

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री भागचंद, लेखा सदस्य के समक्ष  
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI BHAGCHAND, AM

आयकर अपील सं./ITA No. 926/JP/2017  
निर्धारण वर्ष / Assessment Year : 2012-13

The DCIT, Circle, Jhunjhunu.	बनाम Vs.	Shri Shashi Kant Khetan, H-3, Indra Nagar, Jhunjhunu.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AEHPK0657G		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Vijay Goyal (C.A.) &  
Shri Gulshan Agarwal (C.A.)  
राजस्व की ओर से / Revenue by : Smt. Seema Meena (JCIT)

सुनवाई की तारीख / Date of Hearing : 01/02/2018  
उदघोषणा की तारीख / Date of Pronouncement: 06/02/2018

आदेश / ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the Revenue is directed against the order dated 19.09.2017 of CIT (A), Jaipur for the assessment year 2012-13. The Revenue has raised the following grounds:-

*"(i) On the facts and in the circumstances of the case, the CIT(A) has erred in deleting the addition of Rs. 20,62,004/- made by the AO u/s 40(a)(ia) of the Act on the basis of non-deduction of TDS while making payment of interest to NBFIs.*

*(ii) On the facts and in the circumstances of the case, the CIT(A) has erred in deleting the addition of Rs. 7,40,870/- made by the AO on account of proportionate of interest on borrowed funds alleged to have been utilized for making investment in non-business assets.*

*(iii) On the facts and in the circumstances of the case, the CIT(A) has erred in deleting the entire addition on account of addition made u/s 2(22)(e) amounting to Rs. 4,54,752/-.*

*(iv) The appellant craves leave to add, alter, amend, withdraw or insert any ground or grounds of appeal before or at the time of hearing of the appeal."*

2. At the time of hearing, the Id. AR of the assessee has raised an objection of maintainability of the appeal of the Revenue due to the tax effect not exceeding Rs. 10 lacs as per the CBDT Circle No. 21 of 2015 dated 10.12.2015. The Id. AR has submitted that the grievance of the Revenue in the appeal comprising of three additions deleted by the Id. CIT(A) come to Rs. 32,57,626/- and therefore, the tax on the said amount @ 30% comes to Rs. 9,77,288/-. Hence, the Id. AR has submitted that the present appeal is not maintainable and liable to be dismissed in limine due to low tax effect.

3. On the other hand, Id. Dr has submitted that the total tax on this amount of Rs. 32,57,626/- come to Rs. 10,06,607/-. The Id. DR has submitted that this amount of total tax includes education cess and higher education cess. To counter this submission, the Id. AR of the

assessee has pointed the tax does not include the education cess in view of the various decisions of the Tribunal. He has referred to the various decision of the Tribunal as under:-

- ACIT vs. M/s Shiv Edibles Ltd. in MA No. 95/JP/2017
- Dy. CIT vs. Shri Yuvraj Singh in ITA No. 408/LKW/2011
- DCIT vs. M/s Done Bell Electronics India Ltd. in ITA No. 2480/Mum/2012
- ACIT vs. M/s Dallas Finance Ltd. in ITA No. 3946/Del/2010
- ITO vs Sri P. Prasen Kumar in M.A. No. 35/HYD/2017

4. We have considered the rival submissions as well as relevant material on record. At the outset, we note that undisputedly the tax effect in this appeal of the Revenue excluding the education cess is Rs. 9,77,288. The details of the computation of tax and education cess are as under:-

<i>S.No.</i>	<i>Particulars</i>	<i>Amount</i>	<i>Tax, surcharge and cess</i>	<i>Tax Effect if education cess is not considered</i>
<i>1.</i>	<i>Ground No. 1</i>	<i>2062004</i>		
<i>2.</i>	<i>Ground No. 2</i>	<i>740870</i>		
<i>3.</i>	<i>Ground No. 3</i>	<i>454752</i>		
	<i>Total</i>		<i>32,57,626</i>	<i>32,57,626</i>
	<i>Tax @ 30%</i>		<i>9,77,288</i>	<i>9,77,288</i>
	<i>Surcharge</i>		<i>Nil</i>	<i>Nil</i>
	<i>Education cess 2% of</i>		<i>19,546</i>	

	<i>Income tax</i>			
	<i>Secondary and higher education of income tax cess is 1%</i>		<i>9,773</i>	
	<i>Total</i>		<i>10,06,607</i>	<i>9,77,288</i>

The details of the total amount involved in the Revenue's appeal and computation of tax as well as education cess are not in dispute. The only contention of Id. DR on this point is that the tax includes the education cess and therefore, when the total demand in the case is more than Rs. 10 lacs then, it cannot be considered as low tax for the purpose of maintainability of the appeal of the Revenue. We do not agree with the contention of the Id. DR that education cess shall be part of the tax for the purpose of limit of tax effect as per the Circular No. 21 of 2015. The definition of tax has been provided u/s 2(43) as under:-

"[(43) "tax"<sup>72</sup> 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<sup>74</sup>[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](#)] ;]”*

Thus, it is clear that as per the definition provided u/s 2(43) of the Act the term tax means income Tax chargeable under the provisions of the Act comprising of income tax and super tax as well fringe benefit of tax. Therefore, the definition of tax does not include education cess in its ambit and accordingly for the purpose of determining the maintainability of the Revenue’s appeal the tax has to be computed only the income tax, super tax, fringe tax but not education cess. The Coordinate Bench of this Tribunal in case of ACIT vs. M/s Shiv Edibles Ltd. (supra) as considered this issue in para 2 to 3 as under:-

*"2. The Id DR relied on the submissions made in the Misc. application. While the Id. AR of the assessee has submitted as under:*

*1. In the MA filed by the Department, it is stated that the Id. CIT(A) deleted the additions of Rs.29,71,662/- on which, the tax @ of 30% including education cess & SHEC @ of 3% and surcharge @ 10%, came to Rs.10,10,068/-. Accordingly, the tax on the disputed additions was more than Rs.10 lakhs and hence the honorable ITAT has mistakenly relied upon the CBDT circular.*

*In this connection it is submitted as under:*

*2. At the outset it is submitted that the above appeal is filed by the department is covered by the CBDT circular being a Low Tax Effect, as per the following calculation:*

<i>Particulars</i>	<i>Amount (in Rs.)</i>
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<i>Total Additions:</i>	
<i>i. Trading Addition</i>	<i>24,75,535/-</i>
<i>ii. Repair Work Expenses</i>	<i>2,58,966/-</i>
<i>iii. Addition u/s 40(a)(ia)</i>	<i>2,37,161/-</i>
<i>Total Additions</i>	<i>29,71,662/-</i>
<i>Tax on total additions @ 30%</i>	<i>8,91,499/-</i>
<i>Surcharge @ 10%</i>	<i>89,150/-</i>
	<i>9,80,649/-</i>
<i>EC &amp; SHEC @ 3%</i>	<i>29,419/-</i>
<i>Total Tax</i>	<i>10,10,068/-</i>

3. *As per the CBDT circular, the Department should not file an appeal where the tax effect involved is below Rs.10 lakhs. Therefore, the only question to be decided is whether the tax effect includes income tax only or includes surcharge and education cess also. In this case, the tax effect including the same stands at Rs.10,10,068/-. However, at the same time, excluding the surcharge and cess, the amount of income tax only at the rate of 30% stands at Rs.8,91,499/- which is far below Rs.10 lakhs.*
4. *Covered Issue: This controversy is already covered and this Hon'ble Bench has taken a view that for the purposes of computing tax effect, the amount of education cess should not be considered.*
- 4.1 *In the case of ACIT v/s Mohammad Miyan in ITA No. 171/JP/2012 vide order dated 25.04.2017 (DPB 1-4), it was contended that before including the amount of EC & SHEC*

*of Rs. 19,733/-, the tax came to Rs.9,86,629/- which was below the limit. Accepting the contention, the Hon'ble Jaipur ITAT held that*

*"6. The revenue has not given any other computation, therefore in view of this computation, we dismiss the appeal of the revenue as not maintainable as even if the surcharge is included then also the tax effect remains lesser than the prescribed limit i.e. Rs. 9,86,629/-."*

*5. Other direct decisions: 5.1 In the cases of DCIT v/s Dome Bell Electronics India Ltd. in ITA No. 2480/Mum/2012 vide order dated 22.07.2016 (DPB 5-9) and DCIT v/s Shri Yuvraj Singh in ITA No. 408/Lkw/2011 vide order dated 23.12.2013 (DPB 10-13), it has been held that for the purpose of computing tax effect for the purposes of the circular, should not include the surcharge and cess.*

*5.2 Also the Hon'ble Delhi ITAT in the case of ACIT v/s Dallas Finance Ltd. in ITA No. 3946/Del/2010 vide their order dated 07.04.2017 at para 7 (DPB 14-22), held that*

*"7. So, respectfully following the aforesaid view of the Coordinate Bench, we do not see merit in this contention of the Id. DR that the surcharge and the cess is a part of the tax."*

*5.3 In the cases of ACIT v/s R. Viswanathan in ITA No. 30/MDS/2011 and ITO Vs. P. Prasen Kumar in ITA No. 418/Hyderabad/2014 wherein, it has been held that surcharge and education cess should not be included while calculating the tax effect. This case has recently been followed in ITO vs. M/s.Sarojben G. Shah in MA No.89/Ahd/2016 vide order dated 06/01/2017.*

*5.4 Latest in the case of ITO vs. Lamba Celebrations Resort in MA No. 45/Chd./2016 dated 19.05.2017, ITO vs. Shri*

*Vishweshar Sahakari Patpedhi Maryadit in ITA No. 3929/Mum./2016 dated 19.04.2017, ITO vs. Patteboina Maheswara Rao in ITA No. 29/Viz./2013 dated 03.05.2017, ITO vs P.Prasen Kumar in MA No. 63/Hyd./2016 dated 07.12.2016, ITO vs. Smt. Parulben Jayantibhai Patel in 320/AHD/2014 vide order dated 12.04.2017 and DCIT vs. M/s. Tilaknagar Industries Ltd in ITA No.2506/Mum/2015 vide order dated 31.05.2017*

5.5 *Recently in ITO vs. Shri K. Vivekanandan in M.P. No.220/Mds/2016 vide order/ dated 15.03.2017, the MA filed by the department has been rejected and the case of CI1 v. K. Srinivasan (1972) 83 ITR 346 was also distinguished.*

5.6 *Also kindly refer Dalmia Cement (Bharat) Ltd. v/s CIT (2013) 263 CTR 0308 (De) though rendered in the context of Sec. 43B yet is relevant because it has held that tax does not include cess and surcharge.*

*Thus, the tax effect having been below Rs.10 lakhs, the Hon'ble ITAT has rightly held t the MA of the department was not maintainable.*

6. *In any case, if there is a contrary view, the issue becomes debatable when rectification is permissible. Otherwise also it is a case of review which is not permissible within the narrow scope of the powers conferred upon the ITAT u/s 254(2) of the act. The present miscellaneous application filed by the revenue, is an attempt to pray for review under the grab of rectification. Kindly refer ITO v/s ITAT (1987) 168 ITR 0809 (Raj) and 82 ITR 50 (SC). Accordingly the appeal of the revenue kindly be dismissed.*

*The ld AR of the assessee has relied on the following case laws:*

(i) *ITO vs. Shri K. Vivekanandan in ITA No. 1256/Mds/2012 vide order dated 15.03.2017.*

- (ii) *ITO vs Lamba Celebrations Resort in MA No. 45/Chd./2016 dated 19.05.2017*
- (iii) *ITO vs Shri Vishweshar Sahakari Patpedhi Maryadit in ITA No. 3929/Mum./2016 dated 19.04.2017*
- (iv) *ITO vs Patteboina Maheswara Rao in ITA No. 29/Viz./2013 dated 03.05.2017*
- (v) *ITO vs P.Prasen Kumar in MA No. 63/Hyd./2016 dated 07.12.2016.*

3. *After hearing both the sides, the Bench find that the tax effect including the surcharge also come below the threshold limit of Rs. 10.00 lacs. Considering these facts, the Bench find no merit in this M.A. of the revenue and the same is hereby dismissed."*

In view of the above facts and circumstances of the case, when the tax effect excluding education cess is less than Rs. 10 lacs then, the appeal of the Revenue is not maintainable in view of the CBDT Circular No. 21 of 2015.

In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 06/02/2018

Sd/-

(भागचंद )

(Bhagchand)

लेखा सदस्य / Accountant Member

Sd/-

(विजय पाल राव)

(Vijay Pal Rao)

न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 06/02/2018.

\*Santosh.

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- The DCIT, Circle, Jhunjhunu.
2. प्रत्यर्थी / The Respondent- Shri Shashi Kant Khetan, Jhunjhunu.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 926/JP/2017}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar