Hon'ble DRP.

3. The learned AO / Hon'ble DRP has erred in not following the earlier decisions pronounced by the Hon'ble ITAT in Appellant's own case / in case of group companies of the Appellant wherein it has been held that borrowed service fee received is not taxable as 'fees for included services' under Article 12 of the India-US Tax Treaty.

4. The learned AO/ Hon'ble DRP has erred in concluding that the Appellant does not satisfy the tests as laid down by 'Article 24— Limitation of benefits' of the India-US Tax Treaty and thus, denying the benefits of the India-US Tax Treaty to the Appellant.

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5. *Without prejudice to Appellant's primary contention that the receipts of the Appellant from borrowed services are not taxable in India under the provisions of the India-US Tax Treaty, the learned AO/ Hon'ble DRP has erred in estimating that the net profit of the Appellant in respect of such receipts at the rate of 35.52% of the total receipts, on an adhoc basis, and taxing the same accordingly under the provisions of the Act.*

6. *Without prejudice to the above, on the facts and in the circumstances of the case and in law, the learned AO / Hon'ble DRP has failed to appreciate and apply the order passed by the Competent Authorities of India and United States of America as per Article 27 of the India - US Tax Treaty in the case of the Appellant for prior years wherein it has been held that income from borrowed services should not be taxable in India in the hands of the Appellant. The Appellant prays that the principles underlying the said order ought to have been applied and pray accordingly.*

7. *The learned AD has erred in charging interest under Section 234B and Section 234C of the Act. The learned AO erroneously held that the assessee was in receipt of an income-tax refund*

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of Rs 123,650, while the Appellant has never received any such refund till date.

9. The learned AD has erred in initiating penalty proceedings under Section 271(l)(c) of the Act.

The Appellant craves leave to add, alter, omit or substitute any or all of the above grounds of appeal, at any time before or at the time of the appeal, to enable the Hon'ble ITAT to decide the appeal according to law.

2. The brief facts of the case are that the assessee is a foreign company incorporated in USA. It entered into international transactions with its associated concern, McKinsey & Co, Inc. (India Branch) during the financial year relevant for assessment year 2011-12. The assessee has provided assistance in the form of borrowed service to McKinsey India, in consideration for which the assessee received an amount of Rs 7,39,309/- from McKinsey India. This income was not offered by the assessee for tax in the return of income filed by the assessee. It was the case of the assessee that the borrowed service fee earned by the assessee was in the course of the business and therefore, it qualifies as business profits under Article 7 of the India-US Tax

Treaty. Since the assessee does not have a permanent establishment in India, its income is not liable to tax in India. The assessing officer after going through the details of the case has held that the borrowed service income earned by the assessee from McKinsey India was in the nature of fee for included Services. Further the AO followed the final assessment orders of preceding years wherein it was held that the assessee does not satisfy the conditions laid down by 'Article 24 - Limitation of Benefit' of the India-US Tax Treaty and thus denying the benefits of the India-US Tax Treaty to the assessee and objections filed against such assessment order were also rejected by DRP in earlier years. The AO had determined the net profit of 35.52% for the assessee.

Now before us, the assessee has preferred the present appeal by raising the above grounds.

Ground No. (1 to 9)

3. Since all the above grounds raised by the assessee are inter-connected and inter-related and relates to only two substantial grounds i.e. one related with the fees for included

services, if taxable in India or not and second issue relates to the mutual agreement proceedings (MAP). The other issues are academic or would become infructuous if above two substantial issues are decided in favour of assessee. Therefore we thought it fit to decide both the substantial grounds through the present common order.

4. At the very outset, Ld. AR appearing on behalf of the assessee submitted that the present case is fully covered by the order of Hon'ble ITAT in ITA No. 853, 854, 856, 857, 860, 861 & 862/Mum/15 for AY 2011-12 in assessee's own case as the identical grounds raised in the present appeal have already been decided on merits. The operative portion of the order of Hon'ble ITAT is reproduced below:-

4. We have considered the rival submission of the parties and have gone through the order of the authorities below. We have noticed that though the assessee has raised as many as nine grounds of appeals, however as per our opinion there are only two substantial grounds of appeal. One related with the fee related with fees for included services, if taxable in India or not. The second issue relates to the Mutual

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Agreement Proceedings (MAP). Rest of the grounds of appeal are academic or would become infructuous if grounds no.1 and 2 are decided in favour of the assessee. We have perused the order in assessee's group cases for AY 2009-10 in ITA No. 7646 to 7653 and 7654 to 7661/Mumbai 2012 dated 17th April 2015, for the sake of completeness of the order we extracted the relevant para 3 to 26 of the order of the Tribunal as under:

“3. The facts are, pertaining to the above assessee are, the assessee is a company incorporated in and a tax resident of US and is eligible to claim the benefits under the India-US DTAA Tax Treaty to the extent they are more beneficial. The assessee is a part of the McKinsey Group (the Group) which is engaged in providing strategic consultancy services to their clients. McKinsey India was set up to provide similar services in India.

4. In the course of performing its work on various projects / assignments in India, McKinsey India periodically requires assistance from other countries, which is relevant in the context of a specific client project/assignment that it is executing. The assessee ordinarily renders services to McKinsey India in the following areas:

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a) Advice on matters such as prevailing practices in various geographical areas, industries, etc. as may be relevant to the specific client assignment;

b) Provision of information/data as may be specifically requested by McKinsey India in areas such as population, GDP, inflation, production capacities, regulations, policy framework, etc, and

c) Other advisory support as may be required by McKinsey India for the purposes of executing the client assignments.

5. The above services, hereinafter referred to as borrowed services, as requested by McKinsey India may be provided by the assessee by way of emails or verbally through the telephone.

6. To indicate the nature of services rendered, during the course of the assessment proceedings, the assessee submitted sample copies of documents evidencing the nature of services provided by the assessee to McKinsey India in relation to certain projects/client assignments of McKinsey India, along with tabular summary of the projects and client assignments undertaken by McKinsey India in respect of which the assessee had provided assistance to McKinsey India in the following:

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a) Scope of McKinsey India's client assignments/projects;

b) Nature of assistance sought by McKinsey India from the assessee;

c) Assistance provided by the assessee to McKinsey India in respect of the borrowed service request;

d) Name of the McKinsey India employee initiating the borrowed service assistance request;

e) Name of the employee of the assessee handling the request from McKinsey India;

f) Quantum of borrowed service fee payment made by McKinsey India to the assessee in respect of the borrowed services; and

g) Quantum of total fees charged by McKinsey India to the ultimate client.

7. The assessee has also filed documentary evidence vide letter dated 27.12.2011 with the learned Assessing Officer during the course of the assessment proceedings for assessment year 2009-10.

8. The AO, after considering all the arguments of the assessee, negated the same and held, that income earned from borrowed services, by the assessee, from

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McKinsey India is in the nature of 'fees for included services' under India-US Tax Treaty.

9. The AO as well as DRP, held the above services as fee for inclusive services and included in Article 12(4)(b) of India US DTAA.

10. It is against this decision, the assessee is before the ITAT.

11. At the time of hearing before us, the AR segregated the appeals in the following blocks:

<i>S. No</i>	<i>ITA No.</i>	<i>Assessment Year</i>	<i>Country of Incorporation</i>
<i>1</i>	<i>7646/M/12</i>	<i>2009-10</i>	<i>USA</i>
<i>2</i>	<i>7647/M/12</i>	<i>2009-10</i>	<i>USA</i>
<i>3</i>	<i>7648/M/12</i>	<i>2009-10</i>	<i>USA</i>
<i>4</i>	<i>7649/M/12</i>	<i>2009-10</i>	<i>USA</i>
<i>5</i>	<i>7650/M/12</i>	<i>2009-10</i>	
<i>6</i>	<i>7651/M/12</i>	<i>2009-10</i>	
<i>7</i>	<i>7652/M/12</i>	<i>2009-10</i>	
<i>8</i>	<i>7653/M/12</i>	<i>2009-10</i>	<i>USA</i>
<i>9</i>	<i>7654/M/12</i>	<i>2009-10</i>	<i>USA</i>
<i>10</i>	<i>7655/M/12</i>	<i>2009-10</i>	<i>USA</i>
<i>11</i>	<i>7656/M/12</i>	<i>2009-10</i>	<i>USA</i>
<i>12</i>	<i>7657/M/12</i>	<i>2009-10</i>	<i>USA</i>
<i>13</i>	<i>7658/M/12</i>	<i>2009-10</i>	<i>USA</i>
<i>14</i>	<i>7669/M/12</i>	<i>2009-10</i>	<i>USA</i>
<i>15</i>	<i>7660/M/12</i>	<i>2009-10</i>	<i>USA</i>
<i>16</i>	<i>7661/M/12</i>	<i>2009-10</i>	<i>USA</i>
<i>17</i>	<i>7662/M/12</i>	<i>2009-10</i>	<i>USA</i>
<i>18</i>	<i>7663/M/12</i>	<i>2009-10</i>	<i>USA</i>

12. According to the AR serial no. 1 to 18 fall under one category, where the parent company is incorporated in the US and the services are routed through US.

13. The AR submitted that in so far as services from US are concerned, the issue was settled under Mutual Agreement Procedure (MAP), wherein Government of India and Government of US agreed that the services provided by the assessee would not fall in the category of fee for included services, but shall be FTS, and FTS shall not be taxable.

14. The AR also submitted that MAP proceedings covered upto assessment year 2007-08 and since identical services and identical facts are available, the impugned assessment year must also follow and honour the Government to Government agreement. The AR in any case referred the cases of Radhasoami Satsang vs CIT, reported in 193 ITR 232 (SC) and CIT vs J K Charitable Trust Kamal Tower, reported in 308 ITR 161, to bring home the argument, that consistency must be followed by the revenue authorities. The AR in any case submitted that once settlement has been arrived at in MAP proceedings no other view can be possible.

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15. *The next block of assessee pertains to assessee incorporated in Canada, Singapore and Spain:*

<i>S. No</i>	<i>ITA No.</i>	<i>Assessment Year</i>	<i>Country of Incorporation</i>
19	7673/M/12	2009-10	Canada
20	7674/M/12	2009-10	Singapore
21	7675/M/12	2009-10	Singapore
22	7676/M/12	2009-10	Spain

16. *In so far as these are concerned, the AR submitted that in assessment year 2007-08, the issue reached the ITAT and the coordinate Bench following MAP held that borrowed services, being part of FTS were not taxable. The department filed appeal before the Hon'ble Bombay High Court u/s 260A. This appeal u/s 260A was later on withdrawn, as the issue was already decided and the CBDT/Chief Commissioner of Income Tax accepted the decision of the coordinate Bench of ITAT, Mumbai.*

17. *The next block consisted of assessee incorporated in Thailand and Greece:*

<i>S. No</i>	<i>ITA No.</i>	<i>Assessment Year</i>	<i>Country of Incorporation</i>
23	7677/M/12	2009-10	Thailand
24	7678/M/12	2009-10	Greece

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8. *The AR submitted that the issue is covered by the ITAT orders, where it was held that as per Article 7 does not cover the charging provisions & in any case provisions of the Income Tax Act, 1961 gets ruled out (as filed in ITA No. 7624/Mum/2010) (when one of us were a party).*

19. *The AR therefore submitted that no addition is called for.*

20. *The DR on the other hand submitted that the orders of the revenue authorities are very reasonable. The DR submitted that though the issue before MAP pertained upto 2007-08, the current year is 2009-10, thus is not covered by MAP. The DR placed reliance on the decision of Cochin Bench of ITAT in the case of US Technology Resources Pvt. Ltd. in ITA No. 222/Coch/2013.*

21. *We have heard the arguments and have perused the various orders relied upon by the contesting sides.*

22. *At the outset, since there are orders from coordinate Bench at Mumbai in assessee's own case on the issue impugned, we cannot consider or place reliance on the decision of coordinate Bench at Cochin in some other case, unless the orders relied upon by the AR are perverse and/or out of context and issue.*

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23. *We also find ourselves bound by the settlement arrived at Government to Government level under MAP proceedings, which we must honour and follow.*

24. *In such a case we set aside the orders of the revenue authorities and direct the AO to delete the additions so made.*

25. *As mentioned here above, when there is a decision of the coordinate Bench at Mumbai in assessee's own case, judicial propriety demands that similar order must prevail on the issue for the sake of consistency. It is also a fact that the revenue authorities or the DR did not show us anything which could be termed different or looked at differently or were a different fact.*

26. *In such a case, we are of the opinion that assessee incorporated in Canada, Singapore, Spain, Thailand and Greece, we set aside the orders of the revenue authorities and direct the AO to delete the additions in those orders:*

5. *Considering the decision of the Tribunal in assessee's own case for AY 2009-10 wherein it was held the payments made on account of borrowed / loan service charges is not taxable as FTS or Royalty in India. Thus, respectfully following the decision of the*

coordinate bench of the Tribunal, the substantial Ground No.1 of the appeal is allowed in favour of assessee.

6. The substantial ground No.2 of appeal relates to MAP. We have seen that the taxability has been settled by virtue of agreement dated 01.10.2015 arrived between the assessee and the Government of India under MAP for AY 2008-09 & 2009-10 (copy of which is available on record at page no. 107 to 109 of PB). We have further seen that on the basis of similar MAP arrived between Government of India and the assessee, the Revenue has withdrawn the appeal for AY 2003-04 & for AY 2006-07 pending before jurisdictional High Court. Similarly, the Revenue withdrew its appeal for AY 2003-04 & 2004-05 and the assessee withdrew its appeal for AY 2004-05 before the Tribunal. In our view, the Revenue must follow the consistency while passing the assessment order and to honour the MAP entered between Government of India and the assessee concern. Thus, considering the above factual position, we direct the AO to follow the MAP between Government of India and the group of assessee as arrived in Settlement dated 01.10.2015. Thus, the assessee also succeeded on second substantial Ground of appeal. As we have allowed the substantial grounds of appeal in favour of assessee and granted full relief

following the decision of co-ordinate bench of Tribunal and the MAP, thus, other consequential issues raised by assessee became academic.

7. In the result, all the appeals filed by the assessee are allowed.

5. After having gone through the orders passed by the Coordinate Bench of Hon'ble ITAT as mentioned above in assessee's own case and after hearing the parties, we found that that the Coordinate Bench of Hon'ble ITAT has decided the substantial ground no. 1 in favour of assessee by holding that the payments made on account of borrowed /loan service charges are not taxable as FTS or royalty in India and similarly considering the factual position, the coordinate bench of Hon'ble ITAT has also directed the AO to follow the MAP between Govt. of India and the group of the assessee as arrived in settlement dated 01.10.15. Therefore, the assessee also succeeded on the second substantial ground of appeal. Hence, respectfully following the decision of the coordinate bench of Hon'ble ITAT in ITA No. 853, 854, 856, 857, 860, 861 & 862/Mum/15 for AY 2011-12 in assessee's own case and in order to maintain judicial consistency

and discipline which is applicable mutatis mutandis in the case of the assessee, we **allow** the grounds of appeal in favour of assessee and granted full relief following the decision of co-ordinate bench of Tribunal. Since we have allowed the substantial ground of appeal in favor of assessee, thus other consequential issues raised by assessee became academic.

6. In the net result, the appeal filed by the assessee is **allowed.**

Order pronounced in the open court on 10th Jan, 2018.

<p><i>Sd/-</i> (ShamimYahya) लेखासदस्य / Accountant Member मुंबई Mumbai;दिनांकDated : 10.01.2018 <i>Sr.PS. Dhananjay</i></p>	<p><i>Sd/-</i> (Sandeep Gosain) न्यायिकसदस्य / Judicial Member मुंबई Mumbai;दिनांकDated : 10.01.2018</p>
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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार
(Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai