**IN THE INCOME TAX APPELLATE TRIBUNAL**
**HYDERABAD BENCH "A", HYDERABAD**

**BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER**
**AND**
**SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**

ITA Nos. 86, 87, 112 & 113/Hyd/18
Assessment Years: 2009-10, 2010-11, 2011-12 and 2013-14

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| OC NL Invest Cooperatief U.A, Hyderabad – Bangalore Highway, Thimmapur – 509325, Kothur Mandal, Mahaboobnagar District, Telangana state, India. PAN: AABCO 2240 A | Vs. | DCIT, Income Tax-2, International Taxation, Hyderabad. |
| Appellant | | Respondent |

Assessee by: Sri S.P. Chidambaram & Shankar Kapse
Revenue by: Sri M.H. Naik, DR

Date of hearing: 10/04/2019
Date of pronouncement: 03/07/2019

**ORDER**

**PER Smt. P. Madhavi Devi, J.M.:**

All the captioned appeals are assessee's appeals filed against different orders of the CIT (A)-10, Hyderabad dated 25/09/2017 for the assessment years 2009-10; 2010-11; 2011-12 and 2013-14.

2. Brief facts of the case are that the assessee, a foreign company registered in Netherlands, received certain payments from India towards

Royalty and Fees for Technical Services (FTS) after TDS @ 10%. The assessee filed its return of income to claim the credit of TDS made from its receipts. The Assessing Officer passed an intimation u/s 143(1) of the Act for the AYs 2009-10 and 2010-11 bringing the income to tax @ 42.23% which included education cess and surcharge as well. The assessee filed an application u/s 154 of the Act stating that as per the DTAA between India and Netherlands, the tax rate applicable is 10% only and since the DTAA is beneficial to the assessee, the tax should be levied at 10% only as was done at the time of payment by way of TDS. It was also submitted that the TDS credit was not given and the interest u/s 234A, 234B and 234C was also levied. As there was no response to this application, the assessee filed a subsequent rectification application u/s 154 which was accepted by the A.O. by giving the TDS credit. However, the education cess and surcharge were not deleted. Against this order of the A.O., the assessee filed an appeal before the CIT(A). The CIT(A) dismissed the assessee's appeals for the A.Y. 2009-10 stating that the first application u/s 154 was already disposed of by the A.O. vide order dated 16/04/2013 including the education cess and surcharge and therefore, since the assessee has not challenged that order, the appeal against the subsequent rectification order is not maintainable. Accordingly, he rejected the appeals for assessment year 2009-10 and 2010-11. For the AYs 2011-12 and 2013-14, CIT(A) held that the mistakes pointed by the assessee for deleting the education

cess and surcharge are not mistake apparent from record and hence, it is not rectifiable u/s 154 of the Act. Against all the four orders of the CIT(A) for all the four assessment years, the assessee is in appeal before us.

3. The Learned Counsel for the Assessee, while reiterating the submissions made before the authorities below, has submitted that the assessee has not received the copies of the orders dated 16/04/2016 mentioned by the CIT(A) in his order. We therefore directed the Ld DR to produce a copy of the order dated 16/04/2012. Ld DR has filed the copy of the letter of the Assessing Officer wherein he has submitted that the rectification application u/s 154 was disposed of by order dated 16/04/2012 pertaining to the assessment year 2009-10 and 2010-11 but since it pertained to the assessment years more than six years earlier, the relevant dispatch registers are not available and hence he is not able to prove the service of the same on the assessee. He has supplied the copies of the screen shots of the orders for the relevant assessment years and as seen therefrom, we find that the rate of tax has been modified and taken @ 10%, but education cess and surcharge and also the interest u/s 234A, 234B and 234C were levied. In the second rectification order, which is before us also, only the TDS credit has been given but the education cess and surcharge and also the interest u/s 234A, 234B and 234C were levied. When the Learned Counsel for the Assessee submitted that without being served with the

copy of the order, the assessee cannot be expected to file an appeal against such order, the Ld DR fairly submitted that since the Department is not able to produce the copies of the orders dated 16/04/2013 and also the proof of service of such orders on the assessee, the matter may be disposed of on merits.

4. On merits, the Learned Counsel for the Assessee submitted that under the DTAA between India and Netherlands, the income tax including surcharge shall not exceed 10%. He also submitted that at the time when the DTAA was entered into with Netherlands, there was no education cess but education cess was introduced only in the year 2004. He submitted that education cess is nothing but additional surcharge. He referred to Finance Act 2018, clause 11 thereof, wherein it is clearly mentioned that the education cess is additional surcharge. He also placed reliance on the decision of the ITAT, Delhi Bench in the case of ACIT vs. Haryana Telecom Ltd reported in 10 ITR (T) 428 (Delhi) and ITAT, Mumbai decision in the case of DCIT vs. J.P. Morgan Securities Asia (P.) Ltd reported in 42 taxmann.com 33 (Mumbai-Trib.) in support of his contentions. He further submitted that in the subsequent years, the Assessing Officer has not charged any education cess and surcharge on the Income tax. Therefore, according to him, it is clear that the same is not chargeable in view of the DTAA between India and Netherlands.

5. On the other hand, Ld DR supported the orders of the authorities below and submitted that though the DTAA refers to income tax and surcharge, the education cess is not referred to therein and it cannot be considered as surcharge. He submitted that education cess is for a particular purpose mentioned therein and cannot be utilised like income tax by the Government and hence it cannot be considered as part of the income tax.

6. Having regard to the rival contentions and the material on record, we find that the tax treaty between India and Netherlands was entered into in 1989 and subsequently amended in the year 1999. Article 2 and para 3 thereof mentions that the existing taxes to which the Convention shall apply in (a) Netherlands; (b) in India is the income tax including surcharge thereon. Article 12 refers to Royalty and Fees for Technical Services and – para 2 thereunder provides that where the recipient is the beneficial owner of the royalties, or fees for technical services, the tax so charged shall not exceed 10 percent of the gross amount of the royalties or the fees for technical services. Thus, it is clear that the DTAA between India and Netherlands is beneficial to the assessee and therefore the tax can only be charged @ 10% on the assessee's income and this fact has been accepted by the Revenue by accepting the rectification application u/s 154. The only dispute is with regard to the levy of surcharge and education cess. The DTAA clearly provided that the taxes in India means the income tax including surcharge there as

pointed out by the Learned Counsel for the Assessee. Further, clause 11 of the Finance Act 2018 clearly explains that the education cess is nothing but additional surcharge. This fact has been considered by the Coordinate Bench of the Tribunal at Mumbai and Delhi in the cases cited (supra). In the case of J.P. Morgan Securities Asia (P.) Ltd, the coordinate Bench of this Tribunal was considering the provisions of DTAA between India and Singapore wherein similar adjustment was made by the A.O. and the Tribunal, after considering the decision of the Coordinate Bench decision in the case of Sunil V. Motiani vs. ITO (International Taxation) reported in [2013] 59 SOT 37 / 33 taxmann.com 253 (Mum.) has held as under:-

> ***"3.*** *The assessee is a tax resident of Singapore and claim benefit under DTAA between India and Singapore in the return of income. The assessee offered interest income to the tax as 15% as per the provisions of Article 11(2)(b) of DTAA between India and Singapore. The AO, while processing the assessment u/s 143(1) levied Surcharge and education cess on the interest income. The assessee challenged the action of the AO before the CIT(A). The CIT(A) deleted the Surcharge and education cess on the ground that the scope of adjustment u/s 143(1) is limited and the question of upper ceiling for the rate of tax of interest of Article 11 of DTAA as well as Surcharge and education cess cannot be decided while accepting the return u/s 143(1).*
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> ***4.*** *We have heard the Ld. DR as well as Ld. AR and considered the relevant material on record. The Ld. AR of the assessee has pointed out that an identical issue has been considered and decided by the Co-ordinate Bench of this Tribunal in case of Sunil V. Motiani v. ITO (International Taxation) [2013] 59 SOT 37/33 taxmann.com 252 (Mum.). We note that the question of chargeability of tax on interest income as per the provisions of DTAA has been considered and decided by this Tribunal in the case of Sunil V. Motiani (supra) in para 5 and 5.1 as under:*
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> > *"5. We have perused the records and considered the matter carefully. There is no dispute that the assessee is a non resident based in UAE. There is also no dispute that the assessee had received gross interest of Rs.7,55,187/- from the Indian firms in which he was a partner. The interest income is no doubt taxable as the same had arisen from the sources in India. However there is Double-Taxation Avoidance Agreement (DTAA) between India and UAE and, therefore, tax has to he computed under the provisions of DTAA which is beneficial to the assessee. There are specific Articles in DTAA dealing with taxation of income under different heads. The business profit is governed by Articie-7 whereas interest income by Article-Il. Under para-7*

*of Article-7 where business profit includes items of income which are dealt with separately in any other Article of the agreement, provisions of those Articles should not be affected by the provisions of this Article. In other words, in case there is provision for dealing with a particular type of income, such type of income has to be dealt with by those provisions. Therefore, though interest income may have been assessed as business income, there being specific Article to deal with interest income i.e. Article-11, taxation of interest will be governed by the said Article-11. Secondly interest income may be taxed in contracting State in which it arises, according to law of that State but if the recipient is beneficial owner of interest, tax so charged shall not exceed 5% of gross interest if the interest is received from bank and in other cases 12.5% of gross amount of interest. In this case, the assessee is the beneficial owner of interest and tax charged cannot exceed 12.5% of gross interest. Tax has been defined in Article-2(2)(b) as per which income tax included surcharge. Therefore, tax referred to in Article 11(2) @ 12.5% also includes surcharge. Further, nature of education cess and surcharge being same as held by the Tribunal in the case of DIC Asia Pacific Pte Ltd. (supra), in our view education cess and surcharge cannot be levied separately and will be included in tax rate of 12.5%. The judgment of Hon'ble High Court of Uttarakhand in the case of Arthusa Offshore Co. (supra), is not applicable to the facts of the present case as the Hon'ble High Court was concerned with taxability of income under Article 14(2) of the DTA between India and USA. The Hon'ble High Court was not concerned with interpretation of tax payable on interest income under DTAA. The judgment of AAR in the case of Airports Authority of India, In re (supra), is also distinguishable as in that the court was concerned with taxability of business income and it was held that under Article 5(3) of DTAA with USA, preparatory and auxiliary type of work was excluded from the purview of PE and therefore, there being no PE it was held that income from software maintenance was liable to be taxed in India. The high Court was not concerned with taxability of interest income as per the treaty.*

*5.1 In view of the fore-going discussion, we hold that tax payable @ 12.5% under Article 11(2) of FTAA is inclusive of surcharge and education cess. We, therefore, set aside the order of CIT(A) and allow the claim of the assessee."*

***5.*** *We further note that an identical issue has also been considered and decided by the Kolkata Benches of this Tribunal in case of DIC Asia Pacific Pte. Ltd. v. Asstt. DIT (International Taxation) [2012] 52 SOT 447/22 taxmann.com 310. The Tribunal in case of Sunil V. Motiani v. ITO (supra) has considered the decision of Kolkata Benches of the Tribunal in case of DIC Asia Pacific Pte. Ltd. (supra). Accordingly, following the orders of this Tribunal we do not find any reason to interfere with the order of CIT(A) qua this issue."*

7. Respectfully following the same, we hold that the A.O. cannot charge surcharge and education cess over and above 10% of the Income Tax levied on the assessee. Appeals of the assessee are accordingly allowed and the A.O. is directed to delete the adjustments made on

account of the education cess and surcharge levied on the assessee for all the four assessment years.

8. In the result, all the appeals of the assessee are allowed.

Pronounced in the open Court on 03rd July, 2019.

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| **Sd/-** | **Sd/-** |
| **(S. RIFAUR RAHMAN)** | **(P. MADHAVI DEVI)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Hyderabad, Dated: 03rd July, 2019
***OKK***
Copy to:-

1) OC NL Invest Cooperatief U.A, Hyderabad – Bangalore Highway, Thimmapur – 509325, Kothur Mandal, Mahaboobnagar District, Telangana state, India.
2) DCIT, Income Tax-2, International Taxation, Hyderabad.
3) The CIT(A)-10, Hyderabad
4) The Pr. CIT-10, Hyderabad
5) The DR, ITAT, Hyderabad
6) Guard File