

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI**

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

Ms. Astha Chandra, Judicial member

ITA No. 1748/Del/2023 : Asstt. Year: 2017-18

ACIT, Circle-2(2)(1), International Taxation, New Delhi-110001	Vs	Michelin Global Mobility SA, 10, Route Louis, Braille, Granges, Paccot, Switzerland
(APPELLANT)		(RESPONDENT)
PAN No. AAICM8662R		

Assessee by : Sh. Nikhil Tiwari, CA

Revenue by : Sh. Sanjay Kumar, Sr. DR

Date of Hearing: 18.12.2023

Date of Pronouncement: 19.12.2023

ORDER

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

The present appeal has been filed by Revenue against the order of Id. CIT(A)-43, New Delhi dated 14.03.2023.

2. Following grounds have been raised by the Revenue:

"1. Ground 1: That the Learned Assistant Commissioner of Income-Tax, International Taxation, Circle 2(2)(1), New Delhi ("the Learned AO") has erred both in law and on facts of the case while assessing the income of the Appellant for the relevant assessment year at INR 10,97,53,010 as against NIL returned income as per India-Swiss Double tax avoidance agreement ("DTAA").

2. Ground 2: That, the Learned AO erred both in law and on the facts of the case by treating cost to cost reimbursement with respect to social security contributions, relocation expenses etc. as Fee for Technical Services("FTS") as defined under the Income

Tax Act, 1961 ('the Act') and Article 12 of India-Swiss Double tax avoidance agreement ("DTAA") where such payments were made for and on behalf of Indian group companies.

3. Ground 2.1: That, the Learned AO erred in both law and on the facts of the case in interpreting that the arrangement between the Appellant and the Indian entities is for 'provision of services' by the Appellant through expatriates.

4. Ground 2.2: That, the Learned AO erred in both law and on the facts of the case in arbitrarily concluding that the arrangement between the expatriates and Indian entities "make available" technical knowledge/skill and experience.

5. Ground 2.3: That, the Learned AO erred both in law and on the facts of the case by not considering binding ruling of Authority of Advance Ruling (AAR) taken by the payer of the appellant wherein such reimbursement of cost is held as not taxable, while passing the final assessment order.

6. Ground 3: That, the Learned AO erred both in law and on the facts of the case by classifying the administration fee as FTS as defined under the Act and under Article 12 of India-Swiss DTAA read with MFN clause.

7. Ground 4: That on facts and circumstances of the case, the Learned AO erred in charging interest under section 234A, 234B, 234C and 234D of the Act, however, at the same time inadvertently did not compute tax on the assessed income in the computation sheet attached to the assessment order.

8. Ground 5: Without prejudice to above, the Learned AO also erred in charging tax under section 115A of the Act alongwith surcharge and cess instead of tax rate Article 12(2) of India-Swiss DTAA.

9. Ground 6: That on facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 270A of the Act for mis-reporting of income."

Reimbursement of Social Security Contribution/ Fees for Technical Services:

3. The assessee is a company incorporated under the laws of Switzerland and engaged in providing services in the field of mobility to Michelin group entities and also performs administrative functions with respect to the same. The assessee filed return of income on 30.11.2017 declaring an income of Rs. Nil which was selected for scrutiny assessment.

4. During the course of assessment proceedings, the assessee received a notice dated 4th October 2019 wherein it was asked to show-cause as to why payments received from the Indian group entities with respect to cost to cost reimbursement of social security contribution amounting to Rs. 10,64,95,182/- and administration fee amounting to Rs. 32,57,828/- should not be charged as Fee for Technical Services ("FTS") and taxed accordingly.

5. The assessee filed a detailed response, wherein, the assessee contended the following:

- The assessee made available expatriates to Indian group entities who were employed on their local payrolls in India.
- The personnel assigned to these Indian group entities were released/ discharged in their home country from all the obligations and rights of employment and were subsequently employed by the respective Indian group entity for the services rendered in India. Further, the

Indian group entities were solely responsible and liable for the acts and remuneration of the said expatriate personnel, TDS liabilities and filing TDS return.

- Since, the expatriates were employed by the Indian group entities, their remuneration cost was fully borne by the respective Indian group entities and applicable taxes thereon has been withheld as per the provisions of the Act.
- Further, there are certain expenses of such employees (viz. social security benefits) which are to be paid to the government in the home country of respective employee. The said expenses have been paid by appellant on behalf of the Indian group entities for such expatriates during the subject AY which is then subsequently recharged /reimbursed by the Indian group entities on cost-to-cost basis. Also, the appellant has incurred certain expenses for relocating the expatriates to the Indian group entities which is also reimbursed on cost-to-cost basis.
- Further to the above, the appellant also charged an administration fee from the Indian group entities to reimburse their costs for managing the disbursement (viz. social security contribution/ relocation cost) on their behalf.

6. The payment with respect to such cost to cost reimbursement are not separate salary payments borne by the assessee but merely paid on behalf of the Indian entities which are subsequently recharged to the Indian entities.

7. The cost to cost reimbursement received from the Indian group entities towards social security contribution and other expenses with respect to the expatriates is not in the nature of Income of the Appellant.

8. At the outset, it was brought to our notice that this issue is squarely covered by the order of the Co-ordinate Bench of ITAT in assessee's own case in ITA Nos. 1962 & 1963/Del/2020 for A.Y 2015-16 and A.Y. 2016-17 order dated 15.12.2022. The relevant para of the said order is reproduced hereunder:

"6. During the course of the scrutiny assessment proceedings the assessee was asked to explain why the amount received from the group entity in India was not taxable in India. The assessee explained with respect to the activities in India the assessee made available expatriates to Miscelin Group Entities in India i.e. AIMPL and MITC. This group entities in India required experienced employees familiar with the Michelin Group methodology and processes to be employed on their local payrolls in India. The personnel assigned to these group entities were released/ discharged in their home country from all the obligations and rights of employment and were subsequently, employed by the respective Indian entity for the services rendered in India. Since, the expatriates were employed by the Indian entities their remuneration cost was fully borne by the respective Indian entities and applicable taxes thereon has been with held as per the provisions of the Act. It was explained that cost to cost reimbursements from Indian entities towards social security, contributors, relocation expenses etc with respect to the expatriate personnel who are the employees of such Indian entities is not in the nature of income of the assessee.

7. *The contention of the assessee did not find any favour with the AO who after referring to several judicial decisions treated the receipt as FTS as per the India-Switzerland DTAA.*

8. *The assessee approached the authorities for advance rulings where in following question were raised relating to the transaction on which the advance ruling is required:-*

"Following Questions were raised relating to the transaction on which the advance ruling is required:

1. On the facts and circumstances of the case, whether payment to be made by the applicant to Michelin global mobility (MGM) towards payments to be made behalf of the employees of the applicant towards portion of salary , social security contribution , insurance etc , would be chargeable to tax in India , in the hands of the MGM, as per the provisions of the income tax act, 1961 (act) read with the provisions of the double taxation avoidance agreement entered into between India and Swiss confederation (tax treaty),

2. In the case answer to question 1 is in the affirmative, under which section of the act or the article of the treaty would the payment be taxable?

3. In case the answer to question 1 and 2 are in the affirmative, at what rate under section 195 of the act would the applicant to obligate to withhold taxes on the above payments?

9. *The authority for advance rulings vide order dated 07.01.2015 rephrased the question in its admission order u/s. 245 R (2) as under:-*

"Heard Shri Rajan Vora, learned counsel for the applicant and Shri Munesh Kumar for the Department. The question which falls for

consideration in this application is whether the Revenue is justified in treating, all payments from the applicant to Ms Michelin Global Mobility (MGM) in the nature of Fees for Technical Services (FTS). On this question, the matter is admitted. Secretary shall inform the next date of hearing.”

10. After considering the facts and the submissions the AAR ruled as under:-

"26. A perusal of the above documents reveal that there is no lien on employment of the seconded employees with the applicant and also the applicant has the power to terminate the employment and the employee is forbidden to supply his capacity to work to someone else during the period of employment. It is also observed that MGM is providing suitable personnel to the applicant and the applicant is exercising full operational control and the employee is required to abide by policy regulations and guidelines of the applicant company. On the request of the Authority a certificate was also submitted by the MGM and the applicant that the MGM only shared the profile of the expatriate personnel and the process of selection was entirely left with the applicant. It is also avowed that the expatriate personnel are released in their home country' / earlier employer from all obligations and rights of employment and that the applicant is solely responsible for all payment to expatriate personnel and that no salary payments are made by the applicant outside India. It is also seen that to meet the obligation of the expatriate personnel abroad social security contribution, insurance, relocation cost. etc. were deposited by MGM on the behalf of the personnel and the said contribution which form part of the salary are reimbursed on cost to cost basis by applicant to MGM. The sample copies of the debit notes submitted by the MGM and the applicant were also submitted. A letter was also submitted from auditor that the reimbursed amount is on cost to cost basis.

27. It is also noticed from sample invoices of the company that the reimbursements range from 350 to 1421 Euros per month and is roughly above 10*15% of the salary of expatriate employee. From above facts and from perusal of the documents submitted, we are of the view that the expatriate personnel are indeed employees of the applicant and there does exist employee-employer relationship between the personnel and the application company. The applicant has selected the suitable employees depending upon business needs, qualifications and international brand image and best practices of the group from list available with MGM and has issued the employment letters to them. It exercises control and issues directions to the employees who are required to supply their complete time and labour to the applicant. The applicant also has the power to terminate the employment. The sample employment letter submitted also indicates the period of employment as 2 to 4 years. On going through the details of salary and perquisites in form No.16 and form No.12BA, it is noticed that the concerned employee is offering the entire salary and perquisites and social security / insurance / relocation receipts in the return on which tax has been deducted in India.

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31. It is common knowledge that in large multi-national companies the talent pool of personnel is deployed to various countries and these personnel's move from one location to another. They are liable to for certain statutory contributions such as social security contribution in their home countries. To facilitate the statutory commitment toward retirement, insurance etc. in home country some funds are received in their home countries. The parent company assigns this work to some common agency of the group to perform these tasks seamlessly. MGM performs this task in the current case. The payments by MGM are on behalf of applicant which are subsequently reimbursed by the applicant.

32. *The MGM is not exercising any operational or functional control over the employees of the applicant. It is not paying any perquisite or performance related payments to the personnel. It is merely paying statutory payments on behalf of the personnel in their home countries. This is clearly a supportive function performed by MGM.*

33. *We are conscious of the tact that provision of services or provision of personnel could be camouflaged as secondment agreements but in the current case it does not seem that any purpose is served by cloaking reimbursements. It is not a case where entire or substantive salary is paid outside India and then the same is claimed as reimbursement. In that scenario there is possibility of manipulating receipts and relocating it to different accounts of the group companies. Moreover, the entire salary including the reimbursed component has been offered for tax in India by the seconded employees.*

34. *Given these peculiar facts, we are of the considered view that the social security, insurance, relocation expenses which are in the nature of committed and obligated payments are in the nature of reimbursements and not fee for technical services.*

35. *In regard to administrative expenditure paid to MGM for performing the facilitative and disbursing agency role .the Applicant has himself admitted that payments are subject to tax deduction under Section 195 (para 8.2.27 of rejoinder letter and though no specific submissions were made by learned AR about its nature, we presume that in the light of admitted question the Applicant has no objection for treating the charges as FTS and thus the issue does not require our adjudication.*

36. *In view of foregoing the admitted and rephrased questions are answered as under:*

"1. The social security, insurance, relocation expenses which are in the nature of committed and obligated payments are in the nature of reimbursements and not fee for technical services.

2. As admitted by learned AR. the administrative fee paid to MGM is liable for tax deduction under Section 195 as fee for technical services. 11. Since the first appellate authority has followed the rulings of AAR (supra) we do not find any reason to interfere with the findings of the CIT(A). Both the appeals filed by the revenue are dismissed."

Since, the first appellate authority has followed the rulings of AAR (supra), we do not find any reason to interfere with the findings of the CIT(A)."

9. In the absence of any change in the factual matrix and legal proposition, we hereby decline to interfere with the order of the Id. CIT(A).

10. In the result, the appeal of the Revenue is dismissed.
Order Pronounced in the Open Court on 19/12/2023.

Sd/-

(Astha Chandra)
Judicial Member

Dated: 19/12/2023

Subodh Kumar, Sr. PS

Copy forwarded to:

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

Sd/-

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

ASSISTANT REGISTRAR