

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI**

Before Sh. Amit Shukla, Judicial Member

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

(Through Video Conferencing)

ITA No. 475/Del/2018 : Asstt. Year : 2011-12

Security Printing & Minting Corporation of India Ltd., 16 th Floor, Jawahar Vyapar Bhawan, Janpath, New Delhi	Vs	Addl. CIT, Range-8, New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAJCS6111J		

Assessee by : Sh. Y. K. Maghan, CA

Revenue by : Sh. H. K. Choudhary, CIT DR

Date of Hearing: 21.10.2021

Date of Pronouncement: 18.01.2022

ORDER

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

The present appeal has been filed by the assessee against the order of the Id. CIT(A)-28, New Delhi, dated 09.11.2017.

2. Following grounds have been raised by the assessee:

- a. Deduction u/s 14A
- b. Claim of CSR expenditure

3. The assessee has also raised additional grounds of appeal:

"That on the facts and in the circumstances of the case and in the law, the Assessing Officer ought to have considered that the Education Cess paid on the income tax and surcharge was an allowable deduction for computing total income given the facts that the

same was not hit by the provisions of Section 40(a)(ii) of the Income Tax Act, 1961."

4. The assessee is a Central Government PSU under the Ministry of Finance. It was granted a statutory status of company under the Company's Act 1956 as amended in A.Y. 2006-07 under mandatory direction of Ministry of Finance, Government of India. Prior to this corporate status, it was operating as an integral part of Ministry of Finance, Government of India as pure Government treasury/department.

5. Its business activities and objective for printing currency notes of all denominations of RBI, Government of India coins, Printing of Judicial and Non-Judicial stamp papers, all types of postal and non-postal stamps and stationery, passport, visa and other travel documents MICR and non MICR cheques in continuous stationary forms, identity cards, Railway warrants, Income Tax Return forms and orders forms, public saving instruments and commemorative stamp etc.

6. It has also entered into other markets like mark sheets and certificates with security features for Government Universities. It has praised stamps with fragrance and indulges in new products to accommodate technology changes and environmental requirements. It has been set up with the following commercial units in India:

- i. Bank Note Press, Dewas
- ii. Currency Note Press, Nashik
- iii. India Security Press, Nashik
- iv. Security Printing Press, Hyderabad

- v. Security Paper Mill, Hoshangabad
- vi. India Government Mint, Noida
- vii. India Government Mint, Hyderabad
- viii. India Government Mint, Kolkata

7. There remains stock of Gold, Silver and other precious metals in various located mints. Gold and Silver is also refined.

Disallowance u/s 14A:

8. During previous year 2010-11, the assessee has received dividend from UTI Treasury Advantage Fund under Institutional Plan Scheme amounting to Rs.4,31,89,170/-. It was claimed as exempted income u/s 10(34) in the return of income filed. The assessee has been investing in this fund out of its own surplus and does not borrow any amount for the purpose. It has not incurred any borrowing interest directly or indirectly during the previous year. In fact, the fund is being managed by investment advisors M/s SPA Merchant Banker Limited as honorary services without any cost to assessee. It has been advising and also daily managing this fund portfolio for assessee without any cost. The company has been executed this fund on the advice of the investment advisors. The investment advisors engaged does not get any fees/remuneration as stated above being so settled between the assessee and investment advisors vide renewed letter No. SPMCIL/UTI/73/06/6143 dated 30.06.2010. In fact, no indirect expense on account of establishment audit fees or otherwise are incurred related to operation of this fund as being estimated by AO without any reason. The dividend is automatically reinvested in the plan by UTI as per the

instruction of the assessee company. These facts were duly brought to the notice of the Assessing Officer during the course of original assessment proceedings by the Counsel of the assessee. The Assessing Officer did not make any addition on the issue of exempt income received after viewing the above facts. The original assessment was done on 28.02.2014.

9. Thereafter, the Id. PCIT(8) passed an order u/s 263 on dated 30.03.2016 setting aside the order passed u/s 143(3) dated 28.02.2014 with the direction to AO to make disallowance u/s 14A. Following to the direction of the Id. PCIT(8), the Assessing Officer passed the revised assessment order u/s 263/143(3) dated 19.12.2016 by making addition of Rs.50,25,537/- being 0.5 % of the average investment.

10. We have gone through the correspondence between the assessee and M/s SPA Merchant Banker Limited.

The engagement is subject to the following conditions:

1. You are requested to start this assignment w.e.f. 02.06.2008.
2. As per your presentation held on 25.04.2008, the services will be provided by your firm on honorary basis.
3. All investment will be made in compliance with the Department of Public Enterprise guidelines and guidelines of SPMCIL.
4. Fund position and cash flow of SPMCIL will be monitored and reviewed on a weekly basis and based on the same, investment advisor will recommend investment strategy and plan for investment in various applicable/admissible instruments.

5. Quarterly review of the portfolio of investments with the SPMCIL authorities.
 6. If the performance of your firm will be found to be unsatisfactory, then this appointment may be terminated at a notice of one month without assigning any further reasons.
 7. Full confidentiality will be resorted to in all the transactions related to SPMCIL Funds.
11. Since, the funds have been utilized for investment without incurring any expenses and keeping in view the evidences submitted by the assessee that no expenditure has been incurred for investment, no disallowance u/s 14A is called for. The appeal of the assessee on this ground is allowed.
12. The assessee under the Corporate Social Responsibility policy adopted from the Assessment Year 2010-11 incurred the incurred the said expenditure. Keeping in view the facts that it has been printing currency notes, postal order and highly sensitive security items, it is necessary for the smooth conduct of the activities of the assessee to have positive environmental goodwill and social relations with the nearby locality. It has been incurring expense under CSR policy voluntarily without any statutory compulsion except the direction of Ministry of Finance under a MoU for the purpose. The assessee at some place of its industrial units has its own staff colonies and quarters where CSR expenditure have been incurred for the maintenance of pump house, K.V. Station and maintenance of staff quarters. Primary ambulance and medical aid to dispensary set up for staff and other village people. A

statement stating nature of CSR activities has also been enclosed which has been duly perused. The AO disallowed this claim taking a view that the expenditure incurred are capital nature and are enduring benefit to assessee.

13. During appellate proceedings, it was submitted that explanation 2 to section 37(1) of Income Tax Act 1961 was inserted in Finance Act 2015. It does not have retrospective applicability. Moreover, the assessee has not incurred these expenditures under any statute but under a CSR policy as per a more MoU signed with its nodal Ministry. These expenditures are for the direct benefit not only to the employees and workers but also for the business activities.

14. On going through the entire facts of the case since, the amendment to Section 37(1) of the Act was inserted in Finance Act 2015 and is not retrospective, this expenditure is hereby allowed to be claimed as business expenditure u/s 37(1).

15. With regard to the additional grounds, being a legal issue the additional grounds are hereby admitted.

Education Cess:

16. 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

Id. 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.

17. The Id. 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.

18. 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.

19. The Id. 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.

20. The Id. 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.

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

22. 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."

23. 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.

24. 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.

25. 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-Q 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.*

26. Thus, wherever the legislature wanted to include this term specifically in the statute 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."

27. 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.

28. 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.

29. 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."

30. 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-"**Prarambik 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.

31. 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."

32. 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.

33. 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)*

34. 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.

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

Order Pronounced in the Open Court on 17/01/2022.

Sd/-

(Amit Shukla)
Judicial Member

Dated: 17/01/2022

Subodh Kumar, Sr. PS

Copy forwarded to:

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

Sd/-

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

ASSISTANT REGISTRAR