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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI RAHUL CHAUDHARY, JM

ITA No. 2017/Mum/2017
(Assessment Year: 2013-14)

ITA No. 2694/Mum/2016
(Assessment Year: 2012-13)

Kraft Heinz Foods Company (earlier known as H.J. Heinz Company) C/o. Heinz India Pvt. Ltd. Unit Nos. 1901 & 1902, 19th Floor, E&G Wings, Lotus Corporate Park, Off. Western Express Highway, Goregaon (East), Mumbai-400 063	Vs.	Dy. Commissioner of Income Tax (International Taxation), 2(2)2, Room No.1722, Air India Building, Nariman Point, Mumbai-400 021
(Appellant)		**(Respondent)**

PAN No. AACCH2144P

Assessee by	:	Shri Manthan Shah, AR
Revenue by	:	Ms. Surabhi Sharma, CIT DR

Date of hearing:	03.05.2023
Date of pronouncement :	01.08.2023

O R D E R

PER PRASHANT MAHARISHI, AM:

ITA No. 2694/Mum/2016
For A.Y. 2012-13

01. ITA No.2694/Mum/2016 is filed by Kraft Heinz Foods Company earlier known as J.J. Heinz Company (assessee /appellant) for A.Y. 2012-13 against the assessment passed by the Asst. Director of Income Tax, International taxation, Circle 2(1)(1), New Delhi (the learned Assessing Officer) under Section 143 read with section 144C (13) of the Income-tax Act, 1961 (the Act), raising following grounds of appeal: -

> *""On the facts and in the circumstances of the case and in law, M/s H. J. Heinz Company (now merged with Kraft Food Company to form Kraft Heinz Food Company) (hereinafter referred to as the Appellant") craves leave to prefer an appeal against the order passed by the Assistant Director of Income-tax, (International tax), Circle 2(1)(1), New Delhi (hereinafter referred to as the learned AO') under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (hereinafter referred to as the 'Act) on the following grounds, each of which are without prejudice to one another.*
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> *Ground 1: General*
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> *1. On the facts and in the circumstances of the case and in law, the Learned AO/ Dispute Resolution Panel-1, New Delhi (hereinafter referred to as the 'DRP') erred in assessing the total income at Rs 10.44.21.324 as against an income of INR 40,42,979 computed and returned by the Appellant:*
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> *Ground 2: Taxing of reimbursements of Rs. 10,03,78,345 as Fees for Technical / included service (FTS/FIS) and Royalty under the Act and Double*

Taxation Avoidance Agreement between India and USA ('DTAA')

2. On the facts and in the circumstances of the case and in law, the Learned AO/ DRP erred in holding that the cost reimbursements of Rs. 10,03,78,345 received by the Appellant towards providing support services to its group affiliates are taxable as FTS both under section 9(1)(vii) of the Act as well as Article 12(4) of the DTAA;

3. On the facts and in the circumstances of the case and in law, the Learned AO erred in holding that the Appellant has made available technical knowledge, skill, experience, etc. to the recipient of services; On the facts and in the circumstances of the case and in law, the Learned AO/ DRP further erred in holding that the cost reimbursements are also taxable as 'Royalty both under section 9(1)(v) of the Act as well as Article 12 of the DTAA

5. On the facts and circumstances of the case, the Learned AO/ DRP failed to appreciate that the amounts represented pure reimbursement of costs and hence does not result into any taxable income accruing in India:

6. Without prejudice to the above, the Learned AG/ DRP failed to appreciate that the income, cannot be both royalty as well as 'FTS and hence the order passed on account of non application of mind, needs to be quashed;

Ground 3: Not granting credit of taxes deducted at source ("TDS') of Rs 1,40,93,981

7. On the facts and in the circumstances of the case and in law, the Learned AO erred in not granting credit for TDS of Rs 1,40,93,981 claimed by the Appellant in the return of income,

Ground 4: Levy of surcharge and education cess in respect of tax on royalty

8. On the facts and in the circumstances of the case and in law, the Learned AO erred in levying surcharge and education cess of Rs. 12,129 and Rs 18,557 respectively while taxing royalty offered to tax under the India-USA double tax treaty:

Ground 5: Initiation of penalty proceedings under section 271(1) (c) of the Act

9. On the facts and in the circumstances of the case and in law, the Learned AO erred in initiating penalty proceedings under section 271(1)(c) of the Act for concealment of income and furnishing of inaccurate particulars of income, without appreciating the facts and circumstances of the case."

02. Brief facts of the case shows that assessee is a resident of USA, filed its return of income on 14th March, 2013, at ₹nil. The return was picked up for scrutiny. The fact shows that Heinz, USA, the assessee is a leading manufacturer of food products and has a global presence. It has entered into a global agreement with effect from 3rd May, 2007, with its group entities for the provision of support activities. Heinz USA Pvt.

Ltd. is one of the group entities in India. The learned Assessing Officer noted that there is trademark and technology license agreement dated 21st February, 2005 with Indian entity and another one is for support services dated 3rd May, 2007. The learned Assessing Officer issued show cause notice that why the support services receipt should be taxed as fees for technical services. The assessee submitted its reply dated 4th March, 2014. The reply of the assessee was considered and rejected. The learned Assessing Officer rejected the contention of the assessee that activities carried out by the assessee exclude any special services and further, actual cost incurred by the assessee in relation to the activities carried out are allocated and therefore, same cannot be treated as Fees for Technical Services (FTS). The learned Assessing Officer rejected the contention of the assessee and held that service fee would be subject to tax at the rate of 10% as the services performed by the assessee qualify as fees for technical service by the Act and the Double Taxation Avoidance Agreement between India and USA. The learned Assessing Officer noted that the gross amount received by the assessee as royalty is ₹34,54,897/- on which tax is payable at the rate of 15% and further, the gross amount received by the assessee as Fees For Technical Services amounting to ₹9,82,61,852/- is chargeable tax at the rate of 15%. Thus, the total income was assessed at ₹10,17,16,749/- by passing the draft assessment order under Section 144C of the Act on 12th March, 2014.

03. The assessee approached to the learned Dispute Resolution Panel-1, New Delhi, who passed the direction on 30th September, 2015, wherein the learned Dispute Resolution Panel confirmed the order of the learned Assessing Officer.

Accordingly, the assessment order was passed computing the total income of the assessee at ₹10,44,21,324/-.

04. The assessee has a ground of appeal about taxability of ₹10,03,78,345/- as fees for technical and included services and royalty under the Act and as per Double Taxation Avoidance Agreement between India and USA.

05. When the appeal was called for hearing, the learned Authorized Representative stated that the appeal for A.Y. 2009-10 and for A.Y. 2011-12 in ITA No.6252/Del/2012 and ITA No.1991/Del/2015 were heard and disposed off as per order dated 23rd August, 2019 by the Hon'ble Bench of ITAT at New Delhi. The issue in this appeal i.e. ITA No.2694/Mum/2016 for A.Y. 2012-13 and ITA No.2017/Mum/2017 for A.Y. 2013-14 are also involving similar issue. learned Authorized Representative claimed that there are certain errors in the order of the co-ordinate Bench for A.Y. 2009-10 and 2011-12 against which Miscellaneous Application no. 861 & 862/Del/2019, has been filed. Those Miscellaneous Applications have been heard on 10th February, 2023. The order of such MA will have a bearing on this issue of appeal and therefore, these appeals should be adjourned.

06. The learned Departmental Representative vehemently submitted that the issue is squarely covered against assessee by the above decision of the co-ordinate Bench at New Delhi, wherein after detailed discussion the co-ordinate Bench has decided the issue as per Para no.21 of the order. He submitted that ground no.2 of the appeal at page no.2 of the order for A.Y. 2009-10 and ground no.2 of the appeal for A.Y. 2011-12 at page no.4 of the order are identical. Therefore, these issues have already been covered and decided in assessee's own case

against the assessee. Even, assessee does not say that there is a difference between the facts stated for these two years with the present two years. Therefore, these appeals should be concluded by following that order. He also vehemently stated that when the issue is squarely decided against the assessee, there is no reason these appeal should be adjourned. He stated that merely pendency of MA cannot be the basis for adjourning the matter. Therefore, it was submitted that the appeal should be decided based on the issues covered in assessee's own case for earlier years. The learned CIT Departmental Representative extensively referred to the order of the co-ordinate Bench and stated that this issue is decided in favor of the Revenue.

07. We have carefully considered the rival contentions and perused the orders of the lower authorities. We have also carefully perused the orders of the co-ordinate bench in assessee's own case for A.Y. 2009-10 and 2011-12. We also find that the ground no.2 in those appeals is identically worded except the change in amount. Even the facts are not stated to be even slightly different in the current year. The co-ordinate Bench vide order dated 23rd August, 2019 for A.Y. 2009-10 and A.Y. 2011-12 has categorically held as Para no.21 of that order for the above amount is correctly assessed as FTS both under Section 9(1) (vii) of the Act as well as Article 12(4) of the Double Taxation Avoidance Agreement. Accordingly, on careful perusal of the Para no.21 of the order, this issue is squarely decided against the assessee. In such circumstances, we reject the application for adjournment, when the issue is squarely covered against the assessee.

08. Coming to the merits of the case, the learned Authorized Representative could not point out any distinction in the facts. On the contrary, he has categorically stated that the facts are similar as already been decided by the co-ordinate bench. The Co-ordinate Bench has decided this issue as per Para no.21 as under: -

> *"21. We have heard both the parties and perused all the relevant materials available on record. It is pertinent to note that taxability of the payment made by Heinz India towards the cost allocated by Heinz USA in respect of the activities carried out will depend upon the characterization of such payment. Such payment could be governed by Article 12 – 'Royalties and fees for included services' or Article 7 – 'Business Profits'. The term "fees for included services" (FIS) has been explained in Article 12(4) of the DTAA which reads as under:*
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> > *"4. For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:*
> >
> > > *(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or*

(b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

The assessee has filed the present appeal challenging the assessment order on the ground that the cost reimbursement of Rs. 1,88,54,358/- received by the assessee towards providing support services to its group affiliates are taxable as FTS both u/s 9(1)(vii) of the Act as well as Article 12(4) of the DTAA taxing the same by the assessing officer as royalty is also not just and proper. From the perusal of the records it can be seen that the assessee has entered into a global agreement effective from 3rd May, 2007 with its group entities (affiliates), including Heinze India Pvt. Ltd. (Heinze India) for the provision of support activities. The underlying objective of the agreement is to achieve consistency of approach and economies of scale for the group entities. The activities carried out by the Heinz, USA under the agreement are broadly in the area of supply chain Human Resources, Strategic Planning and marketing, Finance and information systems from the DTAA as well as the agreements entered into by the assessee company as well as Heinz, India Novel Define but services are coming while claiming the reimbursement. The approach of the assessee

is that the services should not be considered as taxable contending that they are merely reimbursements and reimbursement cannot be taxed. But to come under the category of reimbursement of certain receipts of service, the same has to fulfill certain criteria for which the services have to be provided by the assessee to its affiliated companies. The assessing officer has observed that the services provided by the assessee are in the area of supply chain, human resources, strategic planning and marketing, finance and information systems under the agreement which is an admitted fact. Thus, services have been utilized by the Indian Company as well. The concept of make available requires that the fruits of the services should remain available to the service recipients in some concrete shape such as technical knowledge, experience, skills etc. which is met in the instant case as can be reflected from the nature and duration of the contract. The service recipient has to make use of such technical knowledge, skills etc. by himself in his business and for his own benefit. Thus, the short durability or permanent usage of the service envisages by the concept of make available services remains at the disposal of their service recipients. Thus, the consideration qualifies as fees for technical services (FTS) both under the Income Tax Act and under the tax treaty as well. The Ld. AR relied upon the various decisions in respect of meaning of make

available under DTAA and certain support services which do not satisfy make available clause under DTAA. The first case law of the Hon'ble Jurisdictional High Court is Guy Carpenter and Company Ltd. 346 ITR 504. After going through the decision in this particular case, the issue was whether the nature of reinsurance brokerage, commission which was paid by insurance companies operating in India to the assessee was assessable as fees for technical services within the meaning of Section 9(1)(vii) of the said Act read with Article 13 of the India United Kingdom Double Tax Avoidance Agreement or not. The Hon'ble Delhi High Court observed that a plain reading of Article 13(4)(c) of the DTAA indicates that fees for technical services would mean payments of any kind to any person in consideration for the rendering of any technical or consultancy services which inter alia makes available technical knowledge, experience, skill, know-how or processing or consist of the development and transfer of a technical plan or technical design. In the said case, the assessee did not maintain any office in India and has a referral relationship with J. B. Boda which is not affiliated company of the assessee. Thus, the factual aspect differs with the present assessee and therefore the ratio laid down by the Jurisdictional High Court decision is not applicable to the facts of the present case. In fact the assessee during the hearing has given

almost 20 decisions which are quoted hereinabove as the submissions of the Ld. AR which are not be applicable in the present case as the factual aspect differs and has unique features which will not be applicable in the present case. As regards the decision that certain support services cannot be taxable as royalty on the DTAA, the decision of the Tribunal cited by the Ld. AR will not be applicable in the present case. Decisions on ancillary and subsidiary clauses in DTAA will also be not applicable. As regards, the decision on reimbursement the Hon'ble Bombay High Court in case of Siemens (supra) has held that the amounts received by the assessee therein under the agreement would be royalty under the DTAA but would fall within the expression, industrial or commercial profits within the meaning of Article 3 of the DTAA. Thus, the ratio will not be applicable in the present case. Thus, Ground No. 2 is dismissed."

09. Therefore, respectfully following the decision of the co-ordinate Bench in assessee's own case for A.Y. 2009-10 and 2011-12, ground no.2 is dismissed. Accordingly, the action of the learned Assessing Officer holding that the cost reimbursement of ₹10,03,78,345/- received by the assessee towards providing support services is taxable as fees for technical services both under Section 9(1) (vii) of the Act as well as Article 12(4) of the Double Taxation Avoidance Agreement.

010. Ground no.3 is against in granting credit for tax deduction at source of ₹1,40,93,981/-. On hearing the learned Departmental Representative, the learned Assessing Officer is directed to verify the claim and if it is in accordance with the law to grant the credit for the same.

011. Ground no.4, is with against the order of the learned Assessing Officer levying the surcharge and education cess while taxing royalty for two taxes as per Double Taxation Avoidance Agreement. On hearing the parties, we set aside the issue back to the file of the learned Assessing Officer and decide when the tax rates are to be applied as per the Double Taxation Avoidance Agreement whether surcharge and education cess can be levied on it. If the learned Assessing Officer finds that the Double Taxation Avoidance Agreement rates cannot be further increased by education cess and surcharge, the same may be deleted.

012. Ground no.5, with respect to the initiation of penalty proceedings under Section 271(1) (c) of the Act is premature, therefore, same is dismissed.

013. Ground no.1 is general in nature and therefore, same is dismissed.

014. Accordingly, ITA No.2694 of 2016 is partly allowed.

ITA No. 2017/Mum/2017
For A.Y. 2013-14

015. ITA No.2017/Mum/2017 is filed by the assessee for A.Y. 2013-14, wherein identical grounds are raised. This appeal is filed against the assessment order dated 31st January, 2017, passed by the Dy. Commissioner of Income-tax, International Taxation 2(2)(2), Mumbai under Section 143(3), read with section 144C

(13), wherein the total income of the assessee is assessed at ₹12,58,52,080/- against the return of income of ₹38,34,090/-.

016. Ground no.1 is general in nature, ground no.5 is against initiation of penalty proceedings and therefore, is premature and hence grounds no.1 and 5 of the appeal are dismissed.

017. Ground no.2 is against the taxation of ₹12,20,17,986/- as FTS under the Act and as well as Double Taxation Avoidance Agreement (DTAA). This ground is identical to the ground no.2 decided by the co-ordinate Bench in assessee's own case for A.Y. 2009-10, which we have followed while deciding the appeal of the assessee for A.Y. 2012-13. As per the statement of the assessee also, there is no change in the facts and circumstances of the case and therefore, we are duty bound to follow the decision of the co-ordinate Bench. We have already followed the same while deciding the ground no.2 for the appeal of A.Y. 2012-13. Accordingly, respectfully following the decision of the co-ordinate Bench, we uphold the action of the learned Assessing Officer and Dispute Resolution Panel holding that the cost of reimbursement of ₹12,20,17,986/- received by the assessee is correctly held to be taxable as Fees for Technical Services (FTS) under the Income Tax Act, as well as per the Double Taxation Avoidance Agreement. Thus, the actions of the lower authorities are upheld. Ground no.2 of the appeal is dismissed.

018. Ground no.3 is against the Short Credit for taxes deducted at source of ₹28,48,778/-. We direct the assessee to prove the credit before the learned Assessing Officer, the learned Assessing Officer may examine the same and grant the credit if found in accordance with the law. Ground no.3 is allowed with above direction.

019. Ground no. 4 is with respect to DTAA tax rates by surcharge and cess. This is identical to ground no.4 for A.Y. 2012-13. For identical reasons, we restore this ground to the file of the learned Assessing Officer to decide afresh. Accordingly, ground no.4 of the appeal is allowed with above direction.

020. Accordingly, ITA No.2017/Mum/2017 is partly allowed.

021. In the result, both the appeals of the assessee for A.Y. 2012-13 and 2013-14 are partly allowed.

Order pronounced in the open court on 01.08. 2023.

Sd/-	Sd/-
(RAHUL CHAUDHARY)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 01.08. 2023
Sudip Sarkar, Sr.PS
Copy of the Order forwarded to:

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai