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### Education cess is not disallowable under section 40(a)(ii) of the Income tax Act, 1961

Education cess is allowable expenditure as word "cess" is conspicuously absent under section 40(a)(ii) of the Income tax Act, 1961

The Bombay High Court in Sesa Goa Limited <sup>1</sup> has held that education cess is allowable expenditure as word "cess" is conspicuously absent under the provisions of section 40(a)(ii) of the Income tax Act, 1961.

#### Facts of the case:

Sesa Goa Limited (the taxpayer) is in the business of mining and export of iron ore and manufacture and sale of metallurgical coke. It had filed original return of income and revised return of income. While filing original return and revised return of income, it had not claimed deduction of cess as business expenditure. Taxpayer had claimed deduction of cess as business expenditure by filing a separate letter before the Assessing Officer (AO). The AO denied the claim for deduction of cess as business expenditure.

Aggrieved by the assessment order, taxpayer preferred an appeal before the Commissioner of Income tax (Appeals) [CIT(A)]. The CIT(A) denied the deduction of cess as business expenditure relying on the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. v. CIT<sup>2</sup> wherein it has been held that where an assessee has claimed deduction after the return has been filed, the assessing authority has no powers to entertain such claim made otherwise than by a way of a revised return.

Aggrieved by the CIT(A) order, taxpayer preferred an appeal before the Income Tax Appellate Tribunal (ITAT). ITAT denied the deduction and held that education cess and secondary higher education cess levied, has been collected as part of the income-tax and the provisions of section 40(a)(ic) & 40(a)(ii) of the Income tax Act, 1961 (the Act) are clearly applicable. Further, it held that cess payment is not a fee but is a tax and in case of fees, payment is made against getting certain benefit or services while tax is imposed by the government and is levied for which the person who pays the tax is not promised to get any benefit or service in return and the taxpayer is not getting any benefit or service in return for making payment towards cess.

The taxpayer challenged the order of the Tribunal before the High Court.

#### Decision of Bombay High Court:

Whether education cess, higher and secondary education cess, collectively referred to as "cess" is allowable as a deduction in the year of its payment?

The High Court noted the following provisions of the tax law:

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<sup>1</sup> ITA no. 17 and 18 of 2013

<sup>2</sup> 284 ITR 323

Section 40(a)(ii) of the Act provides that notwithstanding anything to the contrary in sections 30 to 38 of the IT Act, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession", -

(a) in the case of any assessee -

(ia).....

(ib).....

(ic) any sum paid on account of fringe benefit tax under Chapter XIIH;

(ii) any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains.

[Explanation 1.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes and shall be deemed always to have included any sum eligible for relief of tax under section 90 or, as the case may be, deduction from the Indian income-tax payable under section 91.]

[Explanation 2.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes any sum eligible for relief of tax under section 90A;]

The High Court discussed that under the Income tax Act, 1922, section 10(4) had banned allowance of any sum paid on account of 'any cess, rate or tax levied on the profits or gains of any business or profession'. However in the corresponding section 40(a)(ii) of the Income-tax Act, 1961 the expression "cess" is quite conspicuous by its absence.

The High Court discussed the Circular<sup>3</sup> issued by the CBDT which clarifies that the word "cess" has been omitted from Section 40(a)(ii) and only taxes paid are to be disallowed in the assessments for the years 1962-63 and onwards. Further, the CBDT circular, is binding upon the authorities under the Act, like Assessing Officer and the first Appellate Authority.

The High Court discussed following judicial precedents:

- New Shorrock Spinning and Manufacturing Co. Ltd. Vs Raval<sup>4</sup>, wherein it has been held that one safe and infallible principle, which is of guidance in these matters, is to read the words through and see if the rule is clearly stated. If the language employed gives the rule in words of sufficient clarity and precision, nothing more requires to be done. The language used by the legislature best declares its intention and must be accepted as decisive of it.
- CIT vs Motors & General Stores<sup>5</sup> wherein it has been held that when it comes to interpretation of the Act, it is well established that no tax can be imposed on the subject without words in the Act clearly showing an intention to lay a burden on him.
- CIT Vs Radhe Developers<sup>6</sup> wherein it has been held that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied, into the provisions which has not been provided by the legislature.

<sup>3</sup> No. F. No.91/58/66-ITJ(19), dated 18th May, 1967

<sup>4</sup> 37 ITR 41 (Bom.)

<sup>5</sup> 66 ITR 692 (SC)

<sup>6</sup> 341 ITR 403

- Goodyear Vs State of Haryana<sup>7</sup> wherein it has been held that one can only look fairly at the language used and no tax can be imposed by inference or analogy. It is also not permissible to construe a taxing statute by making assumptions and presumptions.
- AGS Tiber Vs CIT<sup>8</sup> wherein it has been held that the provision for deduction, exemption or relief should be interpreted liberally, reasonably and in favour of the assessee and it should be so construed as to effectuate the object of the legislature and not to defeat it. Further, the interpretation cannot go to the extent of reading something that is not stated in the provision.
- CIT Vs Gurupada Dutta<sup>9</sup> wherein it has been held that the rate was not 'assessed on the basis of profits' and was allowable as a business expense.
- Jaipuria Samla Amalgamated Collieries Ltd Vs CIT<sup>10</sup> wherein it has been held that the expression 'profits or gains of any business or profession' has reference only to profits and gains as determined in accordance with Section 29 of this Act and that any rate or tax levied upon profits calculated in a manner other than that provided by that section, could not be disallowed under this sub-clause.
- In Chambal Fertilisers and Chemicals Ltd. Vs CIT Range-2, Kota<sup>11</sup>, the Rajasthan High Court relied on above circular and held that the ITAT erred in holding that the "education cess" is a disallowable expenditure under Section 40(a)(ii) of the IT Act. This decision has been followed by the Tribunal in DCIT Vs Peerless General Finance and Investment and Co. Ltd.<sup>12</sup>, DCIT Vs Graphite India Ltd.<sup>13</sup> and DCIT Vs Bajaj Allianz General Insurance<sup>14</sup>.
- The High Court rejected the Revenue's reliance on the Supreme Court decision in the case of M/s Unicorn Industries Vs Union of India and others<sup>15</sup> on the basis that, the issue involved therein was different and accordingly cannot be applied.

The High Court held that although the taxpayer did not claim any deduction in respect of amounts paid by it towards "cess" in their original return of income nor in revised return of income, there was no bar to the CIT(A) and ITAT to consider and allow such deduction to the appellant. The High Court relied upon the decision of CIT Vs Pruthvi Brokers & Shareholders Pvt. Ltd.<sup>16</sup> and Ahmedabad Electricity Co. Ltd Vs CIT<sup>17</sup>. The Appellate Authorities may confirm, reduce, enhance or annul the assessment or remand the case to the Assessing Officer. Further the High Court distinguished the decision of Goetze (India) Ltd. v. Commissioner of Income Tax<sup>18</sup> relied upon by Revenue, as the Hon'ble Apex Court was not dealing with the extent of the powers of the appellate authorities but the observations were in relation to the powers of the assessing authority.

The High Court held that there is no reference to any cess in section 40(a)(ii) of the Act, accordingly there will not be any disallowance for cess paid under section 40(a)(ii) of the Act.

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<sup>7</sup> 188 ITR 402(SC)

<sup>8</sup> 233 ITR 207

<sup>9</sup> 14 ITR 100

<sup>10</sup> 82 ITR 580

<sup>11</sup> Income Tax Appeal No.52/2018

<sup>12</sup> ITA No.1469 and 1470/Kol/2019 decided on 5<sup>th</sup> December, 2019 by the ITAT, Calcutta

<sup>13</sup> ITA No.472 and 474 Co. No.64 and 66/Kol/2018 decided on 22nd November, 2019 by the ITAT, Calcutta

<sup>14</sup> ITA No.1111 and 1112/PUN/2017 decided on 25th July, 2019 by the ITAT, Pune

<sup>15</sup> [2019] 112 taxmann.com 127 (SC)

<sup>16</sup> 349 ITR 336

<sup>17</sup> 199 ITR 351

<sup>18</sup> (2006) 284 ITR 323 (SC)

## Observations:

There have been conflicting decisions of the Mumbai Tribunal in the past; adverse decisions in the case of Everest Industries Ltd vs JCIT [2018] 90 taxmann.com 330 (Mum ITAT) and Kalimati Investments Co. Ltd vs ITO (ITA No. 4508/Mum/2010) (dated 09-05-2012), while recent decision in Tata Steel Limited<sup>19</sup> was favourable that cess paid was not disallowable under section 40(a)(ii) of the Act.

The High Court has not discussed the Supreme Court case in CIT vs K. Srinivasan [1972]<sup>20</sup> wherein it has been held that, *"The meaning of surcharge is to charge in addition or to subject to an additional or extra charge. If that meaning is applied to section 2 of the Finance Act, 1963, it would lead to the result that income-tax and super-tax were to be charged in four different ways or at four different rates which may be described as: (i) the basic charge or rate (In Part I of the First Schedule); (ii) surcharge; (iii) special surcharge; and (iv) additional surcharge calculated in the manner provided in the Schedule. Read in this way, the additional charges form a part of the income-tax and super-tax. According to the revenue, the word 'surcharge' has been used in Article 271 for the purpose of separating it from the basic charge of a tax or duty of the purposes of distributing the proceeds of the same between the Union and the States. The proceeds of the surcharge are exclusively assigned to the Union."*

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<sup>19</sup> ITA No. 5616, 4043, 5573 of 2012 – Mumbai ITAT

<sup>20</sup> 83 ITR 346 (SC)



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