

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A', NEW DELHI**

Before Sh. N. K. Saini, AM And Sh. Kuldip Singh, JM

ITA No. 4052/Del./2015 : Asstt. Year : 2014-15

OSRAM India Pvt. Ltd. Signature Towers, 11 th Floor Tower-B, South City-1 Gurgaon	Vs	DCIT CPC-TDS, Aayakar Bhawan, Vaishali Ghaziabad
(APPELLANT)		(RESPONDENT)
PAN No. AAACO0160A		

**Appellant by : Sh. S.K.Agarwal, CA
Respondent by : Sh. K.K.Jaswal, DR**

Date of Hearing : 06.10.2015	Date of Pronouncement : 29.12.2015
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ORDER

PER N.K. SAINI, A.M.

1. This is an appeal by the Assessee against the order dated 01/04/2015 of the Ld. CIT(A)- 1, Gurgaon.
2. The 1st issue in this appeal requiring the adjudication is as to whether the ld. CIT(A) was justified in upholding the levy of education cess @ 3% in addition to the tax rates prescribed in double taxation avoidance agreement (DTAA)

entered by India with Germany, China and the United States of America (USA).

3. Facts of the case in brief are that the AO raised the TDS liability on account of the payments made by the assessee to non-resident @ 10.30% (10% tax + 0.30% on account of secondary and higher education cess) as against 10% deducted by the assessee.

4. The assessee carried the matter to the Id. CIT(A) and submitted that the tax was deducted @ 10% as per the DTAA between Government of India with Germany, China and the United States of America (USA) and that as per Article 3 of DTAA rate of tax means Income Tax including surcharge thereon. The reliance was placed on the following decision of the ITAT -:

a) "DIC Asia Pacific Pte. Ltd. ITA No. 1458/Kol/2011 (Kol).

b) Sunil v. Motiani vs. ITO ITA No. 276/M/12 (Mum)

c) CSC Technology Singaport Pvt. Ltd. vs. ADIT ITA No. 5604/Del/2010(DEL)."

5. The Id. CIT(A) after considering the submissions of the assessee confirmed the action of the AO by observing that surcharge is also payable by the foreign companies under the Act. The reliance was placed on the decision of the

Authority for Advance Ruling in the case of Airport Authority of India reported at 299 ITR 102 (AAR). Now the assessee is in appeal.

6. The Id. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that as per the DTAA, the TDS was to be deducted @ 10% which the assessee rightly deducted therefore, the AO was not justified in raising the demand on the ground that TDS was to be deducted @ 10.30% and the Ld. CIT was not justified in upholding the same. The reliance was placed on the following case laws -:

a) *“Sunil V. Motiani vs. ITO, ITA no. 276/Mum/ 2012, order dated 27.02.2013*

b) *DIC Asia Pacific Pte. Ltd. vs. ADIT, ITA no. 1458/Ko/.2011, order dated 20.06.2012*

c) *CSC Technology Singapore Pte. Ltd. vs. ADIT, ITA No. 5604/Del/2010 order dated 17.02.2012.”*

7. In his rival submissions the Id. DR reiterated the observations made by the Id. CIT(A) and strongly supported the impugned order.

8. We have considered the submissions of both the parties and carefully gone through the material available on the record. It is noticed that an identical issue having similar facts was a subject matter of adjudication before the ITAT Kolkata Bench B in ITA No. 1458/ Kol./2011 for the assessment

year 2009-10 in the case of DIC Asia Pacific Pte Ltd. vs. Assistant Director of Income Tax International Taxation (1), Kolkata wherein relevant findings have been given in para 9 and 10 of the order dated 20th June, 2012 which read as under -:

“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.”

9. Since the facts of the case under consideration are identical to the facts involved in the aforesaid referred to case of DIC Asia Pacific Pte Ltd. So, respectfully following the order dated 10th June, 2012 in the said case we set aside the impugned order and direct the AO not to levy the education cess in respect of tax liability of the assessee company.
10. As regards to ground no. 2 relating to charging of interest u/s 201(1A) of the IT Act, 1961 it was the common contention of both the parties that it is consequential in nature. We, order accordingly.
11. In the result appeal of the assessee is allowed.
(Order Pronounced in the Open Court on 29/12/2015).

Sd/-
(Kuldip Singh)
JUDICIAL MEMBER

Sd/-
(N. K. Saini)
ACCOUNTANT MEMBER

Dated: 29 / 12/2015

B. Rukhaiyar

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

		Date	<u>Initial</u>	
1.	Draft dictated on	21.12.2015		
2.	Draft placed before author	22.12.2015		
3.	Draft proposed & placed before the second member			
4.	Draft discussed/approved by Second Member.			
5.	Approved Draft comes to the Sr.PS/PS			
6.	Kept for pronouncement on	29/12/2015		
7.	File sent to the Bench Clerk			
8.	Date on which file goes to the AR			
9.	Date on which file goes to the Head Clerk.			
10.	Date of dispatch of Order.			