

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "I", MUMBAI**

**Before Shri Narendra Kumar Billaiya, Accountant Member &
Shri Anikesh Banerjee, Judicial Member**

ITA No.2535/Mum/2023: Asst.Year : 2013-2014

The Deputy Commissioner of Income-tax (IT)-3(2), Mumbai.	vs.	M/s.McKinsey & Company Singapore Pte Limited C/o.S.R.B.C. & Associates LLP, CAs, 14 th Floor, The Ruby, Senapati Bapat Marg, Dadar, Mumbai Pin – 400 028 [PAN: AAECM4465A]
(Appellant)		(Respondent)

Appellant by: S/Shri Porus F.Kaka & Divesh Chawla

Respondent by: Shri Anil Sant, Addl.CIT-DR

Date of Hearing : 18.06.2024	Date of Pronouncement: 21.06.2024
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ORDER

Per Narendra Kumar Billaiya, AM :

This appeal by the Revenue is directed against the order of the CIT(A)-57, Mumbai, dated 27.04.2023 pertaining the assessment year 2013-2014.

2. The solitary grievance of the Revenue is that the CIT(A) erred in concluding the 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.

3. We have heard representatives of both the sides, records perused and the judicial decisions duly considered.

4. Briefly stated the facts of the case are that the assessee is a foreign company, incorporated in Singapore. The assessee has entered into international transactions with its Associated Enterprises (AEs), McKinsey & Co., Inc. (Indian Branch) during the financial year under consideration. Transfer Pricing Study report in Form 3CEB was filed. 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. 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 ₹6,79,39,779 qualified to be a business receipt of the assessee. Since the assessee-company has no PE in India, the incidence of tax does not arise in India. During the course of scrutiny assessment proceedings, the assessee was asked to explain as to why the borrowed services income of ₹6,79,39,779 should not be treated as fees for technical services. In its reply, the assessee filed various documentary evidences to substantiate the services rendered to McKinsey India during the year along with reasons why non-taxation of the borrowed services. The detailed explanation by the assessee did not find any favour with the A.O. for the simple reason that the same was not accepted in assessment orders of earlier years, i.e., A.Ys 2012-2013, 2011-2012 and 2010-2011. Drawing support from the findings given by the A.O. in earlier assessment years, the AO treated the income of ₹6,79,39,779 as fees for technical services and added the same to the total income of the assessee.

5. The assessee carried the matter before the CIT(A). It was brought to the notice of the CIT(A) that the Tribunal in assessee's own case has taken up consistent view for various assessment years that the income from borrowed services is not taxable under the India-Singapore Treaty. The assessee submitted the orders of the Tribunal from AYs 1999-2000 to 2011-2012. It was also brought to the notice of the CIT(A)

that against the order of the Tribunal for AYs 2006-2007, 2007-2008 and 2008-2009 to 2010-2011, the Revenue had preferred appeals before the Hon'ble High Court of Bombay, but subsequently the appeals were withdrawn due to low tax effect. It was further brought to the notice of the CIT(A) that in the case of group companies for AYs 2006-2007, 2011-2012 and 2012-2013, the Department withdrew the appeals as the issue was resolved under Mutual Agreement Procedure (MAP). Considering the facts of the case in totality and following the judicial disciplines, the CIT(A) followed the orders of the Tribunal and deleted the additions.

6. Before us, the DR could not bring out any factual error in the findings of the CIT(A), but strongly relied upon the assessment order. The Counsel reiterated what has been stated before the CIT(A) and drew our attention to the various decisions of the Tribunal in assessee's own case in earlier assessment years.

7. After giving a thoughtful consideration to the orders of the authorities below, we are of the considered view that the quarrel has been decided by this Tribunal in assessee's own case in earlier assessment years. This Tribunal in a bunch of appeal of the group companies of the assessee vide order dated 21.10.2016 in ITA No.1579/Mum/2014 has considered the quarrel of the assessee for A.Y. 2010-2011. The relevant finding of the co-ordinate Bench reads as under:-

“Before us, Shri Porus Kaka and Mr. Divesh Chawla, Id Counsel for the assessee brought our attention to the above said order assessment order for the AY 2010-11 and submitted that the Assessing Officer proceeded to make above addition in all the cases under consideration substantially relying on his order for the AY 2007-2008. Assessing Officer did not recognise the binding nature of the Mutual Agreement Procedure (MAP) order relevant to the issue under consideration. Further, Ld Counsel for the assessee submitted that assessment for the AY 2007-08 was a subject matter of litigation before the Tribunal and the Tribunal passed the order in favour of the assessee holding that the said loan service charges earned by the assessee do not amount to FTS. Therefore, as per the Ld AR, the addition has to be deleted for all these ten AYs. He further mentioned that the issue in all these ten appeals is common and the same stands covered in favour of the assessee by the order of the Tribunal in the assessee's own case not only for the AY 2007-08 but also rest of the AYs as well ie AYs 2008-09 to 2011-12. In support of the same, Ld Counsel for the assessee brought

our attention to page 100 of the paper book wherein a copy of the order of the Tribunal in ITA No.7595/Mum/2010 (AY 2006-07), dated 21.2.2014 is placed. Bringing our attention to page 2 of the said Tribunal's order for the AY 2006-07 (supra), Ld Counsel for the assessee submitted that the Ground no.1 of the said appeal relates to Article 12 of the Treaty and if the borrowed service charges constitutes FTS or not? Further, bringing our attention to para 6 of the said decision of the Tribunal (supra), Ld Counsel for the assessee demonstrated that the issue was decided in favour of the assessee and the AO was directed to grant relief after verification of the facts and finally the appeals of the assessee are allowed. Ld Counsel for the assessee also mentioned that Article 12 of both Indo-US Indo-Singapore treaties are commonly worded therefore, the said order of the Tribunal is equally applicable to the facts of the companies registered in US as well as Singapore. Bringing our attention to the of the AO / DRP, Ld Counsel for the assessee also demonstrated that they approved the order of the AO merely by stating that the MAP is year specific and they cannot be extended to the other Assessment Years. On this issue, he submitted that the fact are alike in all the AYs / appeals under consideration, the issue is common and the conclusions will not differ and therefore, the order of the Tribunal is fairly applicable to the facts of the present case. Further, bringing our attention to page 82 of the paper book, Ld Counsel for the assessee submitted that the resolution under MAP was duly accepted by the Department. In such case, the DRP / AO cannot take a different view in the matter. Further, referring to para 3.3 on page 85 of the paper book (a copy of the MAP proceedings vide File No.480/02/2008-FTD.I), Ld Counsel for the assessee mentioned that the 'borrowed service charges shall not be taxable in India as 'royalty' or 'FIS'.' Relevant lines from the said para 3.3 read as under:-

"3.3. The amount paid by McKinsey India to Mckinsey & Co., Inc. Or any other McKinsey entity incorporated in the US on account of.....borrowed service charges.....shall not be taxable in India as royalty or fees for included services....."

4. These MAP proceedings are relevant for the AYs 2008-09 and 2009-10 where such service charges were held conclusively not taxable in India. He further mentioned that if the facts are common, the above said conclusions are equally applicable to the appeals under consideration for the AY 2010-2011 too. Ld Counsel for the assessee also submitted that the proceedings pending before the Hon'ble jurisdictional High Court on this issue were also withdrawn by virtue of the judgment dated 23.1.2013, a copy of which is placed at pages 94 & 95 of the paper book. In essence, Ld Counsel for the assessee submitted that the issue under consideration stands covered in favour of the assessee considering the discussion given in paras 3 to 7 of the said order of the Tribunal (supra) for the AY 2007-2008, wherein one of us (AM) is a party to the said order.

5. Per contra, Ld DR for the Revenue submitted that MAP is year specific and therefore, the issue under consideration cannot be decided relying on the Tribunal's order for the AY 2007-2008.

6. We have heard both the parties and perused the order of the DRP / AO well as the relevant material placed before us. On hearing both the parties, we ha perused paras

5, 6 and 7 of the order of the assessment, which are extracted above and find that it is obvious that the Assessing Officer relied heavily on the assessment order for the AY 2007-2008 and found the issue is one and the same ie 'if the borrowed service charges constitutes FTS under Article 12 of the Indo-Singapor DAA. Since, the language of Article 12 is common for Indo-US and Indo-Singapor DTAA, the order of the Tribunal is equally relevant for all the US based companies as well.

3. We have heard Shri Poras Kaka Id. Senior Counsel of the assessee as well as Id. DR and considered the relevant mater on record. The Id. Senior Counsel has pointed out that the issue involved in this appeal has already been considered and decided by this Tribunal in the number of decisions in the cases of group concerns of the assessee. He has referred the following decisions.

> P.T.McKinsey Indonesia v/s DDIT(IT), (ITA No.7625/M/ 2010)

> DDIT(IT) v/s McKinsey Incorporated & Ors. (ITA NO.2289/M/ 2009)

> ADIT(IT) /s McKinsey & Company, Inc. United States (ITA No.649/M/2007)

* McKinsey & Company, Inc. Switzerland v/s ADIT(IT)(ITA No.7238/M/2002)

> McKinsey & Company, Inc. (Philippines) & Ors. v/s ADIT (99TT) 857)

> DDIT(IT) V/s McKinsey & Company, Inc. United States & Others v ADIT(IT)(ITA No.3483/M/2005)

> McKinsey & Company, Inc. China & Others v/s DCIT (ITA No.7239/M/2002)


> ADIT(IT) /s McKinsey & Company, Inc. Belgium (ITA No.3711/Mum/2006)

4. The Id. Counsel has further invited our attention that even the amount paid by the Indian Branch to the head office on account of borrowed service charges has been accepted and decided in favour of the assessee under Mutual Agreement Procedure (MAP) resolution and therefore the same is not taxable. The Id. Counsel has referred letter dated 23/03/2012 to show that under the Mutual Agreement Proceeding, one of the item was borrowed service charges. The Id. Counsel has further pointed out that the revenue challenged the decision of this Tribunal before the Hon'ble High Court record the issue involved in the appeal how duly been resolved under MAP and given effect by the Assessing Officer. He has referred the decision of the Hon'ble Jurisdiction High Court dated 23/01/2013, wherein the appeals filed by the revenue were allowed to withdrawn and dismissed accordingly. On the other hand, the Id. DR though has not disputed the withdrawn of the appeals however submitted that whether these issues in these appeals have been settled under MAP requires verification.

5. We have heard the rival submissions and considered the relevant material on record, we noted that these issues have already been decided by this Tribunal in the various decisions as mentioned above in the group concerns of the assessee before us. Against the decision of the Tribunal, the revenue filed the appeals before the

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 MOST URGENT
 LIMITATION MATTER

Office of the
 Director-General of Income-Tax
 International Taxation, Fourth Floor, Drum Shape Building
 I.P. Estate, New Delhi, 110002 PH. 23378351

Hon'ble High Court in 14 cases. Those 14 appeals were withdrawn by the revenue as per the order of the Hon'ble High Court dated 23rd January 2013. We further note that the department had decided to withdraw those appeals before the High Court due to the reason that the issues were duly resolved under MAP. In this connection the letter dated 22/10/2012 as well as 21/01/2013 are relevant which are as under:-

22/10/12 ✓

From: DGT/ Intl. Taxation/Judicial/2012-13/1801 Dated: 22.10.2012

To: The Director of Income Tax
 (International Taxation)-3,
 Mumbai.


Sir/Ma'am,


Subject: Order of Coarparent Authority of India under Mutual Agreement Procedure of India - USA DTAC in the case of M/s McKinsey & Co., USA and McKinsey's Indian Branch - Withdrawal of appeals - regarding.

Reference: DIT(7)-II/Judl./MAP/12-13 dated 09.07.2012.


Kindly refer to the above.

2. In this regard, I am directed to inform you that the Director General of Income Tax (International Taxation) has accorded approval for withdrawal of appeals from the High court only in the cases/issues which have duly been resolved under MAP and given effect to by the AO and in respect of which the assessee has confirmed its acceptance of the decision of MAP in writing to the Department.

Yours faithfully,

 Shashi Saldani
 Dy. Director of Income Tax,
 (Int'l) (Judicial), New Delhi.


 25-10-2012

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भारत सरकार
GOVERNMENT OF INDIA
कार्यालय, निदेशक आयकर (अन्तर्राष्ट्रीय करामान)
OFFICE OF THE DIRECTOR OF INCOME TAX (INTERNATIONAL TAXATION)
007, Scindia House, N.M.Road, Ballard Pier,
Mumbai-400038.

दूरभाष (226 35418
Phone (226 35418
Telex : 226 35408
Fax : 226 35408

No. : DIT(IT)-II/judl./2012-13
दिनांक :
Dated : 21.01.2013

To
Shri Sureshkumar,
Sr. Standing Counsel
Mumbai High Court
Mumbai.


Sir,

Sub: Request for withdrawal of the appeals filed in the
cases of McKensey group – reg.

Kindly refer to the above.

2. I am directed to request you to withdraw the appeals filed before the Hon'ble High Court in the list of cases enclosed on the basis of Mutual Agreement Procedure of India-USA DTAC Order No.480/2/2008-FTD.1 u/s.90 of I.T. Act, 1961, r.w. Article 27 of India-USA DTAC. Copy of approval received from DGIT(IT), New Delhi for withdrawal of appeals is enclosed.

Yours faithfully,



(SURESHKUMAR E.V.)
Income-tax Officer (Tech)
(International Taxation)-II, Mumbai.

Encl: as above.

R
22-1-13

6. Thus, it is clear that the issue involved regarding borrowed service charges was decided by this Tribunal in favour of the assessee and further the department

has resolved that the issue under MAP and consequently withdrawn the appeals filed before the Hon'ble High Court. Further, the assessee has filed a letter dated 12/02/2014 thereby stated that the issue relating to taxability of firm function charges does not arise in case of these three appeals and the only issue involved in these appeals is the taxability of borrowed service charges, which has been decided in favour of the assessee under the Mutual Agreement Procedure. In view of the above facts and circumstances, when the issues involved in these appeals have already resolved under the Mutual Agreement Procedure, we direct the AO to grant the relief accordingly to the assessee after verification of fact that the issues have already been resolved under the Mutual Agreement Procedure.

7. In the result, appeals of the assessee are allowed.

7. We have extracted and inserted in the preceding paras of this order, the stand of the Competent Authority India on the such loan service charges collected by the assessee and the same were held as neither 'royalty' nor 'FIS'. If the facts are similar over the other AYs and also the other assessees of the group, the ratio of the order of the Tribunal for the AY 2007-2008 in the case of other assessees becomes relevant for adjudicating the similar issue of the ten appeals under consideration. As such, the assessee's MAP is pending in all these cases before the authorities. Further, we find that it is not the case of the AO that the facts are not similar to that of the AY 2007-2008 and others. Therefore, the argument that the MAP relevant for the other AY has no application to the facts of the present AY 2010-2011 is not sustainable.

8. Considering the above settled nature of the issue under consideration, we direct the AO to grant relief accordingly to the assessee after verification of the fact that the issues have already been resolved under the Mutual Agreement Procedure. Accordingly, all the grounds raised by the assessees in all the ten appeals are allowed.

8. As no distinguishing facts have been brought to our notice, respectfully following the decision of the co-ordinate Bench (supra), we decline to interfere in the finding of the CIT(A).

9. In the result, the appeal of the Revenue is dismissed.

Order pronounced on this 21st day of June, 2024.

Sd/-
(Anikesh Banerjee)
Judicial Member

Sd/-
(Narendra Kumar Billaiya)
Accountant Member

Mumbai; Dated: 21st June, 2024
Devadas G*

Copy to:

1. The Appellant.
2. The Respondent.
3. The CIT(Appeals).
4. The CIT concerned.
5. The Sr. DR, ITAT, Mumbai.
6. Guard File.

Asst.Registrar
ITAT, Mumbai