

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH KOLKATA

आयकर अपीलिय अधीकरण, न्यायपीठ “C” कोलकाता,

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER****ITA No.2356/Kol/2019
Assessment Year: 2016-17**

Outotec (Finland) OY C/o Outotec India Pvt. Ltd. 12 th Floor, South City Pinnacle, Plot No. XI, Block-EP, Sector-V, Salt Lake, Kolkata-700091 (PAN: AABCO9366P)	Vs.	Deputy Commissioner of Income-tax (International Taxation), Circle-2(1), Kolkata.
(Appellant)		(Respondent)

Present for:Appellant by : Shri K. M. Gupta, AR
Respondent by : Shri Gaurav Kanaujia, CIT, DRDate of Hearing : 18.08.2022
Date of Pronouncement : 18.10.2022**ORDER****PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:**

This appeal filed by the assessee is against the order of Ld. DCIT, (International Taxation), Circle-2(1), Kolkata vide Order No. ITBA/AST/S/143(3)/2019-20/1017544064(1) dated 23.08.2019 passed against the order of the Dispute Resolution Panel-2, New Delhi u/s. 144C(5) r.w.s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) dated 19.07.2019.

2. Grounds of appeal raised by the assessee are reproduced as under:

“1. That on the facts and in the circumstances of the case and in law, the order passed by the Ld. Deputy Commissioner of Income Tax ("Ld. AO") under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 ("the Act") is bad in law. .

2. Taxability of income earned from testing and other services

2:1. That on the facts and in the circumstances of the case and in law, Ld. AO/DRP erred in holding that the income earned from testing and other services is taxable in India under the provisions of Article 12 of the India-Finland DTAA .

2.2. That on the facts and in the circumstances of the case and in law, Ld. AO/DRP erred in not appreciating the contention that income earned from testing and other services performed entirely in Finland would not be taxable in India in view of the provisions of Article 12 of the India-Finland DTAA.

2.3. That on the facts and in the circumstances of the case and in law, Ld. AO/DRP erred in holding that the income earned from testing and other services in Finland is taxable in India because the result of testing was used by customers in India.

3. Levy of surcharge and education cess

3.1. That on the facts and in the circumstances of the case and in law, Ld. AO erred in levying surcharge and education cess on the tax computed at the special rate provided under the provisions of Article 12 of the India-Finland DTAA.

4. Levy of interest u/s. 234B of the Act

4.1 That on the facts and in the circumstances of the case and in law, Ld. AO erred in levying interest under Section 234B of the Act.

5. That the appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal.”

3. Brief facts of the case are that assessee is incorporated in Finland and is a tax resident of the same. Assessee is a worldwide leader in providing innovative and environmentally sound solutions for a wide range of customers in metals processing industries. During the year under consideration, with regard to Indian projects, assessee has earned revenue from –

- (i) rendition of technical services (Rs.5,21,510/- revised before the ld. AO to Rs.16,63,030/-)
- (ii) testing and other services (Rs.6,15,75,326/- from Hindustan Copper Ltd) and
- (iii) sale of spares.

4 In the course of assessment proceedings, Ld. AO treated amounts received from Hindustan Copper Ltd on account of testing and other services in the sum of ₹ 6,13,64,084 as income from fees for technical services (FTS) on the basis of terms and conditions extracted from the contract of the assessee with Hindustan copper Ltd for hydro-metallurgical test and laboratory analysis test. On this treatment by the Ld. AO, assessee contended that these tests were conducted in the laboratory of assessee in Finland without any employees of the assessee visiting India to render such services and hence the income could not be taxed in India in view of the India – Finland Double Taxation avoidance Agreement (DTAA).

5. Ld. AO passed the draft order under section 144C of the Act dated 20.20.2018 proposing to tax income from testing and other services at the rate of 10% on the gross basis. Assessee raised objection before the Ld. DRP on the proposal of the Ld. AO.

6. Ld. DRP issued its directions by its order under section 144C of the Act dated 19.07.2019 wherein it noted that identical issue was considered by the DRP in assessee's own case for AY 2015-16 as under:-

“3.2 Having considered the submissions of the assessee, we find that the materials for testing were sent to the assessee's laboratories for analysis and testing the quality of the material in connection with the materials and equipment is to be used for construction and erection of the plants. There is no dispute that in laboratories test and related analytical services are based on technical expertise of the personnel/employee of the assessee working in assessee's laboratories. For the payment of fees for technical services, it is not necessary that the non-resident services provider must have PE or that the services have to be rendered in India. This issue has been discussed at length in para 2 above, while deciding the taxability of payments for designs and drawings.

3.3 In view of the above, assessee's objection is not sustainable and AO's action is upheld.”

7. Ld. DRP also noted the fact that Hon'ble ITAT, Kolkata Bench has considered the issue of taxability of testing services as FTS in assessee's

own case for AY 2015-16 in ITA No. 2601/Kol/2018, reported in TS-311-ITAT-2019(Kol). The relevant extract of the ITAT order is reproduced below:

“18. On the issue of taxability of income from testing and other services, the undisputed fact is that these services were rendered outside the country i.e. in Finland. Article 12(5) of the India Finland DTAA reads as follows.

“5. Royalties or fees for technical services shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority or a resident of that State. Where, however, the right or property for which the royalties are paid is used within a Contracting State or the fees for technical services relate to services performed, within a Contracting State, then such royalties or fees for technical services shall be deemed to arise in the State in which the right or property is used or the services are performed. Where, however, the person paying the royalties or fees for technical services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties or fees for technical services was incurred, and such royalties or fees for technical services are borne by such permanent establishment or fixed base, then such royalties or fees for technical services shall be deemed to arise in the State in which the permanent establishment or fixed base is situated. ” [Emphasis ours]

19. The first sentence of this Clause lays down that the royalties or fees for technical services shall be deemed to arise in a Contracting State where the payer is located. In cases where the right of property, for which royalty was paid is used within a contracting state or a case where the fees for technical services relate to services were performed within a contracting state, then the income shall be deemed to arise in the state in which the right of property is used or the state in which the services were performed. The third limb relates to the case where there is a permanent establishment which is not relevant in our case.

20. In the case on hand, the income in question becomes taxable as royalty or fees for technical services, is deemed to arise in the contracting state where the payer is a resident of that contracting state, which is in India, in our case.

21. The income, in question, is also taxable in India as the right or property for which the royalty was paid, is used within India and hence, it is deemed to arise in India, i.e. the state in which the right or property is used.

22. The assessee argues that the technical services of testing is performed outside the country, i.e. in Finland and hence cannot be taxed in India in view of the exception carved out to Article 12(5) of the India-Finland DTAA. The exception in question is, when the fees is paid for technical services which are performed within a contracting state, then the income therefrom is deemed to accrue or arise within the state in which the services were performed. In our view, this Clause does not apply as the payment in question was made for the test results which were used within the contracting state, India. It may be true that the process of testing may have been conducted outside India. But the payment in question is not for the process but was for the results of testing which is used in India. The argument of the Ld. D/R that these services were availed in India and hence are taxable in India has to be upheld. Hence, we

agree with the finding of the Assessing Officer as upheld by the DRP on this issue. In the result, this ground of the assessee is dismissed.”

8. In the course of hearing before us, Ld. Counsel of the assessee, Shri K.M. Gupta fairly accepted that issue raised on the taxability of income earned from testing and other services vide ground no. 2.1 to 2.3 are covered against the assessee by the order of coordinate bench of ITAT Kolkata in assessee's own case for the immediately preceding AY 2015-16 in ITA No. 2601/Kol/2018 as quoted by the Ld. DRP in its order.

9. Considering the factual matrix in the present case before us which are identical to what is dealt by the coordinate bench of ITAT Kolkata in assessee's own case for AY 2015-16 (supra) and the detailed finding given thereon, we find no reason to take a divergent view on the identical issue. Accordingly, this ground of the assessee is dismissed.

10. In ground no.3, assessee has raised the issue of levy of surcharge and education cess on the tax computed at the special rate provided under the provisions of Article 12 of the India – Finland DTAA.

11. Ld. Counsel for the assessee referred to surcharge of ₹1,26,054/- and education cess of ₹1,92,863/- levied on the tax payable by the assessee as mentioned in computation sheet issued by the Ld. AO. He submitted that surcharge and education cess cannot be levied in respect of tax liability under India – Finland DTAA. It was stated by the Ld. Counsel that income which is brought to tax under Article 12 of the treaty in the assessee's case is taxable at the rate prescribed which is 10%.

12. Ld. Counsel referred to the decision of coordinate bench of ITAT Kolkata in the case of DIC Asia-Pacific Pte Ltd. v. ADIT, Int'l Taxation [2012] 22 taxmann.com 310 (Kol) wherein this issue was dealt in respect of India – Singapore DTAA and it was held that education cess cannot be levied in

respect of tax liability of assessee company which was a company incorporated under the laws of Singapore. It was submitted that relevant Articles 1, 2 and 12 of India – Singapore DTAA are similar to Articles 3,4 and Article 12 of India – Finland DTAA and covers the issue in hand of the assessee in its favour.

13. Per contra, Ld. CIT, DR strongly opposed the submissions made by the Ld. Counsel and contended that the purpose of Double Taxation Avoidance Agreement is to avoid double taxation. When the income is subjected to tax from India perspective, the surcharge and education cess as applicable under the Act on the tax payable by the assessee is to be levied, which has been rightly so done by the Ld. AO.

14. We have heard the rival contentions and perused the decision referred by the Ld. Counsel in the case of DIC Asia-Pacific Pte Ltd (supra) by the coordinate bench of ITAT Kolkata. We find that in the said decision, coordinate bench has dealt with the same issue as before us relating to levy of surcharge and education cess on the tax payable by the assessee under DTAA. The relevant extract from the said decision are reproduced as under:

“5. We find that the provisions of Articles 2, 11 and 12, which are relevant for our present purposes, are as follows:

ARTICLE 2 : TAXES COVERED

1. The taxes to which this Agreement shall apply are :

(a) in India

income-tax including any surcharge thereon (hereinafter referred to as “Indian tax”) ;

(b) in Singapore :

the income-tax (hereinafter referred to as “Singapore tax”).

2. The Agreement shall also apply to any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of the present Agreement in addition to, or in place of, the taxes referred to in paragraph 1. The competent authorities of the Contracting States shall notify each other of any substantial changes which are made in their respective taxation laws.

ARTICLE 11 : INTEREST

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such interest may also be taxed in the Contracting State in which it arises, and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed :

(a) 10 per cent of the gross amount of the interest if such interest is paid on a loan granted by a bank carrying on a bona fide banking business or by a similar financial institution (including an insurance company) ;

(b) 15 per cent of the gross amount of the interest in all other cases.

(remaining portion of this article is not relevant for the present purposes)

ARTICLE 12 : ROYALTIES AND FEES FOR TECHNICAL SERVICES –

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that Contracting State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10 per cent.

(remaining portion of this article is not relevant for the present purposes)

6. A plain reading of these provisions show that while interest and royalties can indeed be taxed in the source state, the tax so charged on the same, under Article 11 and 12, cannot exceed 15% and 10% respectively. The expression 'tax' is defined in Article 2(1) to include S.I.T .A. No .: 1 4 5 8 / Ko l/2 0 1 1 As s e s s m e n t y e a r : 2 0 0 9 -1 0 Page 4 of 5 'income tax' and is stated to include 'surcharge' thereon, so far as India is concerned. Article 2(2) further extends the scope of the 'tax' by laying down that it shall also cover "any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of the present Agreement in addition to, or in place of, the taxes referred to in paragraph 1".

7. We find that education cess was introduced in India by the Finance Act, 2004, and Section 2(11) of the Finance Act 2004 described it as follows:

(11) The amount of income-tax as specified in subsections (4) to (10) and as increased by a surcharge for purposes of the Union calculated in the manner provided therein, shall be further increased by an additional surcharge for purposes of the Union, to be called the "Education Cess on income-tax", so as to fulfil the commitment of the Government to provide and finance universalised quality basic education, calculated at the rate of two per cent of such income -tax and surcharge. (emphasis by underlining supplied by us)

8. It is thus clear that the education cess, as introduced in India initially in 2004, was nothing but in the nature of an additional surcharge. It was described as such in the Finance Act introducing the said cess.

9. We have also noted that Article 2(1) of the applicable tax treaty provides that the taxes covered shall include tax and surcharge thereon. Once we come to the conclusion that education cess is nothing but an additional surcharge, it is only corollary there to that the education cess will also be covered by the scope of Article

2. Accordingly, the provisions of Article 11 and 12 must find precedence over the provisions of the Income Tax Act and restrict the taxability, whether in respect of income tax or surcharge or additional surcharge – whatever name called, at rates specified in the respective article. In any case, education cess was introduced by the Finance Act 2004, with effect from assessment year 2005-06 which was much after the signing of India Singapore tax treaty on 24th January 1994. In view of the specific provisions to the effect that the scope of Article 2 shall also cover “any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of the present Agreement in addition to, or in place of the taxes referred to in paragraph 1”, and in view of the fact that education cess is essentially of the same nature as surcharge, being an additional surcharge, the scope of article 2 also extends to the education cess.

10. For the reasons set out above, we are of the considered view that the education cess cannot indeed be levied in respect of tax liability of the appellant company. The assessee, therefore, deserves to succeed on this issue.

11. In the result, the appeal is allowed in the terms indicated above. It was so pronounced in the open court immediately upon conclusion of the hearing.”

15. The relevant articles 3 and 4 from the India – Finland DTAA are also reproduced hereunder:

“3. The existing taxes to which the Agreement shall apply are:-

(a) In Finland,

(i) the State Income-taxes (valtion tuloverot; de statliga inkomstskatterna);

(ii) the corporate Income-tax (yhteisöjen tulovero; inkomstskatten för samfund);

(iii) the communal tax (kunnallisvero; kommunalskatten);

(iv) the church tax (kirkollisvero; kyrkoskatten);

(v) the tax withheld at source from interest (korkotulon lahdevero; källskatten på ranteinkmost); and the tax withheld at source from non residents’ income (rajoitetusti verovelvollisen lahdevero; källskatten för

(vi) begränsat skattskyldig); (hereinafter referred to as “Finish tax”);

(b) in India, the income-tax, including any surcharge thereon; (hereinafter referred to as “Indian tax”)

4. The Agreement shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the

Agreement in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their respective taxation laws.”

16. From the above, we note that relevant articles in the two treaties of India – Singapore and India – Finland bear similarity and the findings given as recorded by ITAT Kolkata in the case of DIC Asia-Pacific Pte Ltd (supra) are applicable in the present case. Thus, for the reasons set out in the said decision, we are of the view that surcharge and education cess cannot be levied in respect of tax liability of the assessee under DTAA. Accordingly, groundno. 3 of the assessee is allowed.

17. Ground no. 4 taken by the assessee is in respect of levy of interest under section 234B of the Act which is consequential in nature and hence does not need a specific adjudication. Also, ground no. 1 is general in nature which is not adjudicated upon.

18. In the result appeal of the assessee is partly allowed.

Order is pronounced in the open court on 18th October, 2022.

Sd/-

Sd/-

(RAJPAL YADAV)
VICE PRESIDENT

(GIRISH AGRAWAL)
ACCOUNTANT MEMBER

Dated: 18.10.2022

JD, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent:.
3. The ACIT, Circle-2(1), IT, Kolkata
4. DRP-2, New Delhi.
5. The DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata