IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-1', NEW DELHI

Before Sh. Amit Shukla, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

(Through Video Conferencing)

ITA No. 489/Del/2021 : Asstt. Year : 2016-17
&
SA No. 75/Del/2021 : Asstt. Year : 2016-17

AT&T Global Network Services (India) Pvt. Ltd., Vatika Triangle, 3rd Floor, Sushant Lok-I, Block-A, Gurgaon, Haryana-122002	Vs	DCIT, Circle-2(1), National E-Assessment Centre, New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AAFCA8810L		

Assessee by : Sh. Ravi Sharma, Adv. &
Sh. Rishabh Malhotra, AR
Revenue by : Sh. Surenderpal, CIT DR &
Ms. Shashi Kajle, Sr. DR

Date of Hearing: 28.07.2021		**Date of Pronouncement: 24.08.2021**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order dated 30.03.2021 passed by AO u/s 143(3) r.w.s. 144C(3) of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

"***1. TP adjustment with respect to receipt of Intra-Group Services***

On the facts and circumstances of the case, & in law, the Ld. Assessing Officer ("Ld. AO")/ Learned Transfer

Pricing Officer ("Ld. TPO") [in pursuance to the directions of the Dispute Resolution Panel ("DRP")], erred in enhancing the income of the Appellant by INR 17,67,56,395 holding that the international transaction pertaining to receipt of intra-group services do not satisfy the arm's length principle envisaged under the Income-tax Act, 1961 ("the Act"), and in doing so have grossly erred in:

1.1. disregarding the favourable adjudication/ findings of the Hon'ble Income- tax Appellate Tribunal ("ITAT") in Appellant's own case for AY 2008-09, AY 2009-10, AY 2010-11, AY 2011-12, AY 2012-13, AY 2013-iig AY 2014-15 and AY 2015-16 wherein the Hon'ble ITAT has concluded the issue in favour of the Appellant.

1.2. rejecting the combined transaction approach of benchmarking adopted by the Appellant in its TP documentation (i.e. aggregating availing of intra-group services with provision of network support services) and proceeding to determine the arm's length price of international transaction pertaining to availing of intra-group services from its AEs on a standalone basis;

1.3. arbitrarily applying Comparable Uncontrolled Price ("CUP") method as the most appropriate method as against Transactional Net Margin Method ("TNMM") applied by the Appellant in its Transfer Pricing documentation;

1.4. disregarding the elaborate documentary evidence submitted as part of assessment proceedings to erroneously assume that 'no benefit' has been conferred upon the Appellant from the international transactions pertaining to availing of intra-group services and thereafter re-determining the ALP of the said transaction as 'NIL'; and

1.5. disregarding the receipt of services by the Appellant from its AEs which is contrary to the facts of the present year as well as to the stand taken by the Ld. TPO in prior year despite no change in the nature

of services involved. Further, the learned TPO erred in contending that the services received are duplicative and stewardship in nature, ignoring the documentation and evidences submitted by the Appellant which contradicts his own contention that the services have actually not been received;

1.6. arbitrarily challenging the veracity of the contractual service agreement disregarding the actual conduct of the Appellant in the availing of intra-group services from AEs basis the elaborate documentary evidences submitted as part of assessment proceedings.

2. TP adjustment with respect to payment of royalty

On the facts and circumstances of the case, & in law, the Ld. AO/ Ld. TPO (in pursuant to the directions of the DRP), erred in enhancing the income of the Appellant by INR 17,64,30,505 and holding that the international transaction pertaining to payment of royalty does not satisfy the arm's length principle envisaged under the Act, and in doing so have grossly erred in:

2.1. rejecting the combined transaction approach of benchmarking adopted by the Appellant in its TP documentation (i.e. aggregating payment of royalty, availing of intra-group services with provision of network support services) and proceeding to determine the arm's length price of international transaction pertaining to payment of royalty from its AEs on a standalone basis by rejecting TNMM as the most appropriate method;

2.2. holding that the Appellant did not receive tangible benefit in lieu of the payment of royalty thereby challenging the commercial wisdom of the Appellant in making payment for royalty and passing the order in contrast with the recent judicial pronouncements in this regard;

2.3. disregarding the judicial pronouncement/ finding of the ITAT in Appellant's own case for the AY 2009-10, AY 2010-11, AY 2013-14, AY 2014-15 and AY 2015-16 and merely placing reliance on past year orders passed by the DRP;

2.4. arbitrarily rejecting the supplementary analysis using CUP method to benchmark the payment of royalty transaction submitted by the Appellant without giving any cogent reasons;

2.5. undertaking fresh benchmarking analysis using Royaltystat database and selecting agreements which are not comparable to the royalty payment made by the Appellant to its AEs.

2.6. not providing the detailed search process along with backup documentation such as accept-reject matrix to provide Appellant an opportunity to evaluate the appropriateness of the benchmarking analysis; and

2.7. erroneously computing arm's length price as average of the royalty rates of six comparable agreements instead of applying the range concept as prescribed under Rule 10CA of the Income-tax Rules, 1962.

3. Disallowance of circuit accruals

3.1. On the facts, in circumstances of the case and in law, the Ld. AO/ DRP erred in making a disallowance of INR 5,18,23,315 on account of circuit accruals created towards bandwidth and last mile services availed by the Appellant company, ignoring that the accruals were based on a reasonable and scientific basis.

3.2. On the facts, in circumstances of the case and in law, the Ld. AO/ DRP failed to appreciate that the Appellant follows mercantile system of accounting and accrues circuit charges on scientific basis.

3.3. On the facts, in circumstances of the case and in law, the Ld. AO/ DRP failed to appreciate that as per

the accounting standards notified under section 145(2) of the Act, the Appellant was required to make provision for circuit accruals for the subject financial year.

3.4. On the facts, in circumstances of the case and in law, the Ld. AO/ DRP erred in not appreciating that the Appellant produced evidences to the extent of more than 94.89% for utilization/reversal made in subsequent years and no adverse finding has been given by Ld. AO/ DRP on the same.

3.5. On the facts, in circumstances of the case and in law, the Ld. AO/ DRP erred in ignoring the claim of reversals of circuit accruals of INR 4,70,15,658 made in the subsequent years, submitted before the Ld. AO/ DRP.

3.6. On the facts, in circumstances of the case and in law, the Ld. AO/ DRP erred in not allowing deduction of circuit accruals of INR 10,95,20,722 disallowed in the preceding assessment year (i.e. AY 2015-16) without appreciating that non-deduction of such amount would result in double disallowance of the same amount in AY 2015-16 as well as in AY 2016-17, which is untenable in law.

3.7. Without prejudice to the above, on the facts, in circumstances of the case and in law, where any disallowance is made in respect of the aforesaid accruals for the year under consideration, deduction in respect of the disallowed amount should be allowed in the subsequent year(s) in which such accruals were reversed or utilized.

3.8. On the facts, in circumstances of the case and in law, the Ld.AO/ DRP erred in ignoring that the aforesaid disallowance of circuit accruals has been deleted by the Hon'ble ITAT in Appellant's own case for assessment years 2008-09 to AY 2015-16.

Therefore, any disallowance on account of circuit accrual is not tenable.

4. Disallowance of year-end accruals

4.1. On the facts, in circumstances of the case and in law, the Ld. AO/ DRP erred in making a disallowance of INR 62,972 on account of year-end accruals representing accruals created towards normal business expenditure incurred by the Appellant ignoring that the accruals were based on a reasonable basis.

4.2. On the facts, in circumstances of the case and in law, the Ld. AO/ DRP failed to appreciate that as per the accounting standards notified under section 145(2) of the Act, the Appellant was required to make provision for all liabilities/expenses for the subject financial year.

4.3. On the facts, in circumstances of the case and in law, the Ld. AO/ DRP erred in not appreciating that the Appellant produced evidences to the extent of more than 99.88% for utilization/reversal made in subsequent years and no adverse finding has been given by Ld.AO/ DRP on the same.

4.4. On the facts, in circumstances of the case and in law, the Ld. AO/ DRP erred in not allowing deduction of year-end accruals of INR 1,40,82,744 disallowed in the preceding assessment year (i.e. AY 2015-16) without appreciating that non-deduction of such amount would result in double disallowance of the same amount in AY 2015-16 as well as in AY 2016-17, which is untenable in law.

4.5. Without prejudice to the above, on the facts, in circumstances of the case and in law, where any disallowance is made in respect of the aforesaid accruals for the year under consideration, deduction in respect of the disallowed amount should be allowed in the subsequent year(s) in which such accruals were reversed or utilized.

4.6. On the facts, in circumstances of the case and in law, the Ld. AO/ DRP erred in ignoring that the aforesaid disallowance of year-end accruals has been

deleted by the Hon'ble ITAT in Appellant's own case for AY 2010-11 to AY 2015-16.

Therefore, any disallowance on account of year-end accrual is unjustified.

5. Disallowance of Support Service Expenditure

5.1. On the facts, in circumstances of the case and in law, the Ld. AO/ DRP erred in disallowing the legitimate business expenditure being in the nature of support service expenses of INR 8,75,98,575 paid to AT&T Communication Services India Private Limited ("ACSI").

5.2. On the facts, in circumstances of the case and in law, the Ld. AO/ DRP erred in not taking cognizance of the submissions made by Appellant and the documentary and circumstantial evidence/ proof produced by the Appellant, which duly substantiate that support services were rendered by ACSI to the Appellant company.

5.3. On the facts, in circumstances of the case and in law, the Ld. AO/ DRP erred in ignoring that the aforesaid disallowance on account of support service expenditure has been deleted by the Hon'ble ITAT for AYs 2008-09, 2009-10, 2010-11 and 2011-12.

6. Disallowance of annual revenue share based license fee

6.1. On the facts, in the circumstances of the case and in law, the Ld. AO/ DRP erred in disallowing an amount of INR 40,17,70,517 under the head license fees debited to Profit & Loss Account by holding that annual license fee is not allowable as a revenue expenditure and it should be amortized under section 35ABB of the Act.

6.2. On the facts, in the circumstances of the case and in law, the Ld. AO/ DRP erred in not following the judgment of the Hon'ble jurisdictional Delhi High Court in the case of Bharti Hexacom Ltd. [2014] 265 CTR

130 (Delhi) wherein it was held that annual revenue share based license fee paid by the telecom operators is revenue expenditure, allowable under section 37(1) of the Act and not a capital expenditure amortizable under section 35ABB of the Act.

6.3. On the facts, in the circumstances of the case and in law, the Ld. AO/ DRP erred in ignoring that the aforesaid disallowance has been deleted by the Hon'ble ITAT in Appellant's own case for AY(s) 2010-11, AY 2012-13, AY 2013-14, AY 2014-15 and AY 2015-16.

7. Disallowance of Lease line charges on account of non-deduction of tax at source

7.1. On the facts, in the circumstances of the case and in law, the Ld. AO/ DRP erred in making disallowance of INR 8,55,380 under section 4o(a)(ia) of the Act on account of non-deduction of tax at source under section 194I of the Act on lease line expenses of INR 28,51,268 incurred by Appellant.

7.2. Without prejudice to above, on the facts, in circumstance of the case and in law, the Ld. AO erred in disallowing the entire expense of INR 28,51,268 instead of 30% thereof i.e. INR 8,55,380 in the computation sheet.

7.3 On the facts, in the circumstances of the case and in law, the Ld. AO/ DRP erred in ignoring that the aforesaid disallowance has been deleted by the Hon'ble ITAT in Appellant's own case for AY 2012-13 to AY 2015-16.

8. Short-grant of credit for taxes deducted at source

8.1. On the facts, in the circumstances of the case and in law, the ld. AO erred in granting complete credit of taxes deducted at source to the Appellant.

9. Allowability of road tax and value added tax on assets taken on lease

9.1. On the facts, in the circumstances of the case and in law, the road tax and value added tax on motor vehicles amounting to INR 22,78,910 paid by appellant is allowable business expenditure under section 37(1) and ought to have been allowed by the ld. AO while computing the total income of the appellant.

10. Allowability of Education Cess and Higher and Secondary Education Cess

On the facts and circumstances of the case and in law, education cess paid by the Appellant is an allowable expense and ought to have been allowed by the Ld. AO while computing the total income of the Appellant."

3. The assessee is engaged in the business of providing Tele-communication services under International Long Distance (ILD), National Long Distance (NLD) and Internet Service Provider (ISP) Licenses. The assessee had entered into various international transactions with its Associated Enterprises (AEs). The Assessing Officer made reference u/s 92CA(1) of the Act to the Transfer Pricing Officer (TPO) to determine the Arm's Length Price ("ALP") of the international transactions undertaken by the assessee. The TPO first determined the Arm's Length Price of the intra group services availed by the assessee. The TPO was of the view that the assessee had not received any benefit from such services and hence, the Arm's Length Price of the alleged services were held to be NIL, on application of Comparable Uncontrolled Price ('CUP') method. The Assessing Officer was directed to make an upward adjustment of Rs.35,31,86,900/-.

Intra Group Services:

4. The assessee is providing seamless services to its customers was availing services from its AE. As the services required specialized knowledge and experience in the field, the assessee had entered into services agreement in the earlier years in order to avail such Intra Group services. During the year under consideration, the assessee availed these services from Global Customers Services Center. Similar issues arose before the Tribunal and on similar facts, the adjustment made in the hands of the assessee was deleted by the Tribunal in following orders:

- ITA No.2538/Del/2014 relating to Assessment Year 2008-09, vide order dated 18.09.2017;
- ITA No.1059/Del/2015 relating to Assessment Year 2010-11, vide order dated 18.09.2017
- ITA No.292/Del/2016 relating to Assessment Year 2011-12, vide order dated 18.09.2017
- ITA No.5535/Del/2016 and 7115/Del/2017 relating to Assessment Years 2012-13 and 2013-14, vide order dated 27.05.2019

5. The issue of intra group services, availed by the assessee has been benchmarked by the TNMM which has been found to be acceptable by the Tribunal for the earlier year 2014-15 and 2015-16. Since, the facts are identical, we hereby allow the claim of the assessee.

Issue of Royalty:

6. During the year, the assessee paid royalty to AE of Rs.31,08,90,758/- @ 4% on net sales of Rs.777.22 Crores. The ALP of the royalty determined @1.73% resulted in Rs.13,44,60,253/- thus adjusting an amount of Rs.17,64,30,505/-. The ld. DRP confirmed the adjustment made by the TPO on the grounds that the similar issue in the case of the assessee for assessment years 2012-13 to 2015-16 has been continuously upheld.

7. Before us, the ld. AR argued that the royalty determined in the earlier year by the revenue was 3.76% against the royalty of 4% as per the assessee whereas during the year the revenue has allowed only 1.73% on royalty. The ld. DR argued that the royalty payment made to the entities in the earlier year is different from the entities which have been paid during the current year. Reference was invited to page nos. 309, 322 & 581 of the paper book with regard to these facts. The main grievance of the assessee revolves around not following the comparable data of the relevant financial year.

8. We have gone through the history of the case and found that the issue has been limited back to the file of the AO to carry out comparability analysis with direction to provide an opportunity to the assessee with benchmarking analysis adopted and the comparables applied so. For the sake of ready reference, the order of the Co-ordinate Bench of ITAT in ITA No. 6385/Del/2019 vide order dated 22.10.2019 in the case of the assessee for the earlier year is reproduced as under:

"13.....in this appeal against the transfer pricing adjustment of payment of royalty. The assessee had entered into providing long distance telecommunication services pursuant to the International Long Distance ("ILD"), National Long Distance ("NLD") and Internet Service Provider ("ISP") licenses granted by the Department of Telecommunication ("DOT"). The assessee had entered into service mark license agreement with AT & T Intellectual Property II L.P., pursuant to which it was granted the right to use licensed marks i.e. "AT & T" brand in marketing material. The consideration for usage between both the parties was agreed @ 4 % of net sales. During the year under consideration, the assessee had paid Rs. 29.13 crores as royalty to its AE. The assessee was granted non-exclusive, nontransferable and non-licensable royalty bearing license and right to use the licensed marks in respect of the telecommunication services provided over AT & T Global Telecommunications Network which was used for obtaining customers contracts in India. The assessee in the TP study report while benchmarking the said transaction of payment of royalty had on aggregate basis, applied Transactional Net Margin Method, along with provision of network connectivity services. The margins of the assessee were at 54.08% as against mean margins of the comparable companies at 7.70%, hence the claim to be at arm's length. During the course of the TP proceedings, the assessee undertook an alternate analysis wherein a search using RoyaltyStat database to determine the contemporaneous industry rate of royalty for brand name/trade mark paid by other independent companies on similar products was carried out. The said document is placed at Page 934 of Paper Book Volume-II. The TPO rejected both the analysis of the assessee and applied Comparable Uncontrolled Price method only and undertook fresh search wherein he concluded that arms' length payment @ 2.48% of net sales and made an upward adjustment of

Rs.11.30 crores. The grievance of the assessee before us is that the TPO did not share the search process result and hence, did not allow an opportunity for hearing to the assessee to rebut his findings and also did not consider the comparables picked up by the assessee. The second grievance of the assessee is before us that the DRP acknowledged that the facts were similar to the earlier years, placed reliance on the orders of the earlier years and upheld the addition.

14. On this issue, the first aspect is whether benefit test is to be applied or not, while benchmarking the payment of royalty. We find that the Tribunal in the earlier years has allowed the claim of the assessee and has held that the benefit test cannot be applied. Such is the view taken from Assessment Year 2009-10 onwards. The relevant findings of the Tribunal in this regard are reproduced in the order of the Tribunal relating to Assessment Year 2014-15 at paras 17 & 18 which are being referred, but not being reproduced for the sake of brevity. The Tribunal further noted that though the benefit test could not be applied to determine the Arm's Length Price of International Transaction but the matter was restored back to the Assessing Officer/TPO to examine as to whether the payment was based on the agreement and the same adheres to arms length price or not. Following the same parity and reasoning, we hold that the benefit tax could not be applied in the hands of the assessee. However, we remit the issue back to the file of Assessing Officer/TPO to carry out the comparability analysis with direction to confront the assessee with benchmarking analysis adopted and the comparables applied and also to look into the comparables selected by the assessee and decide the issue in accordance with law, after allowing a reasonable opportunity of hearing to the assessee."

9. Since, the factual and legal position remains unaltered except the quantum involved, we hereby referred the matter to

the TPO to examine the issue afresh after affording due opportunity to the assessee.

Circuit Accruals:

10. The assessee was following consistent method of accounting wherein on a scientific basis. The assessee is estimating the expenses to be incurred on account of circuit accruals. The said accounting is through an automated system, which is used by the assessee as an operational tool and such method is followed by all the connected companies of the group worldwide. The assessee claimed the said expenditure as business expenditure. Further, the assessee also following recognized method wherein the actual expenditure incurred against the accrual/provisions for the year is accounted for in the subsequent year. This approach adopted by the assessee in recognizing the provision of circuit accruals was not accepted by the Assessing Officer/ DRP on the ground that similar disallowance was made in the earlier years. We find that the Tribunal has consistently from Assessment Years 2009-10 to 2014-15 allowed the claim of the assessee in entirely.

Disallowance of year-end Accruals:

11. The assessee was following systematic method of accounting from year to year and was creating year end accruals towards normal business expenditure and was debiting the expenditure when paid or reversed in the subsequent years. The said details were furnished before the authorities below and the AR for the assessee has also referred to them before us. The Tribunal in Assessment Year 2014-15 relying on the orders

of the Tribunal in the case of the assessee in earlier years had allowed the claim of the assessee. Following the same parity of reasoning, we hold that the said expenditure is duly allowable in the hands of the assessee.

Support Service Expenditure:

12. The assessee had incurred the said expenditure of support services on account of services availed from the group company in different fields of operation, which was necessary and imperative for carrying on its business. No mark up was charged on the said services provided by the AE. The availment of the support services from the AE was through support services agreement. While deciding the said issue, the Tribunal has remitted the same to the file of Assessing Officer with the direction to consider the evidences filed by the assessee of availment of support services from its AE. The AR for the assessee pointed out that all these evidences were duly filed before the authorities below. However, following the same parity and reasoning as in Assessment Year 2015-16, we remit the issue back to the Assessing Officer to carry out the necessary verification exercise and decide the issue in accordance with our direction in the earlier years.

Share based License Fee:

13. During the financial year, the assessee incurred expenditure of Rs.64,42,91,680/- out of which an amount of Rs.5,85,71,971/- was allowed to be amortized by the TPO and the rest of Rs.58,57,19,710/- has been disallowed and added back to the total income of the assessee. The assessee for its

operations in India had acquired the telecom licences from Financial Year 2006-07 as per the agreement with Department of Telecom. One time entry fee of Rs.5 crore was paid by the assessee in Financial Year 2006-07 which was capitalized and is being amortized under the provision of section 35BB of the Act.

14. The assessee was granted telecom license for initial term of 20 years upon the payment of one time entry fee. However, the license holder as per the Rules of DoT is also required to pay recurring fee on periodic basis towards use of the telecom services, which during the year under consideration were Rs.64.44 crores. The assessee claimed the said expenditure to be its revenue expenditure. However, the Assessing Officer applied the provisions of section 35BB of the Act and amortized the expenditure over the remaining life of the licence resulting in disallowance of Rs. 58.57 crores.

15. We find that the issue stand squarely covered by the order of the Hon'ble High Court in the case of CIT vs Bharti Hexacom Limited (Supra) wherein Hon'ble High Court held that the Revenue share based license fee was an allowable revenue expenditure u/s 37(1) of the Act. Similar proposition is also being laid down by the Tribunal in assessee's own case in Assessment Year 2015-16. Since, the matter is repetitive in nature and in the absence of any change in the factual and legal propositions, we hereby direct that the addition made, be deleted.

TDS on Lease Line Charges:

16. The assessee had withheld tax on lease line charges paid to other telecom operators u/s 194J of the Act. The claim of the assessee was that the lease line services were standard automatic services which were availed by any telecom service provider for the transmission of data and was not under any exclusive arrangement. The Assessing Officer was of the view that the tax on such expenditure was to be withheld u/s 194I of the Act. We find that similar issue of non-deduction of tax on lease line expenses arose before the Tribunal in ITA No.6385/Del/2019 for Assessment Year 2015-16 and for assessment year 2014-15 also.

17. The Tribunal for Assessment Year 2014-15 vide paras 22 to 24 at pages 29 to 35 has decided the issue and concluded by holding as under:-

"24. ……

……

"It is pertinent to note here that the annual revenue share based license fee incurred by the assessee is a business expenditure allowable u/s 37 of the Income Tax Act, 1961. This expenditure was incurred by the assessee company towards maintenance and usage of the telecom license, and not for acquiring a right to operate telecommunication services and thus would not attract the provisions of Section 35ABB of the Act.

The assessee's case is squarely covered by the decision of Hon'ble Delhi High Court in the case of CIT vs. Bharti Hexacom Limited [2014] 265 CTR 130 (Delhi) other case laws relied upon by the

appellant as cited above. It is also important to note that in one of the preceding year on same facts, the DRP allowed the claim of the licence fees on revenue basis u/s 37(1) of the Act. Thus, the issue is identical and therefore Ground Nos. 6 to 6.3 are allowed."

18. The issue arising before us is similar and following the same parity and reasoning, we hold that there was no requirement to deduct tax at source u/s 194I of the Act.

Road Tax and Value added Tax: (Not in grounds before the DRP)

Education Cess:

19. The ld. AR relying on the judgment of Hon'ble Rajasthan High Court in the case of Chambal Fertilizers and Chemicals Ltd. Vs JCIT in ITA No. 52/2018 dated 31.07.2018 wherein the same issue has been decided in favour of the assessee and particularly held that education cess is an allowable expenditure.

20. Further, he argued that in the case of ITC Vs ACIT in ITA No. 685/Kol/2014 dated 27.11.2018 wherein it was held that the education cess is an allowable expenditure.

21. The ld. AR has also relied in the case of Peerless General Finance & Investment Co. Ltd. Vs DCIT in ITA No.937 & 938/Kol/2018 dated 24.03.2019 wherein it was held that education cess is not tax and is an allowable expenditure.

22. The ld. DR argued that it is not the appropriate forum to raise the issue at this juncture. Since, there is no dispute between the assessee and

the Assessing Authorities, a non-dispute cannot be adjudicated. He argued that the education cess is a part of the Income Tax and is a charge on the assessee. Hence, it cannot be treated as expense eligible for deduction.

23. Heard the arguments of both the parties and perused the material available on record.

24. Regarding the claim of education cess as an allowable expenditure, we find that the CBDT vide Circular No. 91/58/66 – ITJ(19) clarified as under:

> *"Interpretation of provisions of Section 40(a)(ii) of the I.T Act – clarification regarding.*
>
> *Section 40(a)(ii) – Recently a case has come to the notice of the Board where the ITO has disallowed the 'cess' paid by the assessee on the ground that there has been no material change in the provisions of Section 10(4) of the old Act and Section 40(a)(ii) of the new Act.*
>
> *2. The view of the ITO is not correct. Clause 40(a)(ii) of the IT Bill, 1961 as introduced in the Parliament stood as under:*
> *"(a) any sum paid on account of any cess, 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."*
>
> *When the matter came up before the Select Committee, it was decided to omit the word 'cess' from the clause. The effect of the omission of the word 'cess' is that only taxes paid are to be disallowed in the assessments for the years 1962-63 and onwards.*
>
> *3. The Board desire that the changed position may please be brought to the notice of all the ITOs so that further litigation on this account may be avoided."*

25. The similar issue of allowability of cess u/s 37 has been examined by the Co-ordinate Bench of ITAT in ITA No. 685/Cal./2014 wherein the amount of the cess paid has been held to be an allowable deduction.

26. Further, we find that the Hon'ble High Court of Judicature for Rajasthan at Jaipur in ITA No. 52/2018 in the case of Chambal Fertilizers and Chemicals Ltd. held that in view of the Circular of CBDT where the word 'cess' is deleted, the claim of the assessee for deduction is acceptable. In that case, the Hon'ble High Court held that there is difference between the cess and tax and cess cannot be equated with the cess.

27. We have also gone through the provisions of Sec. 115 of the Income Tax act 1961 which are as under:

> *"Explanation 2 to section 115JB (2) of the Act defines the term 'Income-tax' in an inclusive manner, which includes cess. Provision of the explanation 2 to section 115JB is as given below:-*
>
> *For the purposes of clause (a) of Explanation 1, the amount of income-tax shall include—*
>
> *(i)any tax on distributed profits under section 115-O or on distributed income under section 115R;*
> *(ii) any interest charged under this Act;*
> *(iii) surcharge, if any, as levied by the Central Acts from time to time;*
> *(iv) Education Cess on income-tax, if any, as levied by the Central Acts from time to time; and*
> *(v) Secondary and Higher Education Cess on income-tax, if any, as levied by the Central Acts from time to time.*

28. Thus, wherever the legislature wanted to include this term specifically in the statue it has done so under the Act. The term 'tax' has been defined in section 2(43) of the Act to include only Income-tax, Super Tax and Fringe Benefit Tax (FBT). Provision of the section 2(43) is as given below:

> *"tax" in relation to the assessment year commencing on the 1st day of April, 1965, and any subsequent assessment year means income-tax chargeable under the provisions of this Act, and in relation to any other assessment year income-tax and super-tax chargeable under the provisions of this Act prior to the aforesaid date and in relation to the assessment year commencing on the 1st day of April, 2006, and any subsequent assessment year includes the fringe benefit tax payable under section 115WA."*

29. Surcharge on income-tax finds place in the First Schedule, but that is not the case so far as Education Cess is concerned. Therefore, the education cess on this reasoning cannot be equated as tax or surcharge. Based on this, it can be said that since the word 'Cess' is not specifically included in the definition, it cannot be considered a part of tax, and accordingly, it should not be disallowed in u/s 40(a)(ii) of the Act.

30. Further, we are guided by the judgment of the Constitutional bench which was also referred in the case of Dewan Chand Builders & Contractors Vs. Union of India & Others in Civil Appeal No. 1830 of 2008 dated 18.11.2011.

31. The Constitution Bench of this Court in Hingir Rampur Coal Co. Ltd. Vs. State of Orissa2 was faced with the challenge to the constitutional validity of the Orissa Mining Areas Development Fund Act, 1952, levying Cess on the petitioner's colliery. The Bench explained different features of a `tax', a `fee' and `cess' in the following passage:

> *"The neat and terse definition of Tax which has been given by Latham, C.J., in Matthews v. Chicory Marketing Board (1938) 60 C.L.R. 263 is often cited as*

a classic on this subject. "A Tax", said Latham, C.J., "is a compulsory exaction of money by public authority for public purposes enforceable by law, and is not payment for services rendered". In bringing out the essential features of a tax this definition also assists in distinguishing a tax from a Fee. It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, a fee 1 AIR 1954 SC 282 2 1961 (2) SCR 537 is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee. Tax recovered by public authority invariably goes into the consolidated fund which ultimately is utilised for all public purposes, whereas a cess levied by way of Fee is not intended to be, and does not become, a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied."

32. We also find that the proceeds from collection of "Education Cess" are not credited to Consolidated Fund but to a non-lapsable Fund for elementary education-**"Prarambhik Shiksha Kosh"**. Since the proceeds from collection of Education Cess are kept separate for a specified purpose, applying the principles in the aforesaid decision of Apex Court in the case of **M/s Dewan Chand Builders (supra)**, it can be said that the same is not in the nature of tax. Hence, it is allowable as deduction.

33. Further, Provisions of Section 37 are perused which are as under:

> *"**37.** (1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".*
>
> *Explanation 1.—For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.*
>
> *Explanation 2.—For the removal of doubts, it is hereby declared that for the purposes of sub-section (1), any expenditure incurred by an assessee on the activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 2013 (18 of 2013) shall not be deemed to be an expenditure incurred by the assessee for the purposes of the business or profession."*

34. From the above, we find that Education Cess is not of the nature described in sections 30 to 36, Education Cess is not in the nature of capital expenditure, Education Cess is not personal expense of the Assessee, it is mandatory for it to pay Education Cess and for the purpose of computation of Education Cess, the Income 'Tax' is taken as the criteria for computational purpose. Thus, the expense of Education Cess is mandatory expenses to be paid but does not fall under capital expense and personal expenditure and hence may be allowed as deduction.

35. We have also gone through the various judgments of judicial authorities pan India wherein the fresh claim of the assessee is considered and the deduction u/s 37 of Education Cess has been allowed. The Hon'ble High Court of Bombay held that the appellate authorities may confirm, reduce, enhance or annul the assessment or remand the case to the AO, because the basic purpose of a tax appeal was to ascertain the correct tax liability in accordance with the law. To mention a few,

- *DCIT Vs M/s. Agrawal Coal Corporation Pvt. Ltd ITA Nos. 801 to 803/Indore/2018.*
- *Atlas Copco India Ltd. Vs ACIT in ITA No. 736/Pune/2011*
- *Tata Autocomp Hendrickson Vs DCIT in ITA No. 2486/Pune/2017*
- *Symantec Software India Pvt. Ltd. Vs DCIT in ITA No. 1824/Pune/2018*
- *Sicpa India Pvt. Ltd. Vs ACIT in ITA No. 704/Kol/2015*
- *Philips India Ltd. Vs ACIT in ITA No. 2612/Kol/2019*
- *ITC Limited Vs ACIT in ITA No. 685/Kol/2014*
- *DCIT Vs The Peerless General Finance & Investment & Co. Ltd. in ITA No. 1469/Kol/2019.*
- *ACIT Vs ITC Infotech in ITA No. 220/Kol/2017*
- *Reckitt Benckiser India Pvt. Ltd. Vs DCIT (2020) 117 taxmann.com 519 (Kol.)*
- *Crystal Crop. Protection Pvt. Ltd. Vs JCIT in ITA No. 1539/Del/2016*
- *Midland Credit Management India Vs ACIT in ITA No. 3892/Del/2017*
- *Voltas Ltd. Vs ACIT in ITA No. 6612/Mum/2018*
- *Sesa Goa Ltd. Vs JCIT (2020) 117 taxmann.com 96 (Bom.)*
- *Chambal Fertilisers and Chemicals Vs JCIT in ITA No. 52 of 2018 (Raj. HC)*

36. Hence, keeping in view the provisions of the Act pertaining to Section 40(a)(ii) and Section 115JB, Circular of the CBDT No. 91/58/66-ITJ(19), the orders of Co-ordinate Benches of ITAT and judicial

pronouncements of the Hon'ble High Court of Bombay and Hon'ble High Court of Rajasthan, we hereby hold that the assessee is eligible to claim the deduction of the 'Education Cess' as per the provisions of Section 37 of the Income Tax Act.

37. Owing to the disposal of the appeal the assessee, the Stay Application No. 75/Del/2021 is dismissed as infructuous.

38. In the result, the appeal of the assessee is allowed and the Stay Application of the assessee is dismissed.

Order Pronounced in the Open Court on 24/08/2021.

Sd/-	Sd/-
(Amit Shukla)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 24/08/2021

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR