

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'A' BENCH, KOLKATA**

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri Aby T. Varkey, Judicial Member)

**I.T.A. Nos. 269 & 270/Kol/2019
Assessment Years: 2013-14 & 2014-15**

Mortex India.....Appellant
[PAN: AAFFM 1720 Q]

Vs.

ACIT, Circle-44, Kolkata.....Respondent

Appearances by:

Sh. S. Agarwal, C.A., appeared on behalf of the Assessee.

Sh. Dhrubajyoti Ray, Sr. D/R, appeared on behalf of the Revenue.

Date of concluding the hearing : March 22nd, 2021
Date of pronouncing the order : April 21st, 2021

ORDER

Per J. Sudhakar Reddy, AM:

Both these appeals are filed by the assessee directed against separate orders of the Learned Commissioner of Income Tax (Appeals)-13, Kolkata, [hereinafter the "CIT(A)"], passed u/s. 250 of the Income Tax Act, 1961 (the 'Act'), for the Assessment Years 2013-14 & 2014-15. As the appeals belong to the same assessee firm, for the sake of convenience they are heard together and disposed off by way of this common order.

2. We have heard rival contentions. On a careful consideration of the facts and circumstances of the case, perusal of the papers on record and the case law cited, we hold as follows.

3. We first take up the appeal in ITA No. 269/Kol/2019 for the AY 2013-14.

3.1. Ground no. 1 is against the disallowance made u/s 43B of the Act. The assessee submits that service tax which was paid to the service provider was payable to the Service Tax Department by the service provider only and not by the assessee. He submits that the service tax component was a part of a cost of services availed by the assessee and it was no service tax payable by the assessee firm to the Govt. of India. The ld. Counsel for the assessee further submitted that the assessee paid commission of

₹1,12,360/- which includes service tax of ₹12,360/- to the service provider and under these circumstances Section 43B of the Act was not applicable to the assessee. The Id. D/R submitted that the confusion was created because of the entries passed in the books of account where the service tax was separately shown.

3.2. In view of the above submissions, we hold that Section 43B of the Act does not apply to this payment on the facts and circumstances of the case and hence the disallowance made u/s 43B of the Act is hereby deleted.

4. Ground nos. 2 & 3 are against the ad-hoc disallowance made by the AO. The AO disallowed part of the expenses claimed by the assessee on ad-hoc basis on the ground that the expenses incurred for personal purposes cannot be segregated. The assessee failed to file supporting bills and vouchers before the AO. In our view, the decision of the AO as confirmed by the Id. CIT(A) on these two issues are ad-hoc and call for no interference for the reason that no bills and vouchers were produced by the assessee before the AO. Thus we uphold the same and dismiss these grounds of the assessee.

4.1. The assessee has raised additional grounds in this appeal. There are legal grounds not requiring enquiry into any fresh facts. The additional ground is regarding the claim for deduction of educational cess paid.

4.2. Following the judgement of the Hon'ble Supreme Court in the case of *National Thermal Power Co. Ltd. vs. CIT [1998] 229 ITR 383 (SC)* we admit this ground of the assessee.

4.3. The Kolkata 'B' Bench of the Tribunal in the case of *ITC Ltd.* in *ITA No. 685/Kol/2014* and *ITA No. 1267/Kol/2014* order dated 27.11.2018 had followed the judgement of the Hon'ble Rajasthan High Court in the case of *M/s. Chambal Fertilisers and Chemicals Ltd. vs. JCIT in D.B. Income Tax Appeal No. 52/2018* and adjudicated the issue in favour of the assessee. Later, the division Bench of the Tribunal in the case of *SREI Infrastructure Finance Ltd. vs. DCIT [2016] 72 taxmann.com 239 (Calcutta)* has decided the issue against the assessee. The assessee carried the matter to the Hon'ble Calcutta High Court. The Hon'ble Calcutta High Court, despite the decision in the case of the assessee group company *SREI Infrastructure Finance Ltd.* (supra) remanded the

issue back to the Tribunal for fresh adjudication. Thus, the Hon'ble Calcutta High Court does not, in our view, lay down the law on this issue.

4.4. The Hon'ble High Court of Bombay & Goa in the case of *Sesa Goa Ltd. vs. JCIT* reported in [2020] 117 taxmann.com 96 (Bom.) (HC) analyzed the issue at length and decided that the question was in favour of the assessee.

4.5. In view of the above discussion, we uphold the contention of the assessee that the education cess and higher education cess is allowable as a deduction by applying the propositions of law laid down by the Hon'ble Bombay High Court in the case of *Sesa Goa Ltd.* (supra). In the result, this ground of the assessee is allowed.

5. In the result, the appeal of the assessee in ITA No. 269/Kol/2019 is allowed in part.

6. Now, we take up the appeal in ITA No. 270/Kol/2019 for the AY 2014-15.

6.1. Ground no. 1 is against the addition of notional interest of ₹64,407/-. The facts of this addition are that the assessee gave loan to Shyam Sundar Kayal (father of a partner of the assessee firm) and he was charged interest @9%, whereas from others who had taken advances from the assessee, the assessee charged interest @12%. The difference amount of 3% was treated as notional income of the assessee and taxed by the AO. It is well settled that notional interest cannot be brought to tax. The Hon'ble Gauhati High Court in the case of *Highways Construction Company Pvt. Ltd. vs. CIT 199 ITR 702(Gau.)* held as follows:

"Section 143 of the Income-tax Act, 1961 - Assessment - Additions to income - Assessment years 1978-79 and 1979-80 - Assessee-company had given interest-free loans and advances to certain parties, including its managing director-ITO added notional amount of interest that should have been charged from those parties to total income of assessee - Whether since assessee had not bargained for interest nor had collected interest, income-tax authorities could not fix a notional interest as due, or collected by assessee - Held, yes - Whether, therefore, Tribunal was not justified in including interest on notional basis - Held, yes"

6.2. Respectfully following the same we allow this ground of the assessee.

6.3. Ground nos. 2, 3 & 4 are against the ad-hoc disallowances made by the AO. The assessee failed to produce sufficient evidences before the AO in support of his claim. The AO noted that there was no explanation furnished by the assessee and also vouchers or log books etc. were not proved by the AO. Thus he made an ad-hoc

disallowance. The Id. CIT(A) confirmed the same. We find no infirmity in this factual finding of the AO. The assessee in this case failed to discharge the burden of proof that lays on it. Thus we dismiss ground nos. 2, 3 & 4 of the assessee.

7. The assessee has raised additional grounds in this appeal. There are legal grounds not requiring enquiry into any fresh facts. The additional ground is regarding the claim for deduction of educational cess paid.

7.1. Following the judgement of the Hon'ble Supreme Court in the case of *National Thermal Power Co. Ltd. vs. CIT [1998] 229 ITR 383 (SC)* we admit this ground of the assessee.

7.2. The Kolkata 'B' Bench of the Tribunal in the case of *ITC Ltd. in ITA No. 685/Kol/2014* and *ITA No. 1267/Kol/2014* order dated 27.11.2018 had followed the judgement of the Hon'ble Rajasthan High Court in the case of *M/s. Chambal Fertilisers and Chemicals Ltd. vs. JCIT in D.B. Income Tax Appeal No. 52/2018* and adjudicated the issue in favour of the assessee. Later, the division Bench of the Tribunal in the case of *SREI Infrastructure Finance Ltd. vs. DCIT [2016] 72 taxmann.com 239 (Calcutta)* has decided the issue against the assessee. The assessee carried the matter to the Hon'ble Calcutta High Court. The Hon'ble Calcutta High Court, despite the decision in the case of the assessee group company *SREI Infrastructure Finance Ltd. (supra)* remanded the issue back to the Tribunal for fresh adjudication. Thus, the Hon'ble Calcutta High Court does not, in our view, lay down the law on this issue.

7.3. The Hon'ble High Court of Bombay & Goa in the case of *Sesa Goa Ltd. vs. JCIT* reported in *[2020] 117 taxmann.com 96 (Bom.) (HC)* analyzed the issue at length and decided that the question was in favour of the assessee.

7.4. In view of the above discussion, we uphold the contention of the assessee that the education cess and higher education cess is allowable as a deduction by applying the propositions of law laid down by the Hon'ble Bombay High Court in the case of *Sesa Goa Ltd. (supra)*. In the result, this ground of the assessee is allowed.

8. In the result, the appeal of the assessee in ITA No. 270/Kol/2019 is allowed in part.

9. In the result, both the appeals filed by the assessee are allowed in part.

Kolkata, the 21st April, 2021.

Sd/-
[Aby T. Varkey]
Judicial Member

Dated: 21.04.2021

Bidhan (P.S.)

Copy of the order forwarded to:

1. ***Mortex India, 9, Jagmohan Mullick Lane, Kolkata-700 007.***
2. ***ACIT, Circle-44, Kolkata.***
3. CIT(A)-13, Kolkata. (sent through mail)
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata. (sent through mail)

True copy

Sd/-
[J. Sudhakar Reddy]
Accountant Member

By order

Assistant Registrar
ITAT, Kolkata Benches