

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI
BEFORE SHRI ABY T. VARKEY, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 2123/Mum/2023 (A.Y. 2012-13)

ITA No. 2124/Mum/2023 (A.Y.2014-15)

ITA No. 2125/Mum/2023 (A.Y.2015-16)

JCIT (OSD) (IT)-3(2)(1)

R. No. 1632, 16th floor,
Air India Building,
Nariman Point,
Mumbai-400 021

..... Appellant

Vs.

M/s McKinsey & Company Singapore Pte Ltd,

C/o-M/s. S.R.B.C. & Associates LLP, CAs
14th floor, The Ruby, Senapati Bapat
Marg, Dadar, Mumbai-400 028
PAN – AAECM4465A

..... Respondent

Appellant by : Shri Anil Sant, Ld. DR
Respondent by : Shri Divesh Chawala, Ld. AR

Date of hearing : 21/09/2023
Date of pronouncement : 28/09/2023

ORDER

PER GAGAN GOYAL, A.M:

These appeals by revenue are directed against the order of Ld. CIT (A)-057, Mumbai dated 30.03.2023 u/s. 250 of the Income Tax Act, 1961 (in short 'the

Act') for A.Y. 2012-13, 2014-15 & 2015-16 respectively. The revenue has raised the following grounds in all the appeals:-

ITA No. 2123/Mum/2023:-

1. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in concluding that borrowed services fees received by the assessee does not constitute Fee for Technical Services in the hands of the assessee and the same falls within the ambit of 'Business Profit' under Article 7 of the India-Singapore Double Taxation Avoidance Agreement and other relevant DTAAS?*
2. *Whether on the fact and circumstances of the case and in law the Ld. CIT (A) erred in holding the income as Business Profit without PE, whereas the nature of income is of 'Fees for Technical Services'?*
3. *The Appellant prays that the order of the Ld. CIT (A) on the above ground(s) be set aside and that of the Assessing Officer be restored.*

The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.

ITA No. 2124/Mum/2023:-

1. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in concluding that borrowed services fees received by the assessee does not constitute Fee for Technical Services in the hands of the assessee and the same falls within the ambit of 'Business Profit' under Article 7 of the India-Singapore Double Taxation Avoidance Agreement and other relevant DTAAS?*
2. *Whether on the fact and circumstances of the case and in law the Ld. CIT(A) erred in holding the income as Business Profit without PE, whereas the nature of income is of 'Fees for Technical Services'?*

3. The Appellant prays that the order of the Ld. CIT (A) on the above ground(s) be set aside and that of the Assessing Officer be restored.

4. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.

ITA No. 2125/Mum/2023:-

1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in concluding that borrowed services fees received by the assessee does not constitute Fee for Technical Services in the hands of the assessee and the same falls within the ambit of 'Business Profit' under Article 7 of the India-Singapore Double Taxation Avoidance Agreement and other relevant DTAAS?

2. Whether on the fact and circumstances of the case and in law the Ld. CIT(A) erred in holding the income as Business Profit without PE, whereas the nature of income is of 'Fees for Technical Services'?

3. The Appellant prays that the order of the Ld. CIT (A) on the above ground(s) be set aside and that of the Assessing Officer be restored.

4. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.

2. The brief facts of the case are that assessee filed its return of income on 29.11.2012 declaring total income of Rs. 3,36,454/- and claiming a refund of Rs. 1,38,22,500/-. Return of the assessee was selected for scrutiny. Assessee is a foreign incorporated in Singapore. Assessee had entered into international transactions with its associated concerns i.e. McKinsey & Co., Inc. (India Branch) during the financial year relevant for assessment year under consideration and filed transfer pricing audit report in Form 3CEB.

3. The transactions with AE were referred to the Transfer Pricing Officer for the determination of Arm's Length Price. The TPO vide his order dated 29.12.2015 passed u/s 92CA (3) of the Act, had considered the transactions with AEs at arm's length price. Thereafter, a draft assessment order was passed u/s. 144C (1) r.w.s. 143(3) of the Act on 30.03.2016 in which assessee was requested to file either acceptance of the variations proposed or file objections if any to such variation with the DRP and AO. Assessee has not filed any objections within the period specified in section 144C (2) of the Act, hence income of the assessee was assessed as per the provisions of section 144C (3) r.w.s. 143(3) of the Act.

4. The assessee is part of McKinsey group of entities, the primary business of which is to render strategic consultancy services to their clients, which inter-alia includes the analysis of performance, developments, strengths and weaknesses of their clients, improving their profitability and productivity and similar other parameters. In order to analyze these parameters, the entities in various countries, McKinsey India, in this case, makes use of certain data, information and other support, that is provided by the assessee. It has been stated that all these services have been performed outside India and since they have been rendered in the ordinary course of business, the receipts on account of the same, amounting to Rs. 9,21,50,032/- in the instant year, qualifies to be a business receipt of the assessee. Also, in view of the fact that the company has no PE in India, the incidence of tax does not arise in India. Based on this belief, the assessee has filed the return claiming the benefits of DTAA between India & Singapore. AO relied upon the order of DRP in AY 2009-10 to 2011-12 and loaned service income of Rs.

9, 21, 50,032/- is treated as fees for technical services and added to the total income of the assessee. Assessee being aggrieved with this order of AO preferred an appeal before the Ld. CIT (A), who in turn allowed the appeal of the assessee. Against this appeal order of Ld. CIT (A), revenue preferred this present appeal before us.

5. We have gone through the order of AO, order of Ld. CIT (A) and submissions of the assessee alongwith grounds raised by revenue. As common issues are involved in all the 3 appeals, we dispose of by this common order for sake of convenience and brevity. First, we take up ITA No. 2123/Mum/2023 for AY 2012-13. It is observed from the order of Ld. CIT (A) that on this issue there are already favorable decisions in favour of assessee vide the chart reproduced below:-

- *Favorable decisions of the Tribunal in Appellant's own case/ Appellant's group companies*
- *At the outset, we wish to highlight that non-taxability of borrowed service charges under the India-Singapore Tax Treaty has been upheld/ confirmed by the Hon'ble Mumbai Income-tax Appellate Tribunal in the Appellant's own case on a consistent basis for various AYS as under.*

<i>Assessment Year</i>	<i>ITA appeal reference</i>	<i>Date of order</i>
<i>1999-00</i>	<i>ITA No.8217/M/2003</i>	<i>26.04.2006</i>
<i>2001-02</i>	<i>ITA No.7337/M/2004</i>	<i>26.04.2006</i>
<i>2006-07</i>	<i>ITA No.7595/M/2010</i>	<i>21.02.2014</i>
<i>2007-08</i>	<i>ITA No.8775/M/2011</i>	<i>19.06.2015</i>
<i>2008-09</i>	<i>ITA No.7661/M/2012</i>	<i>17.04.2015</i>
<i>2009-10</i>	<i>ITA No.7662/M/2012</i>	<i>17.04.2015</i>
<i>2010-11</i>	<i>ITA No. 1579/M/2014</i>	<i>21.10.2016</i>
<i>2011-12</i>	<i>ITA No. 1760/M/2016</i>	<i>14.03.2018</i>

Also, the Hon'ble Mumbai ITAT in the cases of other group companies of the Appellant has also held that borrowed service fee payments received from McKinsey India cannot be considered as FIS/FTS under Article 12 of the Treaty and accordingly, are not liable to tax in India. Refer page 1 to 194 of paper book for copies of the decision of the Hon'ble Mumbai ITAT.

It is also noteworthy that the Department has also withdrawn their appeal before the Hon'ble High Court against the order of the Hon'ble Tribunal for AY 2006-07 and AY 2008-09 to 2010-11 (Refer page 209 to 226 of paper book for copies of the High Court order) and Departmental appeal for only AY 2007-08 has been admitted by the Hon'ble Bombay High Court.

The Department had preferred an appeal against the order of the Hon'ble Tribunal in the case of Appellant's group companies for AY 2006-07 before the Hon'ble Bombay High Court. However, considering the fact that this issue was resolved under MAP and given effect to by the AO, the Department had withdrawn the appeal filed with the Hon'ble Bombay High Court (Refer page 227 to 231 of paper book for copies of the High Court order). Similarly, the Department has also withdrawn their appeal before the Hon'ble High Court against the order of the Hon'ble Tribunal in the case of Appellant's group companies for AY 2011-12 and paper book for copies of the High Court order). TM Order) 2012-13 (Refer page 209 to 212 of paper book for copies of the High Court order)

Based on the above, it is clearly evident that the Department has also accepted the position that borrowed service charges are not taxable in India and thus, the matter has already attained finality in earlier AYS. Accordingly, it is submitted that once a set of facts and legal position has been evaluated by the tax authorities and have been accepted by the Department and the Appellant, it is not open for the tax authorities to deviate from the past position and take a contrary view. Reliance in this regard is placed on the various judicial precedents, inter-alia including the Supreme Court decision in the case of Radhasoami Satsang (193 ITR 321), wherein it has been held as follows:

6. We have considered the material before us and the judicial pronouncements in assessee's own case as mentioned (supra) till AY 2011-12. It is also observed that the competent authorities of India and USA have, in the course of the Mutual Agreement Procedure (MAP) invoked by McKinsey India,

consistently from AY 2002-03 to 2013-14, have accepted that the borrowed service charges cannot constitute FIS under Article 12 of the India- US Tax Treaty.

7. In connection with the above, it is observed that on principles, MAP order should be followed for the subject A.Y.s as well as the India as the provisions of India- Singapore Tax Treaty is similar to the provisions of India-US Double Taxation Avoidance Agreement. In this regard, reliance is placed on the decision of the jurisdictional Hon'ble Mumbai ITAT in the case of J.P. Morgan Services Pvt Ltd vs. DCIT (45 CCH 543) wherein the ITAT has held that where the facts of the transactions with the Non-US incorporated AEs were similar to the facts of the transactions with US incorporated AEs, the MAP resolution should also apply to the Non-US incorporated AEs. Reliance is placed on the decision of the Hon'ble Bangalore ITAT in the case of M/s. Dell International Services India Pvt. Ltd. Vs DCIT (IT (TP) A No. 1302/Bang/2010). The issue before the Hon'ble Bangalore ITAT whether the price determined under MAP mechanism can be adopted even in respect of non-MAP transactions. The Hon'ble Bangalore ITAT relied upon the judgment of J.P. Morgan Services Pvt Ltd (supra) and directed the TPO to adopt the same price if the factors influencing the price are similar between US and non-US transactions.

8. In light of the above, it is observed that the borrowed services charges cannot be treated as FTS under the Treaty. Additionally, it is observed that the end product delivered to the client by McKinsey India itself is not in the nature of

FIS/ FTS. **Accordingly, borrowed services from the assessee which is predominantly in the nature of provision of statistical or qualitative inputs cannot by any stretch of imagination be regarded as being in the nature of FTS under Article 12 of the Treaty.** Consequently, since the amount arises out of the business of the Appellant, it would get classified as business profits and taxed as per the provisions of Article 7 of the Treaty. However, in the absence of a permanent establishment ('PE') of the assessee in India, the borrowed service charge received by the Appellant would not be taxable in India.

9. During the appellate proceedings, it is observed that in the case of appellant itself, the ITAT, Mumbai has taken up consistent view for various assessment years that the income from borrowed services is not taxable under India-Singapore Treaty. We have gone through the orders of the ITAT, Mumbai in its own case for AYs, 1999-2000, 2001-02, 2006-07, 2007-08, 2008-09, 2009-10, 2010-11 and 2011-12. The appellant has further submitted that in other group companies of the appellant, ITAT - Mumbai has taken up similar view that borrowed services fee received from McKinsey India was not considered as fee for included services or fee for technical services under Article 12 of India - United States Treaty. The appellant has further submitted that against the order of ITAT - Mumbai, the Department filed appeal before Hon'ble High Court of Bombay for AYs. 2006-07, 2007-08 and 2008-09 to 2010-11. The Department withdrew the appeals for AYs 2006-07 and 2008-09 to 2010-11 due to low tax effect. The departmental appeal for AY 2007-08 has been admitted by the Hon'ble Bombay High Court. It is also submitted that against the order of the Tribunal in assessee's

group companies for AYs 2006-07, 2011-12 and 2012-13, the Department withdrew the appeal as the issue was resolved under Mutual Agreement Procedure (MAP). Relying upon the decision of the Hon'ble Supreme Court in the case of Radhasoami Satsang [193 ITR 321 (SC)], the appellant has submitted that once a set of facts and legal position has been accepted by the Department, the income tax authority cannot deviate from the past position and take a contrary view. It is also submitted that in the MAP proceedings, in the case of McKinsey India from AY. 2002-03 to 2013-14, the borrowed services fees have not been considered as fees for included services under Article 12 of India-US Treaty. Relying upon the decision of ITAT, Mumbai in the case of J P Morgan Services Pvt. Ltd vs. DCIT [45 CCH 543] and ITAT, Bangalore in the case of Dell International Services India Pvt. Ltd., the appellant has submitted that a price determined under MAP mechanism could be adopted in respect of non-MAP transactions.

10. The appellant has also relied upon Memorandum of Understanding (MoU) agreed upon by the Government of India and United States of America. The MoU provides example of services to be covered in the definition of fees for included services. According to the MoU, Article 12 includes only certain technical and consultancy services. The technical services have been interpreted as services requiring expertise in a particular technology and consultancy services have been interpreted to mean advisory services. In the MOU, it has been clarified that consultancy services which are not of technical nature could not be regarded as included services under Article 12(4)(b) of the India-US Treaty. On analysis of list of category of services mentioned in MoU, the appellant has submitted that all

the services requiring technology expertise could only be services of technical nature and would be covered under FTS/FIS. Further, relying upon the meaning of "make available" under Article 12(4)(b) of India-US Treaty, the appellant has submitted that the borrowed services do not make available any technical knowledge, skill etc. to McKinsey India, therefore, the borrowed services fees should not be qualified as FTS and should not be liable to tax in India. The appellant has further submitted that the principle that services which does not make available technical knowledge/expertise cannot be regarded as FIS/FTS. For this, the appellant has relied upon various decisions in the case of CIT v. De Beers India Minerals (P.) Ltd. (346 ITR 467). (Karnataka HC), US Technology Resources (Pvt) Ltd. (ITA No. 3B/Coch/2014) (Kerala HC), DIT v Guy Carpenter (346 ITR 504) (Delhi HC), Sun Microsystems India Pvt Ltd. (363 ITR 63) (Karnataka HC), Raymond Ltd vs DCIT (Mumbai ITAT) (86 ITD 791), Mark & Spencer Reliance India Pvt. Ltd.(38 taxmann 190) (Mumbai ITAT), Foseco International v ADCIT (68 SOT 127) (Mumbai ITAT), Bharat Petroleum Corp Ltd vs. Jt. DIT(14 SOT 307) (Mumbai ITAT), ITO v Skill Infrastructure Ltd (62 tanmann.com 33) (Mumbai ITAT), National Organic Chemicals Ltd vs. DCIT (5 SOT 317) (Mumbai ITAT), Raytheon Ebasco Overseas Ltd. (68 taxmann.com 133) (Mumbai ITAT), WNS North America Inc. (152 TTI 145) (Mumbai ITAT), Nielsen Company (US) LLC v Deputy Commissioner of Income-tax, (Intl Taxation), (108 taxmann.com 203) (Mumbai ITAT), Entertainment Network (India) Ltd. V Joint Commissioner of Income-tan (102 taxmann.com 49) (Mumbai ITAT), CESC v DCIT (Calcutta ITAT) (80 TTI 806), Hughes Systique India (P) Ltd. vs. DCIT (50) Taxmann.com 2S) (Delhi ITAT), Soregam SA v Deputy Director of Income-tax, Int. Taxation (101 taxmann.com 94) (Delhi ITAT), ABB Inc v DDIT (59 Taxmann.com 159) (Bangalore ITAT), Redcore

(India) (P.) Ltd. v Income-tax Officer (107 taxmann.com 317) (Bangalore ITAT), ACIT v Viceroy Hotels Ltd (60 DTR 1) (Hyderabad ITAT), Bovis Lend Lease (India) (P.) Ltd. vs. ITO [36 SOT 166] (Bangalore ITAT), Deputy Commissioner of Income-tax, International Taxation, Baroda v. Bombardier, Transportation India (P.) Ltd. (162 ITD 586) (Ahmadabad ITAT), NAQ Quality Systems Registrar Limited vs DCIT [2 SOT 249] (Delhi ITAT), Adani Welspun Exploration Ltd. v. Income-tax Officer (International Taxation)-11 Ahmadabad (48 ITR (T) 533) (Ahmedabad ITAT), Bharati AXA General Insurance Co. Ltd. [194 taxman 1] (AAR), Anapharm Inc (305 ITR 394) (AAR), Ernst & Young (P). Ltd. (AAR No. 820 of 2009), XYZ (AAR Nos. 886 to 911, 913 to 924, 927, 929 and 930 of 2010) and M/s Cushman and Wakefield (S) PTE (305 ITR 208) (AAR NO 757 of 2007). Further, it is submitted that the end product delivered to the client by McKinsey India was not in the nature of FIS/FTS. Further, the appellant has submitted the income arises out of business of the appellant; therefore, it classifies as business profit and is taxable under Article 7 of India-Singapore Treaty. However, in absence of permanent establishment (PE), business income from borrowed service fees is not taxable in India. Accordingly, the appellant has submitted that the addition made by the AO should be deleted.

11. The order of ITAT, Mumbai in the case of appellant for AYs. 1999-2000, 2001-02 and from 2006-07 to 2011-12, the order of the ITAT in the case of McKinsey & Co. Inc., US for AYS. 2006-07, 2011-12 and 2012-13 has been perused. Other case laws relied upon by the appellant has been perused. On going through the ITAT order, in the case of the appellant for AY. 2011-12, it is seen that the ITAT, Mumbai has held that the taxability of receipts including borrowed service

fees/loaned service fees was to be determined as per Mutual Agreement Procedure (MAP) statement, therefore, the aforesaid receipts were business profit covered by Article 7 of the treaty and was not in the nature of royalty or fees for included services. Further, the ITAT has held that the assessee had no PE in India; therefore, those receipts were not chargeable to tax in India.

12. Thus, in view of above and decision of ITAT Mumbai in the case of appellant for AY 2011-12, we hold that borrowed services fees is not fees for included services in absence of PE in India. The same is business income for borrowed service fees which is not taxable in India as per Article 7 of the India-Singapore DTAA. **Ground no. 1, 2 & 3 raised by the revenue are dismissed.**

13. **In the result, appeal of the revenue is dismissed for all the 3 years i.e. AY 2012-13 (ITA No. 2123/Mum/2023), 2014-15 (2124/Mum/2023) and 2015-16 (ITA No. 2125/Mum/2023).**

Order pronounced in the open court on 28th day of September, 2023.

Sd/-
(ABY T VARKEY)
JUDICIAL MEMBER

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated: 28/09/2023

Sr. PS (Dhananjay)

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
5. गार्ड फाइल/Guard file.

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BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai