IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-2', NEW DELHI

Before Sh. Amit Shukla, Judicial Member

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

ITA No. 2242/Del/2015 : Asstt. Year: 2009-10

M/s Expeditors International (India) Pvt. Ltd., No. 6, Ground Floor, Sector-C, Pocket-8, Vasant Kunj, New Delhi-110070	Vs	DCIT, Circle-11(1), New Delhi
(APPELLANTT		**(RESPONDENT)**
PAN No. AAACE1795K		

ITA No. 2260/Del/2015 : Asstt. Year: 2009-10

ACIT, Circle-8(2), New Delhi-110002	Vs	M/s Expeditors International (India) Pvt. Ltd., No. 6, Ground Floor, Sector-C, Pocket-8, Vasant Kunj, New Delhi-110070
(APPELLANTT		**(RESPONDENT)**
PAN No. AAACE1795K		

ITA No. 5994/Del/2017 : Asstt. Year: 2010-11

ACIT, Circle-8(2), New Delhi-110002	Vs	M/s Expeditors International (India) Pvt. Ltd., No. 6, Ground Floor, Sector-C, Pocket-8, Vasant Kunj, New Delhi-110070
(APPELLANTT		**(RESPONDENT)**
PAN No. AAACE1795K		

ITA No. 17/Del/2021 : Asstt. Year: 2010-11

M/s Expeditors International (India) Pvt. Ltd., Room No. 7B, 1st Floor, Import Building No. 3, International Cargo Terminal, Indira Gandhi International Airport, New Delhi-110037	Vs	ACIT, Circle-7(1), New Delhi
(APPELLANTT		**(RESPONDENT)**
PAN No. AAACE1795K		

ITA No. 3513/Del/2017 : Asstt. Year: 2011-12

DCIT, Circle-8(2), New Delhi	Vs	M/s Expeditors International (India) Pvt. Ltd., No. 6, Ground Floor, Sector-C, Pocket-8, Vasant Kunj, New Delhi-110070
(APPELLANTT		**(RESPONDENT)**
PAN No. AAACE1795K		

ITA No. 18/Del/2021 : Asstt. Year: 2011-12

M/s Expeditors International (India) Pvt. Ltd., Room No. 7B, 1st Floor, Import Building No. 3, International Cargo Terminal, Indira Gandhi International Airport, New Delhi-110037	Vs	ACIT, Circle-7(1), New Delhi
(APPELLANTT		**(RESPONDENT)**
PAN No. AAACE1795K		

ITA No. 5538/Del/2018 : Asstt. Year: 2012-13

ACIT, Circle-8(2), New Delhi	Vs	M/s Expeditors International (India) Pvt. Ltd., No. 6, Ground Floor, Sector-C, Pocket-8, Vasant Kunj, New Delhi-110070
(APPELLANTT		**(RESPONDENT)**
PAN No. AAACE1795K		

ITA No. 19/Del/2021 : Asstt. Year: 2012-13

M/s Expeditors International (India) Pvt. Ltd., Room No. 7B, 1st Floor, Import Building No. 3, International Cargo Terminal, Indira Gandhi International Airport, New Delhi-110037	Vs	ACIT, Circle-7(1), New Delhi
(APPELLANTT		**(RESPONDENT)**
PAN No. AAACE1795K		

ITA No. 6953/Del/2018 : Asstt. Year: 2014-15

ACIT, Circle-8(2), New Delhi	Vs	M/s Expeditors International (India) Pvt. Ltd., No. 6, Ground Floor, Sector-C, Pocket-8, Vasant Kunj, New Delhi-110070
(APPELLANTT		**(RESPONDENT)**
PAN No. AAACE1795K		

ITA No. 20/Del/2021 : Asstt. Year: 2014-15

M/s Expeditors International (India) Pvt. Ltd., Room No. 7B, 1st Floor, Import Building No. 3, International Cargo Terminal, Indira Gandhi International Airport, New Delhi-110037	Vs	ACIT, Circle-7(1), New Delhi
(APPELLANTT		**(RESPONDENT)**
PAN No. AAACE1795K		

Assessee by : Sh. Deepak Chopra, Adv. &
Sh. Harpreet S. Ajmani, Adv.
Revenue by : Ms. Meera Srivastava, CIT DR

Date of Hearing: 26.07.2021		**Date of Pronouncement: 30.07.2021**

ORDER

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

Since, the issues involved in ITA Nos. 17 to 20/Del/2021 are identical, they were heard together.

2. In ITA No. 17/Del/2021, the following grounds have been raised by the assessee:

> *"1. That on the facts and circumstances of the case and in law, the Assessing Officer ought to have considered that the education cess paid on the income*

tax was an allowable deduction for computing total income given the fact that the same was not hit by the provisions of Section 40(a)(ii) of the Act."

3. In ITA No. 2242/Del/2015, following grounds have been raised by the assessee:

"1. That on the facts and in the circumstances of the case and in law, the order passed by the Ld CIT(A) is bad in law and void ab-initio.

2. Disallowance of lease line connectivity charges (VSAT uplinking charges) amounting to Rs. 1,16,28,390/- paid by the appellant.

2.1 That on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in not providing an adequate opportunity to the appellant of being heard and explained before treating the lease line charges as royalty liable to tax in breach of the principles of natural justice.

2.2 (a) Without prejudice to the above, that on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in treating the lease line connectivity charges (VSAT uplinking charges) amounting to Rs.1,16,28,390/- as royalty under Explanation 6 to Section 9(1)(vi) of the Income Tax Act, 1961 ("the Act") without providing any reasons and without appreciating that the amendments in the Act cannot be read into the Indo-US DTAA.

2.2 (b) That on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in treating the payment of lease line connectivity charges as liable for tax and therefore disallowing the expense u/s 40(a)(i) of the Income-tax Act, 1961 ('Act').

2.2 (c) That on the facts and circumstances of the case and in law, both the Ld AO and the Ld CIT(A) has erred in considering the amount of the payment

of lease line connectivity charges as Rs.11,628,390 instead of correct amount of Rs.3,119,927 as per the financial statements.

3. That on the facts and in the circumstances of the case and in law, the Ld CIT (A) has erred in not considering the provisions of Article 12 (3) of India-USA Double Taxation Avoidance Agreement ("The Treaty") in accordance with section 90 of the Act.

4 That the Ld CIT(A) has erred in law in following the order of the Hon'ble Mumbai ITAT in case of Viacom 18 Media (P.) Ltd. Vs ADIT [2014] 44 taxmann.com 1 (Mumbai Trib) while ignoring the judgment of Hon'ble jurisdictional Delhi High Court in case of Infrasoft Ltd (39.taxmann.com 88) for arriving at the conclusion that the amendment in the Act overrides the benefit under the India-USA tax treaty.

5 On the facts and in the circumstances of the case and in law, the Ld CIT (A) has erred in upholding the levy of interest u/s 234B of the Act made by the AO."

4. In ITA No. 2242/Del/2015, the assessee has also raised additional ground of appeal under Rule 11 of the Income Tax (AT) Rules, 1963 which is as under:

"6. That on the facts and circumstances of the case and in law, the Assessing Officer ought to have considered that the education cess (EC) and Secondary & High Education Cess (SHEC) paid on the income tax was an allowable deduction for computing total income given the fact that the same was not hit by the provisions of Section 40(a)(ii) of the Act."

5. In ITA No. 2260/Del/2015, following grounds have been raised by the revenue:

"1. On the facts and in the circumstances of the case, the ld. CIT (A) erred in law in deleting the addition of Rs.25,01,93,313/- made on account of Arm's Length Price.

2. On the facts and in the circumstances of the case, the ld. CIT (A) erred in law in deleting the addition of Rs.1,82,94,611/- made on account of non-deduction of TDS in respect of payment made towards Global Account Management charges."

6. In ITA No. 5994/Del/2017, following grounds have been raised by the revenue:

"1. The ld. CIT (A) erred on law and on the facts of the case in deleting the addition of Rs.24,61,83,809/- made by the AO on account of ALP adjustment for royalty.

2. The ld. CIT (A) erred in law and on the facts of the case in deleting the addition of Rs.2,36,48,060/- made by the AO on account of global accounts adjustment and deleting Rs.1,82,94,611/- on account of lease line expenses."

7. In ITA No. 3513/Del/2017, following grounds have been raised by the revenue:

"1. The ld. CIT (A) erred in law and on facts in deleting the addition of Rs.35,43,86,010/- made by the AO on the working of TPO made on account of CUP method was used to determine ALP of Infra Group Services as "Royalty".

2. The ld. CIT (A) erred in law and on facts in deleting disallowances of Rs.3,19,94,651/- for u/s 40(a)(ia) of the Act. The judgment of the Hon'ble High Court relied upon is under challenge in SLP."

8. In ITA No. 5538/Del/2018, following grounds have been raised by the revenue:

> *"1. The ld. CIT (A) erred in law and on the facts of the case in deleting the addition of Rs.32,79,49,164/- made on account of Arm's Length Price.*
>
> *2. The ld. CIT (A) erred in law and on the facts of the case in deleting the addition of Rs.3,84,88,293/- made on account of non-deduction of TDS in respect of payment made towards Global Account Management Charges.*
>
> *3. The ld. CIT (A) erred in law and on the facts of the case in deleting the addition of Rs.1,81,052/- made on account of disallowance of expenses u/s 40(a)(ia) of the Act."*

9. In ITA No. 6953/Del/2018, following grounds have been raised by the revenue:

> *"1. The ld. CIT (A) erred in law and on the facts of the case in deleting the addition on account of difference in disallowance on a/c of Arm's Length price of Rs.43,78,37,733/- on account of royalty payment.*
>
> *2. The ld. CIT (A) erred in law and on the facts of the case in deleting the addition on account of Global Account Management Services off Rs.2,93,44,862/- on account of payment for fee for Technical Services (FTS), liable for withholding of tax u/s 195 of I.T. Act and in the absence of the same, are correctly added by the Assessing Officer u/s 40(a)(ia) of the Income Tax Act, 1961."*

10. The issues are common in all the 10 appeals hence adjudicated together.

11. The assessee is a part of the Expeditors Group which is engaged in the provision of global logistics services. The group is headquartered in Seattle, Washington and operates in three segments, i.e. airfreight, ocean freight and ocean services (customs brokerage and import services). It has offices in 167 locations across the globe and has 13 international service centres located worldwide.

12. The Assessee is engaged in the provision of logistics services in the Indian region. The logistics services provided ranges from packing, loading/ unloading, trucking, containerization, customs clearance and other cargo handling activities besides moving the goods via air/ sea. Expeditors India's functions comprise the Indian leg of a logistics contract involving the transportation of consignments from the consignee (or Indian port/ airport) to the Indian Port/ airport (or consignee) while another Group entity typically handles similar services at the other end of the consignment in their respective region.

ITA No. 2260/Del/2015 A.Y. 2009-10(Ground No. 1)
ITA No. 5994/Del/2017 A.Y. 2010-11(Ground No. 1)
ITA No. 3513/Del/2017 A.Y. 2011-12(Ground No. 1)
ITA No. 5538/Del/2018 A.Y. 2012-13(Ground No. 1)
ITA No. 6953/Del/2018 A.Y. 2014-15(Ground No. 1)

Royalty:

13. The assessee contended that the international transactions undertaken by the assessee justified under the TNMM using 6 comparables in the similar line of business. OP/OC of the assessee is 8.23% as against 5.15% of the comparables. The assessee has also argued that the payment of royalty should be treated as justified. The assessee has also contended that these services are essential in a logistics support company and if some companies in the comparable list are not paying for such services, then, they will end up paying it in some other form either by incurring such expenses themselves by hiring such services from third parties. The fact that the PLI of the assessee is over and above the comparables show that the payments of these services made by the assessee is cheaper compared to the market price of such services.

14. The assessee had relied on the decision of Mumbai Bench of the ITAT in the case of Dresser-Rand India Pvt. Ltd. vs. Addl. CIT (ITA No. 8753-Mum-2010) wherein it has been held that how an assessee conducts his business is not for the revenue authorities to decide what is necessary for an assessee and what is not. Further, the above decision has upheld the use of

TNMM as a most appropriate to benchmark the management charges. The assessee has also relied on the decision of the Hon'ble Delhi High Court in the case of CIT vs. EKL Appliances Limited wherein it has been held that the tax administrations should not disregard the actual transaction undertaken by the Assessee with its AE, unless the economic substance of the transaction differs from its form or where the substance and the form are the same but the conduct does not represent the manner in which two parties would have commercially interacted. The assessee has also relied on the decision of the Delhi Tribunal in the case of AWB India Pvt. Ltd vs. Addl. CIT (ITA No. 4454/Del/2011) wherein following the principle as laid down by the Hon'ble High Court in the case of EKL Appliances Ltd.(supra) it has been held that the assessee has the right to enter into an agreement according to which its business interests are protected and it is the Assessee's prerogative to see and decide its business expediency.

15. The assessee has also furnished the case of TATA services ltd. which exclusively provides management services to the TATA group companies as an Indian example for requirement/ payment for such services. The documents filed before the US Tax Authority by the group company was also provided before the TPO which states that these services are provided to the group companies at arm's length price. The assessee has also submitted that they provided the documentary evidences like the intra net snap shots, percentage of nominated business (global business referred by the related entities to the assessee) received by the assessee which are parts of the

services for which the assessee pays the consideration in the form of royalty.

16. The assessee has also stated that the cost base of the AE which provides these services need not be the only basis for allocation of the service charges to the group companies. As these services are ultimately benefitting the assessee in terms of increasing its turnover, sales of the assessee is taken as the basis for allocation. This method is consistently followed by the assessee over the years and by the group companies world over.

17. The royalty payment is based on the agreement between the assessee and its parent company. The agreement is dated 15.12.2001. This issue of payment of royalty was subject matter the appeal before the Tribunal for the assessment year 2005-06 in ITA No. 2128/Del/2011 order dated 17.12.2020.

18. The relevant portion of the order of the Co-ordinate bench is as under:

"17. We find that CIT(A) while deciding the issue in favour of the assessee has given a finding that assessee had received the services received from its US parent company to whom the royalty was paid by the assessee. She has further given a finding that the TPO's conclusion that "when the Revenue was split on the basis of FAR analysis, then no further payment would have been made by the assessee. Therefore, I am holding that ALP of royalty payment as nil" was without any basis or analysis on record. She has further given a finding that no

evidence or analysis was made by TPO to hold that the arm's length price for royalty transaction stands subsumed by the gross profit split on revenue received from logistics services on a predetermined basis. She has further given a finding that TPO has not providing any analysis or evidence to support his findings that no material benefit has been received by the assessee and no evidence has been brought on record to demonstrate that assessee's business could be managed and operated by exclusion of various technical, operating and strategic services extended by the AE to the assessee. She has further noted that assessee was following the same business model, the royalty paid since 2001 has been found to be on an arm's length basis and no adjustments were made in the past by TPO. It is a fact that CIT(A) has also considered the supplementary TNMM analysis to check the impact of royalty payment on assessee's profit margin that of independent comparable companies to come to a conclusion that the ratio of operating profit to cost at sales of the assessee is comparable to that of uncontrolled entities but we are of the view that her decision to grant relief is not based solely on the aforesaid supplementary analysis furnished by the assessee at the behest of CIT(A). We find that CIT(A) has taken into consideration various other factors (which are extracted herein above) to come to the conclusion that the AO/TPO was not justified in making the addition. Considering the totality of aforesaid facts, we are of the view that as far as merits of the deletion of addition is concerned, no fallacy in the findings of CIT(A) has been pointed by the Revenue. We find no reason to interfere in

the order of CIT(A) and thus the grounds of Revenue are dismissed."

19. Respectfully following the decision of Co-ordinate Bench of ITAT in AY 2005-06 the AO is directed to delete the addition made on account adjustment of royalty.

ITA No. 2260/Del/2015 A.Y. 2009-10(Ground No. 2)
ITA No. 5994/Del/2017 A.Y. 2010-11(Ground No. 2)
ITA No. 3513/Del/2017 A.Y. 2011-12(Ground No. 2)
ITA No. 5538/Del/2018 A.Y. 2012-13(Ground No. 2)
ITA No. 6953/Del/2018 A.Y. 2014-15(Ground No. 2)

GAM expenses:

20. Global Accounting Manager (GAM) is a team of employees fully responsible to take care of a particular global customer of the Expeditors group and having operations in many countries. The Expeditor entity having the GAM team on its payroll has to incur expenses on the GAM team and their activities, viz. salary, operational expenses etc. These expenses are distributed to various countries in proportion to the revenue earned by Expeditors in that country from that particular customer account. The assessed has also reimbursed GAM charges to Expeditors Int'l of Washington Inc, USA. The payment represents costs allocated to the assessee on account of global customers.

21. The AO considered these expenses as payment of salary to non-resident and accordingly held that the same is liable to

withholding tax under section 192 of the Act. In the absence of tax withholding, AO disallowed the expense under section 40(a) of the Act.

22. The Assessee has submitted that the payment to be classified as salary, it is necessary to have an employer-employee relationship between the payer and the payee. The principles according to which the relationship between employer and employee or master and servant is to be determined are well- settled, one of them being existence of a right of control on the manner in which the work is to be done. Assessee has relied on the decision of the Hon'ble Supreme Court in the case of State of Gujarat v. Raman Lal Keshav Lal Soni (AIR 1984 SC 161) and submitted that the payment cannot be considered as responsible for withholding any tax from these payments under section 192 of the Act. It was argued that the payment is a reimbursement by the assessee to other group companies on account of allocated expenses incurred by the GAM team. There are various judicial precedents wherein it has been held that reimbursement of expenses is not subjected to tax in India:

- IDS Software Solutions P. Ltd. vs. ITO (122 TTJ 410)(Bang)
- CIT v. Industrial Engineering Projects (P.) Ltd. [202 ITR 1014] (Del)
- CIT v. Dunlop Rubber Co. Ltd. [142 ITR 493] (Cal)
- HNS India VSAT Inc. v. DDIT [96 TTJ 486] (Del)

23. We find that this issue stands adjudicated by the Coordinate Bench of the Tribunal in taxpayer's own case for AY 2005-06 upheld the order passed by the ld. CIT (A). The order of the Tribunal was confirmed by Hon'ble Delhi High Court holding as under:

"We have heard the rival submissions and perused all the relevant materials available on record. The issue in the present ground is with respect to disallowance of GAM expenses by invoking the provision of Section 40(a) of the Act. We find that CIT(A) while deciding the issue in assessee's favour has given a finding that the payments made by the assessee as GAM charges cannot be treated as payment of salary to non-resident but were in the nature of reimbursement of expenses and therefore assessee was not required to deduct TDS on such payments.

24. We further find that in A.Ys. 2001-02 & 2004-05 identical issue arose in assessee's own case and the issue was decided in assessee's favour by the Co-ordinate Bench of Tribunal.

25. Before us, no distinguishing feature in the facts of the case in the year under consideration and that of A.Y. 2001-02 & 2004-05 has been pointed out by the Revenue. The Revenue has also not placed any material on record to demonstrate that the order of the Tribunal in assessee's own case in earlier years has been overruled by higher judicial forum. In such a situation, we find no reason to interfere in the order of CIT(A).

26. Thus, the ground of appeal of the Revenue is dismissed.

ITA No.2260/Del/2015 A.Y.2009-10 [Ground No.3 (VSAT)]
ITA No.5994/Del/2017 A.Y. 2010-11[Ground No.3 (VSAT)]
ITA No.3513/Del/2017 A.Y. 2011-12[Ground No.3 (VSAT)]
ITA No.5538/Del/2018 A.Y. 2012-13[Ground No.3 (VSAT)]

Lease Line expenses:

27. During the course of assessment proceedings, it is observed that the assessee has paid sum of Rs."XX" being lease line expenses to M/s Expediters International of Washington Inc. in foreign currency but no TDS has been made. Revenue held that the payments made are required to be disallowed in view of provisions of Section 40a of the Income Tax Act because no TDS has been deducted or paid to the Government Account. The revenue further held that communication VSAT, uplinking charges, the same are in the nature of consultancy charges/technical fee having been remitted out of India on which no TDS was deducted by the assessee. Revenue mentioned that they have not accepted the version of Hon'ble Delhi HC and has filed an SLP before Hon'ble Apex Court.

28. The similar issue has been adjudicated by the Tribunal in the case of the assessee in ITA No. 2128/Del/2011 A.Y. 2005-06 vide order dated 17.12.2010 wherein it was held that the payment of lease rent charges do not fall in the category of FTS. In the absence of any material change in the factual as well as the legal aspect of the assessee, we hereby hold that the disallowance made by the AO is directed to be deleted.

ITA No. 5994/Del/2017 A.Y. 2010-11(Ground No. 3)

Capital Advance:

29. During the AY 2010-11, the Assessee purchased software from Soft line Software Service Private Limited ("Softline") amounting to INR "YY" for the purpose managing fixed assets database, cheque preparation software, MIS etc. The software was a customized software depending on the business requirements of the Assessee.

30. While using the software, the Assessee found the same to be not suitable to its business requirements. The software also had operational deficiencies due to which the Assessee was unable to use the software as per its requirements and therefore returned it back to Softline requesting them to refund the advances paid for purchase of the software.

31. The software was at first instance capitalized by the assessee in. its books of accounts and after returning the software, the Assessee had written off the advances paid to Softline considering the same to be irrecoverable.

32. Subsequent to this, during the AY 2011-12, the Assessee received half of the advance written off from Softline which was duly offered to tax by the Assessee under the head 'other income' in the profit and loss account as evident from schedule 11 of the signed financial statements for the AY 2011-12.

33. Further, it was argued as the software purchased by the Assessee was an accounting and MIS software which did not provide any enduring benefit to the assessee and was also reversed in the books of account, the same is a revenue expenditure.

34. From the facts, it can be concluded that the expense went into drain by default and the assessee could recover 50% of the expenses paid. Since, the expenses involved pertain to the purpose of the business and not in the nature of any capital expenditure in real sense, the same can be treated as allowable revenue expenditure. The ground of the assessee is treated as allowed.

ITA No. 5538/Del/2018 A.Y. 2012-13(Ground No. 3)
Disallowance u/s 40(a)(ia):

35. The contention of the assessee that the AO had erred in disallowing bank guarantee commission charges and cash management charges under section 40(a)(ia) of the act on basis of Notification No. 56 - 2012 dated 31.03.2012 and holding that TDS was deductible on such payments.

36. The Co-ordinate Bench of ITAT Mumbai Benches, Mumbai in the case of Kotak Securities Ltd in ITA No. 6657 of 2011 for AY 2004-05 dated 03.02.2012 had held that there was no principal agent relationship between a bank issuing bank guarantee and the taxpayer and hence the payment though termed as commission was not covered under section 194H of the Act. The ITAT has observed as follows:

"5. A plain reading of the above provision indicates that tax withholding requirements under section 194H apply in respect of 'commission or brokerage', which, in turn, is defined by Explanation to Section 194 H No doubt, this definition is inclusive but the fundamental question that we really need to consider in the first place is as to what are the connotations of expression 'commission or brokerage ' in common parlance, and then proceed to deal with the inclusions thereto by the virtue of specific provision of law.

6. We find that the expression 'commission' and 'brokerage' have been used together in the statute. It is well settled, as noted by Maxwell in Interpretation of Statutes and while elaborating on the principle of noscitur a sociis, that when two or more words which are susceptible to analogous meaning are used together they are deemed to be used in their cognate sense. They take, as it were, their colours from each other, the meaning of more general being restricted to a sense analogous to that of less general.

37. The Assessee has relied upon the order of DCIT versus Laqshya media (P) Ltd in ITA No. 1297/MUM/2014 for AY 2010-11 dated 27.05.2016 where it has been held as follows:

"4. We have heard the rival submissions and also perused the relevant material placed on record. The first payment is on account of "loan processing fees" paid to the Nationalized Bank. This fee is charged by the bank for, processing the application filed by the borrower and for any inspection of title deeds and

documents relating to properties and to verify and creation of charge etc. on the property. The Ld. Counsel's case before us is that, such a payment does not entail deduction of tax, because it is in the nature of service fee on borrowed money and hence it is covered within the meaning and definition of "interest" as defined under section 2(28) and consequently, falls within the exclusion clause provided under section 194A(3). Further, AO has also treated these charges as payment for "managerial services" rendered by the bank and therefore, tax was required to be deducted under section 194Jr.w. section 9(1)(vii). The Counsel's case before us is that, such a payment of processing fee cannot be treated for rendering of "managerial services" and in support various decisions have been filed before us. Rather it falls within the ambit of interest as defined under section 2(28A), which provides that, interest includes any service fees or other charge in respect of all monies borrowed. Thus, there was no requirement to deduct the TDS on account of rendering of managerial services. On the other hand, Ld. DR supported the order of the AO.

5. As regards the payment of "processing fee" paid to Nationalized Bank, we agree with the contention of Ld. Counsel that, "loan processing fee" is charged by the banks for processing the application when a borrower approached the bank for a loan. Such a service fee or charge it has been included in the definition of "interest", as given in section 2(28A) which reads as under:

"'interest' means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized".

From the above, it is quite apparent that the definition of interest will include any service fee or any other charge in respect of money borrowed. Here, processing fee definitely falls within such definition and, therefore, it cannot be reckoned as payment for rendering of any managerial services by the bank as held by the AO. This has been reiterated by the ITAT Pune Bench in the following cases:

i) Chintamani Hatcheries (P.) Ltd v DCIT, reported in [2000] 75 ITD 116 (Pune) (SMC) and

ii) Ghatge Patil Ltd. Vs ACIT, reported in [2011] 11 taxman.com 168 (Pune) Despite such a payment to the Nationalized Bank falls within the ambit of "interest" under section 2(28) but the TDS provisions under section 194A are not applicable, because it falls within the exclusionary provisions as laid down in sub- section (3) of section 194A, specifically sub-clause (iii)(a) which envisages that, the income credited or paid to any banking company to which Banking Regulation Act, 1949 applies, the provision of section 194A(1) will not apply. In other words, the assessee is not

required to deduct TDS on such payment of income paid to any banking company.

5157/M/14(11-12) Laqshya Media Accordingly, the finding of the ld. CIT(A) deciding in favour that the payment of processing fee does not require deducting of TDS is upheld and revenue's ground on this score is dismissed.

6. As regards "guarantee fees" paid which has been held to be liable for TDS under section 194Hby the AO, we are unable to accept the contention of the AO, because the assessee has sought its hanks like HDFC Bank, Dena Bank and Yes Bank to issue guarantee in its favour for which bank has charged certain amount as 'guarantee fee'. To fall within the ambit and scope of section 194H, the payment has to be in the nature of "commission or brokerage". The Explanation to section 194Hdefines the phrase 'commission and brokerage' in the following manner:- "'Commission or brokerage' includes any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered (not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities".

Thus, it is sine qua non that there has to be a principal - agent relationship for a payment to be treated as commission or brokerage. The recipient of the income must act on behalf of the principal. Here the banker does not act on behalf of the

assessee for rendering any kind of service. The contract of guarantee does not give any rise to principal - agent relationship between the assessee and the bank and, therefore, the consideration received by the bank on account of guarantee commission cannot be reckoned as commission as contemplated under section 194H and accordingly, there was no requirement to deduct TDS on this payment. Thus, on this score also, the order of the Ld. CIT(A) is affirmed. Before us, the Ld. Counsel had also brought to our notice a CBDT Circular No. 56 of 2012 wherein it has been clarified that 'guarantee fee'paid to a nationalized bank will not be subject to withholding tax. Thus in view of the CDBT Circular also the ground raised by the revenue cannot be sustained and accordingly, the same is dismissed. " Respectfully, following the above order, we decide first two grounds of appeal against the AO."

38. The material facts of the case are the same in the instant year also. In accordance with the principle of consistency, the doctrine of judicial discipline and the facts and the circumstances of the case and respectfully following the order of the Hon'ble Mumbai ITAT in the case of Kotak Securities Ltd and DCIT versus Laqshya media (P) Ltd (supra) the ground of appeal is decided in favour of the assessee by the ld. CIT (A). The addition made by the AO is dismissed.

39. On going through the reason given by the ld. CIT (A) and the judgments relied upon, we find the same are cogent and relevant and hence decline to interfere with the order of the ld. CIT (A).

ITA No. 2242/Del/2015 A.Y. 2009-10(Ground No. 6)

ITA No. 17/Del/2021 A.Y. 2010-11(Ground No. 1)

ITA No. 18/Del/2021 A.Y. 2011-12(Ground No. 1)

ITA No. 19/Del/2021 A.Y. 2012-13(Ground No. 1)

ITA No. 20/Del/2021 A.Y. 2014-15(Ground No. 1)

Education Cess:

40. The assessee has taken up additional grounds pertaining to deduction of Education Cess before the ld. CIT (A). The ld. CIT (A) did not allow the grounds holding that it doesn't emanate from the assessment order.

41. Before us, it was argued that a legal ground can be taken up any time before the higher authorities. The ld. AR relied on the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. Vs CIT (1998) 229 ITR 383. Admission of the additional ground has been opposed in principle by the ld. DR.

42. Keeping in view, the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. Vs CIT (1998) 229 ITR 383, the additional ground filed by the assessee is accepted. The relevant portion of the judgment is as under:

> "5. *Under Section 254 of the Income-tax Act, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason*

why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.

6. In the case of Jute Corporation of India Ltd. v. C.I.T. . this Court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.

7. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal [vide, e.g., C.I.T, v. Anand Prasad (Delhi), C.I.T. v. KaramchandPremchand P. Ltd. and C.I.T. v.

Cellulose Products of India Ltd. . Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.

8. The reframed question, therefore, is answered in the affirmative, i.e., the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. We remand the proceedings to the Tribunal for consideration of the new grounds raised by the assessee on the merits."

43. Reading the provisions of Section 40(a)(ii), the assessee argued that education cess paid on Income Tax doesn't come under the purview of the definition as it is levied on the amount of Income Tax but not on profits of business. The ld. AR relied on the Circular No. 91/58/66-ITJ(19) by CBDT dated 18.05.1967, which states the effect of the omission of the words 'cess' from Section 40(a)(ii) is that only taxes paid are to be disallowed in the assessment for the assessment years 1962-63 onwards.

44. The ld. AR also relied 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.

45. 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.

46. 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.

47. 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.

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

49. 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."

50. 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.

51. 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.

52. 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.

53. 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."

54. 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.

55. 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.

56. 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."

57. 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.

58. 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."

59. 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.

60. 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)*

61. 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.

62. In the result, all the appeals of the assessee are allowed and all the appeals of the revenue are dismissed.

Order Pronounced in the Open Court on 30/07/2021.

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

Dated: 30/07/2021
Subodh

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

ASSISTANT REGISTRAR