

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DEHRADUN BENCH, DEHRADUN**

**Before Dr. B.R.R. Kumar, Accountant Member  
&  
Sh. Yogesh Kumar U.S., Judicial Member**

**ITA No.6710/Del/2017  
Assessment Year: 2014-15**

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| Solar Turbines International Company (Singapore Branch of Solar Turbines International Company, USA),<br>14 Tractor Road, Singapore,<br>C/o Delloitte Haskins & Sells LLP, Deloitte Centre Anchorage-II,<br>Richmond Road,<br>Bangalore. | Vs | DCIT,<br>Circle-2,<br>International Taxation,<br>Dehradun. |
| (APPELLANT)  |    | (RESPONDENT)   |
| <b>PAN No. AAJCS3585J</b>  |    |  |

**ITA No.441/Del/2018  
Assessment Year: 2014-15**

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| DCIT,<br>Circle-2,<br>International Taxation,<br>Dehradun. | Vs | Solar Turbines International Company (Singapore Branch of Solar Turbines International Company, USA),<br>14 Tractor Road, Singapore,<br>C/o Delloitte Haskins & Sells LLP,<br>Deloitte Centre Anchorage-II,<br>Richmond Road,<br>Bangalore. |
| (APPELLANT)  |    | (RESPONDENT)  |
| <b>PAN No. AAJCS3585J</b>                                  |    |   |

**Assessee by : None  
Revenue by : Shri T.S. Mapwal, Sr.DR**

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| <b>Date of Hearing: 28.04.2022</b> | <b>Date of Pronouncement: 29.04.2022</b> |
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**ORDER****Per Yogesh Kumar U.S., Judicial Member:**

The above captioned Cross Appeals have been filed by the Assessee as well as by the Revenue against the order of the Ld. Commissioner of Income Tax (Appeals)-II, Noida dated 04.06.2017 for the Assessment Year 2014-15. The grounds of appeal raised by the assessee are as under:

*Non-rectification of mistake apparent on record*

- a) *The learned Commissioner of Income-tax (Appeals) [‘CIT(A)’] erred in holding that when an issue is decided by passing a speaking order, such order cannot be modified.*
- b) *The learned CIT(A) erred in holding that the Appellant had not indicated any mistake apparent from record in the order dated 14 June 2017 despite the fact that the learned CIT(A) was apprised of the erroneous levy of surcharge and education cess on rates considered as per Double Taxation Avoidance Agreement (‘DTAA’) vide the rectification application.*
- c) *The learned CIT(A) erred in not appreciating that when a specific provision of the Income-tax Act, 1961 (‘the Act’) is not applied while passing an order, it constitutes a mistake apparent on record.*

d) *The learned CIT(A) therefore erred in concluding that the Appellant is seeking modification of the order in the garb of rectification without appreciating that provisions of section 90(2) of the Act providing for application of beneficial rate of tax as per DTAA had not been applied and hence constituted mistake apparent on record.*

e) *The learned CIT(A) erred in not upholding justice by adjudicating on merits of the rectification application.*

## *2 Erroneous levy of surcharge and education cess*

a) *The learned CIT(A) erred in upholding the levy of surcharge and education cess on income from troubleshooting services which is chargeable to tax at special rate of 15% as per India-USA Double Taxation Avoidance Agreement ('DTAA').*

b) *The learned CIT(A) erred in not appreciating that as per para 1 (b)(i) of Article 2 of India-USA DTAA, tax has been defined to cover income tax including any surcharge thereon.*

c) *The learned CIT(A) erred in not considering circular 728 dated 30 October 1995 which provides for application of rates as per DTAA or the relevant Finance Act whichever is beneficial to the assessee.*

*d) The learned CIT(A) erred in not following the binding decision of the jurisdictional Honourable Income Tax Appellate Tribunal, Delhi in the case of OSRAM India Pvt. Ltd. vs. DCIT, CPC-TDS [ITA 4052/Del/2015.*

2. The assessee has raised the issue of levy of surcharge and education cess. This issue is no longer *res integra* as amended involved to the clarification has been brought in the memorandum explaining the provisions in the Finance Bill, 2022 wherein it was clarified that the deduction for taxes paid as cess cannot be allowed as a deduction.

3. In this regard, we have examined the judgments of various Hon'ble High Courts and Hon'ble Apex Court and provisions of the Act.

4. Section 2(43) of the Income-tax Act, 1961 (ITA) defines the term 'tax' as under:

*"tax".... means income-tax chargeable under the provisions of this Act, and in relation to any other assessment year income-tax and super-tax chargeable under the provisions of this Act....; "*

*Also, Section 40 of the ITA reads as follows:*

*"Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head PGBP-*

*....(ii) any sum paid on account of any rate or tax levied on the profits or gains of any business or profession..."*

5. In addition, Section 43B of the ITA provides that certain sum to be allowed on actual payment basis. Clause (a) of the said section covers tax, duty, cess or fee. Thus, it can be said that cess should be allowed in year in which it is paid.

6. The assessee pleads that Health and Education Cess levied on income-tax should be allowed as a deduction while calculating the total income-tax payable, since the cess is a levy which is separate, and in addition to tax payable and is not 'income tax' in itself. However, the Revenue Authorities took a contrary view that the term 'education cess' is covered within the meaning of 'tax' as mentioned in Section 40(a)(ii) of ITA, and should accordingly not be allowed as a deduction.

7. The Hon'ble Bombay High Court and the Hon'ble Rajasthan High Court have given favourable judgements by relying on the CBDT Circular dated 18 May 1967. Several Income-tax Appellate Tribunals (ITAT) of different jurisdictions have relied on the above two judgements and have allowed deduction on payment of "Cess".

8. The relevant part of the CBDT circular is reproduced below:

*Clause 40(a)(ii) of the IT Bill, 1961 as introduced in the Parliament stood as under:*

*"(ii) any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains".*

*When the matter came up before the Select Committee, it was decided to omit the word 'cess' from the clause. The effect of the omission of the word 'cess' is that only taxes paid are to be disallowed in the assessments for the year 1962-63 and onwards.*

9. On the other hand, the Kolkata ITAT has delivered a judgment in the favour of revenue by relying on the Hon'ble Supreme Court's in the case of K. Srinivasan, 83 ITR 346 held that surcharge or "additional tax" would be included within the meaning of income- tax. The Finance Act, 2004 through which education cess was introduced, describes education cess as an additional surcharge levied to finance the Government's commitment to universalise quality basic education. As per the provisions of Finance Act, 2011, the amount of income-tax as increased by the applicable surcharge, shall be further increased by an additional surcharge, to be called the "Education Cess on income-tax", calculated at the rate of 2% of such income-tax and surcharge.

10. Accordingly, the Kolkata ITAT held that "A perusal of the provisions of the Finance Act 2004 and Finance Act 2011 would show that it has been specifically provided that 'education cess' is an additional surcharge levied on the income-tax. The same have not been brought into the knowledge of the Hon'ble High Courts in the cases of "Sesa Goa Ltd" & "Chambal Fertilisers (supra). Following the judgement of the apex Court in case of K. Srinivasan (supra) has held that surcharge and additional surcharge are part of the income-tax. And accordingly not eligible for deduction."

11. We have gone through the memorandum to the Finance Bill, 2022. As per the memorandum to the Finance bill 2022, the Circular needs to read in the context that it does not specifically refer to the 'cess' imposed by the Central Government. Hence, cess and surcharge are actually a tax levied in the form of surcharge and cess. The relevant extracts are reproduced below:

***"....This CBDT circular needs to be seen from the perspective that "Education Cess" imposed by Finance Act 2004 and subsequent Acts and then designated as "Education and Health Cess" are actually tax in the form of additional surcharge, as stated clearly in each of the relevant Finance Act***

*imposing such "Cess". It is only called "Cess" since they were imposed for a particular purpose of fulfilling the commitment of the Government to provide and finance quality health services and universalized quality basic education and secondary and higher education."*

12. Further the memorandum has also provided its views on the Judicial applicability of the Bombay and Rajasthan FICs in case of Sesa Goa Ltd" & "Chambal Fertilisers. It relied upon the judgment of the Apex Court in case of K. Srinivasan (supra) would prevail.

13. In order to give finality to this issue, the Finance Act 2022 has been passed to retrospectively insert an Explanation, which clarifies that education cess is not an allowable expenditure while computing profits and gains from business or profession. This implies that the amendment will take effect retrospectively from the Assessment Year (AY) 2005-06.

14. Since the matter has attained finality even after considering the provision of DTAA, we hereby hold that the grounds taken by the assessee are liable to be dismissed.

**ITA No.441/Del/2018 (Revenue's Appeal)**

15. The grounds raised by the Revenue are as under:

*“(i) Whether on the facts and in law, the CIT(A) has erred in holding that the receipts on account of supply of overhauled equipment (turbine/gas producer assembly Taurus 60) are not taxable in India by ignoring the crucial fact that the assessee is providing services (commissioning, start-up and installation) for the same equipment in India.*

*(ii) Whether on the facts and in law, the CIT(A) has erred in not considering the fact that the sale of equipment (turbine/gas producer assembly Taurus 60) and the services (commissioning, start-up and installation) provided by the assessee are inextricably related and form integral part of composite services.*

*(iii) Whether on the facts and in law, the CIT(A) has erred in not considering the fact that the provision of services are in respect of the equipment supplied and cannot be viewed as independent transactions and the inter relationship of supply of equipment and services thereof cannot be diverged.*

*(iv) Whether on the facts and in law, the CIT(A) has erred in not considering that the dominant intent of the parties was not to merely provide Service or merely sell the equipment but was to set up/establish the turbine rotor/gas producer assembly for power generation on similar lines of a turnkey project.*

*(v) Whether on the facts and in law, the CIT(A) has erred in not considering that the risk & title to goods passed in India and the place where such risk of title passed is secondary to the contract as the dominant intention is set up of the power generation unit.*

*(vi) The appellant prays for leave to add, amend, modify or alter any grounds of appeal at the time of or before the hearing of the appeal.”*

16. The excerpts from the order of the Ld. CIT(A) are as under:

*“5.1 Brief facts of the case on this issue are that during the relevant previous year the assessee in its computation of income filed with return had shown certain receipts in respect as overhauling services. In regard to the receipts from overhauling services with respect to the contracts with four companies were accepted by the assessing officer. However receipts of Rs.4,58,33,000/ from one SI Group India Ltd was not accepted by the assessing officer as revenue from overhauling services. It was found during the assessment proceedings that there was a purchase order placed by SI Group India Ltd to the appellant for sale and supply of turbine/gas producer assembly Taurus 60. It was submitted by the appellant that as per the purchase order, the company is required to provide turbine/gas producer assembly Taurus 60 and gearbox which is an equipment for which the company has*

*carried out the overhauling activity. It was admitted by the appellant that this equipment was provided in exchange of similar equipment used by SI group. The value of the old equipment provided by SI group was considered as a buyback against the overhauled equipment provided by the company. The net amount (price of ordered equipment minus price of old equipment considered as buyback) which pertains to the equipment supplied by the company (as per purchase order) is considered as income from overhauling services performed by the appellant. Further, the receipts from alleged overhauling services was claimed as not taxable by virtue of article 12 of India USA double taxation avoidance treaty. The appellant claims that these services do not “make available” any technical knowledge, experience or expertise to the customers. Alternatively, it is claimed by the appellant, that even if the receipt is not treated as received for overhauling services and treated as sale of goods, then the same shall not be taxable in India since the delivery of equipment has taken place in USA under an ex-works arrangement.*

*5.2 It was held by the Assessing Officer that the receipts under this contract cannot be considered as overhauling revenues. It is also observed by the assessing officer that there is no evidence either in respect of the claim that the equipment was provided in exchange of similar equipment used by SI group. The assessing officer did*

*not accept the claim of the appellant that the risk over the goods was passed outside India and the sale is concluded outside India when the installation and commissioning and start-up of power generator set supplied was carried out in India. The assessing officer therefore held that the overhauling receipts are on account of sale of equipment and the sale was concluded in India. Accordingly the revenues earned on such sale was held to be chargeable as per the provision of section 9(1) of the Act and 25% of gross receipts in respect of such sale was considered as profit and an addition of Rs.1,14,58,250/- was added to the total income of the appellant.”*

17. On perusal of the purchase order, provided by the appellant as Annexure-3 of the submission, it is found by the ld. CIT(A) that the SI group Ltd. had placed an order of supply of accessories that is turbine rotor/gas producer assembly Taurus 60 - T 7001 for power generation set 7001. The total value of such purchased was US \$ 1475452. Against this amount, the cost of buyback of accessories of the Similar equipment amounting to US \$ 625452 was reduced and a net amount of US \$ 850000 was to be paid to the appellant company by SI group Ltd. On examination of the purchase order, invoices, airway bill and other documents it is found by the ld. CIT(A) that the relevant product is altogether a separate equipment produced by the appellant company in its manufacturing unit located at USA. The appellant has tried to show it as overhauling receipts

just to take the benefit of article 12 of India USA DTAA by relying upon the make available clause. The appellant company is producing this equipment in its plant and selling the same to its clients. In the present case, SI group Ltd has been using a similar equipment and has ordered another one from the appellant company. It would always be beneficial to the buyer to get some value against the similar old equipment. Hence, the purchase order placed for the new equipment to the appellant company contained clauses in regard to buying of the old equipment (nomenclature used in the purchase order as buyback of accessories). Against the total value of purchase order of US \$1475452, amount equivalent to buyback of accessories for US \$ 625452 was reduced and a net amount of US \$ 850000 was paid to the appellant company by SI group Ltd.

18. Ld. CIT(A) held that it is not a case that the old equipment was shipped to the premise of the appellant company for overhauling purposes. A purchase order for supply of new equipment was placed to the appellant company and all the documents of shipping, insurance, airway bill etc confirm that after receiving a purchase order from SI group Ltd the appellant company has manufactured the items for shipping the same to the premise of SI group Ltd in India. There is no evidence on record which suggests that the old equipment was sent to the appellant company for overhauling purposes. Even the buyback of accessories, against which SI group Ltd has got certain discount from the appellant company, can be considered as a separate sale

transaction. However, the issue here is to examine whether the purchase order was made for buying a new "Z" equipment at all or it was on account of providing overhauling services to the old equipment of SI group Ltd. On examination of all the relevant documents produced in Z this regard it is evident enough that the supply of accessories Taurus 60 is nothing but a sale transaction only. In view of the above discussion, the assessing officer has correctly held that the relevant revenue receipt is on account of sale only.

19. On the issue whether such income on account of sale of goods is taxable in India or not. It was submitted by the appellant that even if the income is treated as sale of goods, the same shall not be taxable in India since the delivery of equipment has taken place in USA under an "ex-works" arrangement. The appellant has relied upon the 'Inco Terms Rules 2010' wherein 'Ex-works' means "that the seller delivers the goods to the carrier or another person nominated by the buyer at the seller's premises or another named place. The parties are well advised to specify as clearly as possible the point within the named place of delivery, as the risk passes to the buyer at that point. "

20. On examination of the purchase order, the airway bill and the invoice, it was found that the freight terms are ex-works, USA. It is evident that the delivery of the s' equipment was concluded in USA itself and thereby the risk to the equipment passes to the buyer in USA. It is further observed from the purchase order that charges in relation to

the equipment transported are borne by SI group Ltd only. From the content of the purchase order and copies of the airway bill etc. it is clear that the entire work related to production of the equipment was done outside the territory of India. Sale was affected outside India and the consideration was also received outside India in foreign currency. Such manufacturing of the product in the factory of the appellant company in USA, the revenue on account of supply of such product to one of the buyer in India is in the nature of business income only. On perusal of the documents 'Z' it is clear that the equipment was directly sold by the appellant company on ex-works basis and the title of the equipment was transferred outside India before it reaches the / premise of the buyer in India. Payments were made through irrevocable letter of credit / and the buyer SI group Ltd is an independent and unrelated party and purchased the equipment from the appellant company on its own account. The purchase order was placed on a principle to principle basis.

21. In view of the above discussion, ld. CIT(A) held that the receipts on account of supply of equipment Taurus 60 and other accessories cannot be taxed in India as all the activities in relation to manufacturing of the equipment took place outside India. The sale of equipment took place outside India on a principle to principle basis. The customer is an independent party who made purchase on its own-account. The transaction is at arm's length and the consideration is also received outside India in foreign currency.

22. The assessing officer has considered this sale as concluded in India on the basis that the commissioning, start up and installation activities were carried out by the technicians/engineers of the applicant company in the premise of the buyer in India. It is submitted by the appellant that though the appellant had also supervised turbine change out for SI group, the service is a distinguished service from the overhauling services and hence does not form part of the alleged overhauling services rendered to SI group. It was also submitted that the receipts from such service has been offered to tax as troubleshooting services on gross basis at the rate of 10.506%. In this regard an invoice, as per annexure 9 of the submission dated 12.05.2017, was also submitted. Vide this invoice the appellant submits that the purchase order no. 1202517 in regard to troubleshooting services is separate from the purchase order towards the overhauling services which was 120518. The appellant submits that these services were under different contracts and that the contention of the assessing officer that the installation and commissioning and start-up of power generator set is through the contract of equipment purchase is erroneous.

23. On perusal of the purchase order 1202517, Ld. CIT(A) found that the invoice total of US \$ 15,189.03 is in regard to certain services wherein rates of regular man-hours and overtime man-hours are prescribed. It is not clear from the said invoice that the same is for any specific troubleshooting services. Without taking into account the invoice furnished

by the appellant in support of the receipts of troubleshooting services, it has to be examined that whether by providing installation and commissioning by the technicians /engineers of the appellant company, the sale of equipment can be considered as concluded in India.

24. The purchase order in regard to supply of Taurus 60 and other accessories do not mention about any services in regard to installation and commissioning to be provided by the appellant company. No separate price for such services is quoted in the purchase order. The only basis for the assessing officer for concluding that the sale of equipment is concluded in India is that the appellant has admitted that it has supervised the turbine change out in India. As it is held in paragraphs above that the receipts on account of supply of equipment Taurus 60 and other accessories cannot be taxed in India as all the activities in relation to manufacturing of the equipment took place outside India and sale was carried out on a principle to principle basis. The transaction was at arm's length and the consideration is also received outside India in foreign currency.

25. The Apex Court in the judgment in the case of Ishikawajima Harima([2007] 288 ITR 408 (SC))held that Section 9 raised a legal fiction, but having regard to the contextual interpretation and in view of the fact it is a taxation statute the legal fiction must be construed having regard to the object it seeks to achieve. Pursuant to the above observations, the Apex Court held that: "Territorial

nexus doctrine, thus, plays an important part in assessment of tax. Tax is levied on one transaction where the operations which may give rise to income may take place partly in one territory and partly in another. The question which would fall for our consideration is as to whether the income that arises out of the said transaction would be required to be proportioned to each of the territories or not.

26. Income arising out of operation in more than one jurisdiction would have territorial nexus with each of the jurisdiction on actual basis. If that be so, it may not be correct to contend that the entire income 'accrues or arises' in each of the jurisdiction. The Authority has proceeded on the basis that supplies in question had taken place offshore. It, however, has rendered, its opinion on the premise that offshore supplies or offshore services were intimately connected with the turnkey project. ”

27. Thus, as held by the Apex Court, where income arises out of operations performed in more than one jurisdiction, then it has a nexus with each of the jurisdictions and no one state can exercise its right to tax the income which has not arisen in that state. Accordingly, only that part of the work which is attributable to business operations carried out by the Appellant in India is taxable in India. In the present case, therefore, at the most the supervisory services for installation and commissioning etc., provided in India at the premises of the buyer, can be considered to be taxed in India.

28. The appellant had submitted during the assessment proceeding that it had offered tax on such services (Installation, commissioning and supervision) on gross basis at the rate of 10.506% u/s 115A of the Act. The assessing officer has not disputed this fact in the assessment order. He has not made any separate addition on this account. The only addition made by the assessing officer is of Rs.1,14,58,250/, on account of sale of the machine to SI Group-India Ltd.

29. In view of the above discussion, it was, therefore, held that the receipts on account of supply/sale of equipment Taurus 60 and other accessories cannot be taxed in India as all the activities in relation to manufacturing of the equipment took place outside India. The services rendered by the personnel of the appellant company for the purpose of installation and commissioning of the turbine has accrued in India and therefore taxable in India. Hence, the addition of Rs.1,14,58,250/is deleted. Ground of appeal No.1 is allowed.

30. No contrary material could be brought before us. Hence, we have no hesitation in affirming the well-reasoned order of the Ld. CIT(A).

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

Order Pronounced in the Open Court on 29/04/2022.

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**Dated: 29/04/2022**

*\*Prabhat, Sr. PS\**

Sd/-

**(YOGESH KUMAR U.S.)**  
**Judicial Member**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**ASSISTANT REGISTRAR**