

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-1', NEW DELHI**

Before Sh. Amit Shukla, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 5597/Del/2018 : Asstt. Year : 2010-11

ITA No. 5598/Del/2018 : Asstt. Year : 2011-12

ITA No. 2019/Del/2019 : Asstt. Year : 2012-13

McCain Foods India Pvt. Ltd., Ground Floor, The Crescent, Plot No. 1 to 7, LSC Lado Sarai, New Delhi-110030	Vs	ACIT/DCIT, Circle-16(2), New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AAACM4861G		

Assessee by : Sh. K. M. Gupta, Adv. &

Ms. Shruti Khimta, AR

Revenue by : Sh. Mrinal Kumar Das, Sr. DR

Date of Hearing: 11.03.2022

Date of Pronouncement: 31.05.2022

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by the assessee against the orders of the Id. CIT(A)-44, New Delhi dated 29.06.2018 and 31.12.2018.

2. Since, the issues involved in all these appeals are identical, they were heard together and being adjudicated by a common order.

3. In ITA No. 5597/Del/2018, following grounds have been raised by the assessee:

"1. That the Learned Commissioner of Income Tax (Appeals)~44, New Delhi ("Ld. CIT(A)") has grossly

erred on fact and in law in upholding (in part) the transfer pricing adjustments made by the Ld. AO under Section 92CA(3) of the Act in the year under consideration in respect of payment of management fees paid to an associated enterprise. In doing so, the Ld. CIT(A) erred in

1.1 failing to appreciate that said, payment of Management fee was also disallowed under section 40(a)(ia) of the Act by the Ld. AO in rectifying order under section 154 of the Act for the year under consideration, and consequently incorrectly holding that the sections 92CA(3) and 40(a)(ia) of the Act operate simultaneously to allow income additions to be included in the income of the Appellant twice. Such a holding is punitive and contradicts the well-established principles of statutory interpretation to be applied to the Act.

2. That the Ld. CIT(A) erred in upholding adhoc addition of 70% (INR 13,819,050) of the management fees paid (INR 19,741,500) to its associated enterprise based on a misapplication of section 92CA(3) of the Act. In doing so the Ld. CIT(A) erred in:

2.1. not adequately considering the significant amount of documentary evidence provided by the Appellant to evidence the services actually received and their considerable commercial and economic value;

2.2. arbitrarily disallowing the deduction of 70% of such fees on an "estimate basis" without regard for the need to apply the most appropriate method prescribed under Rule 10B of the Income-tax Rules, 1962 (the 'Rules')

2.3. misinterpreting the guidance contained in the OECD Guidelines for Multinational - Enterprises and Tax Administrations in reaching the incorrect conclusions that the services provided were duplicative of services performed by the Appellant, created only incidental benefits to the Appellant, were of a generic and shareholder-nature, and

cannot be calculated based on the use of allocation keys; and

2.4. basing its conclusions on incorrect statements of fact, such as that the cost of stewardship/shareholding activities had not been deducted in the calculation of the management fee, and that the Appellant did not provide details of how the costs were allocated to it by the associated enterprise.

3. That the Ld. CIT(A) grossly erred on fact and in law in confirming disallowances of excess depreciation of INR 109,985 on electrical fitting on the alleged ground that the electrical fittings would be classified under 'Furniture and Fittings' and depreciated at 10% as against 'Plant and Machinery' which is depreciable at 15%."

4. McCain India is a private limited company incorporated under the laws of India since 1996. McCain India is a wholly owned subsidiary of McCain Canada. McCain India is engaged in the business of manufacture of frozen French fries and potato specialties and trading of frozen French fries, potato specialties, potato tubers and potatoes.

5. The facts relevant for adjudication are as under:

- The appellant during the assessment year 2010-11, paid management fees, amounting to Rs.2,17,74,875/- (including service tax paid on reverse charge) to its AE McCain Foods Ltd, Canada ("MFL" or "McCain Canada") on which no tax had been deducted. Accordingly, the same was disallowed in the original tax return filed on October 12, 2010 under Section 40(a)(ia) of the Act. In the revised return the deduction of the aforesaid

amount was taken on protective basis on professional advice that the sum in question is not subject to tax deduction at source, and hence would qualify as deductible expense.

- The assessment was taken up by the AO for the year under consideration, the reference was also made to TPO under section 92CA(3) of the Act.
- During the course of TP assessment proceedings, the TPO held these management services of Rs. 1,97,41,500/-, value of international transaction excluding service tax to be in the nature of shareholder services and accordingly determined the value at Nil; thereby adding the management charges to the taxable, income of the appellant assessee vide TP Order dated 29.01.2014.
- The AO vide rectification order under Section 154 of the Act dated 11.02.2016 made a disallowance of Rs.2,17,74,875/- including service tax under section 40(a)(ia) of the Act for the same services and recomputed the income assessed under original assessment order dated 21.03.2014 to Rs.2,17,74,875/-. The said disallowance under section 40(a)(ia) of Act was accepted by the assessee and the same has attained finality.
- On the above development, the additional ground was taken before the Id. CIT(A) as stated above and before Id. CIT(A) it was submitted that the AO ought to be

directed to delete the TP adjustment of the same amount and that the adjudication of the transfer pricing addition of management fee would become academic in nature as the said international transaction has no bearing on the total income of the assessee for the year under consideration.

- The Ld. CIT(A) after allowing the additional ground to be admitted and sought remand report and response of the assessee on remand report held that the provisions of Section 40(a)(ia) and Section 92CA(3) of the Act operate simultaneously and are not contradictory to each other, therefore the additional ground of the appeal was dismissed.

6. Before us, it was submitted that the provisions of Section 92CA(3) of the Act cannot operate simultaneously with the provisions of Section 40(a)(ia) of the Act. Thus, the approach adopted by the Ld. CIT(A) was incorrect and would have the effect of taxing the same transaction/amount twice which is not in consonance with the accepted principles of taxation.

7. The Id. DR submitted that Section 40(a)(ia) and Section 92CA(3) of the Act can operate simultaneously.

8. Heard the arguments of both the parties and perused the material available on record.

9. The Ld. CIT(A) disposed of the ground raised by the appellant assessee by holding that:

"7.20 Moreover, section 40(a)(ia) and 92CA of the Act operate simultaneously in the case of any transaction and are not contradictory to each other."

10. The liability under section 40(a)(ia) of the Act arises where there is a failure on the part of the assessee to deduct the requisite tax at source (which is the case of the appellant assessee). Meaning thereby that, the deduction of such expenses sought by the assessee is liable to be added to the total income of the assessee. Similarly, for the same amount, the ALP was determined by the TPO as NIL which amounts to addition of such amount to the total income of the assessee again in the instant case.

11. Hence, the observation of the Id. CIT(A) that section 40(a)(ia) and 92CA of the Act operate simultaneously in the instant case and are not contradictory to each other is incorrect is devoid of merit.

12. Reliance is being placed on the decision of the Hon'ble Supreme Court in Laxmipat Singhania Vs. Commissioner of Income Tax, U.P. 72 ITR 291 wherein the Hon'ble Supreme Court has observed that "It is a fundamental rule of law of taxation that, unless otherwise expressly provided, income cannot be taxed twice. Similar view was taken by the Hon'ble Apex Court in Jain Brothers and Others Vs. Union of India and Other 77 ITR 107 and Mahaveer Kumar Jain Vs. Commissioner of income Tax, Jaipur in Civil Appeal No. 4166 of 2006.

13. Reliance is also being placed on the decision in the case of Royal Canin India Private Limited Vs. ACIT in IT(TP)A No. 784/Mum/2016 wherein in identical circumstances, the ITAT held as under:

"16.. ..In any case, since assessee has disallowed the entire payment of "Franchisee Fee" and same has been added back to the income, therefore, there is no question of any addition or adjudication on merits, because it will be purely academic exercise. Accordingly, we are keeping the issue completely open to be argued in subsequent year and assessee has all the rights to plead the case on merits in the subsequent years as when this issue arises.

17. As regards the issue of double disallowance, prima facie it appears that Assessing Officer has made the double disallowance because, at the first instance he has proceeded with the income shown in the return of income Rs. 6,50,39,983/- which also included the amount of Rs.3,97,47,172/-and thereafter he made further addition of same amount under Transfer Pricing adjustment which assessee already had added/included as its income. Accordingly, we direct the AO to remove the double disallowance and grant consequential relief. Thus this ground is also treated as allowed."

14. If the interpretation sought to be taken by the AO/CIT(A) is accepted in the instant situation, then the assessee would be fastened with the liability to pay taxes on the same amount twice within the same assessment year.

15. In the instant case, once the amount pertaining to Intra Group Services has been disallowed u/s 40(a)(ia) and added back to the total income, disallowing the same by treating the ALP has Nil and adding the same again to the total income certainly leads to a situation of taxing the same amount twice.

A.Y. 2010-11

16. The Revenue is hereby directed to allow depreciation @ 15% instead of 10%.

17. In the result, the appeals of the assessee are allowed.
Order Pronounced in the Open Court on 31/05/2022.

Sd/-

(Amit Shukla)
Judicial Member
Dated: 31/05/2022

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR