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2 June 2020

Corporate guarantee fees are not fees for technical services; surcharge, education cess not applicable on India-France tax treaty rates

The Delhi Bench of the Indian Income-tax Appellate Tribunal (ITAT) rendered its decision that corporate guarantee fees did not qualify as fees for technical services. Further, surcharge and education cess are not applicable on the India-France tax treaty rates.

Facts of the case:

JC Decaux S.A (the taxpayer)¹ is a company incorporated in France and is engaged in the field of outdoor advertising. The taxpayer is a holding company of the "JC Decaux" group.

During the financial years (FY) 2010-11 and 2011-12, corresponding to assessment years (AY) 2011-12 and 2012-13 respectively the taxpayer entered into certain transactions with its Indian group company JCD Advertising India Private Limited (JCD India).

Issue 1: Corporate guarantee fee

- The taxpayer had provided corporate guarantee to foreign banks for money borrowed by JCD India. In consideration, the taxpayer charged corporate guarantee fees to JCD India during FY 2010-11 and FY 2011-12, corresponding to AY 2011-12 and AY 2012-13, respectively.
- The Assessing Officer (AO) in the draft assessment order for AY 2011-12 held that the corporate guarantee fee was received in lieu of services rendered by the taxpayer and thus, qualified as fees for technical services (FTS).
- The taxpayer appealed before the Dispute Resolution Panel (DRP) against the draft order of the AO for AY 2011-12 and submitted that:
 - The taxpayer had not lent any money to JCD India and in the absence of a debt-claim (between JCD India and the taxpayer in the current case), corporate guarantee fee did not qualify as interest under Article 12 of the India-France tax treaty; and
 - The corporate guarantee fee did not qualify as FTS.
- The DRP directed the AO to verify if the taxpayer had charged any corporate guarantee fee from any other group company and:
 - If yes, then any sum in excess of the average rate of foreign guarantee fee was to be taxed in the hands of the taxpayer as a transfer pricing adjustment;
 - If no, then the corporate guarantee fee was to be taxed in the hands of the taxpayer as FTS.
- Considering that the taxpayer had failed to submit any signed agreement with other group companies, the AO (based on the DRP's direction) in the final order for AY 2011-12 held that the corporate guarantee fee qualified as FTS and was taxed accordingly.
- For AY 2012-13, the AO while passing the draft order followed the finding in the final order for AY 2011-12 and held that corporate guarantee fee qualified as FTS.

¹ JC Decaux S.A. vs Assistant Commissioner of Income tax (116 taxmann.com 408) (Del ITAT)

- On appeal, the DRP observed that the corporate guarantee given by the taxpayer had enabled JCD India to avail higher credit rating and obtain loan at a lower interest rate. Thus, providing corporate guarantee qualified as services of a managerial, technical or consultancy nature, taxable as FTS under Article 13(4) of the India-France tax treaty and under Section 9(1)(vii) of the Income-tax Act, 1961 (ITA).

Issue 2: Applicability of surcharge and education cess on tax rates prescribed under the India-France tax treaty

- The taxpayer had offered its royalty income and taxable reimbursements to tax on gross basis as per the rates prescribed under the India-France tax treaty. The taxpayer did not levy surcharge or education cess on the tax computed as per the rates under the India-France tax treaty.
 - The taxpayer had relied on the case of BOC Group² in support of its contention.
- The AO levied surcharge and education cess on the tax computed on gross basis as per the rates prescribed under the India-France tax treaty.

Decision of the ITAT:

Issue 1: Corporate guarantee fees

- The ITAT held that the corporate guarantee fees did not qualify as FTS under Section 9(1)(vii) of the ITA as well as under Article 13 of the India-France tax treaty on the following basis:
 - The AO had not brought anything on record that the corporate guarantee fee was in lieu of the services rendered by the taxpayer for assisting JCD India with loan from foreign banks;
 - The services of corporate guarantee by the taxpayer were not in the nature of managerial, technical or consultancy services.

Issue 2: Applicability of surcharge and education cess on tax rates prescribed under the India-France tax treaty

- The ITAT noted that in the case of BOC Group², the Kolkata ITAT in the context of India-UK tax treaty had held as follows:
 - The term ‘tax’ under the India-UK tax treaty in the context of India included ‘income-tax’ and surcharge thereon. Further, the scope of tax extended to identical and similar taxes imposed after the date of signature of the tax treaty.
 - Education cess as introduced and described by the Finance Act, 2004 was in the nature of an additional surcharge.
 - Article 2(1) of the India-UK tax treaty provided that taxes included tax and surcharge thereon.
 - Considering that education cess was in the nature of an additional surcharge, it was covered under the scope of tax as per the provisions of Article 2 of the India-UK tax treaty. Reliance in this regard was placed on various cases³.
- Further, the ITAT noted that:
 - Income-tax under the India-France tax treaty includes any surcharge thereon.
 - The wordings of the India-France tax treaty were similar to that of India-UK tax treaty.

² DCIT vs BOC Group Ltd. 64 taxmann.com 386 (2015) (Kol. ITAT)

³ DIC Asia Pacific Pte Ltd vs Asst Director of Income Tax, International Taxation (2012) 52 SOT 447 (Kol ITAT); Sunil V. Motiani vs ITO (International Taxation) (2013) 33 taxmann.com 252 (Mum. ITAT); Parke Davis and Company LLC vs ACIT (2014) 41 taxmann.com 193 (Mum. ITAT); ITO (Intl Taxn) vs M/s M Far Hotels Ltd in ITA Nos. 430 to 435 / Coch / 2011 (Cochin Tribunal)

- Considering the above and relying on the BOC Group case⁴, the ITAT directed the AO to delete education cess and secondary and higher education cess levied by the AO on the income-tax under the India-France tax treaty.

Comments:

- The ruling will support the position that corporate guarantee is not taxable as FTS.
- The ruling affirms the principle that the rates prescribed under the India-France tax treaty need not be increased by surcharge or education cess.

⁴ DCIT vs BOC Group Ltd. 64 taxmann.com 386 (2015) (Kol. ITAT)



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