IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri N.R.S. Ganesan (JM) and Shri B.R. Baskaran(AM)

I.T.A No. 430 to 435/Coch/2011
(Assessment years 2003-04 to 2008-09)

ITO (Int.Taxation)-II Kochi	vs	M/s M Far Hotels Ltd NH-47, By-Pass Kundannur Junction Kochi-34 PAN : CHNMO1094C
(Appellant)		(Respondent)

C.O. Nos 23 to 28/Coch/2011
(Arising out of I.T.A No. 430 to 435/Coch/2011)
(Assessment years 2003-04 to 2008-09)

M/s M Far Hotels Ltd Kundannur Junction, Kochi-34	vs	ITO (Int.Taxation)-II Kochi
(Cross Objector)		(Respondent)

Revenue by : Shri M Anil Kumar, C.I.T
Respondent by : Shri C Krishnamoorthy

Date of hearing : 02-04-2013
Date of pronouncement : 05-04-2013

O R D E R

Per N.R.S. Ganesan (JM)

All the appeals of the revenue are directed against the independent orders of CIT(A)-III, Kochi dated 30-11-2010 for the assessment years 2003-04 to 2008-09. The taxpayer has also filed cross objections against the very same orders of C.I.T.(A). Therefore, we heard all the appeals of the revenue and the cross objections of the taxpayer together and dispose of the same by this common order.

2. The only issue arises for consideration is treating the taxpayer as "assessee in default" u/s 201(1) and levy of interest u/s 201(1A) of the Act.

3. Shri Anil Kumar, the ld.DR submitted that the taxpayer had to deduct tax u/s 195 of the Act @10.5% inclusive of surcharge. However, surcharge portion was not taken into consideration while deducting the tax. According to the ld.DR under the Income-tax Act, the taxpayer is expected to deducted tax @10.5% after taking into consideration surcharge.

Therefore, the CIT(A) is not correct in deleting the addition by following the DTAA.

4. On the contrary, Shri Krishnamurthy, the ld.representative for the taxpayer submitted that the taxpayer has paid management fee, interest, etc. to a resident of France. According to the ld.representative, there was an agreement between Government of India and Government of France for avoiding double taxation. According to the ld.representative, whenever, there is a double taxation agreement between two sovereign countries, the provisions of DTAA would prevail over the Indian Income-tax Act. According to the ld.representative, double taxation avoidance agreement between India and France does not say anything about inclusion of surcharge for the purpose of deduction of tax. Therefore, double taxation avoidance agreement is more beneficial to the taxpayer than the Indian Income-tax Act. In view of section 90(2) of the Act, the ld.representative submitted that by following the provisions of the DTAA, the taxpayer has deducted tax only the tax portion without including the surcharge. The CIT(A), according to the ld.representative, deleted the addition to the tax

liability to the extent of addition made for surcharge and education cess as per the rate applicable under the DTAA. Therefore, the revenue may not have any grievance at all.

5. We have considered the rival submissions on either side and also perused the material available on record. Admittedly, the management fee, interest, etc. are paid to a resident of France. It is also not in dispute that there was an agreement between the government of India and government of France for avoidance of double taxation. It is also not in dispute that the double taxation avoidance agreement between the government of India and France does not say anything about inclusion of surcharge and education cess for the purpose of deduction of tax at source. Therefore, there is an apparent conflict between the Income-tax Act and DTAA between the two sovereign countries with regard to deduction of tax at source on surcharge and education cess. In these circumstances, the question arises for consideration is whether the provisions of Indian Income-tax Act would prevail over the double taxation avoidance agreement between the two sovereign countries.

6. We have carefully gone through the provisions of section 90(2) of the Act which reads as follows:

> "(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent that are more beneficial to that assessee."

In view of the above, it is obvious that in respect of a taxpayer to whom the double taxation avoidance agreement applies, the provisions of the Indian Income-tax Act shall apply to the extent they are more beneficial to that taxpayer. In other words, if the provisions of DTAA are more beneficial to the taxpayer, then the provisions of DTAA would prevail over the Indian Income-tax Act. Since the DTAA is silent about the surcharge and education cess for the purpose of deduction of tax at source, this Tribunal is of the considered opinion that the taxpayer may take advantage of that provision in the DTAA for deduction of tax. The CIT(A) has only deleted the tax

component to the extent of surcharge and education cess at the rate applicable under the DTAA. Therefore, this Tribunal do not find any infirmity in the orders of lower authority. Accordingly the same are confirmed.

7. The cross objections are filed only to support the orders of CIT(A). No independent issue is raised in the cross objections. Therefore, this Tribunal is of the considered opinion that the cross objections of the taxpayer are not maintainable.

8. In view of the above, both the appeals of the revenue and the cross objections of the taxpayer are dismissed.

Order pronounced in the open court on this 05th April, 2013.

Sd/-	sd/-
(B.R. Baskaran)	(N.R.S. Ganesan)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Cochin, Dt : 05th April, 2013
pk/-

copy to:

1. The appellant
2. The respondent
3. The Commissioner of Income-tax
4. The Commissioner of Income-tax(A)
5. The DR

(True copy) By order

Asstt. Registrar, Income-tax Appellate Tribunal, Cochin Bench