

| आयकर अपीलिय अधिकरण न्यायपीठ, कोलकाता |
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, KOLKATA

BEFORE DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER
&
SHRI SONJOY SARMA, HON'BLE JUDICIAL MEMBER

I.T.A. No. 393, 394, 395 & 396/Kol/2023
Assessment Year: 2019-20

TDK India Private Limited Kulia Kanchrapara Road P.O. Netaji Subhas Sanatorium Kalyani Nadia - 741251 [PAN : AAACI6950Q]	Vs	Deputy Commissioner of Income Tax - CPC, TDS
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अपीलार्थी/ (Assessee)		प्रत्यर्थी/ (Respondent)
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I.T.A. No. 397, 398 & 399/Kol/2023
Assessment Year: 2020-21

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अपीलार्थी/ (Assessee)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri Anup Sinha, A/R
Revenue by :	Shri G. Hukugha Sema, CIT D/R

सुनवाई की तारीख/Date of Hearing : 06/06/2023
घोषणा की तारीख /Date of Pronouncement: 12/07/2023

आदेश/ORDER

PER BENCH :

The captioned appeals are directed at the instance of the assessee against the separate but identical orders of the Learned Commissioner of Income Tax (Appeals) - 22 Kolkata, (hereinafter the "ld. CIT(A)") dt. 24/02/2023, passed u/s 250 of the Income Tax Act, 1961 ("the Act") for the Assessment Years 2019-20 & 2020-21.

2. The grounds of appeal for these appeals are verbatim identical, which reads as under:-

“1. That on the facts and in the circumstances of the case and in law, the Ld. Commissioner of Income Tax (Appeals)- 22, Kolkata (hereinafter referred to as 'Ld. CIT(A)'), has erred in confirming the action of the Ld. DCIT-CPC (TDS) (hereinafter referred to as the 'AO') in considering the rate of withholding tax as per the provisions of Income-tax Act, 1961 (hereinafter referred to as the 'Act'), instead of the rate specified in the relevant Double Tax Avoidance Agreement (hereinafter referred to as the 'tax treaty') entered into between India and Spain read with the protocol signed at the time of conclusion of the tax treaty, in respect of payments made by the appellant to TDK Electronics Components S. A. being a tax resident of Spain.

2. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that it is a well settled principle of law that the protocol signed at the time of conclusion of the principal tax treaty is an integral part of the principal tax treaty and its binding force is equal to that of the principal tax treaty.

3. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in stating that the circular issued by the CBDT is binding on Ld. AO, Ld. CIT(A) and Hon'ble Tribunal where it is a settled principle of law that the circular issued by the CBDT is not binding on appellate authorities and the Ld. CIT(A) has further erred in applying the circular to whittle down or override the benefits which are otherwise envisaged in the protocol to the aforesaid bilateral tax treaty.

4. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that the issuance of unilateral notification by the CBDT to amend a bilateral tax treaty as contained in the aforesaid circular has no binding force and as such, it cannot whittle down or override any benefit which is otherwise envisaged in the protocol to the aforesaid bilateral tax treaty.

5. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in confirming the action of the AO in levying interest under section 201(1A) of the IT Act, 1961.

6. That the appellant craves leave to add to and/or amend, alter, modify or rescind the grounds hereinabove before or at the time of hearing of the appeal.”

3. Brief facts of the case are that, assessee, TDK India Private Limited (Formerly known as 'EPCOS India Private Limited') was incorporated under the Companies Act, 1956 and is a tax resident of India. The company is primarily engaged in manufacture and supply of capacitors and soft ferrite cores. TDK Electronics Components S.A., Spain (Formerly known as EPCOS Electronics Components S.A.) is a company incorporated under the laws of Spain and is a tax resident of Spain. TDK Electronics Components S.A., Spain (hereinafter referred to as 'TDK Malaga') renders services to the assessee in the areas of procurement, controlling, logistic coordination, quality management, HR, environment protection and industrial safety, organization, etc. Under the provisions of Income-tax Act, 1961 (hereinafter referred to as the 'Act'), the aforesaid services rendered by TDK Malaga to the assessee would be liable for deduction of tax at source under the head 'Fees for Technical Services' (hereinafter referred to as 'FTS') at the rate of 10.608 percent (10 percent Tax + 2 percent Surcharge + 4 percent Cess) under the provisions of section 115A(1)(b)(B) read with section 9(1)(vii) of the Act. Before making payments to TDK Malaga for the aforesaid services, the assessee deducted tax at source under the head FTS at the rate of 10 percent under the provisions of Article 13 read with Protocol appended below the Indo-Spain tax treaty (hereinafter referred to as the 'Tax Treaty') which forms an integral part of the tax treaty from financial year

2018-19 and onwards, as the treaty rate is more favorable to the assessee. The assessee deposited the said tax deducted at source and filed withholding tax return on quarterly basis. The assessee received intimations under section 200A of Act for all quarters of Financial Year 2018-2019 and Financial Year 2019-2020 from TDS Reconciliation Analysis and Correction Enabling System (hereinafter referred as 'TRACES') wherein short deduction of tax deducted at source was reported and accordingly demand was raised on the assessee along with interest under section 201(1A) of the Act for all the quarters stated hereinbelow:-

Sl. No.	Period	FY	Intimations u/s	Intimation Reference No.	Order Pass Date	Amount Demanded in INR	Interest INR	Total in INR (Round off)	Disputed Amount in INR for which appeal was filed
1	Q1	2018-19	154	TDS/1819/27Q/D/100034548989	25-Jul-2019	2,23,088	33,447	2,56,540	2,56,540
2	Q2	2018-19	154	TDS/1819/27Q/D/100034549022	25-Jul-2019	2,69,015	32,198	3,01,210	3,01,210
3	Q3	2018-19	154	TDS/1819/27Q/D/100034549058	25-Jul-2019	5,04,193	42,796	5,46,990	2,52,590
4	Q4	2018-19	154	TDS/1819/27Q/D/100034549077	25-Jul-2019	2,77,813	19,102	2,96,910	2,96,910
5	Q2	2019-20	154	TDS/1920/27Q/D/100036218187	03-Nov-2019	2,09,046	10,433	2,19,480	2,19,480
6	Q3	2019-20	200A	TDS/1920/27Q/D/100036827148	30-Jan-20	2,11,082	6,326	2,17,410	2,17,410
7	Q4	2019-20	200A	TDS/1920/27Q/D/1	30-Jun-20	1,67,204	8,772	1,75,980	1,75,980

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				Total		18,61,442	1,53,074	20,14,520	17,20,120

On perusal of the justification report forming part of the said intimation issued under section 200A of the Act, it was noted that the rate of tax deducted at source was taken at 10.608 percent as per the provisions of the Act (ignoring the rate prescribed by the Tax Treaty) instead of 10 percent considered by the assessee as per the provisions of the Tax Treaty. However, no reasons for such action have been specified in said report. The assessee filed rectification petitions under section 154 of the Act for all quarters of financial year of 2018-19 and second quarter of financial year 2019-20 with TRACES. TRACES processed the said rectification petitions and passed the order issued under section 154 of the Act for all five above quarters raising the demand on the assessee based on the provisions of the Act ignoring the provisions of the Tax Treaty. 3.1. Aggrieved, the assessee preferred an appeal before the Id. CIT(A) against all the five orders passed by DCIT-CPC under section 154 of the Act (four quarters of the Financial Year 2018-19 and second quarter of the Financial Year 2019-20) and also preferred an appeal against the intimation passed under section 200A of the Act for last two quarters of the Financial Year 2019-20.

4. The Ld. CIT(A) passed orders under section 250 of the Act for all quarters of financial year 2018-19 and last three quarters of

financial year 2019-20 confirming the action of the Ld. DCIT-CPC on the following alleged grounds:-

1. The Ld. CIT(A) has held that the appellant is not entitled to get benefit of the protocol appended below the Tax Treaty, as no notification under section 90 of the Act has been issued by the CBDT with respect to the aforesaid Tax Treaty specifying lower rate of tax to be deducted at source under Article 13 of the Tax Treaty by following the Circular No. 3/2022 dated 3rd February, 2022 issued in this regard.
2. The Ld. CIT(A) has held that since the aforesaid Circular issued by the CBDT is binding on him, he has applied the instructions issued by the CBDT in confirming the orders of the Ld. DCIT-CPC.
3. The Ld. CIT(A) has held that the aforesaid Circular has retrospective effect, and it would be applicable to issues prior to the date of issuance of the Circular.
5. Aggrieved the assessee is in appeal before this Tribunal.
6. On Ground Nos. 1, 2 & 4, which are interrelated, the Id. Counsel for the assessee, firstly invited reference to the provisions of section 115A(1)(b)(B) of the Act which prescribes a tax rate of 10 percent (plus applicable surcharge & cess) on income of non-resident arising from fees for technical services. He further referred to the provisions of Article 13 of the Tax Treaty which interalia states that fees for technical services would be taxable at the rate of 20 percent on gross basis in the contracting state in

which they arise. It was further submitted that provisions of paragraph 7 of the protocol appended below the Tax Treaty which is an integral part of the Tax Treaty which inter alia states that if, under any Convention or Agreement between Indian and a third state which is a member of the Organization for Economic Cooperation and Development (herein after refers to as 'OECD') which enters into force after first January, 1990, India limits its taxation at source on royalties or fees for technical services to a rate lower or a scope lower more restricted than the rate or scope provided for this Convention on the said items of income, the same rate or scope as provided for that Convention or Agreement on the said items of income shall also apply under this Convention with effect from the date on which the present Convention comes into force or the relevant Indian Convention or Agreement, whichever enters into force later. The relevant extract of the Tax Treaty is enclosed at pages 33 to 36 of the paper book.

6.1. The Id. Counsel for the assessee further submitted that India has entered into Tax Treaty with Portugal and Sweden which are OECD Member States which enter into force after 1st January, 1990. As per the provision of Article 12 of the India-Portugal Tax Treaty and India-Sweden Tax Treaty, fees for technical services would be taxed at 10 percent (inclusive of cess and surcharge). Further attention was drawn to the provisions of section 90(2) of the Act which states that the provisions of the Act or the

provisions of the Tax Treaty whichever is more beneficial to the assessee may be applied.

6.1. The ld. Counsel for the assessee submitted that in the instant case, since the provisions of the Tax Treaty is more beneficial than the relevant provision of the statute, the appellant has applied the provisions of the Tax Treaty and deducted tax at source at the rate of 10 percent from fees for technical services before making payment to TDK Malaga.

Further reference was made to the Circular No. 3/2022 dated 3 February 2022 issued by the CBDT. The Circular states that the benefit of MFN clause will only be applicable in the event the Government of India has issued a separate notification extending the benefits of the second treaty into the treaty with the first State as required by section 90(1) of the Act. The copy of the circular is enclosed at pages 51 to 58 of the paper book.

Thereafter, reference was made to the Tax Treaties that India has entered into with Philippines and with Switzerland, wherein similar provisions for incorporation of favourable provisions contained in other tax treaties are existent in the protocol appended to those tax treaties, but with the exception that in order to make the incorporation effective, the Governments of two countries should first mutually decide of such incorporation in the form of amendment of tax treaty. It is thus evident that since there is no such requirement under the Indo-Spain Tax Treaty, there was no need to amend the Tax

Treaty by resorting to issuance of notification for that purpose. The relevant extracts of the Tax Treaty with Switzerland and Philippines are enclosed at 44 to 50 of the paper book.

7. The Id. Counsel for the assessee finally submitted that, it is evident that the allegation of the Ld. CIT(A) that the requirement for issuance of separate notification by the Government of India is clearly redundant and, in any event, it does not whittle down or override the benefits which are otherwise envisaged in paragraph 7 of the protocol to the Tax Treaty. In the instant case, since the tax treaties with Portugal, Sweden and Spain have entered into force prior to the Assessment Year 2019-20 the rate of tax as per the Tax Treaty on income earned on fees from technical fees cannot not exceed 10 percent.

7.1. For this proposition, the Id. Counsel for the assessee relied on the decision of the Hon'ble Kolkata Tribunal in the case of *Deputy Commissioner of Income Tax v ITC Ltd reported in 82 ITD 239(Kol)*, wherein the Hon'ble Tribunal has held that the protocol to the DTAA is an integral and indispensable part of the tax treaty and furthermore, the benefit of lower rate as prescribed in the protocol for fees for technical services under the relevant tax Treaty is not dependent on any further unilateral action y issuance of notification by the respective Governments.

Further reliance was placed on the decision of the Hon'ble Kolkata Tribunal case of *Income Tax Officer v. MSK Travels & Tours Ltd. (ITA 284/Kol/2015)* for the Assessment Year 2008-09 wherein the

Hon'ble Kolkata Tribunal by following the decision of the *DCIT v ITC Ltd. (supra)* has held that no separate notification is required to be issued by the Government of India in order to make the protocol applicable.

And the decision of the Hon'ble Delhi High Court in the case of *Steria (India) Ltd v. Commissioner of Income Tax reported in 386 ITR 390 (Del). (2016)* wherein the Hon'ble High Court has held that no separate notification is required for application of paragraph 7 of the protocol contained in Indo-France Tax Treaty. The Hon'ble Court has further held that issuance of a notification has nowhere been stipulated as a condition precedent therein. Section 90(1) of the Act is very clear that only a Tax Treaty would be notified and not the application of such a 'MFN' clause.

8. The Id. Counsel for the assessee further relied on the following decisions of the various High Courts of the country wherein it has been held that no separate notification is required unless the protocol to the Tax Treaties specifically mention the same:

Concentrix Services Netherlands B.V. v. Income-tax [2021] 127 1. *taxmann.com* 43 (Delhi High Court)

Apollo Tyres Ltd. Commissioner of Income Tax, International Taxation [2018] 92 *taxmann.com* 166 (Karnataka High Court)

Galderma Pharma SA v. Income-tax Officer [2022] 138 *taxmann.com* 44 (Delhi High Court)

9. The ld. Counsel for the assessee finally prayed that, in view of the above submission, more particularly in view of the judgement rendered by the Jurisdictional Tribunal, that the order of the Ld. CIT(A) and the order of the Ld. DCIT- CPC on this issue be set aside and grounds of appeal no. (1), (2) and (4) be allowed.

10. The ld. D/R, on the other hand, vehemently argued supporting the orders of the lower authorities.

11. On Ground No. 3, the ld. Counsel for the assessee submitted that on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in stating that the circular issued by the CBDT is binding on Ld. AO, Ld. CIT(A) and Hon'ble Tribunal whereas it is a settled principle of law that the circular issued by the CBDT is not binding on appellate authorities and the Ld. CIT(A) has further erred in applying the circular to whittle down or override the benefits which are otherwise envisaged in the protocol to the aforesaid bilateral tax treaty.

12. The ld. Counsel for the assessee, placed reliance on the decision of the Hon'ble Supreme Court in the case of CIT v Hero Cycles (P)Ltd (1997) reported in 94 Taxman 271 (SC), wherein the Hon'ble Supreme Court has held as under:

"9.

Moreover, it is well-settled that circulars can bind the ITO but will not bind the appellate authority or the Tribunal or the Court or even the assessee.."

13. He further submitted that apart from the above judgement rendered by the Hon'ble Supreme Court, there are plethora of judgements which states that the Circular issued by CBDT is binding on AO but not binding on the assessee, appellate authorities including Tribunal, High Court and Supreme Court and prayed order passed by the Ld. CIT(A) be set aside as he relied on the Circular issued by the CBDT where the said Circular has taken a view in holding that a separate notification is required to be issued by the Government of India in order to make the protocol applicable, which contrary to the view taken by the various Tribunal and various High Courts of the country and prayed that Ground No. 3 be allowed.

14. The ld. Counsel for the assessee without prejudice to the above submitted that, the Ld. CIT(A) has held that the aforesaid Circular has retrospective effect and would be applicable to issues prior to the date of issuance of the Circular.

15. It was further submitted that even assuming but not accepting that the Circular is binding on the appellate authority, the aforesaid Circular issued by CBDT is prospective in nature and it does not have any retrospective effect, as the requirement contained in the CBDT Circular cannot primarily be applied to the period anterior to the date of issuance as it is the nature of an additional detrimental stipulation mandated for taking the benefit conferred by the Tax Treaty. He further submitted that it is a settled legal position that a piece of legislation which imposes a

new obligation or attaches a new disability is considered prospective unless the legislature intent it clearly to give it a retrospective effect.

16. Reliance was placed on the decision of the Hon'ble Pune Tribunal in the case of *GRI Renewable Industries S.L. vs DCIT [ITA No. 202/Pun/2021]* wherein Hon'ble Pune Tribunal has held that the Circular No. 3/2022 dated 03.02.2022 will be prospective in nature and would not have any retrospective effect.

17. Finally, the Id. Counsel for the assessee prayed that order of the Ld. CIT(A) in this regard, be set aside, as the issue in hand relates to the assessment year 2019-20 and assessment year 2020-21 while the date of issuance of the Circular is 3rd February, 2022.

18. The Id. D/R vehemently argued supporting the orders of the lower authorities.

19. Ground No. 5, is against the action of the Ld. CIT(A) in confirming the action of the AO in levying interest under section 201(1A) of the IT Act, 1961.

20. The Id. Counsel for the assessee, at the outset, placed reliance on decision of the Hon'ble Supreme Court in the case of *CCE vs. HMM Ltd reported in (1995) 76 ELT 497 (SC)* wherein it is held that where demand is unsustainable, there is no question of levying and interest or penalty and prayed to delete the interest levied by the Ld. AO-CPC, as the same is consequential in nature.

21. In view of the above humble submissions, especially in view of the decisions of the Hon'ble Jurisdictional Tribunal in the case

of ITC Ltd. (*supra*) and in the case of MSK Travels and Tours Ltd. (*supra*), the assessee prayed for setting aside of the order issued by the Id. CIT(A) and the Id. DCIT-CPC raising demand on the assessee.

22. We have heard rival contentions and perused the material placed before us. In this bunch of seven appeals which are spread over four quarters of FY 2018-19 and three quarters of FY 2019-20 of which first five appeals are against the intimations u/s 154 and remaining are against the intimation u/s 201 of the Act with the common issues regarding the rate of tax to be deducted at source on the payment of fees for technical services by the assessee to TDK Electronics Components S. A. (hereinafter referred to as TDK Malaga). We notice that the assessee is primarily engaged in the business of manufacturing of capacitors engaged in manufacture and supply of capacitors and soft ferrite cores and is a part of TDK Malaga incorporated in India. The assessee company takes services from TDK Malaga in the areas of procurement, controlling, logistic coordination, quality management, HR, environment protection and industrial safety, organization, etc. As per the provisions of section 115A(1)(b)(B) read with section 9(1)(vii) of the Act, the rate of detection for tax at source is 10.608 percent which includes 10 percent Tax + 2 percent Surcharge + 4 percent Cess. However, the assessee has deducted tax at source @ 10% and not 10.608%. The Id. Counsel for the assessee has filed detailed submissions in support of its

contentions that in view of the provisions of Article 13 read with Protocol appended below the Indo-Spain tax treaty which forms an integral part of tax treaty from Assessment Year 2018-19 and onwards and as the treaty rate is more favourable to the assessee, the assessee was required to deduct tax at source under the head FTS @ 10%. So far as this contention of the assessee is concerned, we notice that as per the agreement for avoidance of DTAA an agreement has been entered into between India and Spain read with the protocol signed at the time of conclusion of the tax treaty.

22.1. As per Article 13 of Indo-Spain Tax Treaty under the head “royalty and fees for technical services” and with regard to royalty and fees for technical services arising in contracting state and paid to resident of another state which in this case is TDK Malage, such royalty and fees for technical services may be taxed in contracting state @ 20% of the gross amount of such fees. Thereafter, the protocol entered in para 7, which reads as follows:-

“7. The competent authorities shall initiate the appropriate procedures to review the provisions of Article 13 (Royalties and fees for technical services) after a period of five years from the date of its entry into force. However, if under any Convention or Agreement between India and a third State which is a Member of the OECD, which enters into force after 1-1-1990, India limits its taxation at source on royalties or fees for technical services to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of incomes, the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention with effect from the date on which the present Convention comes into force

or the relevant Indian Convention or Agreement, whichever enters into force later.”

23. The above referred protocol states that in any Convention or agreement between India and the third State, which is a member of the OECD, which enters into force after 01/01/1990, India limits its taxation at source on royalties or fees for technical services to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of incomes, the same rate or scope as provided for in that Convention or agreement on the said items of income shall also apply under this Convention with effect from the date on which the present Convention comes into force at the relevant Indian Convention or Agreement, whichever enters into force later.

24. Further it has been submitted before us that India has entered into a tax treaty with Portugal and Sweden which are OECD Member States which enter into force after 1st January, 1990. As per the provision of Article 12 of the India-Portugal Tax Treaty and India-Sweden Tax Treaty, fees for technical services would be taxed at 10 percent (inclusive of cess and surcharge). Further attention was drawn to the provisions of section 90(2) of the Act which states that the provisions of the Act or the provisions of the Tax Treaty whichever is more beneficial to the assessee may be applied.

25. The Id. CIT(A), has not accepted the contention of the assessee solely on the ground that the said protocol entered between India and Spain has not been notified by the CBDT. However in view of the decision of this tribunal in the case of *Deputy Commissioner of Income Tax v ITC Ltd reported in 82 ITD 239(Kol)*, the Tribunal has held that the protocol to the DTAA is an integral and indispensable part of the tax treaty and furthermore, the benefit of lower rate as prescribed in the protocol for fees for technical services under the relevant tax Treaty is not dependent on any further unilateral action or issuance of notification by the respective Governments. It is also held by this Tribunal that no separate notification is required to be issued by the Government of India in order to make a protocol applicable. In view of the above, we find merit in the contention of the Id. Counsel for the assessee that as per the DTAA entered into between India and Spain read with the protocol entered into with the members of the OECD, tax rate of 10% was applicable on the payment for fees for technical services. To this extent, relevant grounds raised by the assessee are allowed.

26. Now, so far as the remaining contention that 10% tax rate as per the DTAA includes surcharge and education cess and no separate surcharge of education cess needs to be added. In other words, the contention of the Id. Counsel for the assessee is that the assessee was required to deduct tax at source only @10% and no separate amount was required to be deducted towards surcharge

and education cess since the rate of 10% was as per the agreement of DTAA between India and Spain as per Article 13 read with the protocol referred above. So the only dispute before us remains that as per the CPC/intimation u/s 200A/154 of the Act, it has been alleged that the assessee is required to deduct tax at source @10.608% i.e., (10 percent Tax + 2 percent Surcharge + 4 percent Cess) under the provisions of section 115A(1)(b)(B) read with section 9(1)(vii) of the Act, whereas the assessee has contended that an all inclusive rate of 10% is applicable, as it is the rate as per the DTAA. At this stage we would like to go through the decision of this tribunal in the case of *DCIT vs. BOC Group Ltd.* reported in 64 *taxmann.com* 386 (2015) (Kol. ITAT), wherein it was held as under:-

“6. We have heard the rival submissions and perused the materials available on record and the various case laws relied upon by the counsels of both the sides. We find that the assessee herein is governed by India UK Treaty wherein the relevant clauses are reproduced hereunder for the sake of convenience: –

'ARTICLE 2 Taxes covered-1. The taxes which are the subject of this Convention are

- (a) in the United Kingdom:*
 - (i) the income-tax;*
 - (ii) The corporation tax;*
 - (iii) The capital gains tax; and*
 - (iv) The petroleum revenue tax;**(hereinafter referred to as "United Kingdom tax");*
- (b) In India*
The income-tax including any surcharge thereon;
(hereinafter referred to as "Indian tax")

2. This Convention shall also apply to any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of this Convention in addition to, or in place of, the taxes of that Contracting state referred to in paragraph 1 of this Article. The competent authorities of the

Contracting States shall notify each other of any substantial changes which made in their respective taxation laws.

ARTICLE 3- General definitions-

1. *In this Convention, unless the context otherwise requires:*

- (a) *The term United Kingdom means Great Britain and Northern Ireland;*
- (b) *The term India means the Republic of India;*
- (c) *The term tax means United Kingdom tax or Indian tax, as the context requires,, but shall not include any amount which is payable in respect of any default or omission in relation to the taxes to which this Convention applies or which represents a penalty imposed relating to those taxes;*

ARTICLE 13- Royalties and fees for technical services -1. *Royalties and fees for technical services arising in a Controlling 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 law of that State; but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed:*

- (a) *In the case of royalties within paragraph 3(a) of this Articles, and fees for technical services within paragraphs 4(a) and (c) of this Article,*
 - (i) *During the first five years for which this Convention has effect;*
 - (aa) *15 per cent of the gross amount of such royalties or fees for technical services when the payer of the royalties or fees for technical services is the Government of the first mentioned Contracting State or a political sub-division of that State, and*
 - (bb) *20 per cent of the gross amount of such royalties or fees for technical services in all other cases; and*
 - (ii) *During subsequent years, 15 per cent of the gross amount of such royalties or fees for technical services; and*
- (b) *In the case of royalties within paragraph 3(b) of this Article and fees for technical services defined in paragraph 4(b) of this Article, 10 per cent of the gross amount of such royalties and fees for technical services."*

The expression 'tax' is defined in Article 2(1) to include 'income tax'and is stated to include 'sur charge' 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, 200, and Section 2(11) of the Finance Act, 2004 described it as follows:*

(11) *The amount of income-tax as specified in sub-sections (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 fulfill the commitment of the Government to provide and finance universalized quality basic education, calculated at the rate of two per cent of such income-tax and surcharge [Emphasis Supplied]*

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 thereto that the education cess will also be covered by the scope of Article 2. 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 Simngapore 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.'*

6.1. *We find that the Article 2 of the India UK Treaty provides that income tax including any surcharge thereon and it further provides that this convention shall also apply to any identical or substantially similar taxes which are imposed by either contracting state after the date of signature of this convention in addition to or in place of the taxes of the contracting state referred to in paragraph 1 of this article. Hence by this, it can safely be concluded that the levy of education cess though introduced from Finance Act, 2004 which is much after the date of signing of this convention would also be made applicable while determining the tax rates under the convention. It is well settled that the education cess is nothing but an additional surcharge. When the Article 2 states that surcharge is included in income tax and the tax rate of 15% for fee for technical services is prescribed in Article 13 shall have to be deemed to include surcharge and since cess is nothing but an additional surcharge, the tax prescribed under DTAA @ 15% in the instant case shall be deemed to included surcharge and education cess. Hence we hold that when the tax rate is determined under DTAA, then the tax rate prescribed thereon shall have to be followed strictly without any additional taxes thereon in the form of surcharge or education cess. Reliance in this regard is also placed on the following decisions in support of our contentions:-*

(a) *DIC Asia Pacific Pte. Ltd. (supra)*

This was a case of treaty between India and Singapore. Issue involved was taxability of interest and royalty income under the relevant article of the treaty and the levy of surcharge and education cess to the tax prescribed under DTAA in the relevant article. It was held that : –

"A plain reading of Article 2, 11 and 12 of the treaty show that while interest and royalties can indeed be taxed in the source state, the tax so charged on the same, under Articles 11 and 12, cannot exceed 15% and 10% respectively. The expression 'tax' is defined in Article 2(1) to include '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".

It is 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 2004 introducing the said cess.

We have also noted 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 thereto 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 the 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 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.

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.

(b) Sunil V. Motiani (supra)

This judgement was rendered by the Mumbai Tribunal in the context of India UAE Treaty after considering the decision of the Uttarakhand High Court in the case of CIT v. Arthusa Offshore Co. 216 CTR 86 which dealt with India US Treaty. It was held that : –

"5. We have heard both the parties and their contentions have carefully been considered. We found that the issue raised by the assessee is covered in favour of the assessee by the aforementioned decisions of Tribunal in the case of Sunil V. Motiani (supra)."

(c) Parke Davis and Company LLC (supra)

This judgement was rendered in the context of India USA treaty after considering the decision of the Uttarakhand High Court in the case of Arthusa Offshore Co (supra) which dealt with India US Treaty. It was held that : –

"2. At the outset it was submitted by Ld. AR that the only issue raised by the assess in the present appeal is that the education cess and secondary and higher secondary education cess of Rs.50,104/- is not liable to be payable when tax is determined as per India US Tax Treaty. It was submitted that this issue is covered in favour of assessee by the decision of ITAT in the case of Sunil V. Motiani v. ITO [\[2013\] 33 taxmann.com 252/59 SOT 37 \(Mumbai - Trib\)](#). He has placed a copy of the said order on our record and a copy was also given to Ld. DR. He drew our attention towards the observation of the Tribunal in para-5.

3. On the other hand, Ld. DR submitted that education cess and secondary and higher secondary education cess are considered to be tax payable even when the tax is determined on the basis of DTAA. For this purpose she relied upon the decision of Hon'ble Uttarakhand High Court in the case of CIT v. Arthusa Offshore Co. [\[2008\] 169 Taxman 484](#) and decision of Advance Rulling Authority in the case of Airports Authority of India, In re [\[2008\] 299 ITR 102/168 Taxman 158\(AAR - New Delhi\)](#).

5. We have heard both the parties and their contentions have carefully been considered. We found that the issue raised by the assessee is covered in favour of the assessee by the aforementioned decisions of Tribunal in the case of Sunil V. Motiani (supra)."

(d) ITO (Intl Taxn) v. M Far Hotels Ltd [\[2013\] 58 SOT 261/32 taxmann.com 100 \(Cochin - Trib.\)](#)

This judgement was rendered in the context of India France treaty. Issue involved was taxability of management fees and interest income under the relevant article of the treaty and the levy of surcharge and education cess to the tax prescribed under DTAA in the relevant article. It was held that : –

"If the provisions of DTAA are more beneficial to the taxpayer, then the provisions of DTAA would prevail over the Indian Income Tax Act. Since the DTAA is silent about the surcharge and education cess for the purpose of deduction of tax at source, this tribunal is of the considered opinion that the taxpayer may take advantage of that provision in the DTAA for deduction of tax. The CITA has only deleted the tax component to the extent of surcharge and education cess at the rate applicable under the DTAA. Therefore, this tribunal do

not find any infirmity in the orders of lower authority. Accordingly, the same are confirmed. "

Respectfully following the aforesaid judicial precedents, we hold that the surcharge and education cess is not leviable when the tax rate is prescribed under DTAA. Hence we do not find any infirmity in the order of the Learned CITA in this regard. Accordingly, the grounds raised by the revenue are dismissed.

7. In the result, the appeal of the revenue is dismissed."

27. After going through the above decision, we find that it has been well settled that in case the rate of tax are adopted as per the DTAA, then no surcharge and education cess is to be applied over and above the tax rate since the tax rate as per the DTAA is held to be all-inclusive of such surcharge and education cess. Therefore, we are of the considered view that since the rate of tax applicable in the case of the assessee is 10% and not 10.608% and since the assessee has rightly deducted the tax at source @ 10%, it cannot be treated as an assessee in default and accordingly the excess amount of tax demanded by the revenue authorities at Rs.18,61,442/- is deleted. Further as tax demand has been deleted, the interest levied at Rs.1,53,074/-, also stands deleted being consequential in nature. Accordingly, all the effective grounds raised by the assessee in the instant bunch of appeal stands allowed.

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

Order pronounced in the Court on 12th July, 2023 at Kolkata.

Sd/-

**(SONJOY SARMA)
JUDICIAL MEMBER**

Kolkata, Dated 12/07/2023

**Sd/-*

Sd/-

**(DR. MANISH BORAD)
ACCOUNTANT MEMBER**



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

1. अपीलार्थी / The Assessee
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Kolkata