

IN THE INCOME TAX APPELLATE TRIBUNAL ‘I’ BENCH, MUMBAI
BEFORE MS. KAVITHA RAJAGOPAL, JM AND SMT. RENU JAUHRI, AM

ITA No. 1814/Mum/2024 (Assessment Year: 2019-20)

ITA No. 1815/Mum/2024 (Assessment Year: 2018-19)

ITA No. 1816/Mum/2024 (Assessment Year: 2017-18)

ACIT (International Taxation)(3)(2)(1) Room No. 1613, 16 th Floor, Air India Building, Nariman Point, Mumbai-400 021	Vs.	Mckinsey and Company Singapore PTE Limited Ernst & Young LLP, Cas 14 th Floor, The Ruby, Senapati Bapat Marg, Dadar, Mumbai-400 028
PAN/GIR No. AAECM 4465 A		
(Assessee)	:	(Respondent)

ITA No. 1821/Mum/2024 (Assessment Year: 2017-18)

ACIT (International Taxation)(3)(2)(1) Room No. 1613, 16 th Floor, Air India Building, Nariman Point, Mumbai-400 021	Vs.	Mckinsey and Company LME Limited Ernst & Young LLP, Cas 14 th Floor, The Ruby, Senapati Bapat Marg, Dadar, Mumbai-400 028
PAN/GIR No. AAKCM 0197 M		
(Assessee)	:	(Respondent)
Assessee by	:	Shri Divesh Chawla
Revenue by	:	Shri Anil Sant
Date of Hearing	:	11.07.2024
Date of Pronouncement	:	08.10.2024

and

ITA No. 1818/Mum/2024 (Assessment Year: 2018-19)

ACIT (International Taxation)(3)(2)(1) Room No. 1613, 16 th Floor, Air India Building, Nariman Point, Mumbai-400 021	Vs.	Mckinsey and Company LME Limited Ernst & Young LLP, Cas 14 th Floor, The Ruby, Senapati Bapat Marg, Dadar, Mumbai-400 028
PAN/GIR No. AAKCM 0197 M		
(Assessee)	:	(Respondent)
Assessee by	:	Ms. Cheshtha Moolchandani
Revenue by	:	Shri Anil Sant
Date of Hearing	:	09.08.2024
Date of Pronouncement	:	08.10.2024

ORDER

Per Kavitha Rajagopal, J M:

The captioned appeals are filed by the Revenue, challenging the order of the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A) for short), National Faceless Appeal Centre ('NFAC' for short) passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Years ('A.Y.' for short) 2017-18 to 2019-20.

2. As the facts are identical in all the appeals, we hereby pass a consolidated order by taking ITA No. 1814/Mum/2024 as a lead case.

ITA No. 1814/Mum/2024 (A.Y. 2019-20)

3. In all these appeals the Revenue has challenged the ld. CIT(A)'s order on the ground that the Ld. CIT(A) has erred in holding that the borrowed service fees received by the assessee from Mckinsey India does not constitute fee for technical service and the same falls within the ambit of 'business profit' as per Article 7 of the India Singapore Double Taxation Avoidance Agreement and other relevant DTAAAs and also in holding the income as 'business profit' which is not taxable in India as there being no Permanent Establishment (PE for short).

4. The brief facts of the case are that the assessee company is part of McKinsey group of entities, incorporated in Singapore and had filed its return of income dated 27.11.2019, declaring total income at Rs.Nil. The assessee's case was selected for scrutiny and notice u/s. 143(2) and 142(1) were duly issued and served upon the assessee.

5. The learned Assessing Officer (ld. A.O. for short) observed that the assessee had entered into international transactions with its Associated Enterprises (AEs), McKinsey & Co., Inc. (Indian Branch) as per Form 3CEB and that the assessee was engaged in rendering Strategic Consultancy Services to its clients which includes analysis of performance, development, strength and weakness of their client, improving their profitability and productivity and other alleged services. For this purpose, McKinsey India makes use of certain data, information and other support services, which are provided by the assessee and the total receipt for the same during the year under consideration amounted to Rs.20,76,36,061/-. The assessee claimed it to be a business receipt and alleges that as there was no PE, the assessee was not liable to be taxed in India. The ld. A.O. observed that the assessee has declared Rs.11,90,646/- towards reimbursement of expenses and had claimed the same as 'exempt' in the revised return of income and further the assessee has also claimed exemption of Rs.20,76,36,067/- towards 'borrowed services/advisory support' rendered to M/s. McKinsey India as per Indo-Singapore Tax Treaty. The ld. A.O. passed the draft assessment order u/s. 144C of the Act dated 20.09.2021, where the total income was determined at Rs.20,84,66,151/- after making an addition of Rs.20,76,36,061/- as 'fee for included services' and Rs.8,30,090/- as 'reimbursement of expenses'. The ld. A.O. then passed the final assessment order dated 26.10.2021 u/s.143(3) r.w.s. 144C(3) of the Act.

6. The assessee was in appeal before the first appellate authority and the ld. CIT(A) vide order dated 24.01.2024 deleted the impugned addition on the ground that on identical facts the Tribunal for A.Ys. 2012-13, 2014-15 and 2015-16 has held that the

borrowed service fees are not 'fees for technical services' and also in the absence of PE in India, the business income from borrowed service fee is held to be not taxable in India.

7. The Revenue is in appeal before us, challenging the impugned order of the Id. CIT(A).

8. We have heard the rival submissions and perused the materials available on record. The assessee contends that as per Article 12 only certain technical and consultancy services which make available experience, skill, knowhow or processes or consist of development and transfer of a technical plan or technical design qualify as included services and further the consultancy services as per the MOU developed and agreed by the Government of India and Singapore, does not categorize to be technical in nature as per Article 12(4)(b) of the Treaty. The relevant extract of the said Article is reproduced hereinunder:

(b) make available technical knowledge, experience, skill, know how or processes, which enables the person acquiring the services to apply the technology contained therein; or

The assessee further contended that the assessee does not make available any technical knowledge skill to M/s. Mckinsey India while providing the borrowed services and, therefore, the same would not qualify as 'fees for included services'. It is observed that this issue has been decided by the co-ordinate bench in favour of the assessee in assessee's case for A.Y.2010-11 (in ITA No.1579/Mum/2014 vide order dated 21.10.2016), wherein it has been held that the loaned service charges/borrowed services received by the assessee was not in the nature of 'royalty or fees for included services'

and the same was not chargeable to tax in India for the reason that the assessee had no PE in India.

9. Pertinently, it is observed that there has been a Mutual Agreement Procedure (MAP) resolution for A.Y. 2007-08 in the group cases of the assessee, pertaining to India-USA DTAA (vide Order No. 480/2/2008-FTD.1 u/s.90 of I.T. Act, 1961 r.w. Article 27 of India-USA DTAC) which has been extensively relied upon by the assessee, where the said receipt was held to be not taxable in India and the Revenue after duly accepting the same has withdrawn its appeals filed before the Hon'ble Jurisdictional High Court. The Id. AR for the assessee submitted that in the mutual agreement proceeding, one of the receipt was borrowed service charges and since then the Tribunal has been consistently holding the impugned receipt to be 'not FTS/FIS/royalty'. The Revenue has also not placed its argument on the ground that MAP is binding on the assessee only for the year in which it was passed and has also not brought anything on record to show if there was any change in the nature of services rendered by it to the Indian entity, as that of the earlier years. In the absence of the same, we deem it fit to hold that the borrowed services are not FTS/FIS/royalty and are held to be business income of the assessee. As we have held the same to be 'business income' as per Article 7 of the Treaty, it is pertinent to examine whether or not the assessee had a permanent establishment (PE) in India *qua* the year under consideration, which fact was not examined by the lower authorities. We, therefore, remand this issue back to the file of the Id. A.O. for the limited purpose of whether the assessee had a PE during the impugned year for considering whether the said receipt is taxable in India as per Article 7 of the Treaty. The appeal filed

by the Revenue in ITA No. 1814/Mum/2024 (A.Y. 2019-20) is partly allowed for statistical purpose.

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10. The findings applied in ITA No.1814/M/2024 (A.Y. 2019-20) will apply *mutatis mutandis* to these appeals also.

ITA No.1818/M/2024 (A.Y. 2018-19)

11. As the India-UK DTAA is worded identical to India-Singapore DTAA the finding in ITA no.1814/Mum/2024 (A.Y.2019-20) will apply *mutatis mutandis* to this appeal also.

12. In the result, all the above appeals filed by the Revenue are partly allowed for statistical purpose.

ITA No.1821/M/2024 (A.Y. 2017-18)

13. It is observed that this appeal filed by the Revenue would fall under the low tax effect specified as per CBDT Circular No.09/2024 dated 17.09.2024, we deem it fit to dismiss this appeal with the liberty given to the Revenue to restore the same, if in case, the same falls under the exception to the said Circular..

14. In the result, all this appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 08.10.2024.

Sd/-
(Renu Jauhri)
Accountant Member
Mumbai; Dated : 08.10.2024
Roshani, Sr. PS

Sd/-
(Kavitha Rajagopal)
Judicial Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai