IN THE ITAT MUMBAI BENCH 'L'

P.T. McKinsey Indonesia

v.

Deputy Director of Income-tax (International Taxation) - 4(1), Mumbai

D.K. AGARWAL, JUDICIAL MEMBER

AND RAJENDRA, ACCOUNTANT MEMBER

IT APPEAL NO. 7625 (MUM.) OF 2010

[ASSESSMENT YEAR 2007-08]

JANUARY 16, 2013

Porus Kaka and **Divesh Chawla** *for the Appellant.* **Ms. Neeraja Pradhan** *for the Respondent*.

ORDER

Rajendra, Accountant Member - The present appeal is filed against the direction dt. 28-07-2010 of Dispute Resolution Panel-II, (DRP) Mumbai. Following Grounds of Appeal have been raised by the Appellant:

Based on the facts and circumstances of the case, P.T. McKinsey Indonesia (hereinafter referred to as the 'Appellant') craves to prefer an appeal against the order passed by the learned Assessing Officer (hereinafter referred to as the 'AO') under Section 143(3) of the Income-tax Act, 1961 ('Act') read with Section 144C(13) of the Act, on the following grounds:

1. The learned AO/ Hon'ble Dispute Resolution Panel ('DRP') has erred in concluding that borrowed service rendered by the Appellant are in the nature of 'royalty' under Article 12 of the India-Indonesia Double Taxation Avoidance Agreement ('India-Indonesia Tax Treaty').

2. Without prejudice to the above, the learned AO/ Hon'ble DRP has, in the absence of specific clause for fees for technical services under the India-Indonesia Tax Treaty, erred in concluding that the fee received by the Appellant in consideration for the borrowed service rendered is taxable under the India-Indonesia Tax Treaty.

3. The learned AO's order and finding on the evidence submitted is contrary to the details filed before him and also the Hon'ble DRP and is contrary to the record and order of the DRP.

4. The learned AO has erred in charging interest under Section 234B of the Act.

The Appellant craves leave to add, alter, omit or substitute any or all of the above grounds of appeal, at any time before or at the time of the appeal, to enable the Hon'ble ITAT to decide the appeal according to law."

2. Assessee, a foreign company, engaged in the business of providing Strategic Consultancy Services filed its return of income on 27-10-2007 declaring NIL income. Assessing Officer (AO) finalised the assessment on 30-08-2010 u/s. 143(3) r.w.s. 144C (13) of the Income Tax Act, 1961 (Act) at Rs. 23.41 Lakhs.

3. During the assessment proceedings, AO found that assessee had claimed to have received a sum of Rs. 23.41 Lakhs under the head 'Business Receipts'. After considering the submissions of the assessee-company, AO held that the assessee had earned a revenue of Rs. 23,41,094/- in respect of certain services rendered to Mc Kinsey India, that the assessee had not filed details pertaining to the projects in respect of which the information made available by it had been utilised by Mc Kinsey India, that the assessee had also not filed the details with respect to the nature of information or details that were provided by it to Mc Kinsey India or copies of correspondences between the two entities with respect to providing of these services, that the payments received by the assessee were in the nature of consideration received for rendering of technical and consultancy services so as to make available technical knowledge, skill, know how, experience or process and thus was in the nature of fees for included services as covered by Article 12 of the DTAA between India and Indonesia'. Referring to Article 12 of the Double Taxation Avoidance Agreement (DTAA), he held that expression 'made available' would mean that the person providing the services merely enabled the acquirer to use the knowledge and the provider die not participate in the act of doing the job himself. AO was of the opinion that MOU of INDO-US Treaty was useful to decide the issue of taxability by the assessee-company. He further observed that the Department had been treating the income of all the branches of McKinsey & Co., Inc. located in the various parts of the world, received from the Indian branch, as fees for included services. Finally, he held that the fees received by the assessee in respect of services (which were consultancy/advisory services with no technology in it) rendered fell in the category of Royalty' in terms of Article 12 of the DTAA.

4. Assessee-company approached the DRP as per the provisions of section 144 of the Act. After considering the submission of the assessee, DRP held that provision of Article 22(3) of the DTA Treaty were applicable in the case under consideration.

5. Before us, Authorised Representative (AR) submitted that entire Assessment Order was based on INDO-USA Treaty and not on INDO-INDONESIA Treaty, that assessee had erred in concluding that borrowed services were in the nature of royalty under Article 12 of the DTAA, that assessee had filed details of the nature of the information provided by it to McKinsey and Co., that information supplied by the assessee was typically statistical or qualitative data, that pieces of information borrowed by the Indian counter-part of the assessee were of general nature and did not satisfy the tests of Royalty and hence could not be classified as such, that in the earlier year-services rendered by assessee were treated as FTS, that assessee had provided only services, that services rendered by the assessee were commercial services and not technical services, that assessee had no permanent establishment in India, , that sums received for giving advice could not be treated Royalty, that DRP had directed the AO to treat the receipt-in-question under the head 'Other Income' as per the provisions of Article 22 of the Treaty, that business-income could not be taxed under the head 'Other Income' i.e., under Article 22, that addition was made/confirmed by the AO/FAA on the basis of a non-existent clause, that MOU was not part of the INDO-INDONESIAN Treaty. He referred to Group cases decided against the Revenue on the same issue. He relied upon the cases of *Christiani and Nielsen Copenhagen* v. *First Income-tax Officer* (39 ITD 355); *Ericsson Telephone Corporation India AB* v. *Commissioner of Income-tax* (224 ITR 203); *McKinsey & Company, Inc (Philippines) & Others* v. *ADIT* (99 TTJ 857); *DDIT (IT)* v. *McKinsey & Company*, *Inc United States & Others*

v. *ADIT (IT)* (ITA No. 3483/ M/ 05); *McKinsey & Company, Inc. China & Others* v. *DCIT* (ITA No. 7239/M/02) and *ADIT(IT)* v. *McKinsey & Company, Inc. Belgium* (ITA No. 3711/M/2006).

6. Departmental Representative (DR) submitted that particular articles had been incorporated in the DTAAs to deal with FTS, that provisions of Article 22(3) were rightly invoked by the DRP, that assessee did not furnish necessary details before the AO. DR relied upon the cases of *Perfetti Van Melle Holding B. V*., In re (AAR) [342 ITR 200 (AAR)] and *ThoughtBuzz Pvt. Ltd.*, In re (AAR) (346 ITR 345).

7. We have heard the rival submissions and perused the material available on record. Before proceeding further, we would like to mention the un-disputed facts pertaining to the case under consideration.

i. The Assessee is a company incorporated in and a tax resident of Indonesia;

ii. The Assessee is a part of McKinsey group (the 'Group') which is engaged in providing strategic consultancy services to their clients. The Indian branches of McKinsey & Company, Inc ('McKinsey India') were set up to provide similar services in India;

iii. During Assessment Year 2007-08, McKinsey India received various information from the assessee;

iv. The Assessee provided information requested and charged McKinsey India for collating the information;

v. Services were rendered outside India;

vi. Assessee claimed that the amount received from McKinsey India was to be taxed as business receipt;

vii. AO taxed the same as fees for included services as per Article 12 of the INDO-INDONESIA DTAA;

viii. DRP opined that receipt-in-question was to be taxed as per the provisions of Article 22 of the Agreement.

8. After considering the facts of the case and cases relied upon by the representatives of both the sides, we are of the opinion that issue of taxability of amounts pertaining to the information supplied by the assessee-company to McKinsey India has been dealt in length and decided conclusively in a series of orders of Mumbai Tribunal i.e. *McKinsey & Company, Inc (Philippines) & Others* v. *ADIT* (99 TTJ 857); *DDIT (IT)* v. *McKinsey & Company*, *Inc United States & Others* v. *ADIT (IT)* (ITA No. 3483/ M/ 05); *McKinsey & Company, Inc. China & Others* v. *DCIT* (ITA No. 7239/M/02) and *ADIT(IT)* v. *McKinsey & Company, Inc. Belgium* (ITA No. 3711/M/2006).After going through the orders of Group Companies of McKinsey where similar issue has been adjudicated in favour of the assessee, we are of the opinion that matter does need further deliberation from our side. AO has nowhere established that pieces of information supplied by the assessee were arising out of exploitation of the know-how generated by the skills or innovation of the persons who possesses such talent. In our opinion, information received by McKinsey India was in the nature of data and same cannot be held to payment received as Royalty. Word 'Royalty' in taxation-terminology has its distinct meaning and the

amounts received by the assessee does not fall in that category. As far as taxing the receipts under the head 'Other Income' is concerned, as held by the penal, we are of the opinion that residuary head is analogous to sections 56-57 of the Act. If a certain receipt cannot be taxed under any other head, only then the sections dealing with 'Income from Other Sources', come into play in domestic taxation matters. Likewise, under the DTAAs, if a sum can be taxed under any other Article, provisions of Article 22 will not be applicable. We are of the opinion, in light of the earlier decisions of the Mumbai Tribunal income received by the assessee-company form McKinsey India is not to be treated as Royalty-rather it has to assessed as business income as per Article 7 of the DTAA.

Respectfully following the earlier orders of the Mumbai Tribunal referred to in paragraphs 5 and 8, we decide Ground Nos. 1 to 4 in favour of the assessee.

As a result, appeal filed by the assessee stands allowed.