IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI I BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Sandeep S Karhail (Judicial Member)]

ITA No. 11/Mum/2022
Assessment year: 2017-18

Deputy Commissioner of Income Tax
International Tax Circle 3(2)(1), Mumbai ……Appellant

Vs.

Marubeni Corporation, Japan ……...……Respondent
Care of Marubeni India Pvt Ltd
25 Mittal Chambers, Nariman Point
Mumbai 400 021 [PAN: AAACM7628D]

CO No.: 69/Mum/ 2022
Arising out of ITA No. 11/Mum/20122
Assessment year 2017-18

Marubeni Corporation, Japan ……...…… Appellant
Care of Marubeni India Pvt Ltd
25 Mittal Chambers, Nariman Point
Mumbai 400 021 [PAN: AAACM7628D]

Vs.

Deputy Commissioner of Income Tax
International Tax Circle 3(2)(1), Mumbai ……Respondent

Appearances by:
Milind Chavan *for the appellant*
Ravi Sharma *for the respondent*

Date of concluding the hearing : 02/06/2022
Date of pronouncing the order : 20/06/2022

O R D E R

Per Pramod Kumar VP

1. This appeal, as also the cross objection, call into question correctness of the order dated 04th October 2021 passed by the Assessing Officer under section 143(3) of the Income Tax Act, 1961, for the assessment year 2017-18.

2. Grievances raised by the Assessing Officer are as follows:-

> *1. "Whether on facts and circumstances of the case and in law, the Ld.CIT(A) has grossly erred in holding that the interest income on loans in the form of suppliers credit given to Indian parties is taxable at special rates as per Article 11(2) of the India-Japan ignoring the fact that the suppliers credit in respect of which DTAA the interest is paid is effectively connected with the Permanent Establishment of the assessee in India and the interest income thereon was taxable as per Article 11(6) read with Article 7 of the DTAA."*
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> *2. "Whether on facts and circumstances of the case and in law, the Ld.CIT(A) has grossly erred in holding that the interest income on loans in the form of suppliers credit given to Indian parties is taxable at special rates as per Article 11(2) of the India-Japan DTAA specially because the assessee had a permanent Establishment in India during the said time."*
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> *3 "Whether on facts and circumstances of the case and in law, the Ld.CIT(A) has grossly erred in holding that the interest income on loans in the form of suppliers credit given to Indian parties is taxable at special rates as per Article 11(2) of the India-Japan DTAA specially because the Indian parties from whom the assessee has received interest income are also the clients of the assessee in India with whom contracts were executed through the Permanent Establishment in India and assessee has received fees for technical services in previous year from them"*
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> *4. "The Appellant prays that the order of the Ld. CIT(A) on the above ground(s) be set aside and that of the Assessing Officer be restored."*

3. When this appeal came up for hearing, learned representatives fairly agreed that whatever we decide in the case of *DCIT vs Marubeni Corporation, Japan in ITA No. 10/Mum/2022*, vide our order 17th June 2022, we have dismissed the said appeal and *inter alia* observed as follows:-

> *2. The assessee before us is a company incorporated in, and fiscally domiciled in, the Republic of Japan. It has various streams of income from its India operations- income from its permanent establishment in India (Rs 8,47,64,383), income earned from India as fees from technical services (Rs 31,76,15,635), income from shipping business (Rs 1,09,53,179) and income from interest on suppliers' credit (Rs 2,25,89,136), apart from other incidental incomes. This interest of Rs 2,25,89,136 is received by the assessee company from its customer Tata Hitachi Construction Co Ltd (earlier known as Telco Construction Equipment Co Ltd) on suppliers' credit on the sale of Excavator CKD and CBU manufactured by Hitachi Sumitomo Heavy Industries Construction Crane Co Ltd Japan and sold by the assessee company or one of its controlled entities. The terms of this supplier credit, as evident from the details placed before us at page 3 of the paper book indicate, for suppliers credit of up to 15 billion Japanese Yens at the interest rate of 6 months Japanese Yen LIBOR plus 0.90%. This interest income was offered to tax at the rate of 10% in terms of the provisions of Article 11(2) of India Japan Double Taxation Avoidance Agreement [**(1990) 182 ITR (Stat) 380- as amended from time to time**; **Indo Japanese tax treaty** in short]. When this issue came up for consideration before the Assessing Officer, in the course of scrutiny assessment proceedings, he noted that the assessee admittedly*

*has a permanent establishment in India and that, in terms of the provisions of Article 11(6) of Indo-Japanese tax treaty, the provisions of Article 11(2), which provide for a lower rate of 10%, will not come into play. There is no dispute that the assessee had a permanent establishment in India for the execution of certain projects that the assessee had in India, but the plea of the assessee was that the interest income was earned by the assessee on suppliers' credit for funding purchase of Excavator CKD and CBU manufactured by Hitachi Sumitomo Heavy Industries Construction Crane Co Ltd Japan and sold by the assessee company or one of its controlled entities, and that this transaction had nothing to do with the permanent establishment in India. The Assessing Officer did not even analyze this plea in much detail but implicitly rejected it nevertheless by proceeding on the basis that since the assessee had a permanent establishment, the exclusion clause under Article 11(6) was triggered, and the assessee was no longer eligible for the concessional rate of gross basis taxation @ 10%. He thus proceeded to hold, as he had originally proposed in the show cause notice, that interest income of Rs 2,25,89,136 "**at 40% as per the India Japan DTAA taking into account the presence of the permanent establishment in the year under consideration**". Aggrieved, the assessee carried the matter in appeal before the CIT(A) who upheld the plea of the assessee and concluded that the interest income in question is required to be taxed @10% in terms of the provisions of the Article 11(2) as there is no connection between the interest income and the permanent establishment. The Assessing Officer is aggrieved and is in appeal before us on the following grounds which are raised in the form of questions requiring our adjudication:*

1. Whether on facts and circumstances of the case and in law, the Ld. CIT(A) has grossly erred in holding that the interest income on loans in the form of suppliers' credit given to Indian parties is taxable at special rates as per Article 11(2) of the India-Japan DTAA ignoring the fact that the suppliers' credit in respect of which the interest is paid is effectively connected with the Permanent Establishment of the assessee in India and the interest income thereon was taxable as per Article 11(6) read with Article 7 of the DTAA.

2. "Whether on facts and circumstances of the case and in law, the Ld. CIT(A) has grossly erred in holding that the interest income on loans in the form of suppliers credit given to Indian parties is taxable at special rates as per Article 11(2) of the India-Japan DTAA especially because the assessee had a Permanent Establishment in India during the said time.

3. Whether on facts and circumstances of the case and in law, the Ld. CIT(A) has grossly erred in holding that the interest income on loans in the form of suppliers credit given to Indian parties is taxable at special rates as per Article 11(2) of the India-Japan DTAA especially because the Indian parties from whom the assessee has received interest income are also the clients of the assessee in India with whom contracts were executed through the Permanent Establishment in India and assessee has received fees for technical services in a previous year from them.

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

4. Let us first take a careful look at the relevant treaty provisions, i.e. Article 11, Article 7 and Article 14, and try to understand the scheme of source jurisdiction taxation of interest income as envisaged therein. These provisions are reproduced below for ready reference:

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 Contracting State.

*2. However, **such interest may also be taxed in the Contracting State in which it arises, and according to the laws of that Contracting State, but if the recipient is the beneficial owner of the interest the tax so charged shall not exceed 10 per cent of the gross amount of the interest.***

3. Notwithstanding the provisions of paragraph 2, interest arising in a Contracting State shall be taxable only in the other Contracting State if:

(a) the interest is derived and beneficially owned by the Government of that other Contracting State, a political sub-division or local authority thereof, or the central bank of that other Contracting State or any financial institution wholly owned by that Government; or

(b) the interest is derived and beneficially owned by a resident of that other Contracting State with respect to debt-claims guaranteed, insured or indirectly financed by the Government of that other Contracting State, a political sub-division or local authority thereof, or the central bank of that other Contracting State or any financial institution wholly owned by that Government.

4. For the purposes of paragraph 3, the terms "the central bank" and "financial institution wholly owned by that Government" mean:

(a) in the case of Japan:
(i) the Bank of Japan;
(ii) the Japan Bank for International Cooperation;
(iii) the Japan International Cooperation Agency;
(iv) the Nippon Export and Investment Insurance; and
(v) such other financial institution the capital of which is wholly owned by the Government of Japan as may be agreed upon from time to time between the Governments of the Contracting States;

(b) in the case of India:
(i) Reserve Bank of India;
(ii) Export-Import Bank of India;
(iii) General Insurance Corporation of India;
(iv) New India Assurance Company Limited; and
(v) such other financial institution the capital of which is wholly owned by the Government of India as may be agreed upon from time to time between the Governments of the Contracting States.

5. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from Government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures.

***6. The provisions of paragraphs 1, 2 and 3 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performs in that other Contracting State independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply**.*

7. Interest shall be deemed to arise in a Contracting State when the payer is that Contracting State itself, a political sub-division or a local authority thereof or a resident of that Contracting State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection

with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

8. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

ARTICLE 7- BUSINESS PROFITS

1. The profits of an enterprise of a Contracting State shall be taxable only in that Contracting State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in that other Contracting State but only so much of them as is directly or indirectly attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the Contracting State in which the permanent establishment is situated or elsewhere.

4. Insofar as it has been customary in a Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary; the method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article.

5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

6. For the purposes of the provisions of the preceding paragraphs of this Article, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

7. Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

Article 14 - INDEPENDENT PERSONAL SERVICES

1. Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that Contracting State unless he has a fixed base regularly available to him in the Contracting State for the purpose of performing his activities or he is present in that other Contracting State for a period or periods exceeding in the aggregate 183 days during any taxable year or 'previous year' as the case may be. ***If he has such a fixed base or remains in that other Contracting State for the aforesaid period or periods, the income may be taxed in that Contracting State but only so much of it as is attributable to that fixed base or is derived in that other Contracting State during the aforesaid period or periods.***

2. The term 'professional services' includes incredibly independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants.

[Emphasis, by underlining, supplied by us]

5. As is evident even from a plain reading of the above treaty provisions, the scheme of the Indo-Japanese tax treaty, so far as taxability of interest income in the source jurisdiction is concerned, is like this. When the enterprise of one of the contracting states (such as Japan, as in this case) earns interest, as a beneficial owner, from the other contracting state (such as India, as in this case), the source jurisdiction has the right to tax it, barring in the cases of specified exception- which have no application on the facts of this case, at the rate of 10% on a gross basis. Article 11(2) is unambiguous on this aspect, and there is no dispute on this fundamental position. Article 11(6), however, provides an exception to this taxation @ 10% on the gross basis. This article provides that where such an enterprise (i) carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performing professional services from a fixed base situated therein, (ii) and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base, the provisions of Article 7 or Article 14, as the case may be, shall apply. In plain words, so far as the situation like the one before us is concerned, the legal position is that where the interest is earned on a debt claim which is effectively connected with a permanent establishment through which such an enterprise is carrying on the business, the provisions of Article 11 will have to make way for the applicability of Article 7.

6. Let us now turn to the scheme of Article 7(1) and Article 14(1). Article 7(1) provides that if an enterprise of one of the treaty partner jurisdictions carries on business in the other jurisdiction, say a Japanese enterprise carrying on business in India, the profits of such an enterprise may be taxed in the source jurisdiction, i.e. India, but only to the extent, such profit is directly or indirectly attributable to that permanent establishment in the source jurisdiction, i.e. in India. What follows is that unless the profit earned by an enterprise in the other jurisdiction is directly or indirectly attributable to that permanent establishment in the source jurisdiction, it cannot be taxed even under article 7. Article 14(1), inter alia, provides that if a person providing independent personal services has "a fixed base or remains in that other Contracting State for the aforesaid period or periods, the income may be taxed in that Contracting State but only so much of it as is attributable to that fixed base or is derived in that other Contracting State during the aforesaid period or periods". Therefore, even if a person has a fixed base for providing independent personal services, and an interest income can be said to be connected with the same, it cannot be brought to tax under Article 14(1) unless such an interest income is attributable to that fixed base. What essentially follows is that the mere existence of a permanent establishment in the source jurisdiction cannot, therefore, be reason enough to invoke the taxability of an interest income under Article 7(1) unless such an income is directly or indirectly attributable to such a permanent establishment. As we say so, we may add that a connection per se of an

income with the permanent establishment cannot always and inevitably lead to the attribution of such income in the hands of the permanent establishment, as 'attribution of an income to the permanent establishment' is a degree higher than mere 'connection of an income with the permanent establishment'. While every income attributable to a permanent establishment inherently has a connection with that permanent establishment, the converse is not necessarily and universally correct, inasmuch as there can be incomes which may have some connection with the permanent establishment and yet the connection may not be material enough to hold that such an income is attributable to that permanent establishment. The connotations of the expression "effectively connected" are to be seen in this light. It is also equally important to bear in mind the fact that the Article 11(6) does not explicitly provide for taxation of interest income at a rate higher than the rate under Article 11(2); all it does is to provide that in a situation in which the interest is "effectively connected" with a PE or a fixed base, the provision of Article 7 or Article 14, as the case may be, will come into play. Article 11(6) thus proceeds on an underlying assumption, and the assumption is that when the debt claim in respect of which interest is paid is "effectively connected" with the permanent establishment, it will result in taxability of the said income under Article 7(1). Unless taxability under Article 7(1) or Article 14(1) comes into play, the exclusion clause under article 11(6) is meaningless. An interpretation of Article 11(6) to make the exclusion clause under article 11(6) meaningless will result in an interpretation contrary to the well-settled principle of interpretation ut res magis valeat quam pereat, i.e., to make a legal provision workable rather than redundant- a principle which has been consistently approved by Hon'ble Courts above, such as in the case of ***Tinsukhia Electricity Supply Co Ltd Vs State of Assam [(1989) 45 Taxman 29 (SC)/ 1989 SCR (2) 544]****. In our considered view, the scheme of Article 11(6) does not visualise a situation in which the source jurisdiction taxability of an interest income under Article 11(2) will be ousted because of the enterprise having a permanent establishment in the source jurisdiction, and such an interest income will also not be taxable under article 7(1) as the interest income is not attributable to the permanent establishment or under article 14(1) as the interest income attributable to the fixed base available to the assessee. Such a no man's land between the domain of Article 11(2) vis-à-vis Article 7(1), or between Article 11(2) vis-à-vis Article 14(1) will be an apparent incongruity. Therefore, the connotations of the expression "effectively connected", in respect of Article 11(6) read with Article 7(1), must be such that unless the interest income cannot be held to 'directly or indirectly attributable to a PE', or attributable to the fixed base of the assessee, the taxation of such an interest income, at a rate higher than article 11(2), does not come into play, and, in such a situation also, such an interest income is to be taxed on a net basis as a part of the business profits or income from independent personal services. Viewed in the light of the above discussions, an interest income can only be said to be effectively connected with a permanent establishment or with a fixed base only when the connection is such that it leads to taxability in the hands of the taxpayer under article 7 or article 14.*

7. In view of the above discussions, to term a connection of the interest income with the permanent establishment or the fixed base, as "effectively connected", one has to see whether, by virtue of such a connection, the interest income in question is taxable as an income attributable to the permanent establishment or the fixed base in question. The effectiveness of connection thus lies in the taxability under article 7 or article 14. Unless that taxability comes into play, there cannot be any overlapping in the scope of article 11 vis-à-vis Article 7 or vis-à-vis article 14, and, unless there is such an overlapping of the treaty provisions, there is no occasion for exclusion of one of the overlapping treaty provision by Article 11(6). In other words, the taxability under Article 7 or Article 14 is a sine qua non for triggering the exclusion clause under Article 11(6). There is no finding to, or even indication of, that effect. Unless the Assessing Officer gives that finding, excluding interest income from gross basis taxation under Article 11(6) cannot come into play. In any event, triggering of exclusion under Article 11(6) does not, by itself, result in taxation of interest income at the normal rate of tax-unless the interest income is taxable under Article 7(1) or under Article 14(1).

8. On the facts of this case, however, all that the Assessing Officer has indicated is that the assessee had a permanent establishment in India during the relevant period and that there was presumably some connection between the interest income of the assessee and the existence of the permanent establishment. There is nothing to elaborate upon the nature of the connection, except for the vague generalities, or to even prima facie indicate that the connection was such that it could result in the debt claim in question, i.e. the debt claim on which the impugned interest income is earned by the assessee, being treated as effectively connected with the permanent establishment to the extent that income from such debt claim could be brought within the ambit of Article 7(1). The basic finding of taxability under article 7(1) is missing, but then, as we have concluded earlier, such a finding is the foundational requirement triggering the exclusion clause under Article 11(6). As far as interest income is concerned, it can happen, for example, when the debt claim in respect of which interest is paid is forming part of the assets of the permanent establishment, when economic ownership of the debt claim is allocated to the permanent establishment or when the permanent establishment plays a critical role in earning of that interest income. None of these conditions is satisfied in the present case, and there is nothing more than the mere existence of a permanent establishment of the assessee company in India, which is being put against the assessee. Unless Article 7 comes into play, the jurisdiction of Article 11(2) is not ousted, Article 7 cannot come into play unless the interest income is directly or indirectly attributable to the permanent establishment, and there is not even an effort, on the part of the revenue, to demonstrate the nexus between the permanent establishment and the interest income. It is only elementary that the onus of establishing the 'effective connection' between the debt claim with the permanent establishment is on the Assessing Officer, and, to this end, all that is expected of the assessee is to reasonably comply with the requisitions, for relevant information, made by the Assessing Officer. The assessee has not even been faulted on this count. The Assessing Officer has simply proceeded on the basis that since the assessee has a permanent establishment in India, it can be said to be connected with such a PE, and, accordingly, taxation at the normal rate at which business profits are taxed in the hands of the foreign companies is permissible. That approach is inherently flawed. Even if the interest income is connected with the assessee company's permanent establishment, it can only be brought to tax in India, under Article 7, when the interest income is directly or indirectly attributable to the permanent establishment. It is not even the case of the Assessing Officer that the permanent establishment played any role in the supplier credit, which is the debt claim leading to the impugned interest income, being extended to the Indian customers who have paid interest on the suppliers' credit. As such, no part of interest income, by any stretch of logic, can be said to be directly or indirectly attributable to the Indian permanent establishment of the assessee company.

9. In the grounds of appeal raised before us, it is alleged that the Indian parties from whom the assessee has received interest income are also the clients of the assessee in India with whom contracts were executed through the Permanent Establishment in India and the assessee has received fees for technical services in a previous year from them, but then the performance of contracts through the PE or receipt of fees for technical services from such clients is irrelevant as long as the interest income is not demonstrated to be attributable to the permanent establishment. Such an attribution cannot be inferred or assumed; there has to be cogent material to establish the fact that the income in question, i.e. interest income in this case, is attributable to the permanent establishment. There is not even a whisper of a suggestion to that effect. In view of the above discussions and the context of the interplay of Article 11(6) and Article 7(1), in our considered view, the expression 'effectively connected with such permanent establishment' must mean a situation in which the interest income in question can be said to be "directly or indirectly attributable to the permanent establishment" and can be brought to tax under article 7(1) as such. That is not even the case of the Assessing Officer before us.

> *10. In view of these discussions, as also bearing in mind the entirety of the case, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter. Even though we may have traversed a different path, vis-à-vis the path taken by the coordinate bench in the assessee's own case for the earlier year, our conclusions are the same as arrived at by the coordinate bench, and that's what matters. All the three grounds of appeal centre around this fundamental issue regarding triggering of exclusion clause under Article 11(6), which, as above, we have decided in favour of the assessee, and all the three grounds of appeal must, therefore, be dismissed accordingly. We order so.*

4. We see no reasons to take any other view of the matter than the view so taken by the co-ordinate bench. Respectfully following the same, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

5. In the result appeal filed by the Assessing Officer is dismissed.

6. Now we take up the cross objection filed by the assessee.

7. The assessee has raised the following grievance:

> *On the facts & circumstances of the case and in law, the Assessing Officer [DCIT(IT-3(2)(1), Mumbai] has erred in levying surcharge and health and education cess on FTS income when the same is table at the rate of 10% as prescribed in Article 12 of the India –Japan Tax Treaty.*

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

9. On a perusal of assessment order, we find that in the last paragraph of the assessment order, the Assessing Officer has specifically mentioned that the FTS "income of Rs. 30,92,20,199 is to be taxed @10% as per the DTAA" whereas the income said to be attributable to the PE "is to be taxed at the rates applicable to foreign companies, i.e. 40% plus surcharge and cess as per the Income Tax Act." Yet, in the computation of tax liability, the surcharge as also health and education is also levied. That is certainly incorrect. In any event, this issue is covered, in favour of the assessee, by co-ordinate bench decisions, including in the case of *DIC Asia Pacific Pte Ltd vs ADIT [(2012) 22 taxmann.com 310 (Kol)]* wherein speaking through are of us, i.e, the Vice President the co-ordinate bench as observed as follows:-

> *5. We find that the provisions of Articles 2, 11 and 12, which are relevant for our present purposes, are as follows:*
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> *ARTICLE 2 : TAXES COVERED*
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> *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 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".*

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 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. Accordingly, the provisions of Articles 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. The view so taken by the coordinate bench, with which we are in complete agreement, has also been adopted in a large number of cases and including in the context of the India UAE Double Taxation Avoidance Agreement. These cases include Capgemini SA v. Dy. CIT (International Taxation) [2016] 72 taxmann.com 58/160 ITD 13 (Mum. - Trib.), Dy. DIT v. J.P. Morgan Securities Asia (P.) Ltd. [2014] 42 taxmann.com 33/[2015] 152 ITD 553 (Mum. - Trib.), Dy. DIT v. BOC Group Ltd. [2015] 64 taxmann.com 386/[2016] 156 ITD 402 (Kol. - Trib.), Everest Industries Ltd. v. Jt. CIT [2018] 90 taxmann.com 330 (Mum. - Trib.), Soregam SA v. Dy. DIT (Int. Taxation) [2019] 101 taxmann.com 94 (Delhi - Trib.) and Sunil v. Motiani v. ITO (International Taxation) [2013] 33 taxmann.com 252/59 SOT 37 (Mum. - Trib.). We may add that no contrary decision was cited before us nor any specific justification assigned for the levy of surcharge and education cess. The provisions of the India Japan Double Taxation Avoidance Agreement are in pari materia with the provisions of India Singapore DTAA which was subject matter of consideration in DIC Asia Pacific's case (supra). We, therefore, have no reasons to take any other view of the matter than the view so taken by the coordinate benches. Respectfully following the same, we uphold the plea of the assessee and direct the Assessing Officer to delete the levy of surcharge and health and education cess on the facts of this case. The assessee gets the relief accordingly.

11. In the result, the cross objection appeal is allowed. To sum up, while the appeal of the Assessing Officer is dismissed and cross objections filed by the assessee is allowed. Pronounced in the open court today on the 20th day of June, 2022.

Sd/-	***Sd/-***
Sandeep S Karhail	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 20th day of June, 2022

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

By order etc

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai