IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-1', NEW DELHI

Before Sh. K. N. Chary, Judicial Member

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

(Through Video Conferencing)

ITA No. 4370/Del/2019 : Asstt. Year : 2015-16

Convergys India Services Pvt. Ltd., Ground Floor, Bestech Business Towers, Sohna Road, Sector-48, Gurgaon-122001	Vs	Addl. CIT, Special Range-02, New Delhi-110002
(APPELLANT)		**(RESPONDENT)**
PAN No. AABCC5056G		

Assessee by : Sh. K. M. Gupta, Adv.
Revenue by : Sh. Surendrapal, CIT DR

Date of Hearing: 05.10.2021		**Date of Pronouncement: 29.10.2021**

ORDER

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

The present appeal has been filed by the assessee against the order dated 27.03.2019 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Convergys India is a wholly owned subsidiary of Convergys Customer Management Group Inc., USA (CMG USA) and was incorporated in January 2001. It is primarily engaged in the provision of IT enabled customer care back-office support services. Convergys India Services Pvt. Ltd. (CIS) operates remote customer interaction call centres or providing services to its Group Companies like outbound call services, web based support, technical help desk, e-mail customer care support

services, in bound call services and other miscellaneous back office services like transaction processing.

3. Convergys India entered into a service agreement with CMG USA to provide Information Technology enabled customer care back-office support services with effect from April 1, 2001.

4. During the course of the TP proceedings, the TPO rejected the economic analysis undertaken by the assessee and proposed a TP adjustment of Rs.37,53,13,450/- on account of the provision of ITeS by the assessee.

5. Further, the TPO reclassified the outstanding receivables beyond the credit period of 30 days as deemed loans to the AE and treated them as separate international transaction. The TPO further imputed an interest on the same by applying a markup of 400 basis points on LIBOR, thereby making an addition amounting to Rs.4,71,09,902/-.

Foreign Exchange Fluctuation:

6. During the year under consideration, the assessee recorded a foreign exchange ('forex') gain of INR 10,17,49,505. The ld. AR argued that the foreign exchange gain has arisen on account of revenue receivables and export of service provided by the assessee. The net foreign exchange recorded pertains to the service income received from AE, forming an inherent part of the consideration received for export of service and hence, it should be a part of the operating margin of the Appellant and shouldn't be excluded so as to make the operating margin comparable to that of the comparables. Further, it was argued

as per the service agreement between the assessee and its AE, the forex fluctuations will be compensated by the AE in case of any loss due to exchange rate fluctuation occurring between date of invoice and date of payment. Hence, it is clear that the foreign exchange risk is not borne by the assessee. Accordingly, any gain or loss arising from foreign exchange fluctuation would form part of the computation of mark-up and hence should be treated as operating in nature.

7. It was argued that the assessee has consistently included forex as an operating item while computing its margins. Foreign exchange gain/loss has been accepted as an operating item by the TPO in AY 2013-14. Thus, the Department does not have any plausible reason to change the treatment of forex to a non-operating item in FY 2014-15.

8. The ld. DR relied on the order of the Ld.DRP.

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

10. The forex fluctuation is an integral part of the sale and purchase transactions. It is, in essence, an integral part of the 'transfer price' for any transaction. Hence it is, by default, an operating item. Since a forex gain/loss is a direct outcome of the 'international transaction' with an AE, it therefore partakes the same character as that of the international transaction. Hence, Forex gain/loss very much forms part of the international transaction.

11. Reliance is placed on the following judgments wherein held that forex to be an operating item:

- *PCIT vs. Ameriprise India (P.) Ltd. (ITA 206/2016)*
- *Mckinsey Knowledge Centre (P.) Ltd. v. Dy. CIT (77 taxmann.com 164 (Delhi - Trib.)*
- *Virginia Transformer India P. Ltd. vs. ITO (I.T.A. No. 1001/Del./2014)*

12. From the above stated facts and precedents, it is quite evident that since the forex difference arises out of an international transaction, it is pertinent for the assessee to pass on the forex fluctuation to its AE. Hence, we hold that the assessee has correctly treated it under the operating income.

Interest on Receivables:

13. The TPO reclassified the outstanding receivables beyond the credit period of 30 days as deemed loans to the AE and treated them as separate international transaction. The TPO by applying a markup of 400 basis points on LIBOR on the receivables made an addition amounting to Rs.4,71,09,902/-.

14. Before us, it was argued that the assessee entered into numerous international transactions with its AEs resulting in receivables for the same. The said receivables are settled with its AEs on an ongoing basis, in the day-to-day business transactions, at an arm's length price having regard to the economic and commercial factors. As mentioned earlier, the working capital adjustment subsumes the adjustment on account of receivables. Therefore, the arm's length price determination for the said receivables is subsumed within the arm's length price determination of the principal international

transaction itself. Furthermore, the said outstanding receivables are a result of the international transactions undertaken by the assessee with its AEs and are not a separate international transaction as per Section 92B of the Act.

15. It is settled principle that there is no need to benchmark the interest on receivables wherein the interest has not been charged from either of the parties i.e. payables and receivables. In the instant case, period of 90 days has been allowed and the amounts have been received within the range of 90 to 95 days. In the absence of any fact to prove that the assessee is liable to payment of interest, no adjustment is warranted. There cannot be one straight jacketed formula to allege that the assessee has received interest or the delay was allowed to confer an undue advantage to the other party. Reliance is being placed in the case of Pr. CIT vs. Kusum Health Care Pvt. Ltd. (ITA No. 765/2016) wherein the Hon'ble Delhi High Could held that the inclusion in the Explanation to Section 92B of the Act of the expression 'receivables' does not mean that de hors the context, every item of 'receivables' appearing in the accounts of an entity which may have dealings with the foreign AEs, would automatically be characterized as an international transaction. It further went on to hold that there can be a delay in the collection of monies for the supplies made, even beyond the agreed limit, due to various factors which would be investigated on a case to case basis and also the case of Gillette India Limited (ITA No. 40/2017) wherein the Hon'ble Rajasthan High Court has affirmed the order of the Tribunal wherein it was held that the transaction of allowing credit period to the AE for realization of its sale proceeds is not an independent

international transaction but is closely linked with the sale transactions of the AE.

16. Hence, we hereby allow the appeal of the assessee on this ground is allowed.

Education Cess:

17. The assessee has taken up additional grounds pertaining to deduction of Education Cess.

18. 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.

19. 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."

20. Respectfully following the above judgment of the Hon'ble Apex Court, the additional grounds taken up by the assessee are hereby admitted.

21. 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.

22. The ld. AR also relied on the judgment of Hon'ble Rajasthan High Court in the case of Chambal Fertilisers 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.

23. 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.

24. 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.

25. 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.

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

27. 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."

28. 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.

29. 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.

30. 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.

31. 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."

32. 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.

33. 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.

34. 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."*

35. 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.

36. 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."*

37. 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.

38. 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)*

39. 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.

40. In the result, the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 29/10/2021.

Sd/-

(K. N. Chary)
Judicial Member

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

Dated: 29/10/2021
Subodh Kumar, Sr. PS
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR