IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH “E”, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA No.168/M/2020
Assessment Year: 2016-17

Dy. CIT 1(3)(1), R.No.540, 5th Floor, Aayakar Bhavan, M.K. Road, Mumbai – 400020	Vs.	M/s. Sumitomo Chemicals India Pvt. Ltd., 195, 7th Floor, Moti Mahal, J. Tata Road, Churchgate, Mumbai – 400 020 **PAN: AAECS 3750L**
(Appellant)		(Respondent)

CO No.69/M/2021
(Arising out of ITA No.168/M/2020)
Assessment Year: 2016-17

M/s. Sumitomo Chemicals India Pvt. Ltd., 195, 7th Floor, Moti Mahal, J. Tata Road, Churchgate, Mumbai – 400 020 **PAN: AAECS 3750L**	Vs.	Dy. CIT 1(3)(1), R.No.540, 5th Floor, Aayakar Bhavan, M.K. Road, Mumbai – 400020
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Para Savla, A.R.
Revenue by : Shri Vijay Kumar Menon, D.R.

Date of Hearing : 01.07.2021
Date of Pronouncement : 23.07.2021

O R D E R

Per Rajesh Kumar, Accountant Member:

The present appeal by the Revenue and the cross objection by the assessee have been preferred against the order dated 24.10.2019 of the Commissioner of Income Tax (Appeals)

[hereinafter referred to as the CIT(A)] relevant to assessment year 2016-17.

2. We shall first take the Revenue's appeal for adjudication. The issue raised in 1st ground of appeal by the Revenue is against the order of Ld. CIT(A) deleting the disallowance of depreciation of Rs.11,32,485/- as disallowed by the AO on account of excess claim of depreciation.

3. At the outset, the Ld. Counsel of the assessee submitted before the Bench that the issue has been decided by Ld. CIT(A) by following the decision of the co-ordinate bench of the Tribunal in assessee's own case in ITA No.3078/M/2018 A.Y. 2006-07 as well as subsequent years and therefore, following the said decisions of the coordinate benches ,the same may kindly be allowed.

4. The Ld. D.R., on the other hand, relied on the order of AO and grounds of appeal filed.

5. After hearing the rival parties and perusing the decisions of the coordinate benches in assessee's own case , we find that the identical issue has been decided by the co-ordinate benches of the Tribunal in A.Y. 2006-07 in ITA No.3078/M/2012 and also in subsequent years in assessee's own case which have been followed by the Ld. CIT(A) while allowing the appeal of the assessee. We, therefore, respectfully following the orders passed by the coordinate benches and principle of consistency, dismiss the ground No.1 raised by the Revenue.

6. The issue raised in ground No.2 by the revenue is against the order of Ld. CIT(A) directing the AO to take the sale consideration of staff quarters at Rs.6,70,000/- in place of Rs.4,70,69,333/- as has been taken by the AO for computing short term capital gain.

7. The facts in brief are that during the year the assessee sold two staff quarters for a total consideration of Rs.6,70,000/- and accordingly offered the same to tax as short term capital gain amounting to Rs.3,68,927/- in the return of income filed during the year. The AO during the course of assessment proceedings ,on the basis of AIR information, came to conclusion that assessee has sold the staff quarters below market value and consequently invoked the provisions of section 50C of the Act and recomputed the STCG at Rs.4,67,88,260/-by taking the sale consideration at Rs.4,70,69,333/-.

8. In the appellate proceedings, the Ld. CIT(A) deleted the addition by observing and holding as under:

> "I agree with the argument and submission of the appellant that the sale transaction undertaken by the appellant in A.Y. 2016-17 pertains to sale of two staff quarters for an actual aggregate consideration of Rs. 6,7Q,000/-. This is evident from the Memorandum of Understanding entered between the appellant and each of the buyers of the staff quarters and also from the Tax Audit Report for A.Y. 2016-17, wherein total sale value of Rs. 6,70,000/- relating to sale of staff quarters is deducted from the block of assets.
>
> The transaction value of Rs. 4,70,69,333, which is considered by the AO as the market value of the staff quarters, in substance relates to sale of factory building and plant & machinery by the appellant to Bayer Vapi Private Limited which was effected by the appellant in the earlier year ie A.Y, 2015-16. The same is evident from the Deed of Conveyance dated 30 March 2015 entered between the appellant and BayerVapi Private Limited. Further, the appellant has paid applicable stamp duty of Rs. 41,35,000/-on 26 March 2015 as per the Certificate of Stamp Dutyissued by the Government of Gujarat on the consideration of Rs. 4,70,69,333/- which pertains to sale of factory building & plant and machinery, which is also mentioned in the said certificate. The sub-registrar - Vapi registered the deed of

conveyance only on 1 April 2015 as can be seen from the deed of conveyance. Hence, only because the registration happened in F.Y. 2015-16, the said transaction was captured in the AIR data. Further, the appellant has furnished extracts of Tax Audit Report for A.Y. 2015-16, wherein the sale considerations of Rs. 1.85,73,547 for factory building and Rs. 2,84,95,786 for plant & machinery is reduced from the respective block of assets.

In view of the above, it is evident that the AO has not considered the facts of the case in the correct perspective. The actual aggregate sale consideration of the two staff quarters sold by the appellant during A.Y. 2016-17 is Rs. 6,70,000. Thus, the appellant has correctly computed the short term capital gains of Rs. 3,68,927 on account of sale of two staff quarters and has offered to tax the same in the ROI filed for A.Y. 2016-17.Accordingly, in view of facts of the case, the action of the AO of substituting the sale consideration of two staff quarters to Rs. 4,70,69,333 by invoking provisions of section 50C of the Act and re-computing the resultant short term capital gains on account of sale of staff carters to Rs. 4,67,68,260 is not found to be sustainable.

Further, the appellant has relied on various judgements (mentioned in para 4.18 of its submission) which have held that additions made solely on basis of information contained in AIR is not sustainable in the eyes of law. In the light of the decisions relied by the appellant and considering the facts in the present case, the addition made on this account deserves to be deleted."

9. After hearing both the parties and perusing the material on record, we find that the AO came to a fallacious conclusion that assessee has sold two staff quarters for a price of Rs. 6,70,000/- which is below the market value as shown in the AIR information of Rs.4,70,69,333/-. The Ld. CIT(A) has recorded a finding of fact that this transaction value of Rs.4,70,69,333/- is in fact the sale consideration of factory building and plant & machinery sold by the assessee to Bayer Vapi Pvt. Ltd. in A.Y. 2015-16 in terms of deed of conveyance dated 30.03.2015 and even the applicable stamp duty of Rs.4,13,5000/- was paid on 26.03.2015 as per the certificate of stamp duty issued by government of Gujarat clearly stating that the assets sold were plant & machinery and factory building. The sub registrar, Vapi registered the deed of conveyance on 01.04.2015 and hence the transaction which happened in F.Y. 2015-16 appeared in AIR

information in the subsequent year. We find that the said sale consideration has, in fact, been duly shown by the assessee in the books of accounts. Under these circumstances, we do not find any infirmity in the order of Ld. CIT(A) and are inclined to uphold the same by dismissing the ground No.2 of the Revenue's appeal.

10. The issue raised in ground No.3 is against the order of Ld. CIT(A) allowing the relief to the assessee on account of depreciation on goodwill acquired in A.Y. 2006-07.

11. The facts in brief are that the assessee acquired manufacturing facility from Bilag Industry Pvt Ltd. in A.Y. 2006-07 i.e. building, plant & machinery, furniture, patent and goodwill. Accordingly in the return of income filed for A.Y. 2006-07, the assessee claimed depreciation on building and plant & machinery, furniture and patent but did not claim depreciation of goodwill. The assessee filed additional ground before the Tribunal when the matter reached the Tribunal for A.Y. 2006-07 and the co-ordinate bench of the Tribunal in ITA No.3078/M/2018 allowed the claim of the assessee by following the decision of Hon'ble Supreme Court in the case of CIT vs. Smiffs Securities Ltd. 348 ITR 302. In the meantime, the matter travelled to Hon'ble Bombay High Court and the Hon'ble Bombay High Court has also decided the issue in favour of the assessee. The Ld. CIT(A) by following the decision of the co-ordinate bench of the Tribunal and the Hon'ble Bombay High Court allowed the depreciation on goodwill. We, therefore, do not find any infirmity in the order of Ld. CIT(A) and therefore same is upheld by dismissing the ground No.3 of the Revenue.

CO No.69/M/2021 (Assessee)

12. The ground No.1 raised by the assessee in the cross objection is in respect of depreciation on goodwill, leasehold improvements and depreciation on legal and professional fee incurred in connection with the plant & machinery. We note that this ground is consequential to ground No.3 of the Revenue's appeal. We have already dismissed the ground No.3 in the Revenue's appeal and therefore the order of Ld. CIT(A) is affirmed on this issue. Consequently the ground no. 1 in the cross objection is allowed.

13. The ground No.2 in the cross objection raised by the assessee is in respect of allowing the deduction in respect of education-cess on income tax while computing the income of the assessee.

14. By virtue of this ground the assessee has prayed before the bench to direct the AO to allow the deduction of "cess" .The ld counsel has relied on a recent judgment of the Hon'ble High Court of Bombay in the case of Sesa Goa Limited vs. Joint Commissioner of Income-tax (2020) 107 CCH 375 (Bom). On being confronted with the fact that the said claim of the assessee was not raised before the lower authorities, it was submitted by the ld. A.R that the aforesaid ground of appeal was being raised on the basis of the aforesaid recent judgment of the Hon'ble High Court of Bombay in the case of Sesa Goa Limited (supra). The ld. A.R submitted that the Hon'ble High Court in its aforesaid judgment, had observed, that if the legislature intended to prohibit the deduction of amounts paid by an assessee towards "Education Cess" or any other "Cess" and

"Higher and Secondary Education Cess", then, it could have easily included reference to "cess" in clause (ii) of Sec. 40(a). It was further submitted by the ld. A.R that the Hon'ble High Court had observed that as the legislature had not included "education cess" or any other "cess" in clause (ii) of Sec. 40(a), therefore, it would mean that there was no prohibition in claiming deduction of the said amounts while computing the income of the assessee under the head "Profits and gains of business or profession". It was submitted by the ld. A.R that the Hon'ble High Court in its aforesaid order had observed that where the assessee has raised a claim for deduction of the amount paid towards "cess", then, said claim for deduction was bound to be considered by the CIT(Appeals) or the ITAT before whom it was specifically raised. It was, thus, submitted by the ld. A.R that the aforesaid claim for deduction though raised by the assessee for the very first time before the Tribunal may adjudicated and allowed.

15. We have heard the ld. authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, and have also considered the judicial pronouncements that has been relied upon by the ld AR in context of the issue in hand. In so far the claim of the Ld. A.R that unlike "rates" and "taxes" the amount paid by an assessee towards "Education Cess" or any other "cess" viz. the Secondary and Higher Education Cess is not a disallowable expenditure u/s 40(a)(ii) of the Income-tax Act, 1961, we find, that the said issue is squarely covered by the recent order of the Hon'ble High Court of Bombay in the case of Sesa Goa Limited vs. Joint Commissioner of Income-tax (2020) 107 CCH 375 (Bom). In the

case before the Hon'ble High Court the following substantial question of law was inter alia raised:

> "iii. Whether on the facts and in the circumstances of the case and in law, the Education Cessand Higher and Secondary Education Cess is allowable as a deduction in the year of payment."

The Hon'ble High Court had observed that the legislature in Sec. 40(a)(ii) had though 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", but then, there was no reference to any "cess". Also, the High Court observed that there was no scope to accept that "cess" being in the nature of a "tax" was equally not deductible in computing the income chargeable under the head "Profits and gains of business or profession". It was further observed that if the legislature would had intended to prohibit the deduction of amounts paid by an assessee towards say, "education cess" or any other "cess", then, it could have easily included a reference to "cess" in clause (ii) of Section 40(a). On the basis of its aforesaid observations the Hon'ble High Court had concluded that now when the legislature had not provided for any prohibition on the deduction of any amount paid towards "cess" in clause (ii) of Sec. 40(a), therefore, holding to the contrary would amount to reading something which is not to be found in the text of the provision of Sec. 40(a)(ii). Accordingly, the Hon'ble High Court had concluded that there was no prohibition on the deduction of any amount paid towards "cess" in Sec. 40(a)(ii) while computing the income chargeable under the head "Profits and gains of business or profession".

16. Accordingly, respectfully following the aforesaid judgment of the Hon'ble High Court of Bombay in the case of Sesa Goa Limited (supra), we are principally in agreement with the assessee's claim that "Education Cess" and the "Secondary and Higher Education Cess" are allowable as a deduction u/s 40(a)(ii) of the Act. However, as the aforementioned claim had been raised by the assessee for the very first time before us, we, therefore, in all fairness restore the matter to the file of the A.O for considering the said claim of the assessee in the backdrop of our observations recorded hereinabove, though, subject to verification of the factual position as had been claimed by the assessee before us. The Ground no.2 of cross objection is allowed for statistical purposes in terms of our observations recorded hereinabove.

17. In the result, the appeal of the Revenue is dismissed and the cross objection of the assessee is allowed.

Order pronounced in the open court on 23.07.2021.

Sd/- **(Saktijit Dey)** **JUDICIAL MEMBER**	**Sd/-** **(Rajesh Kumar)** **ACCOUNTANT MEMBER**

Mumbai, Dated: 23.07.2021.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.