**IN THE INCOME TAX APPELLATE TRIBUNAL, "C" BENCH, KOLKATA**

Before : **Shri Mahavir Singh,Judicial Member, and**
**Shri M. Balaganesh, Accountant Member**

**I.T.A No. 571/Kol/2013** A.Y : 2010-11

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| D.D.IT (IT)-1(1), Kolkata | Vs. | The BOC Group Limited<br>PAN: AACCT 6494J |
| (Appellant) | | (Respondent) |

For the Appellant/ Shri D.Naskar, JCIT, ld.DR
For the Respondent/: Shri Pratyush Jhunjhunwala, Advocate
(Lead by Shri J.P Khaitan)

Date of Hearing: 18-11 -2015

Date of Pronouncement: 30 -11-2015

**ORDER**

**SHRI M.BALAGANESH, AM**

This appeal of the revenue arises out of the order of the Learned CIT(A)-VI, Kolkata in Appeal No. 23/CIT(A)-VI/Kol/ACIT-CPC/2010-11 dated 28-12-2012 against the intimation dated 23.2.2001 u/s 143(1) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act').

2. The only issue to be decided in this appeal is as to whether surcharge and education cess could be charged when the tax is determined to be payable under the double taxation avoidance agreement.

3. The brief facts of this issue is that the assessee is a foreign company and is a tax resident of United Kingdom. The return of income for the Asst Year 2010-11 was filed by the assessee company on 12.10.2010 declaring taxable income from business or profession to the tune of Rs. 11,98,03,921/- subjecting the same to tax at the rate of

15% in terms of Double Taxation Avoidance Agreement (DTAA) as against the regular tax rate applicable to a foreign company at the rate of 40%. The assessee felt that the provisions of DTAA would prevail over the Act wherever they are inconsistent. While filing the return, the assessee did not calculate surcharge and education cess on the tax rate of 15% as per DTAA , as according to assessee, the tax specified in Article 2 of the Double Taxation Convention entered into between United Kingdom (UK) and India on 25.10.1993, wherein the terms Indian Tax is defined as income tax including any surcharge thereon. It felt that education cess is only an additional surcharge and hence it takes the character of surcharge. Since the Article 2 which defines tax states income tax including surcharge, assessee felt that separately surcharge and education cess is not to be applied on the tax rate of 15% which is inclusive of all and was of the opinion that no other tax other than 15% is payable.

4. The assessment was completed u/s 143(1) of the Act dated 23.2.2011 accepting the income returned ignoring the DTAA rates. The tax was determined to be payable at the rate of 40% being the rate applicable to foreign company. Thereafter, surcharge and education cess was also applied on the said rate. This was challenged by the assessee in first appeal. Before the Learned CITA, the assessee inter alia stated that similar issue came up before the Learned CITA for Asst Year 2007-08 and the same was decided in favour of the assessee. The assessee pleaded that the Learned AO had ignored to apply the provisions of section 90 of the Act containing DTAA provisions which overrides the provisions of the Income Tax Act wherever they are inconsistent and hence the correct rate of tax to be applied in the facts of the case would be the tax rate prescribed under DTAA which is 15% without adding any surcharge and education cess and also stated that in terms of section 90(2) of the Act which provides that where the Central Government has entered into an agreement with the Government of a foreign country for avoidance of double taxation, then in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are are more beneficial to that assessee. The Learned CITA observed

that the assessee had received the income in the nature of fees for technical services and in terms of Article 13(2)(a) and 13(4)(c) of the India UK DTAA convention, the tax rate applicable would be 15% . The Learned CITA held that the tax rate to be applicable to the assessee as per DTAA is 15% on which point, the revenue is not in appeal before us. The applicability of Article 13 of DTAA is not the dispute before us. Whether the surcharge and education cess would have to be applied on the tax determined at 15% as per DTAA is the subject matter of dispute. The Learned CITA held that the surcharge and education cess is not to be levied on the tax rate prescribed under DTAA at 15% on fees for technical services by relying on the decision of Kolkata Tribunal in the case of *DIC Asia Pacific Pte Ltd vs Asst Director of Income Tax, International Taxation in ITA No. 1458 (kol) of 2011 dated 20.6.2012 for Asst Year 2009-10 reported in (2012) 52 SOT 447 (Kol ITAT).* Aggrieved, the revenue is in appeal before us on the following grounds:-

> *"i. That on the facts of the case and in law the ld.CIT(A) failed to appreciated the legal position that 'surcharge'and education cess'ae to be charged on income-tax leviable in this case.*
> *ii. That on the facts of the case and in law the ld.CIT(A) erred in law by not taking cognizance of the decision of the Hon'ble Uttarakhand High Court in the case of CIT, Dehradun Vs. Arthusa Offshore Co reported in 216 CTR 86 where the Hon'ble Court has held that surcharge and cess are chargeable in addition to the income-tax as per the rate specified in the DTTA."*

5. The Learned DR relied on the decision of **Uttarakhand High Court in the case of *CIT vs Arthusa Offshore Co.reported in 216 CTR 86*** , wherein it was held that surcharge is leviable to the tax determined under DTAA. In response to this, the Learned AR reiterated the findings given by the Learned CITA and argued the relevant portions of the Article 2, 3 & 13 of the DTAA between India and UK and further argued that the decision of Uttarakhand High Court was rendered in the context of India US Treaty , whereas the assessee is governed by the India UK Treaty wherein the relevant clauses are significantly different from each other. He also relied on the

following decisions of Mumbai Tribunal which had been rendered after considering Uttarakhand High Court decision and ultimately deciding in favour of the assessee:-

- ***Sunil V. Motiani vs ITO (International Taxation) reported in (2013) 33 taxmann.com 252 (Mumbai Trib)***
- ***Parke Davis and Company LLC vs ACIT reported in (2014) 41 taxmann.com 193 (Mumbai Trib)***

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 vs Asst Director of Income Tax, International Taxation in ITA No. 1458 (kol) of 2011 dated 20.6.2012 for Asst Year 2009-10 reported in (2012) 52 SOT 447 (Kol ITAT)***

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 traty 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 vs ITO (International Taxation) reported in (2013) 33 taxmann.com 252 (Mumbai Trib)***

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 vs Arthusa Offshore Co reported in 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 vs ACIT reported in (2014) 41 taxmann.com 193 (Mumbai Trib)***

This judgement was rendered in the context of India USA treaty after considering the decision of the Uttarakhand High Court in the case of CIT vs Arthusa Offshore Co reported in 216 CTR 86 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) vs M/s M Far Hotels Ltd in ITA Nos. 430 to 435 / Coch / 2011 dated 5.4.2013 (Cochin Tribunal)***

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.

THIS ORDER IS PRONOUNCED IN OPEN COURT ON 30 / 11 /2015

Sd/- Sd/-

( Mahavir Singh, Judicial Member ) (M. Balaganesh, Accountant Member)

Date 30 /11/2015

Copy of the order forwarded to:-

1.. The Appellant: The DDIT (IT) 1(1) Kolkata Room No.210, 2nd Fl., Aaykar Bhawan Poorva, 110 Shanti Pally, Kol-107. .

2 The Respondent-The BOC Group Limited C/o Shri Nimesh Kumar, Pricewaterhouse Coopers Pvt. Ltd Plot No. 56 & 57 Block-DN, Sector-V Salt Lake, Kolkata-91.

3 /The CIT, 4.The CIT(A)

5. DR, Kolkata Bench

6. Guard file.

True Copy, By order, Asstt Registrar