IN THE INCOME TAX APPELLATE TRIBUNAL
"A"BENCH: BANGALORE

BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

IT(TP)A No.894/Bang/2018
Assessment Year:2012-13

M/s. Novozymes South Asia Pvt. Ltd. Plot No.32, 47-52, Survey No.154 EPIP Industrial Area Whitefield Bangalore 560 066 **PAN NO :AAACN7030Q**	**Vs.**	JCIT (OSD) Circle-5(1)(1) Bangalore
APPELLANT		**RESPONDENT**

IT(TP)A No.895/Bang/2018
Assessment Year:2013-14

M/s. Novozymes South Asia Pvt. Ltd. Plot No.32, 47-52, Survey No.154 EPIP Industrial Area Whitefield Bangalore 560 066	**Vs.**	ACIT Circle-5(1)(1) Bangalore
APPELLANT		**RESPONDENT**

Appellant by	**:**	Shri T. Suryanarayan, A.R.
Respondent by	**:**	Ms. Neera Malhotra, D.R.

Date of Hearing	**:**	19.04.2021
Date of Pronouncement	**:**	29.06.2021

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

Both the appeals filed by the assessee are directed against the orders passed by Ld. CIT(A)-5 Bengaluru and they relate to the assessment year 2012-13 and 2013-14.

2. The assessee has filed revised grounds of appeals and also additional ground of appeal in both the years. They give rise to the following two issues:-

a. Disallowance of expenditure incurred in respect of Shares of holding company (hereinafter referred as ESOP) to its employees.
b. The claim for deduction of Education Cess and higher education Cess.

Since identical issues have been raised in both the years, both the appeals were heard together and are being disposed of by this common order.

3. The assessee is engaged in the business of development, production and distribution of Elzimes and Bio-chemicals.

4. The first issue relates to disallowance of claim of expenditure incurred in respect of ESOP (Employees Stock Option Programme). The A.O. noticed that the assessee has claimed a sum of rs.1,25,49,035/- and Rs.1,06,34,674/- under employees benefit expenses in assessment year 2012-13 and 2013-14 respectively. The assessee explained that the employees/directors of the assessee company are eligible to purchase shares of Novozymes A/S Denmark (holding company) as per terms and conditions specified in the stock option plan. The holding company shall issue shares at a price lower than the prevailing market price. As per the

agreement, the holding company shall recover the loss arising to it on issue of shares (difference between average market price and issue price) to the employees of company from the assessee company. As per the ESOP scheme, the right to purchase shares of the holding company shall accrue to the employees proportionately over a period of 3 years. The assessee has entirely borne the loss arising on issue of shares to the ultimate holding company. The assessee company has reimbursed the same to its holding company and claimed the same as expenditure. The assessee has also accounted amount to be given to the holding company on accrual basis and claimed the same also as deduction.

5. The A.O. noticed in assessment year 2012-13 that the assessee has provided for proportionate cost (accrued amount) of Rs.20.81 lakhs and further paid Rs.96.68 lakhs upon exercise of stock option plan by employees and accordingly claimed aggregate amount of Rs.1,25,49,035/-.

6. The A.O. noticed that the assessee has borne the difference between the price at which share was granted to the employees and the value of shares prevailing on the exercise date. The A.O. was of the view that the assessee was not able to prove that the ESOP was actually part of compensation package offered to its employees. The A.O. took the view that the revenue from sale of shares to the employees actually goes to increase the capital base of the holding company. He also took the view that the loss arising on account of issue of shares to the employees should be reflected in the books of the holding company and not in the books of the assessee. The A.O. also took the view that the loss arising is only notional and not cystalized one. In this regard, the A.O. has observed that if the shares had been offered at discounted price to a third party, the assessee would not have claimed the discount as loss. Simply because it was offered to the employees, the discount in issuing

shares has been treated as loss. Since no money has gone out of the packet of the company issuing shares, loss is imaginary loss. The A.O. observed that the income tax Act does not allow the said notional or fictitious loss. Accordingly, he held that the claim of the assessee in both the years is not allowable as deduction. The ld. CIT(A) also confirmed the disallowance in both the years.

7. We heard the parties and perused the record. We notice that an identical issue has been considered by the coordinate bench in the assessee's own case relating to assessment year 2006-07 reported in 2014-15 (42 Taxmann.com 168). The coordinate bench has allowed the claim of the assessee with the following observations:

> ***"6.*** *The Assessee framed Novo Nordisk India Private Limited Employee Stock Purchase Scheme, 2005. ("hereinafter referred to as ESOP") whereby it offered shares of NNAS to its employees subject to certain terms and conditions set out in the scheme. A copy of the ESOP is at page-28 to 31 of the Assessee's paper book. For the Assessment Year 2006-07, the assessee filed its return of income on November 29, 2006, reporting an income of Rs 58,399,200. During the FY 2005-06, eligible employees of assessee (NNIPL) were given the option of purchasing shares of its parent company NNAS under the NNAS Global Share Programme, 2005 ("the Plan"). In this regard, 231 employees of the company had applied for purchase of 12,931 shares at the price of DKK 150 per share. Further, as per the Plan, the difference between the purchase price of the shares and the average market price of the shares during the purchase offer period (i.e., DKK 313.39) amounting to DKK 163.39 per share was recharged by NNAS to NNIPL. The Plan was conceptualised with a view to encouraging stock ownership among NNIPL's employees, to motivate and encourage employees to render services which would contribute to the continued growth and success of the company. Accordingly, since NNIPL has actually incurred the expenses during the subject financial year, the entire amount of ESOP recharge cost amounting to DKK 2,112,796 (Rs 15,191,003) was recognised as employee cost, and claimed as a deductible expenditure in computing the taxable income of NNIPL for the AY 2006-07.*
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> ……..
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> ***18.*** *We have considered the rival submissions. It is clear from the facts on record that there was an actual issue of shares of the*

parent company by the assessee to its employees. The difference, between the fair market value of the shares of the parent company on the date of issue of shares and the price at which those shares were issued by the assessee to its employees, was reimbursed by the assessee to its parent company. This sum so reimbursed was claimed as expenditure in the profit & loss account of the assessee as an employee cost. The law by now is well settled by the decision of the Special Bench of the ITAT Bangalore in the case of Biocon Ltd. v. Dy. CIT [2013] 35 taxmann.com 335 and other connected appeals, by order dated 16.07.2013, wherein it was held that expenditure on account of ESOP is a revenue expenditure and had to be allowed as deduction while computing income. The Special Bench held that the sole object of issuing shares to employees at a discounted premium is to compensate them for the continuity of their services to the company. By no stretch of imagination, we can describe such discount as either a short capital receipt or a capital expenditure. It is nothing but the employees cost incurred by the company. The substance of this transaction is disbursing compensation to the employees for their services, for which the form of issuing shares at a discounted premium is adopted.

19. *In the present case, there is no dispute that the liability has accrued to the assessee during the previous year. The only question to be decided is as to whether it is the expenditure of the assessee or that of the parent company. We are of the view that the observations of the CIT(A) in para 5.6 of his order that these expenses are the expenses of the foreign parent company is without any basis and lie in the realm of surmises. The foreign parent company has a policy of offering ESOP to its employees to attract the best talent as its work force. In pursuance of this policy of the foreign parent company, allowed its subsidiaries/affiliates across the world to issue its shares to the employees. As far as the assessee in the present case which is an affiliate of the foreign parent company is concerned, the shares were in fact acquired by the assessee from the parent company and there was an actual outflow of cash from the assessee to the foreign parent company. The price at which shares were issued to the employees was paid by the employee to the Assessee who in turn paid it to the parent company. The difference between the fair market value of the shares of the price at which shares were issued to the employees was met by the Assessee. This factual position is not disputed at any stage by the revenue. In such circumstances, we do not see any basis on which it could be said that the expenditure in question was a capital expenditure of the foreign parent company. As far as the assessee is concerned, the difference between the fair market value of the shares of the parent company and the price at which those shares were issued to its employees in India was paid to the employee and was an employee cost which is a revenue expenditure incurred for the purpose of the business of the company and had to be allowed as deduction. There is no reason*

why this expenditure should not be considered as expenditure wholly and exclusively incurred for the purpose of business of the assessee.

20. *We fail to see any basis for the observation of the CIT(A) that the obligation to issue shares at a discounted price to the employees of the Assessee was that of the foreign parent company and not that of the Assessee. Admittedly, the shares were issued to employees of the Assessee and it is the Assessee who has to bear the difference in cost of the shares. The expenditure is necessary for the Assessee to retain a health work force. Business expediency required that the Assessee incur such costs. The parent company will be benefitted indirectly by such a motivated work force. This will be no ground to deny the deduction of a legitimate business expenditure to the Assessee as laid down by the Hon'ble Supreme Court in the case of Sassoon J. David& Co. (P.) Ltd. (supra).*

21. *The reference by the CIT(A) to the provisions of Sec.40A(2)(b) of the Act is again without any basis. The price of the shares of NNAS is arrived at by applying the average market price for the period 3rd October, - 17the October, 2005 in the Copenhagen Stock Exchange. The price so arrived at and the price at which shares are issued to the employees of the Assessee is the benefit which the employees get under the ESOP. The Assessee or its parent company can never influence the stock market prices on a particular date. There is no evidence or even a suggestion made by the CIT(A) in his order. There is no basis to apply the provisions of Sec.40A(2)(b) of the Act.*

22. *With regard to the decision of the ITAT in the case of AccentureServices (P.) Ltd. (supra), we find that the facts of the case of Accenture Services (P.) Ltd. (supra)are identical. In the case of Accenture Services (P.) Ltd. (supra), the facts were that the assessee company incurred certain expenses on account of payments made by it for the shares allotted to its employees in connection with the ESPP. The AO had disallowed Rs. 9,06,788/- incurred by the assessee on the ground that this expenditure is not the expenditure of assessee company but that expenditure is of parent company and the benefit of such expenditure accrues to the parent company and not assessee. The CIT(A) deleted the addition made by the AO. The CIT(A) found that the common shares of Accenture Ltd. the parent company, have been allotted to the employees of ASPL, the Indian affiliate/Assessee and not to the employees of the parent company. The CIT(A) also found that though the shares of the parent company have been allotted, the same have been given to the employees of the Assessee at the behest of the Assessee. The CIT(A) thus held that it was an expense incurred by the assessee to retain, motive and award its employees for their hard work and is akin to the salary costs of the assessee. The same was therefore business expenditure and should be*

allowable in computing the taxable income of the assessee. The tribunal upheld the view of the CIT(A). It can be seen from the decision in the case of Accenture Services (P.) Ltd. (supra) that the shares of the foreign company were allotted and given to the employees of affiliate in India at the behest of the affiliate in India. The CIT(Appeals), however, presumed that the facts in the instant case of the assessee was that the shares were allotted to the employees of the affiliate in India at the behest of the foreign company. This is not the factual position in the assessee's case, as the assessee had on its own framed the NNIPL ESOP Scheme, 2005, to benefit its employees. NNAS may have a global policy of rewarding employees of affiliates with its shares being given at a discount and that policy might be the basis for the Assessee to frame ESOP. That by itself will not mean that the ESOP was at the behest of the parent company. In any event the immediate beneficiary is the Assessee though the parent company may also be indirect beneficiary of a motivated work force of a subsidiary. We are of the view that the factual basis on which the CIT(Appeals) distinguished the decision of the Mumbai Bench of ITAT in the case of Accenture Services (P.) Ltd. (supra) is erroneous.3

***23.** With regard to the observations of the CIT(Appeals) that the ESOP actually benefits only the parent company, we are of the view that the expenditure in question is wholly and exclusively for the purpose of the business of the assessee and the fact that the parent company is also benefited by reason of a motivated work force would be no ground to deny the claim of the assessee for deduction, which otherwise satisfies all the conditions referred to in section 37(1) of the Act. The decision of the Hon'ble Supreme Court in the case of Sassoon J. David & Co. (P)Ltd. (supra) and the Hon'ble Karnataka High Court decision in the case of Mysore Kirloskar Ltd. (supra) clearly support the plea of the assessee in this regard.*

***24.** We are of the view that in the facts and circumstances of the present case, the expenditure in question was wholly and exclusively for the purpose of the business of the assessee and had to be allowed as deduction as a revenue expenditure".*

8. The Ld. A.R. submitted that the coordinate bench has followed the decision rendered by special bench of ITAT, Bengaluru in the case of Biocon Ltd. Vs. DCIT (2013) 35 Taxmann.com 335. He submitted that the decision rendered by special bench has since been upheld by Hon'ble High Court of Karnataka in the case of CIT Vs. Biocon Ltd. (2020) 121 Taxmann.com 351 with the following observations:-

*"**6.** We have considered the submissions made by learned counsel for the parties and have perused the record. The singular issue, which arises for consideration in this appeal is whether the tribunal is correct in holding that discount on the issue of ESOPs i.e., difference between the grant price and the market price on the shares as on the date of grant of options is allowable as a deduction under section 37 of the Act. Before proceeding further, it is apposite to take note of section 37(1) of the Act, which reads as under:*
Section 37(1) says that 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".

***7.** Thus, from perusal of section 37(1) of the Act, it is evident that the aforesaid provision permits deduction for the expenditure laid out or expended and does not contain a requirement that there has to be a pay out. If an expenditure has been incurred, provision of section 37(1) of the Act would be attracted. It is also pertinent to note that section 37 does not envisage incurrence of expenditure in cash.*

***8.** Section 2(15A) of the Companies Act, 1956 defines 'employees stock option' to mean option given to the whole time directors, officers or the employees of the company, which gives such directors, officers or employees, the benefit or right to purchase or subscribe at a future rate the securities offered by a company at a free determined price. In an ESOP a company undertakes to issue shares to its employees at a future date at a price lower than the current market price. The employees are given stock options at discount and the same amount of discount represents the difference between market price of shares at the time of grant of option and the offer price. In order to be eligible for acquiring shares under the scheme, the employees are under an obligation to render their services to the company during the vesting period as provided in the scheme. On completion of the vesting period in the service of the company, the option vest with the employees.*

***9.** In the instant case, the ESOPs vest in an employee over a period of four years i.e., at the rate of 25%, which means at the end of first year, the employee has a definite right to 25% of the shares and the assessee is bound to allow the vesting of 25% of the options. It is well settled in law that if a business liability has arisen in the accounting year, the same is permissible as deduction, even though, liability may have to quantify and discharged at a future date. On exercise of option by an employee,*

the actual amount of benefit has to be determined is only a quantification of liability, which takes place at a future date. The tribunal has therefore, rightly placed reliance on decisions of the Supreme Court in Bharat Movers supra and Rotork Controls India P. Ltd., supra and has recorded a finding that discount on issue of ESOPs is not a contingent liability but is an ascertained liability.

***10**. From perusal of section 37(1), which has been referred to supra, it is evident that an assessee is entitled to claim deduction under the aforesaid provision if the expenditure has been incurred. The expression 'expenditure' will also include a loss and therefore, issuance of shares at a discount where the assessee absorbs the difference between the price at which it is issued and the market value of the shares would also be expenditure incurred for the purposes of section 37(1) of the Act. The primary object of the aforesaid exercise is not to waste capital but to earn profits by securing consistent services of the employees and therefore, the same cannot be construed as short receipt of capital. The tribunal therefore, in paragraphs 9.2.7 and 9.2.8 has rightly held that incurring of the expenditure by the assessee entitles him for deduction under section 37(1) of the Act subject to fulfilment of the condition.*

***11**. The deduction of discount on ESOP over the vesting period is in accordance with the accounting in the books of account, which has been prepared in accordance with Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999.*

***12**. So far as reliance place by the revenue in the case of Infosys Technologies Ltd.(supra) is concerned, it is noteworthy that in the aforesaid decision, the Supreme Court was dealing with a proceeding under section 201 of the Act for non-deduction of tax at source and it was held that there was no cash inflow to the employees. The aforesaid decision is of no assistance to decide the issue of allowability of expenses in the hands of the employer. It is also pertinent to mention here that in the decision rendered by the Supreme Court in the aforesaid case, the Assessment Years in question was 1997-98 to 1999-2000 and at that time, the Act did not contain any specific provisions to tax the benefits on ESOPs. Section 17(2)(iiia) was inserted by Finance Act, 1999 with effect from 1-4-2000. Therefore, it is evident that law recognizes a real benefit in the hands of the employees. For the aforementioned reasons, the decision rendered in the case of Infosys Technologies is of no assistance to the revenue. The decisions relied upon by the revenue in A. Gajapathy Naidu,Morvi Industries Ltd. and Keshav Mills Ltd.(supra) support the case of assessee as the assessee has incurred a definite legal liability and on following the mercantile system of accounting, the discount on ESOPs has rightly been debited as expenditure in the books of account. We are in*

respectful agreement with the view taken in PVP Ventures Ltd. And Lemon Tree Hotels Ltd.'case (supra).

***13**. It is also pertinent to mention here that for Assessment Year 2009-10 onwards the Assessing Officer has permitted the deduction of ESOP expenses and in view of law laid down by Supreme Court in Radhasoami Satsang v. CIT, [1992] 60 Taxman 248/193 ITR 321, the revenue cannot be permitted to take a different stand with regard to the Assessment Year in question."*

9. We notice that the Hon'ble jurisdictional Karnataka High Court has held that the liability accrued in respect of ESOP is not contingent liability but an ascertained liability. It also has held that the discount given on shares would be expenditure for the purpose of section 37(1) of the Act. In the case of Biocon Ltd, the assessee was issuing its own shares to its employees at discounted price and the discount so given has been held to be allowable.

10. In the instant case, we are of the view that the assessee stands in a better footing. The assessee has not issued its own shares at the discounted price. In fact, the employees have been given shares of the holding company at a discounted price and the assessee has borne the discount amount on behalf of its employees. Hence, in effect, it is a staff welfare programme of the assessee and hence the same is allowable as deduction u/s 37(1) of the Act.

11. In view of the foregoing discussions, we set aside the order passed by Ld. CIT(A) on this issue in both the years under consideration and direct the A.O. to delete the disallowance.

12. The next issue urged by the assessee relates to the claim of deduction of education Cess expenditure. This claim has been raised for the first time before the Tribunal. The Ld. A.R. submitted that this issue is a legal issue and it does not involve examination of fresh evidences, since the facts are available already on record. The Ld. A.R. submitted that the claim of the assessee is supported by

the decision rendered by Hon'ble Bombay High Court in the case of Sesagoa Ltd. Vs. ACIT (2020) 117 Taxmann.com 96 and also the decision rendered by the coordinate bench in the case of Wipro Ltd. Vs. ACIT (2020) 122 Taxmann.com 268.

13. We heard Ld. D.R. in this regard and perused the record. We notice that the claim of the assessee for deduction of payment of education Cess is held to be allowable by Hon'ble Bombay High Court in the case of Sesagoa Ltd. (supra). The said decision has been followed by the coordinate bench in the case of Wipro Ltd. (supra). For the sake of convenience, we extract below the decision rendered by Hon'ble Bombay High Court in the case of Sesagoa Ltd. (supra).

"15. *The substantial question of law No. (iii) in Tax Appeal No. 17 of 2013 and the only substantial question of law in Tax Appeal No. 18 of 2013 is one and the same namely, 'whether Education Cess and Higher and Secondary Education Cess, collectively referred to as "cess" is allowable as a deduction in the year of its payment ?'.*

16. *The aforesaid question arises in the context of provisions of Section 40(a)(ii) which inter alia 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) …

(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;]

17. *Therefore, the question which arises for determination is whether the expression "any rate or tax levied" as it appears in section 40(a)(ii) of the IT Act includes "cess". The Appellant - Assessee contends that the expression does not include "cess" and therefore, the amounts paid towards "cess" are liable to be deducted in computing the income chargeable under the head "profits and gains of business or profession". However, the Respondent - Revenue contends that "cess" is also included in the scope and import of the expression "any rate or tax levied" and consequently, the amounts paid towards the "cess" are not liable for deduction in computing the income chargeable under the head "profits and gains of business or profession".*

18. *In relation to taxing statute, certain principles of interpretation are quite well settled. In New Shorrock Spinning and Mfg. Co. Ltd. v. Raval, [1959] 37 ITR 41 (Bom.), it is 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. Indeed, in such a case the task of interpretation can hardly be said to arise : Absoluta sententia expositore non indiget. The language used by the Legislature best declares its intention and must be accepted as decisive of it.*

19. *Besides, when it comes to interpretation of the IT 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. The subject cannot be taxed unless he comes within the letter of the law and the argument that he falls within the spirit of the law cannot be availed of by the department. [See CIT v. Motors & General Stores [1967] 66 ITR 692 (SC)].*

20. *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 [See CIT v. Radhe Developers [2012] 17 taxmann.com 156/204 Taxman 543/341 ITR 403 (Guj.). One can only look fairly at the language used. No tax can be imposed by inference or analogy. It is also not permissible to construe a taxing statute by making assumptions and presumptions [See Goodyear v. State of Haryana [1991] 188 ITR 402(SC)].*

21. *There are several decisions which lay down rule 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 [See AGS Tiber v. CIT [1998] 233 ITR 207/[1997] 92 Taxman 268 (Mad.)].*

22. *Applying the aforesaid principles, we find that the legislature, in Section 40(a)(ii) has provided that "any rate or tax levied" on "profits and gains of business or profession" shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession". There is no reference*

to any "cess". Obviously therefore, there is no scope to accept Ms. Linhares's contention that "cess" being in the nature of a "Ta x" is equally not deductable in computing the income chargeable under the head "profits and gains of business or profession". Acceptance of such a contention will amount to reading something in the text of the provision which is not to be found in the text of the provision in section 40(a)(ii) of the IT Act.

23. *If the legislature intended to prohibit the deduction of amounts paid by a Assessee towards say, "education cess" or any other "cess", then, the legislature could have easily included reference to "cess" in clause (ii) of Section 40(a) of the IT Act. The fact that the legislature has not done so means that the legislature did not intend to prevent the deduction of amounts paid by a Assessee towards the "cess", when it comes to computing income chargeable under the head "profits and gains of business or profession".*

24. *The legislative history bears out that the Income Ta x Bill, 1961, as introduced in the Parliament, had Section 40(a)(ii) which read as follows :*
"(ii) 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"

25. *However, when the matter came up before the Select Committee of the Parliament, it was decided to omit the word "cess" from the aforesaid clause from the Income-tax Bill, 1961. The effect of the omission of the word "cess" is that only any rate or tax levied on the profits or gains of any business or profession are to be deducted in computing the income chargeable under the head "profits and gains of business or profession". Since the deletion of expression "cess" from the Income-tax Bill, 1961, was deliberate, there is no question of reintroducing this expression in Section 40(a)(ii) of IT Act and that too, under the guise of interpretation of taxing statute.*

26. *In fact, in the aforesaid precise regard, reference can usefully be made to the Circular No. F. No. 91/58/66-ITJ(19), dated 18th May, 1967 issued by the CBDT which reads as follows :—*

> *"Interpretation of provision of Section 40(a)(ii) of IT Act, 1961 - Clarification regarding.- "Recently a case has come to the notice of the Board where the Income-tax Officer 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 Income-tax Officer is not correct. Clause 40(a)(ii) of the Income-tax Bill, 1961 as introduced in the Parliament stood as under:-*
> *"(ii) 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 Income-tax Officers so that further litigation on this account may be avoided.[Board's F. No. 91/58/66-ITJ(19), dated 18-5-1967.]

27. *The CBDT Circular, is binding upon the authorities under the IT Act like Assessing Officer and the Appellate Authority. The CBDT Circular is quite consistent with the principles of interpretation of taxing statute. This, according to us, is an additional reason as to why the expression "cess" ought not to be read or included in the expression "any rate or tax levied" as appearing in section 40(a)(ii) of the IT Act.*

28. *In 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'. In the corresponding Section 40(a)(ii) of the IT Act, 1961 the expression "cess" is quite conspicuous by its absence. In fact, legislative history bears out that this expression was in fact to be found in the Income-tax Bill, 1961 which was introduced in the Parliament. However, the Select Committee recommended the omission of expression "cess" and consequently, this expression finds no place in the final text of the provision in Section 40(a)(ii) of the IT Act, 1961. The effect of such omission is that the provision in Section 40(a)(ii) does not include, "cess" and consequently, "cess" whenever paid in relation to business, is allowable as deductable expenditure.*

29. *In Kanga and Palkhivala's "The Law and Practice of Income Tax" (Tenth Edition), several decisions have been analyzed in the context of provisions of Section 40(a)(ii) of the IT Act, 1961. There is reference to the decision of Privy Council in CIT v. Gurupada Dutta [1946] 14 ITR 100 (PC), where a union rate was imposed under a Village Self Government Act upon the assessee as the owner or occupier of business premises, and the quantum of the rate was fixed after consideration of the 'circumstances' of the assessee, including his business income. The Privy Council held that the rate was not 'assessed on the basis of profits' and was allowable as a business expense. Following this decision, the Supreme Court held in Jaipuria Samla Amalgamated Collieries Ltd. v. CIT 1971 [82 ITR 580] 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. Similarly, this sub-clause is inapplicable, and a deduction should be allowed, where a tax is imposed by a district board on business with reference to 'estimated income' or by a municipality with reference to 'gross income'. Besides, unlike Section 10(4) of the 1922 Act, this sub-clause does not refer to 'cess' and therefore, a 'cess' even if levied upon or calculated on the basis of business profits may be allowed in computing such profits under this Act.*

30. *The Division Bench of the Rajasthan High Court (Jaipur Bench) in Income-tax Appeal No. 52/2018 decided on 31st July, 2018 Chambal Fertilisers and Chemicals Ltd. v. CIT, by reference to the aforesaid CBDT Circular dated 18th May, 1967 has held that the ITAT erred in holding that the "education cess" is a*

disallowable expenditure under section 40(a)(ii) of the IT Act. Ms. Linhares was unable to state whether the Revenue has appealed this decision. Mr. Ramani, learned Senior Advocate submitted that his research did not suggest that any appeal was instituted by the Revenue against this decision, which is directly on the point and favours the Assessee.

31. *Mr. Ramani, in fact pointed out three decisions of ITAT, in which, the decision of the Rajasthan High Court in Chambal Fertilisers and Chemicals Ltd.(supra) was followed and it was held that the amounts paid by the Assessee towards the 'education cess' were liable for deduction in computing the income chargeable under the head of "profits and gains of business or profession". They are as follows :—*

(i) Dy. CIT v. Peerless General Finance and Investment and Co. Ltd. [IT Appeal No. 1469 and 1470/Kol/2019 decided on 5-12-2019 by the ITAT, Calcutta;

(ii) Dy. CIT v. Graphite India Ltd. [IT Appeal No. 472 and 474 Co. No. 64 and 66/Kol/2018 dated on 22-11-2019)by the ITAT, Calcutta;

(iii) Dy. CIT v. Bajaj Allianz General Insurance [IT Appeal No. 1111 and 1112/PUN/2017 dated on 25-7-2019) by the ITAT, Pune.

32. *Again, Ms. Linhares, learned Standing Counsel for the Revenue was unable to say whether the Revenue had instituted the appeals in the aforesaid matters. Mr. Ramani, learned Senior Advocate for the Appellant submitted that to the best of his research, no appeals were instituted by the Revenue against the aforesaid decisions of the ITAT.*

33. *The ITAT, in the impugned judgment and order, has reasoned that since "cess" is collected as a part of the income tax and fringe benefit tax, therefore, such "cess" is to be construed as "tax". According to us, there is no scope for such implications, when construing a taxing statute. Even, though, "cess" may be collected as a part of income tax, that does not render such "cess", either rate or tax, which cannot be deducted in terms of the provisions in Section 40(a)(ii) of the IT Act. The mode of collection, is really not determinative in such matters.*

34. *Ms. Linhares, has relied upon Unicorn Industries v. Union of India [2019] 112 taxmann.com 127 (SC) in support of her contention that "cess" is nothing but "tax" and therefore, there is no question of deduction of amounts paid towards "cess" when it comes to computation of income chargeable under the head profits or gains of any business or profession.*

35. *The issue involved in Unicorn Industries (supra) was not in the context of provisions in Section 40(a)(ii) of the IT Act. Rather, the issue involved was whether the 'education cess, higher education cess and National Calamity Contingent Duty (NCCD)' on it could be construed as "duty of excise" which was exempted in terms of Notification dated 9th September, 2003 in respect of goods specified in the Notification and cleared from a unit located in the Industrial Growth Centre or other specified areas with the State of Sikkim. The High Court had held that the levy of education cess, higher education cess and NCCD could not be included in the expression "duty of excise" and consequently, the amounts paid towards such*

cess or NCCD did not qualify for exemption under the exemption Notification. This view of the High Court was upheld by the Apex Court in Unicorn Industries (supra).

***36.** The aforesaid means that the Supreme Court refused to regard the levy of education cess, higher education cess and NCCD as "duty of excise" when it came to construing exemption Notification. Based upon this, Mr. Ramani contends that similarly amounts paid by the Appellant - Assessee towards the "cess" can never be regarded as the amounts paid towards the "tax" so as to attract provisions of Section 40(a)(ii) of the IT Act. All that we may observe is that the issue involved in Unicorn Industries (supra) was not at all the issue involved in the present matters and therefore, the decision in Unicorn Industries (supra) can be of no assistance to the Respondent - Revenue in the present matters.*

***37.** Ms. Linhares, learned Standing Counsel for the Revenue however submitted that the Appellant - Assessee, in its original return, had never claimed deduction towards the amounts paid by it as "cess". She submits that neither was any such claim made by filing any revised return before the Assessing Officer. She therefore relied upon the decision of the Supreme Court in Goetze (India) Ltd. v. CIT [2006] 284 ITR 323/157 taxman 1 (SC) to submit that the Assessing Officer, was not only quite right in denying such a deduction, but further the Assessing Officer had no power or jurisdiction to grant such a deduction to the Appellant - Assessee. She submits that this is what precisely held by the ITAT in its impugned judgments and orders and therefore, the same, warrants no interference.*

***38.** Although, it is true that the Appellant - Assessee did not claim any deduction in respect of amounts paid by it towards "cess" in their original return of income nor did the Appellant - Assessee file any revised return of income, according to us, this was no bar to the Commissioner (Appeals) or the ITAT to consider and allow such deductions to the Appellant - Assessee in the facts and circumstances of the present case. The record bears out that such deduction was clearly claimed by the Appellant - Assessee, both before the Commissioner (Appeals) as well as the ITAT.*

***39.** In CIT v. Pruthvi Brokers & Shareholders (P.) Ltd. [2012] 349 ITR 336/208 Taxman 498/23 taxmann.com 23 (Bom), one of the questions of law which came to be framed was whether on the facts and circumstances of the case, the ITAT, in law, was right in holding that the claim of deduction not made in the original returns and not supported by revised return, was admissible. The Revenue had relied upon Goetze (supra) and urged that the ITAT had no power to allow the claim for deduction. However, the Division Bench, whilst proceeding on the assumption that the Assessing Officer in terms of law laid down in Goetze (supra) had no power, proceeded to hold that the Appellate Authority under the IT Act had sufficient powers to permit such a deduction. In taking this view, the Division Bench relied upon the Full Bench decision of this Court in Ahmedabad Electricity Co. Ltd. v. CIT [1993] 199 ITR 351/66 Taxman 27 (Bom.) to hold that the Appellate Authorities under the IT Act have very wide powers while considering an appeal which may be filed by the Assessee. The Appellate Authorities may confirm, reduce, enhance or annul the assessment or remand the case to the Assessing Officer. This is because, unlike an ordinary appeal, the basic purpose of a tax*

appeal is to ascertain the correct tax liability of the Assessee in accordance with law.

40. *The decision in Goetze (supra) upon which reliance is placed by the ITAT also makes it clear that the issue involved in the said case was limited to the power of the assessing authority and does not impinge on the powers of the ITAT under section 254 of the said Act. This means that in Goetze India Ltd. (supra), 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. This is the distinction drawn by the division Bench in Pruthvi Brokers Shareholders (P.) Ltd. (supra) as well and this is the distinction which the ITAT failed to note in the impugned order.*

41. *Besides, we note that in the present case, though the claim for deduction was not raised in the original return or by filing revised return, the Appellant - Assessee had indeed addressed a letter claiming such deduction before the assessment could be completed. However, even if we proceed on the basis that there was no obligation on the Assessing Officer to consider the claim for deduction in such letter, the Commissioner (Appeals) or the ITAT, before whom such deduction was specifically claimed was duty bound to consider such claim. Accordingly, we are unable to agree with Ms. Linhare's contention based upon the decision in Goetze India Ltd. (supra).*

42. *For all the aforesaid reasons, we hold that the substantial question of law No. (iii) in Tax Appeal No. 17 of 2013 and the sole substantial question of law in Tax Appeal No. 18 of 2013 is also required to be answered in favour of the Appellant - Assessee and against the Respondent-Revenue. To that extent therefore, the impugned judgments and orders made by the ITAT warrant interference and modification."*

14. Respectfully following the decision rendered by Hon'ble Bombay High Court in the case of Sesagoa Ltd. (supra), we direct the A.O. to allow education Cess as deduction in both the years.

15. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open court on 29th June, 2021

Sd/-	**Sd/-**
(George George K.)	**(B.R. Baskaran)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 29th June, 2021.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.