

IN THE INCOME TAX APPELLATE TRIBUNAL  
“I” BENCH, MUMBAI  
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER &  
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 951/Mum/2021  
(A.Y: 2017-18)

M/s. Buro Happold Ltd C/o. urmi Axis, 6 <sup>th</sup> Floor, Famous Studio Lane, Dr. Emoses Road, Mahalaxmi, Mumbai – 400011.	Vs.	DCIT (IT) – 1(3)(2) 1810, 18 <sup>th</sup> Floor, Air India Bldg, Narimanpoint, Mumbai- 400 021.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCB9239Q		
Appellant	..	Respondent

Appellant by :	Mr.Anuj Kisnadwala. AR
Respondent by :	Mr.Milind Chavan, Sr. DR

Date of Hearing	08.12.2021
Date of Pronouncement	10.01.2022

आदेश / O R D E R

**PER PAVAN KUMAR GADALE JM:**

The assessee has filed the appeal against the Assessment order passed u/s 143(3) r.w.s 144C(13) of the Income Tax Act, 1961 in pursuance to the directions of the Dispute Resolution Panel (DRP) U/sec144C(5) of the Act.

The assessee has raised the following grounds of appeal:

1. *Ground No. I - Taxability of amount received for Consulting and Engineering services as Fees for technical*

*services (FTS)*

*1.1 On the facts and in the circumstances of the case and in law, the learned DRP ('Dispute Resolution Panel') and DCIT have erred in considering income from consulting and engineering services amounting to INR 4,20,666/- as Fees for technical services ('FTS') as per Article 13 of India-UK Double Taxation Avoidance Agreement ('DTAA').*

*2. Ground No. II - Taxability of amount received as common cost recharge as Royalty and Fees for technical services (FTS)*

*2.1 On the facts and in the circumstances of the case and in law, the learned DRP ('Dispute Resolution Panel') and DCIT have erred in considering common cost recharge amounting to INR 4,39,80,878/- as Royalty and Fees for technical services ('FTS') as per Article 13 of India- UK Double Taxation Avoidance Agreement ('DTAA').*

*3. Ground No. III - Erroneous rate of tax applied while computing tax payable*

*3.1 Without prejudice to the above grounds, on facts and circumstances of the case and in law, the learned DCIT has erroneously applied a tax rate of 15% as per India-UK DTAA instead of applying a beneficial rate of 10.506% under the Income Tax Act, 1961 while computing the amount of tax payable by the Appellant.*

*4. Ground No. IV - Erroneous levy of consequential interest under section 234B*

*4.1 On facts and circumstances of the case, the learned DCIT has erred in levying consequential interest under Section 234B of the Act, amounting to INR 10,48,368/-*

2. The Brief facts of the case are that the assessee is a company registered in the United Kingdom (UK)

and is tax resident of U.K. The assessee company is an international, integrated engineering and consulting company and is engaged in the business of providing structural and MEP (Mechanical, Electrical and public health), engineering and consultation services for various buildings and projects in India. The assessee has filed the return of income for the A.Y 2017-18 on 29.11.2017 with a total income of Rs.46,28,070/-. The assessee has offered to tax the income it has received as fees for consulting engineering services and fees for technical services. The assessee has filed the revised return of income on 29.09.2019 with a total income of Rs.Nil. Subsequently, the case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act along with specific questionnaire was issued. In the scrutiny proceedings it was found that the assessee has filed a revised computation of income where the receipts from M/s. Buro Happold Engineers India Pvt Ltd( Buro India) is disclosed Rs. Nil as against Rs.46,20,066/- disclosed in the original return of income. In compliance, the Ld. AR of the assessee appeared from time to time and furnished the details

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and the case was discussed. The A.O has passed the Draft assessment order u/s 144C(1) of the Act on 30.12.2019. The assessee has filed objections in form no 35A in respect of variations made by the A.O before the DRP. The DRP has considered the objections, submissions of the assessee and finally has passed directions on 24.02.2021. Whereas, the A.O in respect of consulting engineering services of Rs. 46,20,066/- which includes services provided in form of specialized services like master planning, acoustic engineering and environmental engineering. The said amount was offered to tax in the original return of income and was not offered in revised return of income. Whereas in the last scrutiny assessment, the A.O found that for the A.Y 2014-15 and 2015-16, the assessee has suo moto offered consulting engineering services for taxation. Whereas, in the present asst year, the assessee has filed a letter explaining the reasons for not included for taxation dated 20.12.2019 referred at Para 6(a) of the assessment order.

3. Whereas in respect of management fees & common cost recharge of Rs4,39,80,878/- which is not included in total income by the assessee as they does not make available any knowledge, skill process know-how and experience to Buro india as per the terms of the India -UK DTAA .The A.O found the submissions of the assessee are not acceptable as it is evident on reading the provisions of the original agreement made on 01.04.2013 the basis on which the services under cost charge are provided and the applicable provisions of the Act and the India-UK DTAA. The A.O has dealt on the transactions of the Assesee with the Associate Enterprises (AE) agreement and the provisions of royalty and the fees for technical services in the India-UK DTAA. Finally the A.O has treated Rs. 4,39,80,875/- received by the assessee under the head cost recharge as income from royalty as per the Sec. 9(1)(vi) of the Act and Article 13 of the India - UK DTAA. The A.O has observed at page 16 Para 8 of the order on the discussions of the DRP and has passed the order :

*“8. Discussions and directions of DRP: while deciding the appeal of the assessee in this regard, on the both*

grounds i.e addition of Rs. 46,20,066/- made towards consulting engineering services and addition of Rs. 4,39,80,878/- made towards management fees and common cost recharge. The DRP stated that in the A.Y 2015-16, it was observed by the DRP that once a new agreement incorporating the clause relating to payment for use of trade mark has been entered into between the two parties on the same issue, there is no question of the earlier agreement surviving. It is also been that the new agreement contains clause indicating the reason for entering into new agreement. Hence, the nature of the receipt to the assessee has to be discussed in light of the new agreement. The DRP is of the view that the payment made to the appellant is clearly for use of information concerning industrial, commercial or scientific experience in India. These payments are specifically covered by Article 13(3)(a) of the India-UK Treaty and are taxable as Royalty and since the services have been utilized by a resident of India in India, the services are liable to be taxed in India. Also the receipts of the assessee are held to be covered by Article 13 of the India UK DTAA and liable to tax in India. In light of the above, the DRP in its directions u/s 144C(5) of the IT Act dated 24.02.2021 has held that the services result in making available technical knowledge, experience and skill to the India Partly and the grounds raised by the assessee stands dismissed. Through the facts of the case and issues involved are same as those in A.Y 2015-16. The assessee has contended that the ITAT has decided the matter in favour of the assessee for Assessment Year 2011-12 and department has not filed an appeal in Bombay High Court because of low tax effect involved. As the department has not accepted the decision of the ITAT. Hence the panel has not interfered in the draft order passed by the AO and rejected the objections filed by the assessee.”

9. Subject to the above remarks, the total income of the assessee is computed as under:

<i>S.No</i>	<i>Particulars</i>	<i>Amount</i>
<i>1</i>	<i>Consulting Engineering Services (As para 5.2)</i>	<i>46,20,066</i>
<i>2</i>	<i>Management Fees &amp; Cost recharge (As discussed above)</i>	<i>4,39,80,878</i>
	<i>Total income</i>	<i>4,86,00,944</i>
	<i>Rounded off to</i>	<i>4,86,00,940</i>

4. Aggrieved by the order passed u/s 143(3) r.w.s 144C(13) of the Act dated 19-03-2021 the assessee has filed an appeal before the Hon'ble Tribunal.

5. At the time of hearing, the Ld. AR submitted that the additions made by the A.O are not acceptable. Whereas on the similar facts in the earlier years the Honble Tribunal in the assessee's own case has granted the partial relief and referred to the findings and with respect to fees for technical services and royalty payments and further supported the submissions with the orders of the Honble Tribunal. Contra, the Ld. DR relied on the findings of the DRP and orders of the lower authorities..

6. We heard the rival submissions and perused the material available on record. The assessee has raised the ground of appeal No. 1 & 2 with respect to taxability of consulting and engineering services as fees for technical services (FTS) and taxability of amount received as common cost recharge as royalty and fees for technical services(FTS). Whereas, on both these transactions, the A.O has made the addition and the DRP has confirmed the action of the A O. We find on the similar and identical issue, the decision of the Co ordinate bench of the Hon'ble Tribunal for the A.Y 2015-16 in assessee's own case in ITA No. 834/M/2019 dated 13.12.2020 dealt at page 3 Para 3 to 3.8 which is read as under:

*3. We have heard rival submissions and perused the materials available on record. We find that assessee is a company registered in United Kingdom and is a tax resident of that state. It is in the business of providing engineering, design and consultancy services. Assessee is providing structural and MEP (Mechanical, Electrical and Public Health) engineering for various buildings. The return of income for the A.Y.2015- 16 was filed by the assessee on 30/11/2015 declaring total income of Rs.47,97,000/-. The assessee has offered to tax the income it has received under the head "consulting engineering fees" as fee for technical services under Article 13 of India-UK DTAA. During the scrutiny proceedings, the assessee filed the revised computation of income wherein the receipt from M/s. Buro Happold Engineers India Pvt. Ltd., was mentioned at Rs.53,23,753/- instead of*

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*Rs.4,61,574/- given in the original return. The draft assessment, order was framed in the hands of the assessee u/s.143(3) of the Act r.w.s. 144C(1) of the Act dated 29/12/2017 determining the total income of the assessee at Rs.3,46,30,309/- as under:-*

*Consulting Engineering Services - Rs. 96,59,182/-*

*Cost Reiterated - Rs.2,49,71,127/-*

*3.1. The above total income was ought to be taxed @15% as in Article 13 of India-UK DTAA by the ld. AO. We find that assessee had preferred objections before the ld. Dispute Resolution Panel (DRP) and the same were disposed off vide order dated 04/09/2018.*

*3.2. During the year assessee has received amounts from the following stream:-*

*(a) Consulting Engineering Services (Rs.96,59,182/-):- This includes technical services provided in the form of sketch diagrams and concept design criteria / assumptions bound in a report to support the architectural design concept. This amount is received from various entities as under:-*

*(i) Gliders Buildcon LLP - Rs.33,22,086/-*

*(ii) Nival Developers Pvt. Ltd - Rs.10,13,343/-*

*(iii)Buro Happold Engineers India Pvt. Ltd., (Buro India) - Rs.53,23,753/-*

*In respect of the receipt from Buro Happold Engineers India Pvt. Ltd., the above mentioned amount was offered by the assessee in its Revised Computation of Income.*

*(b) Cost recharge (Rs.2,49,72,127):- This is the amount charged to Buro India towards various costs incurred. The same has not been offered to tax by the assessee on the contention that these being management cost recharges does*

*not make available any knowledge, skill, process, know-how and experience to Buro India as per the terms of the India-UK DTAA. During the assessment proceedings, the assessee has given an explanation as to why the amount received under this head has not been offered to tax.*

*3.3. The assessee submitted that it incurs various costs for the benefit of Buro group and hence, these costs are allocated group entity passed on certain pre-determined cost allocation key as per the cost allocation agreement. Accordingly, during the year under consideration, the assessee had raised common costs amounting to Rs.2,49,71,127/- to Buro India in respect of IT functions, business development, finance, human resource management, operations, project management function, corporate and commercial. The assessee pleaded that the transactions are governed by the India-UK DTAA as assessee is a tax resident of UK. He pleaded that as per Article 13 of India-UK DTAA, Fees for technical Services („FTS“) provided by foreign company would be taxable in India on gross basis. The relevant extract of the definition of FTS as per Article 13 of India-UK DTAA is reproduced below for your ready reference.*

*“4. For the purposes of paragraph 2 of the Article, and subject to paragraph 5, of this Article, the term “fees for technical services” means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:*

*a. ....or*

*b. ....or*

*c. Make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.”*

3.4. The ld. AR further submitted that in order to fall within the ambit of Article 13 of India-UK DTAA, twin conditions are to be satisfied:-

1. Services should be in the nature of technical or consultancy services and

2. Services should make available technical knowledge, experience, skill knowhow or processes to the recipient of services.

3.5. It was submitted that the services provided by the assessee are managerial in nature and the same would not be covered under the definition of FTS under India-UK DTAA. The assessee even made argument on without prejudice basis, that even where it is considered that out of the above services, few services may be considered as technical or consultancy services, the same would still be not taxable under Article 13(4)(c) of the India-UK DTAA services as these services does not thus make available any technical knowledge, experience, skill, knowhow or processes to the recipient. The ld. AR finally pleaded that such income be classified as only as business income and would not be taxable in India in the absence of permanent establishment (PE) as per Article 7 read with Article 5 of India-UK DTAA. All these submissions were also made by the assessee before the ld. DRP.

3.6. With regard to admission of additional ground raised by the assessee, the ld. DR vehemently objected to the said admission on the ground that the facts relevant for the additional ground are not on record and it does not emanate from the objections raised before the ld. DRP. The ld. DR also objected to the admission of the additional ground that if the additional ground is admitted, then the same would result in assessed income going below the returned income.

3.7. Per contra, the ld. AR vehemently argued that there is absolutely no bar if the assessed income goes below the returned income as ultimately only the real income should be brought to tax in accordance with law which would also be in consonance with the Article 265 of the Constitution of India.

*He vehemently argued that the department could not be unjustly enriched merely because certain amounts had been erroneously offered to tax by the assessee. He placed reliance on the decision of the Hon"ble Gujarat High Court in the case of Milton Laminates Ltd., vs. CIT reported in 37 Taxmann.com 249 (Guj) and Gujarat Gas Company Ltd., vs. JCIT reported in 245 ITR 84. We find lot of force in the said arguments of the ld. AR and we find that issue involved in the additional ground and the regular ground No.1 was the subject matter of adjudication of this Tribunal in assessee"s own case for A.Y.2014-15 in ITA No.7111/Mum/2017 dated 13/11/2019 wherein the exactly similar arguments were advanced by the ld. DR for that year also. We find that this Tribunal for A.Y.2014-15 in assessee"s own case had admitted the additional ground and disposed off the issue in dispute as under:-*

*"3.1 Facts on record would reveal that the assessee being non-resident assessee stated to be engaged in providing engineering and consultancy services was assessed for year under consideration vide final assessment order dated 23/10/2017 pursuant to the directions of Ld. DRP, wherein the income of the assessee was determined at Rs.637.19 Lacs as against Nil return filed by the assessee on 30/11/2014. The original return was revised twice wherein the assessee finally declared an income of Rs.120.58 Lacs on account of consulting and engineering services. The assessment was framed on the basis of latest revised return filed by the assessee on 31/03/2016. The assessee is stated to be an entity registered in UK and engaged in the business of providing engineering design and consultancy services with respect to buildings.*

*3.2 Initially, a draft assessment order was passed on 08/12/2016 as per law, wherein it transpired that the assessee was in receipt of consulting and engineering services of Rs.120.58 Lacs from various entities. The said services were in the form of providing sketch diagrams and concept design criteria / assumptions bound in a report to support the*

*architectural design. This amount was already offered to tax and the same was accepted by the revenue.*

*3.3 It further transpired that the assessee was in receipt of cost recharge of Rs.516.60 Lacs from its Associated entity in India i.e. Buro India towards various costs incurred. The same was not offered to tax since as per assessee's submissions, these services did not make available any knowledge, skill, process, know-how and experience as per the terms of India-UK DTAA. These costs were stated to be incurred for the benefit of Buro Group as a whole and allocated to various group entities based on certain predetermined cost allocation keys as per the cost allocation agreement. These costs would, interalia, include costs incurred by the assessee in providing various services viz. IT functions, Business development, finance, Human Resource Management, operations, Project Management function, corporate and commercial services etc. It was submitted that these services would qualify as managerial services and hence not covered by Article 13 of India-UK DTAA. Even, if these services were considered to be technical or consultancy services, the same would still not be covered since these services do not make available any technical knowledge, experience, skill, know-how or processes to the recipient of service. Therefore, such services would be classified as business income and not taxable in India in the absence of Permanent Establishment (PE) in India as per Article-7 read with Article-5 of India-UK DTAA.*

*3.4 However, Ld. AO formed an opinion that the income earned by the assessee was taxable in India as per Section-9 of the Act and Article 13 of India-UK ITA No.834/Mum/2019 M/s. Buro Happold Limited 8 DTAA both s royalty as well as fees for technical services. Since, as per the agreement, the assessee was entitled for mark-up of 5%, the said receipts were enhanced to that extent and brought to tax.*

3.5 Aggrieved, the assessee raised objections against the proposed addition before Ld. DRP. The Ld. DRP, after considering assessee's submissions, confirmed the stand of Ld. AO by noticing that the services being rendered by the assessee were ancillary and subsidiary to the application or enjoyment of right of the assessee in brand used by the Buro-India and the payment was royalty in terms of para 3(a) of Article-13 of the treaty and therefore, its nature was that of fees for technical services. Aggrieved, the assessee is under appeal before us.

4. Upon perusal of earlier order of Tribunal in assessee's own case for AY 2012-13, it is evident that two issues were under consideration in the said appeal viz. (i) Taxability of Consulting & Engineering Services; (ii) the taxability of cost recharge which were stated to be ancillary and incidental to consulting & engineering services. The co-ordinate bench, in para-20, held that the amount received by the assessee on account of consulting & engineering services were to be treated as business profit and in the absence of assessee's PE in India, it could not be brought to tax. Consequently, the cost recharge which was considered to be ancillary and incidental to consulting & engineering services, was also held to be not taxable in the absence of assessee's PE in India. However, in the year before us, the assessee has already offered the consulting & engineering fees to tax which has been accepted by the revenue. Since we have admitted additional ground of appeal on this point, the issue of taxability of consulting & engineering services would go back to Ld. AO for adjudication. Therefore, logically, the issue of taxability of cost recharge, which has been treated as ancillary and incidental to consulting & engineering services, would also go back to Ld. AO for re-adjudication in the light of stand taken qua consulting & engineering services. Therefore, we deem it fit to restore both the grounds to the file of Ld. AO for re-adjudication denovo after affording reasonable opportunity of hearing to the assessee, who, in turn, is directed to substantiate his claim and demonstrate that the facts in AY 2012-13 and in the year consideration was identical. Needless

*to add that the adjudication shall be done keeping in view the decision rendered by the Tribunal in AY 2012-13.”*

*3.8. We admit the additional ground raised by the assessee as it goes to the root of the matter and by respectfully following the aforesaid judicial precedents in assessee"s own case for A.Y.2014-15, we restore the issue to the file of ld. AO for fresh adjudication as was directed by this Tribunal for A.Y.2014-15 in assessee"s own case. Accordingly, the ground No.1 of original ground of appeal and additional ground raised by the assessee are allowed for statistical purposes.*

7. In respect of ground of appeal No. 3, the Ld. AR submitted that DCIT has erroneously applied the tax rate @15% as per the India- UK DTAA instead of applying the beneficial rate @10.506%. The Ld.AR submitted that on the similar ground of appeal was raised in the earlier assessment year (A.Y) 2015-16 and the Hon'ble Tribunal has granted the relief. At this juncture, we considered it appropriate to refer the findings of the Honble ITAT at page 9 Para 4 to 4.1 of the order as under;

5. *The ground No.2 raised by the assessee is with regard to levy of surcharge and education cess on tax calculated at special rates under the DTAA.*

*4.1. We have heard rival submissions and we find that the issue in dispute is squarely allowed in favour of the assessee*

*by the Co-ordinate Bench decision of Hyderabad Tribunal in the case of RAK Ceramics UAE vs. DCIT International Taxation (2), Hyderabad reported in 104 Taxmann.com 380 dated 29/03/2019 wherein it was categorically held that surcharge and education cess could not be added to connotation „tax“ when the same is calculated as per DTAA. We find that the Hyderabad Tribunal while rendering this judgment had inturn placed reliance on the co-ordinate Bench decision of Kolkata Tribunal in the case of DIC Asia Pacific (Pte) Ltd., vs. Asst. DIT reported in 52 SOT 447 (Kol). No contrary decision was cited before us by the ld. DR in this regard and accordingly by respectfully following the aforesaid judicial president, the ground No.2 raised by the assessee is allowed*

8. The Ld. DR has accepted the present facts and the decision of the Honble Tribunal with respect to the transactions of taxability of amount received for consulting and engineering Services and also amount received as common cost recharge as Royalty and fees for technical services are restored to the file of the Assessing officer. The Ld. DR could not controvert the findings of the Honble Tribunal with the new information to take a different view. We respectfully follow the judicial precedence and restore the grounds of appeal no 1 & 2 with respect to the transactions of taxability of amount received for consulting and engineering Services and also amount received as common cost recharge treated as Royalty and fees for

technical services to the file of the A.O. for fresh adjudication on merits with the similar directions as in the earlier years.. Whereas, the ground of appeal on the tax rate applicability while computing tax payable, the disputed issue is allowed as in earlier years.

9. In the result, the assessee appeal is partly allowed for statistical purposes.

Order pronounced in the open court on 10.01.2022.

Sd/-  
(PRASHANT MAHARISHI)  
**ACCOUNTANT MEMBER**

Sd/-  
(PAVAN KUMAR GADALE)  
**JUDICIAL MEMBER**

Mumbai, Dated 10.01.2022

KRK, PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

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सत्यापित प्रति //True Copy//