IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)
"A" BENCH, MUMBAI

BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND SHRI AMARJIT SINGH, HON'BLE JUDICIAL MEMBER

ITA NO. 325/MUM/2021 (A.Y: 2017-18)

A.T. Trade Overseas Pvt. Ltd., A-601 Cello Trihumph I.B. Patel Road, Goregaon (E) Mumbai – 400063 **PAN: AACCA7944A**	*v.*	DCIT – Central Circle – 2(4) 802, 8th Floor Pratishtha Bhavan Old CGO Annexe Maharishi Karve Road Mumbai - 400020
(Appellant)		**(Respondent)**

Assessee by	**:**	**Shri Dharmesh Shah**
Department by	**:**	**Ms. Sailaja Rai**
Date of Hearing	**:**	**05.01.2022**
Date of Pronouncement	**:**	**23.03.2022**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax (Appeals) – 48, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 23.02.2021 for the A.Y.2017-18.

2. Assessee has raised following grounds in its appeal: -

"1. The Ld. CIT(A) has erred in law and in facts in confirming the additions made by the Assessing Officer without any incriminating evidence found at the time of search.

2. The Ld. CIT(A) has erred in law and in facts in confirming the addition of ₹.51,50,000/- on account of additional income offered in the application filed u/s. 245D(1) of the Act before the Hon'ble Income Tax Settlement Commission.

3. The Ld. CIT(A) ought to have appreciated that education cess on the tax payable on the assessed income was allowable as deduction while computing the income of the appellant.

4. The appellant craves leave to add to, alter, amend and/or delete in all the foregoing grounds of appeal."

3. With regard to grounds 1 and 2 of grounds of appeal, the relevant facts are, the search and seizure action u/s. 132 of Income-tax Act, 1961 (in short "Act") was carried in the case of Hisaria Group on 16.11.2017. Assessee is one of the Flagship concerns of the group, Shri Sandeep Kumar Hisaria and Shri Sawarmal Hisaria are the partners of the assessee firm. Subsequent to the search, assessee filed application before settlement commission u/s. 245C of the Act on 27-12-2019. ITSC passed order u/s.245D(1) of the Act in which it had rejected application of assessee because of not fulfilling of conditions mentioned in section 245C of the Act. The Assessing Officer observed in his order that as per section 245HA(3) of the Act, whenever an abated proceeding gets restored back, the Assessing Officer is entitled to use all-the material filed by the assessee before settlement commission for determining the true income

of assessee. Accordingly, assessee was asked to submit all the material filed by it in front of settlement commission for determining its correct income. Assessee submitted the copies of the material on 07.02.2020. Based on which a show cause notice was issued to assessee on 27.02.2020 and assessee was asked to explain why the additional income offered by it in front of settlement commission should not be added to the final income. In response assessee submitted that assessee offered additional income in front of settlement commission in order to buy peace of mind and to avoid litigation. Further, it was stated that no incriminating material has been found with respect to additional income offered. Therefore, no addition would be made on the additional income offered before settlement commission.

4. Assessing Officer rejected the submissions of the assessee and made addition of ₹.51,50,000/- as additional income of the assessee which was offered before settlement commission. The Assessing Officer observed that Assessing Officer is entitled to use all the material filed before ITSC for the purpose of completing the assessment and even without incriminating material, addition can be made since assessee has offered additional income before ITSC. He observed that assessee has

not brought anything on record which suggest that the income offered by the assessee should not be considered for completing the assessment.

5. Aggrieved assessee preferred an appeal before the Ld.CIT(A) and filed detailed submissions. After considering the detailed submissions Ld.CIT(A) sustained the additions made by the Assessing Officer by applying the provisions of section 245HA of the Act and observing as under: -

> *"9.5 In view of these specific provision of the law, the additional income offered in Settlement application is liable to be taxed in the hands of the assessee. The assessee in this regard, has relied upon certain case laws. However, the ratio of the same is distinguishable in view of peculiar facts of the present case and the specific provisions of sec.245HA. Further, the assessee has also argued that he should be given set-off of this income against other additions made. However, it appears that the AO has made addition of only unexplained cash credits in the hands of the assessee u/s.68 of the Act. from certain parties. The assessee while filing settlement application never stated the nature of income offered, least the unexplained cash credits, so no benefit could be given to the assessee in this regard. Further, I would like to clarify that no other addition has been made by the AO during this year, against which any set-off could be granted for miscellaneous business income offered by the assessee in the settlement application. So this contention of the assessee is also not acceptable."*

6. Aggrieved assessee is in appeal before us and at the time of hearing Ld. AR brought to our notice statement of facts filed before ITSC on 27.12.2019 and he brought to our notice Page No. 51 of the Paper Book in which assessee has clearly submitted before ITSC that all the expenses are genuine and that no evidences have been found as a result of search,

with the view to buy peace of mind and to cover any possible deficiency and/or omission in any of these evidences with respect to these expenses incurred , the assessee has agreed for adhoc addition of ₹.51,50,000/- for this assessment year. In this regard he submitted that Assessing Officer cannot make any addition relying on voluntary disclosure of adhoc income before ITSC without there being any incriminating material. In this regard he relied on the decision of the Anantnadh Constructions and Farms (P.) Ltd., *v.* DCIT [166 ITD 83].

7. On the other hand, Ld. DR brought to our notice finding of the Ld.CIT(A) in Para No. 9.5 of the order and he accordingly, relied on the orders passed by the Tax Authorities below: -

8. Considered the rival submissions and material placed on record, we observed that subsequent to search action assessee has disclosed additional income before ITSC and as per the information available on record assessee has agreed for adhoc disallowance relating to business expenses to the extent of ₹.50 Lakhs. We observed that assessee has agreed for adhoc addition in order to buy peace and to cover if there is any possible deficiency in any of the evidences with respect to the business expenditure incurred by the assessee. Further, assessee agreed

for additional expenses of ₹.1.5 Lakhs over and above the above business expenditure. It is fact on record Assessing Officer relied on the informations submitted before ITSC which in fact is only voluntary disclosure of adhoc expenses in order to avoid unnecessary verification and cumbersome exercise of following up with the Tax Authorities. Since settlement commission has rejected the application of the assessee, now assessee retracts the submissions made before settlement commission. The Assessing Officer now relying on the adhoc disclosure before settlement commission in order to make additions, which in our considered opinion is not proper. As Assessing Officer can use all the material which is submitted before settlement commission and Assessing Officer can make the addition based on the proper evidences on concealment of income or any evidences which proves that assessee has not disclosed its proper income. In the given case, it is also fact on record that in the search, no incriminating material was found and no other material available before the Assessing Officer to sustain the addition except relying on the voluntary disclosure before ITSC. We observe that the Coordinate Bench in Anantnadh Constructions and Farms (P.) Ltd., *v.* DCIT (supra) held as under:

> *"15. We find that section 245HA(1) of the income Tax Act lists several circumstances in which the case before the Settlement*

Commission would abate; whereas in section 32L(1) non - cooperation of the petitioner is the only ground. The Central Excise Officer derives its power its power to assess such abated proceeding vide section 32L(2) of the Central Excise Act. This is identical to powers vested with an AO under section 245HA(2) and 245HA(3) under the Income Tax Act. It is therefore very clear that the provisions of Central Excise Settlement Commission and that for Income Tax settlement Commission are identical. Therefore, the judgment of Hon'ble Gujarat High Court in the case of Maruti Fabrics although pertaining to Central Excise should be applied to cases abated under section 245HA of the Income Tax Act also.

16. Therefore, we are of the view that the judgment of Hon'ble Gujarat High Court is applicable to the facts of the assessee's case. We find that Hon'ble Gujarat High Court has held that if the petition filed before the Settlement Commission wherein assessee has made declaration but proves that assessee has neither earned such income nor any incriminating material was found during the search relating to undisclosed income then no addition can be made.

17. We have also gone through the judgment of ITAT, Mumbai in the case of Dolat Investment vs. Dy. Commissioner of Income Tax wherein the ITAT has specifically held in para 22 which reads as under:

> *"22. The first issue is whether the case of the assessee for assessment year 2005-06 was admitted by the Settlement Commission under section 245D(1) of the Act? On this issue, we have already seen that in the order dated 30-11-2007 under section 245D(4) of the Act, the Settlement Commission has clearly held that the assessee for assessment year 2005-06 does not satisfy the criteria of offering income on which at least an income-tax payable should exceed Rs. 1 lakh. The Settlement Commission has further held that when admitting the petition of the assessee for assessment year 2005-06, this aspect was overlooked and that they are rectifying the apparent error by excluding assessment year 2005-06 of the assessee from the process of settlement. Thus, the case of the assessee for assessment year 2005-06 cannot be considered to have been admitted for the process of settlement under section 245D(1) of the Act. Consequently, the confidential information disclosed in the Annexure to the Settlement application could not have been used by the Assessing Officer against the assessee to make the impugned addition. Therefore, the addition to the income made by the Assessing Officer in assessment year 2005-06 which is based only on the disclosure made in the Annexure to the Settlement*

Commission is not valid in law. Consequently, the imposition of penalty on the basis of such invalid addition cannot be sustained. In view of the above conclusion, we do not wish to go into the other alternate argument of the learned counsel for the assessee regarding abatement of proceedings before Settlement Commission and use of confidential information disclosed by the assessee in such proceedings by the Assessing Officer in making assessment."

18. From the above decision of the Tribunal where they have discussed the section 245C(1) and section 245D(i) and 245HA by following observation:

"20. The Finance Act, 2007 made changes to the provisions for settlement of cases contained in Chapter XIX-A of the Income-tax Act 1961. One change involves introduction of a new concept of abatement of proceedings before the Settlement Commission for which provisions has been made in the newly inserted section 245HA relevant portion whereof reads thus :—

"245HA. Abatement of proceeding before Settlement Commission.—(1) where....

(i) an application made under section 245C on or after the 1st day of June, 2007 has been rejected under sub-section (1) of section 245D;

(ii) an application made under section 245C has not been allowed to be proceeded with under sub-section (2A) or further proceeded with under sub-section (2D) of section 245D;

(iii) an application made under section 245C has been declared as invalid under sub-section (2C) of section 245D;

(iv) in respect of any other application made under section 245C, an order under sub-section (4) of section 245D has not been passed within the time or period specified under sub-section (4A) of section 245D, the proceedings before the Settlement Commission shall abate on the specified date.

Specified date would be (i) in respect of an application referred to in sub-section (2A) or sub-section (2D), on or before the 31st day of March, 2008; (ii) in respect of an application made on or after 1st day of June, 2007 within nine months from the end of the month in which the application was made.

(2) Where a proceeding before the Settlement Commission abates, the Assessing Officer or as the case may be any other income-tax authority before whom the proceeding at the time of making the application was pending, shall dispose of the case in accordance with the provisions of this Act as if no application under section 245C had been made.

(3) For the purposes of sub-section (2), the Assessing Officer or as the case may be, other income-tax authority, shall be entitled to use all the material and other information produced by the assessee before the Settlement Commission or the results of the inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it, as if such material, information inquiry and evidence had been produced before the Assessing Officer or other income-tax authority or held or recorded by him in the course of the proceedings before him."

21. Thus, when a proceedings before the Settlement Commission abates, it reverts to the income-tax authority before whom it was pending at the time of making the application for settlement and the income-tax authority has to dispose of the case in accordance with the provisions of the Act as if no application for settlement had been made and for that purpose, it is entitled to use all the material and other information produced by the assessee before the Settlement Commission or the results of the inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it."

19. We find from the above proposition of law by Hon'ble Gujarat High Court and Tribunal that simply relying upon the declaration made before the Settlement Commission no addition can be made. In this group case, the search was conducted in the business premises of Lodha Group and subsequent to search action assessee company along with other companies of Lodha Group filed a petition under section 245C(1) of the Act before Settlement Commission. The assessee has offered additional income of Rs.5 lakhs towards the land brokerage income. This offer was made for maintainability of petition before Settlement Commission as stated in clause (i) and clause (ia) of section 245C(1) of the Act. We are of the view that after reopening of the assessment order no addition can be made on the basis of income offered by the assessee before Settlement Commission. We find that no incriminating material was found during the course of search action substantiating that assessee has actually earned undisclosed income. Therefore, just because assessee has

offered additional income before Settlement Commission, no addition can be made without basis. Hence, the addition made by the AO and Ld. CIT(A) is deleted."

9. Respectfully following the above said decision, we are inclined to delete the additions made by the Assessing Officer by solely relying on the information submitted before ITSC without there being any material in support of proposed addition. Accordingly, ground No. 1 and 2 are allowed.

10. With regard to ground No. 3 of grounds of appeal which is in respect of the issue of deduction on account of education cess on the tax payable by the assessee, the assessee had relied upon the decision of Hon'ble Bombay High Court in the case of Sesa Goa v. JCIT [423 ITR 426] [Page 155-162 of PB 2] wherein it has been held that the education cess cannot be disallowed by invoking s. 40(a)(ii) of the Act and consequently the education cess payable by the assessee is an allowable deduction. The assessee has also filed a copy of the decision of the Hon'ble Mumbai Tribunal in the case of Overseas Polymers Pvt. Ltd. V. ACIT PTA No. 6754/Mum/20181 dated 17.12.2020[Page 163-166 of PB 2] which is has decided the issue following the aforesaid decision of the Hon'ble Bombay High Court.

11. During the course of hearing, the Ld. DR relied upon the decision of the Hon'ble Kolkata Tribunal in the case of Kanodia chemicals & Industries Ltd. *v.* Addl. CIT and vice versa [ITA No. 2184/Kol/2018 and 2439/Kol/2018 dated 26.10.2021 wherein it has been held that the education cess is not an allowable deduction. The Ld. DR has provided a copy of the said decision to us vide email dated 05.01.2022.

12. Ld. AR further submitted that in the said decision, Hon'ble Kolkata Tribunal has referred to the decision of the Hon'ble Supreme Court in the case of CIT *v.* K. Srinivasan [83 ITR 346 (1972)] to come to conclusion that the education cess is additional surcharge and therefore the same cannot be allowed as deduction while computing the income of the assessee. In view of the decision of Hon'ble Supreme Court, the Hon'ble Kolkata Tribunal chose not to follow the decision of Hon'ble Bombay High Court in the case of Sesa Goa Ltd. (supra).

13. In this regard, he submitted that the aforesaid decision of the Hon'ble Supreme Court in the case of CIT v. K. Srinivasan (Supra) was dealing with the issue of levy of tax on the income of the assessee. The Hon'ble Court was required to decide whether the tax applicable on the salary income of the assessee would be inclusive of the 'surcharge'. The

Hon'ble Supreme Court case was not required to decide whether the amount of 'Education Cess' was allowable as deduction or not. We therefore submit that the issue before the Hon'ble Supreme Court was entirely different than the issue in appeal before Your Honours.

14. It is further submitted that the Hon'ble Tribunal has sought to link the ratio of the aforesaid decision of Hon'ble Supreme Court with the amendment by Finance Act, 2004 and Finance Act, 2011 wherein the 'Education Cess' was introduced to hold that the 'Education Cess' is an additional surcharge and therefore the same would partake the character of 'tax' for the purpose of s. 40(a)(ii) of the Act. It is submitted that the said decision has been rendered by Hon'ble Tribunal without appreciating that while the decision of Hon'ble Supreme Court was rendered in a different context and that the Legislature had clarified in their circular dated 18.05.1967 that for the purpose of s. 40(a)(ii) of the Act, Cess cannot be disallowed. Further, the decisions of Hon'ble Bombay High Court and Hon'ble Rajasthan High Court were rendered directly on the issue involved and hence the same could not have distinguished based on the decision of Hon'ble Supreme Court rendered in a different context.

15. Further, he submitted in any case, as held by Hon'ble Bombay High Court in the case of CIT v. Thana Electricity Supply Co. Ltd. [206 ITR 727], the decision rendered by Hon'ble Bombay High Court in the case of Sesa Goa (Supra), being the decision directly on the issue involved, was binding on the coordinate benches of Tribunal at Mumbai.

16. Further, a reference is invited to an old circular wherein CBDT, vide Circular No. 91/58/66 - 111(19) dated 18.05.1967 explained the scope of provisions of s. 40(a)(ii) of the Act. The relevant extract of the said circular is reproduced below:

> *"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)(i0 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."*

17. The aforesaid circular thus clarifies the intent of the legislature that for the purpose of s. 40(a)(ii) of the Act, 'cess' would not be considered as part of the tax and therefore the same cannot be disallowed invoking s. 40(a)(ii) of the Act. The said circular is directly on the provisions of s. 40(a)(ii) of the Act relied upon by the assessee and therefore cannot be superseded by the ratio of aforesaid decisions rendered under the different provisions and context.

18. Ld. AR submitted that the aforesaid circular was considered by the Hon'ble Rajasthan High Court in the case of Chambal Fertilizers and Chemicals Ltd.v JCIT [107 taxmann.com 484] wherein the Hon'ble High Court held that in view of the Circular of CBDT where the word 'cess' is deleted, the claim of the assessee for deduction is correct. 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 tax.

19. Further, he brought to our attention that the provisions of s. 115JB of the Act. Under the said provision which deals with minimum alternate tax, the legislature has specifically defined income tax for the purpose of the above provisions in Explanation 2 to s. 115JB(2) of the Act. The said provisions are reproduced below for ready reference:

"Explanation 2

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- 0 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"

20. He submitted that the perusal of the aforesaid provisions clearly shows that wherever the legislature wanted to include education cess to be part of the income tax, it has specifically defined under the relevant provisions. If the Education Cess was presumed to be part of Income Tax as defined in s. 2(43) of the Act, there was no need for enacting Explanation 2 to s.115JB(2) and specifically stating that education cess to be included in the amount of income tax. Based on the above, 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.

21. He further submitted that the said issue has been subject matter of dispute before the Hon'ble Bombay High Court in the case of Sesa Goa *v.*

JCIT [423 ITR 426] [Page 151-162 of PB 21] wherein the court was required to address the specific issue of allowability of 'Education Cess' while computing business income of the assessee. It is submitted that while dealing with the said issue, the Hon'ble Bombay High Court has taken into account the express intention of the legislature as elucidated in the circular dated 18.05.1967 stating that cess cannot be subjected to disallowance u/s. 40(a)(ii) of the Act. The Hon'ble High Court has also taken into account several other decisions of various high courts and Hon'ble Supreme Court while concluding that the education cess is an allowable deduction. In fact, the Revenue had relied upon another decision of Hon'ble Supreme Court in the case of Unicorn Industries v. UOI [112 Taxmann.com 127] wherein the Hon'ble Court had held that for the purpose of levy of tax, cess is to be included since the cess is nothing but the tax. However, the Hon'ble Bombay High Court observed that the said decision was not in the context of the provisions of s. 40(a)(ii) of the Act and therefore the said decision cannot be relied upon to come to conclusion that the education cess was allowable as deduction. It is submitted that likewise, even the decision of Hon'ble Supreme Court in the case of CIT v. K. Srinivasan (Supra) cannot support the view of the Department since the said case was relating to inclusion of the surcharge

for the levy of 'tax' on the income of the assessee and not pertaining to the deduction of Education Cess,

22. Finally, it is submitted that several decisions have been rendered by the co-ordinate benches of Hon'ble Tribunal of coordinate bench in deciding the issue in favour of the assessee following the decisions of Hon'ble Bombay High Court and Rajasthan High Court after taking into account the aforesaid decision of Hon'ble Supreme Court in the case of CIT v. K. Srinivasan (Supra), the circulars of CBDT as well as several other decisions of the Hon'ble High Court rendered on the subject. Some of the said decisions are listed below:

a. *Avaya India Pvt. Ltd. v. ACIT [ITA No. 466/Del/20211 dated 09.07.2021*
b. Bharat Rasayan Ltd. v. ACIT [ITA No. 1231/Del/2019] dated 02.02.2021
c. Asian Paints Ltd. v. Addl. CIT [ITA No. 2754/Mum/2014] dated 03.02.2021
d. Bajaj Electricals Ltd. v. ACIT [MA No. 222/Mum/20201 dated 08.01.2021

Copy of the above decisions are enclosed herewith for Your Honour's reference.

23. In light of the above settled position in law and direct decision of the Hon'ble Bombay High Court and Hon'ble Rajasthan High Court on the

issue, we humbly submit that the education cess may kindly be held allowable as deduction.

24. Ld.DR vehemently supported the orders of the authorities below.

25. Considered the rival submissions and material placed on record, we observe that the Hon'ble Jurisdictional High Court has considered this issue in detail in the case of Sesa Goa *v.* JCIT (supra) and held in favour of the assessee. Respectfully following the Jurisdictional decision and Coordinate Bench decision, we are inclined to allow the grounds raised by the assessee.

26. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 23.03.2022.

Sd/-	Sd/-
(AMARJIT SINGH)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated 23.03.2022
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum