

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'B' BENCH, KOLKATA**

[Coram: Pramod Kumar AM and Shri George Mathan JM]

I.T.A. No.: 1458/Kol/2011
Assessment year: 2009-10

DIC Asia Pacific Pte Ltd
c/o DIC India Limited
Transport Depot Road
Taratalla, Kolkata 700088
PAN : AACCD0441P

.....**Appellant**

Vs.

Assistant Director of Income Tax
-International Taxation (1), Kolkata

.....**Respondent**

Appearances by:

Akkal Dudhewewala for the appellant
P K Chakraborty for the respondent

Date of concluding the hearing : June 20, 2012

Date of pronouncing the order : June 20, 2012

O R D E R

Per Pramod Kumar:

1. By way of this appeal, the assessee appellant has challenged correctness of CIT(A)'s order dated 27th September 2011, in the matter of assessment under section 143(1) of the Income Tax Act, 1961, for the assessment year 2009-10.

2. The short issue that we are required to adjudicate in this appeal is whether or not the learned CIT(A) was justified in upholding the levy of 'education cess' and 'higher education cess' at the rates of 2% and 1% respectively, in addition to the tax rates prescribed in the India Singapore Double Taxation Avoidance Agreement (209 ITR Statute 1; 'applicable tax treaty', in short).

3. The material facts are not in dispute. The assessee being a company incorporated under the laws of, and fiscally domiciled in, the Republic of Singapore, is eligible for the benefits of the India Singapore tax treaty. The assessee filed a return of income disclosing interest income of Rs. 28,84,476 and royalty income of Rs 5,87,02,687, and claimed that, under the provisions of Article 11 and Article 12 of the applicable tax treaty, these incomes are taxable @ 15% and 10% respectively. While this claim of taxability at the rates specified in Articles 11 and 12 of the applicable tax treaty was eventually accepted, the assessee was also levied surcharge and education cess in respect of the said tax liability. Aggrieved, inter alia, by the levy of surcharge and education cess, assessee carried the matter in appeal before the CIT(A) but without complete success on this issue. While learned CIT(A) upheld the assessee's grievance against levy of surcharge, learned CIT(A) was of the view that "there is no specific provision in the DTAA or it is provided anywhere that cess will not be charged..", and, accordingly, he held that education cess has been rightly levied. To this extent, assessee's grievance was rejected. The assessee is not satisfied and is in further appeal before us.

4. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of applicable legal position.

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

'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 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 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 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 tax treaty on 24th January 1994. In view of the specific provisions to the effect that the scope of Article 2 shall also cover “any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of the present Agreement in addition to, or in place of, the taxes referred to in paragraph 1”, and in view of the fact that education cess is essentially of the same nature as surcharge, being an additional surcharge, the scope of article 2 also extends to the education cess.

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

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

Sd/xx
George Mathan
(Judicial Member)

Sd/xx
Pramod Kumar
(Accountant Member)

Kolkata, the 20th day of June , 2012

Copies to : (1) *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *The Departmental Representative*
(6) *Guard File*

By order etc

Assistant Registrar
Income Tax Appellate Tribunal
Kolkata benches, Kolkata

Laha Sr PS