IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

आयकर अपीलीय अधीकरण, न्यायपीठ **"C"** कोलकाता,

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA Nos.350 & 351/Kol/2022
Assessment Years: 2018-19 & 2019-20

Outotec (Finland) OY C/o Outotec India Pvt. Ltd. 12th 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 G. HukughaSema, CIT, DR

Date of Hearing : 19.02.2023
Date of Pronouncement : 28.02.2023

O R D E R

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

These two appeals filed by the assessee are against the order of Ld. DCIT, (International Taxation), Circle-2(1), Kolkata vide Order No. ITBA/AST/M/143(3)/2021-22/1039165651(1) and ITBA/AST/M/144C/2021-22/1036056564(1) dated 28.01.2022 30.09.2021 respectively, 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 10.01.2022 & 28.02.2022, respectively, for the two assessment years, viz. AY 2018-19 and AY 2019-20.

2. Ground no. 2 and 3 in both the appeals are common except for variation in amounts. A separate ground is taken vide ground no. 4 in ITA 351/Kol/2022 for AY 2019-20. Both the appeals are disposed off by this consolidated order.

2.1. First, we shall take up the appeal vide ITA No. 350/Kol/2022 for AY 2018-19.Grounds of appeal raised by the assessee in ITA 350/Kol/2022 for AY 2018-19 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. <u>Taxability of income earned from testing and other services</u>

a. 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 he India-Finland DTAA .

b. That on the facts and circumstances of the case and in law, the Ld. A.O passed the draft order without giving the assessee and adequate opportunity of being heard on this issue which is against the principles of natural justice.

c. 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.

d. 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.<u>Taxability of income from supply of design and drawings</u>

a. That on the facts and in the circumstances of the case and in law, Ld. AO/DRP erred in holding that the income earned by the assessee from sale of design and drawings is in the nature of fees for technical services (FTS)/royalty, and is taxable on gross basis on gross basis as per the provisions of the Act and Article 12 of India-Finland Double Taxation Avoidance Agreement (DTAA).

b. That on the facts and in the circumstances of the case and in law, Ld. AO/DRP erred in holding that the sale of designs and drawings by the assessee is not in the nature of sale of goods and the corresponding

income does not constitute business profits of the assessee, not taxable in India in the absence of any Permanent Establishment (PE) of the assessee in India.

c. *That Ld. AO/DRP erred in not appreciating the decision of the Hon'ble Kolkata Tribunal in the case of assessee's group company, Outotec Gmb H, for earlier year, wherein on similar facts, it was held that the sale of designs and drawings is in the nature of sale of goods, and thus, not taxable in India.*

d. *That on the facts and in the circumstances of the case and in law and without prejudice to ground no. 3(a) and 3(b), the Ld. AO/DRP erred in not appreciating the fact that, even if the supply of designs & Drawings is considered to be a service, these services being rendered outside India would not be taxable in light of the provision of Article 12 of the DTAA.*

4. Initiation of penalty under Section 270A of the Act

a. *That on the facts and in the circumstances of the case and in law, Ld. AO erred in proposing to initiate penalty under Section 270A of the Act.*

5.Initiation of penalty under Section 271A and 271B of the Act

a. *That on the facts and in the circumstances of the case and in law, Ld. AO erred in proposing to initiate penalty under Section 271A and 271B of the Act.*

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, tabulated as under, for which return of income was filed –

Description	Income (Rs.)	Rate of Tax
Income from Technical Service	83,95,883/-	@10%
Income from Royalty	2,35,540/-	@10%

4. In the course of assessment proceedings, Ld. AO treated revenue of Rs.65,14,664/- on account of testing and other services provided by the assessee to Outotec India Pvt Ltd, Hindustan Zinc Ltd, etc. as income from fees for technical services (FTS) on the basis of scope of work extracted

from the contract of the assessee with Hindustan Zinc Ltd for Graphite Pre Float& Flash Float Study of RAM Ore Type to Maximize Metal Recoveries. On this treatment by the Ld. AO, assessee contended that these tests were conducted 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). Thus, on the issue of income from rendering of testing and other services, assessee company relies on Article 12(5) of the India-Finland DTAA and that the services, in question, had been rendered outside India, it claimed that the same is not taxable in India.

4.1. Further, ld. AO noted that assessee has provided Design and Drawing to Indian customers during the year under consideration for which revenue raised amounts to Rs.4,81,87,121/-. In this respect, case of assessee is that income from sale of designs and drawings is a sale of copyrighted article and the income derived therefrom is business income and as the assessee does not have a permanent establishment in India, business profits from these sale transactions are not taxable in India.

5. Ld. AO passed the draft of the proposed order of assessment u/s 144C of the Act dated 09.04.2021 proposing to tax income from testing and other services and supply of design and drawings as stated above. 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 10.01.2022 wherein it noted that identical issue on taxability of income from testing and other services was considered by the DRP in assessee's own case for AY 2016-17 as under:-

> *"5.1 The above issue was discussed in details by the DRP in AY 2016-17. The facts of the case are the same in the year under consideration. Hence the DRP finds*

no reason to interfere with the directions of the Panel in AY 2016-17. The ground of objection is rejected an AO's finding are upheld."

6.1. In the same order, on the other identical issue of taxability of income from supply of design and drawings, DRP gave its directions by referring to its order for AY 2015-16, as under:-

"4.1. The above issue was discussed in details by the DRP in AY 2015-16. The facts of the case are the same in the year under consideration. Hence the DRP finds no reason to interfere with the directions of the Panel in AY 2015-16. The Ground of Objection is rejected and AO's findings are upheld."

6.2. Ld. AO by following the directions of the DRP, made the additions and passed the assessment. Aggrieved, assessee is in appeal before the Tribunal.

7. Before us, ld. Counsel for the assessee at the outset submitted that the two issues are squarely covered by the orders of the Coordinate Bench of ITAT Kolkata in the case of the assessee itself by the earlier years. He submitted that on the issue relating to taxability of income from testing and other services, claim of the assessee was rejected by the Hon'ble ITAT Kolkata in the case of the assessee for AY 2015-16 in ITA nos. 2601/Kol/2018 and for AY 2016-17 in ITA No. 2356/Kol/2019 dated 18.10.2022. Accordingly, ground no. 2 in the present appeal is covered by the said decisions against the assessee. In this respect, ld. Counsel stated that assessee has not accepted the said decisions and is in appeal for AY 2015-16 before the Hon'ble High of Calcutta vide appeal no. ITA 139/2019, pending for adjudication.

7.1. On the issue of taxability of income from supply of design and drawings, ld. Counsel submitted that this is covered in favor of the assessee by the aforesaid order of the Coordinate Bench in the case of assessee itself for AY 2015-16 reported in [2019] 109 taxmann.com 69

(Kol). He also stated that this issue was also allowed in favor of the assessee's group entity in the following orders by the Coordinate Bench:

i) Outotec GmbH's (Group Entity) for AY 2010-11 and AY 2011-12 (ITA No. 431/Kol/2014 and ITA No. 283/Kol/2015) dated 16.06.2015

ii) Outotec GmbH's (Group Entity) AY 2004-05 to AY 2007-08 (ITA No. 274,275,276 & 277/Kol/2015) dated 31.05.2017 and

iii) Outotec GmbH's (Group Entity) AY 2012-13 (ITA No. 160/Kol/2016) dated 08.09.2017

7.2. Ld. Counsel thus submitted that following the consistency, ground no. 3 be allowed in view of the above stated decisions of earlier years.

8. When these submissions were confronted to the ld. CIT DR, nothing contrary is brought on record to demonstrate material change in the facts of the present case and the applicable law when compared with the earlier years.

9. We take note of the observations and finding given by the Coordinate Bench of ITAT Kolkata on 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, m 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 curved 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."

10. 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, ground no. 2 taken by the assessee is dismissed.

11. Ground no.3 is on the taxability of income earned from sale of designs anddrawings amounting to Rs.4,81,87,121/-. In this respect, it is contended by the assessee that these receipts are not taxable under the provisions of the Act and the India-Finland DTAA. Assessee had sold basic engineering packages to the Indian customers that were embedded in the plant set up by the Indian customers. Accordingly, per assessee, income earned from sale of designs and drawings is in the nature of business income being consideration received from the sale of a product and can be brought to tax under the Act only when there exists a Permanent Establishment of the assessee in India which is not so under the present set of facts. Further, it is submitted that work relating to designs and drawings was undertaken outside India, sale has also taken place outside India and consideration was also received outside India in foreign currency.

11.1. We have gone through the decision of the Coordinate Bench in the case of the assessee itself for AY 2015-16 by which this issued is claimed to be covered. Relevant extracts from the said decision are reproduced below for ease of reference:

> *"13. The first issue is that of taxability of income earned from sale of designs and drawings. A copy of agreement in question is placed at Page 15 of the Paper Book. This is executed by the Tata Steel Limited and the assessee on 15.01.2014. The Article 1 of this Agreement reads as follows:*
>
> > *"In consideration of the payments to be made by the purchaser to the contractor, the Contractor hereby covenants with the Purchaser to supply imported designs and drawings for civil and structural work, utilities and other services, erection, start-up, commissioning and demonstration of performance tests etc. for Chromite Tailing Retreatment Plant of capacity 50TPH minimum or 70TPH maximum conforming to the Technical Specification and as per the scope of work as defined in Schedule 1 of this Agreement at TATA STEEL Works at Sukinda, Odisha."*
>
> *14. A copy of the invoices raised at Page 58 of the Paper Book and the description of the goods are as follows:*
>
> > *"SUPPLY OF IMPORTED DESIGNS AND DRAWINGS FOR CIVIL & STRUCTURAL WORK, UTILITIES AND OTHER SERVICES, ERECTION, START-UP, COMMISSIONING AND DEMONSTRATION OF PERFORMANCE TESTS*

ETC. FOR CHROMITE TAILING RETREATMENT PLANT AT SUKINDA PLANT, TATA STEEL, SUKINDA, ODISHA."

15. Similarly, copies of other Agreement for sale of drawings and designs have also been placed on record. A perusal of the same demonstrates that the designs and drawings, in question, are not embedded in the plant and machinery. They are separate items which were sold to the assessee. The fact that these were sold outside India is not disputed. The similar issue on similar facts was considered in the group case of the assessee in the case of Outotec Gmbh v. Dy. CIT (International Taxation) [2015] 58 taxmann.com 232 (Kol. - Trib.) wherein it was held as under:

> *'30. We have heard rival submissions and gone through facts and circumstances if the case. The facts mentioned above, clauses of contract and the sample copies of airway bill clearly indicate that the entire work relating to designs and drawings was done outside the territory of India; sale was affected outside India and the consideration was also received outside India in foreign currency. In view thereof and the detailed legal submission mentioned above with regard to income from sale of equipment, it is submitted that the business income earned by the assessee from the sale of designs and drawings is not liable to tax in India both under the provisions of the Act and DTAA. Now we have to consider the Judgments dealing with the non-taxability of sale of designs and drawings outside India as cited by Ld. Counsel for the assessee. Hon'ble Supreme Court in the case of Scientific Engineering House P. Ltd. v. CIT (SC) 157 ITR 86 dealing with the issue of whether the drawings, designs, charts, plants etc. constitute a plant and are entitled to depreciation, Hon'ble Supreme Court held in the affirmative case on page no 97 of the report as under:*
>
> > *"Obviously, the purpose of rendering such documentation service by supplying these documents to the assessee was to enable it to undertake its trading activity of manufacturing the odolites and microscopes and there can be no doubt that these documents had a vital function to perform in the manufacture of these instruments; in fact it is with the aid of these complete and up-to-date sets of documents that the assessee was able to commence its manufacturing activity and these documents really formed the basis of the business of manufacturing the instruments in question. True, by themselves, these documents did not perform any mechanical operations or processes but that cannot militate against their being a plant since they were in a sense the basis tools of the assessee's trade having a fairly enduring utility, though owing to technological advances, they might or would in course of time become obsolete. We are, therefore, clearly of the view that the capital asset acquired by the assessee, namely, the technical knowhow in the shape of drawings, designs, charts, plans, processing date and other literate falls within the definition of "plant" and is, therefore, a depreciable asset".*
> >
> > *(Emphasis supplied)*
> >
> > *Since the assessee supplied the designs and drawings for setting up plants in India, in light of the above judgment, such designs and drawings partake thecharacter of a product and accordingly, it is clear that the income arising to theassessee is in the nature of business income.*

31. A similar issue arose before Jaipur Bench of the ITAT in the case of ModernThreads (India) Limited V DCIT 69 ITD 115(Jp), wherein brief facts were thatModern Threads, an Indian company was interested in building in India a plant forthe production of PTA. It, therefore, entered into an agreement with TecnomintSPA., a tax resident of Italy entered for grant of rights and sub-license to use the'process and technical know-how' for designing, construction and operation of theplant. The agreement, inter alia, provided for lump sum technical know-how fee ofUSD 250 lakhs and USD 50 laks for supply of basic process engineeringdocumentation. The issue was whether the payment for the supply of technicalknow-how and basic process engineering documentation for designing,construction and operation of the plant could be taxed as 'Royalty' or not? ITAT onpage no. 157 of the report held as under:

> *"Having regard to the facts, material on records and ratio of various decision(s)cited I come to the irresistible conclusion that the amount payable to Italiancompany for supply of technical know-how and basic process engineeringdocumentation for setting of the plant in India for manufacturing of PTA is thebusiness profit in the hands of Italian company and the Italian company having nopermanent in India the same is taxable in Italy and not in India. The Revenueauthorities are, therefore, not justified in taxing the said payments in Indiatreating the same as royalty …." (Emphasis supplied)*

32. The revenue authorities has asked assessee to explain as to why the revenuesale of design and drawing made by the Company in the FY 2009-10 should beconsidered as non-taxable, where, as per the various contracts in respect of theabovementioned services, the ultimate ownership of the designs and drawings arenever passed to the buyer, and only license to use the same is granted. In this way,the true nature of the receipts are Royalties under section 9(1)(vi) of the IncomeTax Act, 1961 and Article 12 of India-Germany DTAA rather than Sale of designsand Drawings as a product. It was explained that the nature of retainingintellectual property in designs and drawings, due to which the ownership hasnever passed on to the buyer, is similar in nature to the retaining of patentedrights in any goods/machinery. For example, if any customer purchases a car, inthat case, the company does not transfer its patent or intellectual property to thebuyer of the car but that does not change the nature of the transaction from saleof a product to use of a patent/intellectual property. Similarly, restriction on theintellectual property in designs and drawings sold by the assessee for the purposeof setting up a plant in India does not change the character of the transaction fromthe sale of the product to the use of license/know-how and the mere fact that theword license has been use in the agreement would not make any difference. Theassessee explained that the design and drawings sold by it were used by the Indiancustomers for internal business purpose of setting up of their plants and not forany commercial exploitation. Accordingly, the designs and drawings sold by theassessee tantamount to the use of a 'copyrighted article' rather than use of a'copyright' and is therefore in the nature of business income. Reliance in thisregard is also placed on Commentary on Double Tax Conventions by Klaus Vogel.The relevant extract is reproduced below:

> *"….In a partial transfer of rights the consideration is likely to represent a royaltyonly in very limited circumstances. One such case is where*

the transferor is theauthor of the software (or has acquired from the author his rights of distributionand reproduction) and he has placed pat of his rights at the disposal of a thirdparty to enable the latter to develop or exploit the software itself commercially forexample by development and distribution of it …."
"the acquisition of the software will generally be for the personal or business useof the purchaser. The payment will then fall to be dealt with as commercial incomein accordance with Article 7 or 14. It is of no relevance that the software isprotected by copyright or that there may be restrictions on the use to which thepurchaser can put it."(Emphasis supplied)

33. Reliance in this regard is also placed on the various observations made in theModel convention of OECD 2010 on the Article 12 i.e. Royalties and Fee forTechnical Services. The relevant paras are outlined below:

"131. Payments made for the acquisition of partial rights in the copyright (withoutthe transfer or fully alienating the copyright rights) will represent a royalty wherethe consideration is for granting of rights to use the program in a manner thatwould without licence, constitute an infringement of copyright. Examples of sucharrangements include licences to reproduce and distribute to the public softwareincorporating the copyrighted program, or to modify and publicly display theprogram. In these circumstances, the payments are for the right to use thecopyright in the program (i.e. to exploit the rights that would otherwise be the soleprerogative of the copyright holder)….

13. In other types of transactions, the rights acquired in relation to the copyrightare limited to enable the user to operate the program, for example, where thetransferee is granted limited rights to reproduce the program. This would be thecommon situation in transactions for the acquisition of a program copy. The rightstransferred in these cases are specific to the nature of computer programs. Theyallow the user to copy the program, for example on to the user's computer harddrive or for archival purposes. In this context, it is important to note that theprotection afforded in relation to computer programs under copyright law maydiffer from country to country. In some countries the act of copying the programonto the hard drive or random access memory of a computer would, without alicense, constitute a breach of copyright. However, the copyright laws of manycountries automatically grant this right to the owner of the software whichincorporates computer program. Regardless of whether this right is granted underthe law or under a license agreement with the copyright holder, copying theprogram onto the computer's hard drive or random access memory or making anarchival copy is an essential step in utilizing the program. Therefore, rights inrelation to these acts of copying where they do n more than enable the effectiveoperation of the program by the user, should be disregarded in analysing thecharacter of the transaction for tax purposes. Payments in these types oftransactions would be dealt with as commercial income in accordance with Article7.

14.2 The method of transferring the computer program to the transferee is notrelevant. For example it does not matter whether the transferee acquires acomputer disk containing a copy of the program or directly receives a copy on thehard disk of her computer via a modem connection. It is also of relevance thatthere may be restriction on the use to which transferee can put the software."

34. Further, the Authority For Advance Ruling in the case of GeoQueste SystemsB.V. In re., 327 ITR 1 (AAR) dealing with the non-taxability of payment forsoftware, held that payments would not constitute 'royalty' since the licensedproduct could not be commercially exploited by the licensee/customer. This wasdespite the fact there were clauses regarding the restriction on IntellectualProperty. In this regard, the AAR in the captioned case, at page no 113 of thereport, held as under:

"There is also a specific provision in both the agreements that intellectual propertyrights would always remain with the owner of the product or the licensor. Suchrestrictions placed on the user of software and the fact that the license/customerhad no right to interfere with source code and that the licensed produce cannot becommercially exploited by the license/customer are inconsistent with the inferencethat the rights in respect of copyright or the right to use the copyright of thecomputer programmer have been conveyed to the customer. Further, there isnothing in the agreement to suggest that the underlying technical knowledge indeveloping the software has been transferred. Notwithstanding the grant ofauthority to use the license (on non-exclusive and non-transferable basis), thecopyright imbedded in the software remains with the owner intact."

35. The principle of license and copyright was also discussed by the AAR in thecase of Dassault Systems K.K. In re. 322 ITR 125 (AAR), on page no 144 of thereport, held that"Passing on a right to use and facilitating the use of a product for which the ownerhas a copyright is not the same thing as transferring or assigning rights in relationto the copyright. The enjoyment of some or all the rights which the copyrightowner has, in necessary to trigger the royalty definition. Viewed from this angle, anon-exclusive and non-transferable licence enabling the use of a copyrightedproduct cannot be construed as an authority to enjoy any or all the of theenumerated rights ingrained in a copyright. Where the purpose of the licenceorsthe transaction is only to establish access to the copyrighted product for internalbusiness purpose, it would not be legally correct to state that the copyright itselfhas been transferred to any extent. It does not make any difference even if thecomputer programme passed on to the user is a highly specialized one. Theparting of intellectual property rights inherent in and attached to the softwareproduct in favour of the licencee/customer is what is contemplated by thedefinition clause in the Act as well as the Treaty. As observed earlier, those rightsare incorporated in Section 14. Merely authorizing or enabling a customer to havethe benefit of data or instructions contained therein without any further right todeal with them independently does not, in our view, amount to transfer of rights inrelation to copyright or conferment of the right of using the copyright. However,where, for example, the owner of copyright over a literary work grants anexclusive license to make out copies and distribute them within a specifiedterritory, the grantee will practically step

into the shoes of the owner/grantor andhe enjoys the copyright to the extent of its grant to the exclusion of others. Wemay in this context usefully refer to the well-reasoned opinion expressed by OECDin its Commentary on Article 12.

> *"Transfers of rights in relation to software occur in many different ways rangingfrom the alienation of the entire rights in the copyright in a programme to the saleof a product which is subject to restrictions on the use to which it isput……..Therefore, rights in relation to these acts of copying, where they do nomore than enable the effective operation of the programme by the user, should bedisregarded in analyzing the character of the transaction for tax purposes.Payments in these types of transactions would be dealt with as commercial incomein accordance with Article 7 ….*
>
> *The method of transferring the computer programme to the transferee is notrelevant. For example, it does not matter whether the transferee acquires acomputer disk containing a copy of the programme or directly receives a copy onthe hard disc of her computer via a modem connection. It is also of no relevancethat there may be restrictions on the use to which the transferee can put thesoftware."*

36. From the above submissions read with judicial precedents, it is clear that therestriction on intellectual property would not make any difference since thedesigns and drawings sold by the assessee were used by the Indian customers forinternal purpose of setting up plants and not for commercial exploitation. In viewthereof, the income earned by the assessee is not taxable both under the Act andthe DTAA. Further, the assessee argued that though the ITSC in the final orderpassed for FYs 2007-08 and 2008-09 has held that the payment for designs anddrawings would be taxable as Royalty and Fee for Technical Services @ 10% ongross basis, however the assessee does not agree with the said observation. In thisregard, the assessee has also filed a letter dated March 07, 2012 with the AO andDRP that the assessee has accepted the order of the ITSC on this issue merely tobuy peace of mind and to avoid protracted litigation with the revenue.

37. From the above facts and legal position, it is clear that the basic engineeringpackages sold by the assessee to the Indian customers have been largely designedon the basis of standard technologies available with it. The consideration was,therefore, for the sale of the product, which is embedded in the plant set up by theIndian customers and does not constitute royalty and is in the nature of businessincome. Since the work was done outside India and sale was taken place outsideIndia, such income is not taxable under the provisions of the Act and DTAA.

Retaining intellectual property in designs and drawings is similar in the nature tothe retaining of patented rights in any goods/machinery. Restriction on theintellectual property in designs and drawings sold by the assessee for the purposeof setting up a plant in India does not change the character of the transaction fromthe sale of the product to the use of licence/know-how. Normally, designs anddrawings sold by foreign customers were used by Indian customers for internalbusiness purposes for setting up of their plants and not for any commercialexploitation. Accordingly, the designs and drawings sold by the assesseetantamounts to the use of copyrighted article rather than use of a copyright and is,therefore, in the nature of business income. This issue of assessee's appeal isallowed.'

16. The similar issue was considered in the group case of the assessee in the case ofOutotec Gmbh v. Dy. CIT (International Taxation) [2017] 87 taxmann.com 270 (Kol. -Trib.) wherein the decision in the case of Outotec Gmbh (supra) was followed. Thefindings of the Hon'ble DRP was that the transactions is in the nature of FTS that (i)the assessee had access to a wide range of technologies for the purpose of settingup/construction of the plants, (ii) it was developed after research and after necessarymodification and thereafter (iii) these designs and drawings were sold to Indiancustomers who used the same for internal business purpose of setting up of theirplants. These findings were reversed and the ground of appeal of the assessee wasallowed.

17. Consistent with the view taken therein, we hold that the income from sale ofdesigns and drawings cannot be classified, either as royalty or as FTS. The income hasto be considered as business income and as the assessee does not have PE in India, itcannot be brought to tax in India."

11.2. Considering the factual matrix in the present case before us which are identical to what has been dealt by the Coordinate Bench of ITAT Kolkata in the case of assessee itself for AY 2015-16 (*supra*) and the detailed finding given thereon after considering the finding in the case of other group entity of the assessee, we find no reason to take a divergent view on the identical issue. Accordingly, ground no. 3 taken by the assessee is allowed.

12. Ground no. 4 and 5 taken by the assessee is in respect of levy of penalty are consequential in nature and hence does not need a specific adjudication. Also, ground no. 1 is general in nature which is not adjudicated upon.

13. Now we shall adjudicate in ITA No. 351/Kol/2022 for AY 2019-20.

14. Ground no. 2 & 3 in the present case are identical as decided by us in ITA No. 350/Kol/2022 above. There being no change in the material facts and applicable law, our observation and finding given above applies *mutatis mutandis* in this case. These grounds are disposed off in terms of our observations and finding given in ITA no. 350/Kol/2022, stated above.

15. Ground no. 4 specific to ITA 351/Kol/2022 is extracted below:

> 4. *Computation of tax liability*
>
> *a. That on the facts and in the circumstances of the case and in law, the Ld. AO erred in computing the tax liability at the rate of 40% plus surcharge and cess instead of 10% as per the tax rate available under India-Finland DTAA in the tax computation sheet annexed to the final assessment order.*
>
> *b. That on the facts and in the circumstances of the case and in law, the Ld. AO erred in granting the TDS credit for an amount of INR 63,67,842/- as against the TDS credit amounting to INR 77,76,574/- claimed by the appellant during the course of assessment proceedings.*

16. In respect of rate of 40% plus surcharge and cess adopted by the Ld. AO while computing the tax liability, assessee claims that the treaty rate @10% as per the India-Finland DTAA ought to have been applied. It is submitted by the assessee that DRP while giving its direction had directed the Ld. AO to make the addition and tax @ 10% on gross basis. We find that taxability has arisen under the provisions of India-Finland DTAA. Also, despite theDRP direction, the rate of tax applied by the Ld. AO is as per the Act and not in terms of DTAA.Based on this factual observation, we direct the Ld. AO to recompute the tax liability by adopting the tax under the India-Finland DTAA which is stated to be @ 10% on gross basis. Accordingly, ground taken in this respect is allowed.

16.1. Further, assessee has claimed that levy of surcharge and cess on the income-tax ought not to have been made by the AO. In this respect,ld. Counsel submitted that this issue is already decided in favour of the assessee in its own case in ITA No. 2356/Kol/2019 for AY 2016-17. The finding and observation given in the said order is reproduced is as under:

> "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 SI.T .A. No .: 1 4 5 8 / Ko l/2 0 1 1 As s es s m en t y e ar : 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 24t h 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 (yhteisojen tulovero; inkomstskatten for samfund);

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

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

(v) the tax withheld at source from interest (korkotulon lahdevero; kallskatten pa ranteinkmost); and the tax withheld at source from non residents' income (rajoitetusti verovelvollisen lahdevero; kallskatten for

(vi) begransat 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, ground no. 3 of the assessee is allowed."

16.2. Accordingly, for the reasons set out in the above decision, we hold that surcharge and education cess cannot be levied in respect of tax liability of the assessee computed under DTAA. Accordingly, ground taken in this respect is allowed.

17. In respect of ground no. 4(b) towards short credit of TDS, we find it proper to remit this matter to the file of the Ld. AO to allow the credit as

claimed after due verification of documents relating to TDS claimed by the assessee. Due credit of TDS may be allowed by the Ld. AO based on the verification of documents and records. Accordingly, this ground of appeal is allowed for statistical purposes.

18. In the result,both the appeals of the assessee are partly allowed.

Order is pronounced in the open court on 28th February, 2023.

Sd/- Sd/-

(RAJPAL YADAV)
VICE PRESIDENT

(GIRISH AGRAWAL)
ACCOUNTANT MEMBER

Dated: 28.02.2023

SB, 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