**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)**
**'I' BENCH MUMBAI**

**BEFORE SHRI M.BALAGANESH, AM**

**&**

**SHRI RAM LAL NEGI, JM**

**ITA No.834/Mum/2019**
(**Assessment Year :2015-16**)

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| M/s. Buro Happold Ltd.,<br>Famous Studio Lane<br>Dr. E Moses Road<br>Mahalaxmi<br>Mumbai,<br>Maharashtra-400001 | Vs. | DCIT(IT)-1(3)(2)<br>Mumbai |
| **PAN/GIR No.AABCB9239Q** | | |
| **(Appellant**) | .. | **(Respondent**) |

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| Assessee by | Shri Vijay Mehta & Shri Anuj Kisnadwala - AR |
| Revenue by | Shri Sanjay Singh – CIT DR |
| **Date of Hearing** | **27/08/2020 & 18/12/2020** |
| **Date of Pronouncement** | **30/12/2020** |
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## आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.834/Mum/2019 for A.Y.2015-16 preferred by the order against the final assessment order passed by the Assessing Officer dated 28/11/2018 u/s.143(3) R.W.S. 144C(13) of the Income Tax Act 1961, hereinafter referred to as Act, pursuant to the directions of the ld. Dispute Resolution Panel-1(WZ), Mumbai (DRP in short) u/s.144C(5) of the Act,1961 dated 04/09/2018 for the A.Y.2015-16

2. The assessee had raised the following grounds of appeal:-

***1. <u>Ground No.1- Taxability of amount received as common cost recharge as Royalty and fees for technical services (FTS)</u>***

*1.1. On the facts and in the circumstances of the case and in law, the learned DRP(Dispute Resolution Panel) and DCIT have erred in considering common cost recharge as royalty and Fees for technical services (FTS) as per Article 13 of the India-UK Double Taxation Avoidance Agreement ('DTAA')*

***2. <u>Ground No.II – Levy of surcharge and Education Cess on tax calculated at special rates under the DTAA</u>***

*2.1. Without prejudice to the above, on the facts and circumstances of the case and in law, the learned DCIT has erred in levying surcharge amounting to INR 2,59,727 and education cess amounting to INR 1,63,628 on tax calculated as per rate provided in Article 13 of India-UK DTAA.*

*2.2. The learned DCIT has not appreciated the fact that as per Article 13 of the DTAA, the tax rate cannot exceed 15%. Further, the term 'tax' as defined under India-UK DTAA includes any income tax including surcharge and identical / substantially similar taxes.*

***3. <u>Ground No.III – Erroneous levy of consequential interest under section 234B</u>***

*3.1. On the facts and circumstances of the case, the learned DCIT has erred in levying consequential interest under section 234B of the Act, amounting to INR 3,03,688.*

2.1. We find that assessee had also raised additional ground of appeal on 20/01/2020 which is as under:-

***1. <u>Ground No.1 – Taxability of Consulting and Engineering Service</u>***

*1.1. On the facts and in the circumstances of the case and in law, Consulting and Engineering Service fee amounting to INR 96,59,182 is not taxable as per the provisions of Article 13 of the India-UK Double Tax Avoidance Agreement.*

3. We have heard rival submissions and perused the materials available on record. We find that assessee is a company registered in United Kingdom and is a tax resident of that state. It is in the business of providing engineering, design and consultancy services. Assessee is providing structural and MEP (Mechanical, Electrical and Public Health) engineering for various buildings. The return of income for the A.Y.2015-16 was filed by the assessee on 30/11/2015 declaring total income of Rs.47,97,000/-. The assessee has offered to tax the income it has received under the head "consulting engineering fees" as fee for technical services under Article 13 of India-UK DTAA. During the scrutiny proceedings, the assessee filed the revised computation of income wherein the receipt from M/s. Buro Happold Engineers India Pvt. Ltd., was mentioned at Rs.53,23,753/- instead of Rs.4,61,574/- given in the original return. The draft assessment, order was framed in the hands of the assessee u/s.143(3) of the Act r.w.s. 144C(1) of the Act dated 29/12/2017 determining the total income of the assessee at Rs.3,46,30,309/- as under:-

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| Consulting Engineering Services | - | Rs. 96,59,182/- |
| Cost Reiterated | - | Rs.2,49,71,127/- |

3.1. The above total income was ought to be taxed @15% as in Article 13 of India-UK DTAA by the ld. AO. We find that assessee had preferred objections before the ld. Dispute Resolution Panel (DRP) and the same were disposed off vide order dated 04/09/2018.

3.2. During the year assessee has received amounts from the following stream:-

(a) **Consulting Engineering Services (Rs.96,59,182/-):-** This includes technical services provided in the form of sketch diagrams and concept design criteria / assumptions bound in a report to support the architectural design concept. This amount is received from various entities as under:-

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| (i) Gliders Buildcon LLP | - | Rs.33,22,086/- |
| (ii) Nival Developers Pvt. Ltd | - | Rs.10,13,343/- |
| (iii)Buro Happold Engineers India Pvt. Ltd., (Buro India) | - | Rs.53,23,753/- |

In respect of the receipt from Buro Happold Engineers India Pvt. Ltd., the above mentioned amount was offered by the assessee in its Revised Computation of Income.

(b) **Cost recharge (Rs.2,49,72,127):-** This is the amount charged to Buro India towards various costs incurred. The same has not been offered to tax by the assessee on the contention that these being management cost recharges does not make available any knowledge, skill, process, know-how and experience to Buro India as per the terms of the India-UK DTAA. During the assessment proceedings, the assessee has given an explanation as to why the amount received under this head has not been offered to tax.

3.3. The assessee submitted that it incurs various costs for the benefit of Buro group and hence, these costs are allocated group entity passed on certain pre-determined cost allocation key as per the cost allocation agreement. Accordingly, during the year under consideration, the assessee had raised common costs amounting to Rs.2,49,71,127/- to Buro India in respect of IT functions, business development, finance,

human resource management, operations, project management function, corporate and commercial. The assessee pleaded that the transactions are governed by the India-UK DTAA as assessee is a tax resident of UK. He pleaded that as per Article 13 of India-UK DTAA, Fees for technical Services ('FTS') provided by foreign company would be taxable in India on gross basis. The relevant extract of the definition of FTS as per Article 13 of India-UK DTAA is reproduced below for your ready reference.

*"4. For the purposes of paragraph 2 of the Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:*

*a. .....or*
*b. ……or*
*c. Make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design."*

3.4. The ld. AR further submitted that in order to fall within the ambit of Article 13 of India-UK DTAA, twin conditions are to be satisfied:-

1. Services should be in the nature of technical or consultancy services and
2. Services should make available technical knowledge, experience, skill knowhow or processes to the recipient of services.

3.5. It was submitted that the services provided by the assessee are managerial in nature and the same would not be covered under the definition of FTS under India-UK DTAA. The assessee even made argument on without prejudice basis, that even where it is considered that out of the above services, few services may be considered as technical or consultancy services, the same would still be not taxable under Article 13(4)(c) of the India-UK DTAA services as these services

does not thus make available any technical knowledge, experience, skill, knowhow or processes to the recipient. The ld. AR finally pleaded that such income be classified as only as business income and would not be taxable in India in the absence of permanent establishment (PE) as per Article 7 read with Article 5 of India-UK DTAA. All these submissions were also made by the assessee before the ld. DRP.

3.6. With regard to admission of additional ground raised by the assessee, the ld. DR vehemently objected to the said admission on the ground that the facts relevant for the additional ground are not on record and it does not emanate from the objections raised before the ld. DRP. The ld. DR also objected to the admission of the additional ground that if the additional ground is admitted, then the same would result in assessed income going below the returned income.

3.7. Per contra, the ld. AR vehemently argued that there is absolutely no bar if the assessed income goes below the returned income as ultimately only the real income should be brought to tax in accordance with law which would also be in consonance with the Article 265 of the Constitution of India. He vehemently argued that the department could not be unjustly enriched merely because certain amounts had been erroneously offered to tax by the assessee. He placed reliance on the decision of the Hon'ble Gujarat High Court in the case of Milton Laminates Ltd., vs. CIT reported in 37 Taxmann.com 249 (Guj) and Gujarat Gas Company Ltd., vs. JCIT reported in 245 ITR 84. We find lot of force in the said arguments of the ld. AR and we find that issue involved in the additional ground and the regular ground No.1 was the subject matter of adjudication of this Tribunal in assessee's own case for A.Y.2014-15 in ITA No.7111/Mum/2017 dated 13/11/2019 wherein the exactly similar

arguments were advanced by the ld. DR for that year also. We find that this Tribunal for A.Y.2014-15 in assessee's own case had admitted the additional ground and disposed off the issue in dispute as under:-

> *"3.1 Facts on record would reveal that the assessee being non-resident assessee stated to be engaged in providing engineering and consultancy services was assessed for year under consideration vide final assessment order dated 23/10/2017 pursuant to the directions of Ld. DRP, wherein the income of the assessee was determined at Rs.637.19 Lacs as against Nil return filed by the assessee on 30/11/2014. The original return was revised twice wherein the assessee finally declared an income of Rs.120.58 Lacs on account of consulting and engineering services. The assessment was framed on the basis of latest revised return filed by the assessee on 31/03/2016. The assessee is stated to be an entity registered in UK and engaged in the business of providing engineering design and consultancy services with respect to buildings.*
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> *3.2 Initially, a draft assessment order was passed on 08/12/2016 as per law, wherein it transpired that the assessee was in receipt of consulting and engineering services of Rs.120.58 Lacs from various entities. The said services were in the form of providing sketch diagrams and concept design criteria / assumptions bound in a report to support the architectural design. This amount was already offered to tax and the same was accepted by the revenue.*
>
> *3.3 It further transpired that the assessee was in receipt of cost recharge of Rs.516.60 Lacs from its Associated entity in India i.e. Buro India towards various costs incurred. The same was not offered to tax since as per assessee's submissions, these services did not make available any knowledge, skill, process, know-how and experience as per the terms of India-UK DTAA. These costs were stated to be incurred for the benefit of Buro Group as a whole and allocated to various group entities based on certain predetermined cost allocation keys as per the cost allocation agreement. These costs would, inter-alia, include costs incurred by the assessee in providing various services viz. IT functions, Business development, finance, Human Resource Management, operations, Project Management function, corporate and commercial services etc. It was submitted that these services would qualify as managerial services and hence not covered by Article 13 of India-UK DTAA. Even, if these services were considered to be technical or consultancy services, the same would still not be covered since these services do not make available any technical knowledge, experience, skill, know-how or processes to the recipient of service. Therefore, such services would be classified as business income and not taxable in India in the absence of Permanent Establishment (PE) in India as per Article-7 read with Article-5 of India-UK DTAA.*
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> *3.4 However, Ld. AO formed an opinion that the income earned by the assessee was taxable in India as per Section-9 of the Act and Article 13 of India-UK*

*DTAA both as royalty as well as fees for technical services. Since, as per the agreement, the assessee was entitled for mark-up of 5%, the said receipts were enhanced to that extent and brought to tax. 3.5 Aggrieved, the assessee raised objections against the proposed addition before Ld. DRP. The Ld. DRP, after considering assessee's submissions, confirmed the stand of Ld. AO by noticing that the services being rendered by the assessee were ancillary and subsidiary to the application or enjoyment of right of the assessee in brand used by the Buro- India and the payment was royalty in terms of para 3(a) of Article-13 of the treaty and therefore, its nature was that of fees for technical services. Aggrieved, the assessee is under appeal before us.*

*4. Upon perusal of earlier order of Tribunal in assessee's own case for AY 2012-13, it is evident that two issues were under consideration in the said appeal viz. (i) Taxability of Consulting & Engineering Services; (ii) the taxability of cost recharge which were stated to be ancillary and incidental to consulting & engineering services. The co-ordinate bench, in para-20, held that the amount received by the assessee on account of consulting & engineering services were to be treated as business profit and in the absence of assessee's PE in India, it could not be brought to tax. Consequently, the cost recharge which was considered to be ancillary and incidental to consulting & engineering services, was also held to be not taxable in the absence of assessee's PE in India. However, in the year before us, the assessee has already offered the consulting & engineering fees to tax which has been accepted by the revenue. Since we have admitted additional ground of appeal on this point, the issue of taxability of consulting & engineering services would go back to Ld. AO for adjudication. Therefore, logically, the issue of taxability of cost recharge, which has been treated as ancillary and incidental to consulting & engineering services, would also go back to Ld. AO for re-adjudication in the light of stand taken qua consulting & engineering services. Therefore, we deem it fit to restore both the grounds to the file of Ld. AO for re-adjudication de-novo after affording reasonable opportunity of hearing to the assessee, who, in turn, is directed to substantiate his claim and demonstrate that the facts in AY 2012-13 and in the year consideration was identical. Needless to add that the adjudication shall be done keeping in view the decision rendered by the Tribunal in AY 2012-13."*

3.8. We admit the additional ground raised by the assessee as it goes to the root of the matter and by respectfully following the aforesaid judicial precedents in assessee's own case for A.Y.2014-15, we restore the issue to the file of ld. AO for fresh adjudication as was directed by this Tribunal for A.Y.2014-15 in assessee's own case. Accordingly, the ground No.1 of

original ground of appeal and additional ground raised by the assessee are allowed for statistical purposes.

4. The ground No.2 raised by the assessee is with regard to levy of surcharge and education cess on tax calculated at special rates under the DTAA.

4.1. We have heard rival submissions and we find that the issue in dispute is squarely allowed in favour of the assessee by the Co-ordinate Bench decision of Hyderabad Tribunal in the case of RAK Ceramics UAE vs. DCIT International Taxation (2), Hyderabad reported in 104 Taxmann.com 380 dated 29/03/2019 wherein it was categorically held that surcharge and education cess could not be added to connotation 'tax' when the same is calculated as per DTAA. We find that the Hyderabad Tribunal while rendering this judgment had inturn placed reliance on the co-ordinate Bench decision of Kolkata Tribunal in the case of DIC Asia Pacific (Pte) Ltd., vs. Asst. DIT reported in 52 SOT 447 (Kol). No contrary decision was cited before us by the ld. DR in this regard and accordingly by respectfully following the aforesaid judicial president, the ground No.2 raised by the assessee is allowed.

5. The ground No.3 raised by the assessee is with regard to chargeability of interest u/s.234B of the Act which would be consequential in nature.

**6. In the result, appeal of the assessee is partly allowed for statistical purposes.**

Order pronounced on 30/12/2020 by way of proper mentioning in the notice board.

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| **Sd/-** | **Sd/-** |
| **(RAM LAL NEGI)** | **(M.BALAGANESH)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Mumbai; Dated 30/12/2020
KARUNA, *sr.ps*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
**ITAT, Mumbai**