आयकर अपीलीय अधीकरण, न्यायपीठ –"B" कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA
[Before Hon'ble Shri A. T. Varkey, JM & Hon'ble Shri Manish Borad, AM]

I.T.A. No. 2589/Kol/2019
Assessment Year: 2016-17

M/s. S. R. Batliboi & Company LLP. (PAN: ACHFS9180N)	Vs.	Deputy Commissioner of Income-tax, Circle-22, Kolkata.
Appellant		Respondent

Date of Hearing (Virtual)	16.09.2021
Date of Pronouncement	26.10.2021
For the Appellant	Shri Debabrata Ghosh, AR
For the Respondent	Smt. Ranu Biswas, Addl. CIT

ORDER

Per Shri A. T. Varkey, JM:

This is an appeal filed by the Assessee against the order of Ld. CIT(A)-6, Kolkata dated 25.11.2019 for Assessment year 2016-17.

2. At the outset, the Ld. AR Shri Debabrata Ghosh drew our attention to the additional ground of appeal raised by the assessee which is against the action of the AO not granting deduction of educational Cess (*including Secondary & Higher Education Cess*) while computing total income for relevant assessment year. According to Ld. AR, the Hon'ble Bombay High Court in the case of M/s Sesa Goa Ltd. Vs. JCIT (2020) 423 ITR 426 (Bom.) and Hon'ble Rajasthan High Court in the case of M/s Chambal Fertilisers & Chemicals Ltd. Vs. CIT, ITA No. 52/2018 dated 31.07.2018 has held that the provisions of section 40(a)(ii) of the Income-tax Act, 1961 (*hereinafter referred to as the* "Act") does not include Cess and consequently Cess whenever paid in relation to business is allowable as deductible expenditure and he pointed out to the decision of this Tribunal in plethora of cases. Further according to Ld. AR, the above additional ground does not require any fresh examination of facts and can be adjudicated on the basis of the material available on record as the details of payment of educational Cess (*including Secondary & Higher Education Cess*) are part of the return of income filed before AY 2016-17. According to Ld. AR, the chargeability of tax is

a legal issue and it can be raised for the first time even before this Tribunal as held by the Hon'ble Supreme Court in the case of NTPC Vs. CIT 229 ITR 383 (SC). Therefore, he prayed that this additional ground of appeal may be admitted and adjudicated.

3. Per contra, the Ld. DR opposing the additional ground of appeal of the assessee contended that the assessee has not claimed deduction of Cess before the AO and therefore, should not be allowed.

4. In his re-joinder, the Ld. AR submitted that the assessee has filed revised return of income claiming the educational Cess, which is placed at pages 196 to 198 of paper book.

5. We have heard rival submission and gone through the material available on record. We note that the assessee has claimed by preferring appeal this additional ground about the deduction of educational Cess (*including Secondary & Higher Education Cess*) while computing the total income for the relevant assessment year 2016-17. We note that the issue is no longer *res integra* as rightly pointed out by the Ld. AR of the assessee. The Hon'ble Bombay High Court in the case of M/s Sesa Goa Ltd. (supra) and the Hon'ble Rajasthan High Court in the case of M/s Chambal Fertilizers & Chemicals Ltd. (supra) have held that educational Cess is an allowable expense. The Hon'ble Bombay High court in the case of M/s Sesa Goa Ltd. (supra) held on this issue as under:

> "**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 ?'.
> ……..
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> ***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.*
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> ***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.*

……..

***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.*"*

6. In the light of the aforesaid decision of the Hon'ble Bombay High Court and Rajasthan High Court in the case of M/s Sesa Goa Ltd. (supra) and M/s Chambal Fertilizers & Chemicals Ltd. (supra) respectively, we allow this additional ground of appeal and direct the AO to allow deduction of educational Cess (*including Secondary & Higher Education Cess*) to the tune of Rs.39,86,279/- as submitted in the revised computation of income placed at page 196 of the PB.

7. Coming next to the sole ground of appeal raised by the assessee that the Ld. CIT(A) erred in upholding the disallowance of a sum of Rs.2,22,020/- being the provision made for leave encashment in the current assessment year on the basis of actuarial valuation.

8. At the outset, the Ld DR pointed out that the aforesaid ground of appeal of the assessee is no longer *res integra*. We note that the Hon'ble Supreme Court has decided this issue against the assessee in the case of UOI Vs. Exide Industries Ltd. 425 ITR 1 (SC) wherein the Hon'ble Supreme Court has held as under:

> "**39.** Reverting to the true effect of the reported judgment under consideration, it was rendered in light of general dispensation of autonomy of the assessee to follow cash or mercantile system of accounting prevailing at the relevant time, in absence of an express statutory provision to do so differently. It is an authority on the nature of the liability of leave encashment in terms of the earlier dispensation. In absence of any such provision, the sole operative provision was section 145(1) of the 1961 Act that allowed complete autonomy to the assessee to follow the mercantile system. Now a limited change has been brought about by the insertion of clause (f) in Section 43B and nothing more. It applies prospectively. Merely because a liability has been held to be a present liability qualifying for instant deduction in terms of the applicable provisions at the relevant time does not ipso facto signify that deduction against such liability cannot be regulated by a law made by Parliament prospectively. In matter of statutory deductions, it is open to the legislature to withdraw the same prospectively. In other words, once the Finance Act, 2001 was duly passed by the Parliament inserting clause (f) in section 43B with prospective effect, the deduction against the liability of leave encashment stood regulated in the manner so prescribed. Be it noted that the amendment does not reverse the nature of the liability nor has it taken away the deduction as such. The liability of leave encashment continues to be a present liability as per the mercantile system of accounting. Further, the insertion of clause (f) has not extinguished the autonomy of the assessee to follow the mercantile system. It merely defers the benefit of deduction to be availed by the assessee for the purpose of computing his taxable income and links it to the date of actual payment thereof to the employee concerned. Thus, the only effect of the insertion of clause (f) is to regulate the stated deduction by putting it in a special provision.
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> **40.** Notably, this regulatory measure is in sync with other deductions specified in Section 43B, which are also present and accrued liabilities. To wit, the liability in lieu of tax, duty, cess, bonus, commission etc. also arise in the present as per the mercantile system, but assessees used to defer payment thereof despite claiming deductions there against under the guise of mercantile system of accounting. Resultantly, irrespective of the category of liability, such deductions were regulated by law under the aegis of Section 43B, keeping in mind the peculiar exigencies of fiscal affairs and underlying concerns of public revenue. A priori, merely because a certain liability has been declared to be a present liability by the Court as per the prevailing enactment, it does not follow that legislature is denuded of its power to correct the mischief with prospective effect, including to create a new liability, exempt an existing liability, create a deduction or subject an existing deduction to new regulatory measures. Strictly speaking, the Court cannot venture into hypothetical spheres while adjudging constitutionality of a duly enacted provision and unfounded limitations cannot be read into the process of judicial review. A priori, the plea that clause (f) has been enacted with the sole purpose to defeat the judgment of this Court is misconceived.
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> **41.** The position of law discussed above leaves no manner of doubt as regards the legitimacy of enacting clause (f). The respondents have neither made a case of non-existence of competence nor demonstrated any constitutional infirmity in clause (f)."

9. Therefore, in the light of the decision of Hon'ble Supreme Court in Exide Industries Ltd. (supra), we are inclined to uphold the order of the Ld. CIT(A) and dismiss this ground of appeal of the assessee.

10. In the result, the appeal of assessee is partly allowed.

Order is pronounced in the open court on 26th October, 2021.

Sd/-	Sd/-
(Manish Borad)	(A. T. Varkey)
Accountant Member	Judicial Member

Dated: 26.10.2021

JD, Sr. PS

Copy of the order forwarded to:

1. Appellant- M/s. S. R. Batliboi & Company LLP, 22, Camac Street, 3rd floor, Block "C", Kolkata-700 016. .
2. Respondent – DCIT, circle-22, Kolkata
3. CIT(A)-6, Kolkata. (sent through e-mail)
4. CIT, Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy By Order

Senior Private Secretary/DDO
ITAT, Kolkata Benches, Kolkata