

IN THE INCOME TAX APPELLATE TRIBUNAL “G” BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No. 7639/Mum/2019

(निर्धारण वर्ष / Assessment Year: 2008-09)

Grasim Industries Ltd. (Successor to Aditya Birla Nuvo Ltd.) Aditya Birla Centre, A Wing, 2 nd Floor, S. K. Ahire Marg, Worli, Mumbai-400030.	बनाम/ Vs.	DCIT-Central Circle-1(4) Room No.902, 9 th Floor, Old CGO Building, M. K. Road, Churchgate, Mumbai-400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACI1747H		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Yogesh Thar	
Revenue by:	Shri K. K. Mishra (DR)	

सुनवाई की तारीख / Date of Hearing: 25/01/2022

घोषणा की तारीख /Date of Pronouncement: 18/04/2022

आदेश / ORDER

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 19.09.2019 passed by the Commissioner of Income Tax (Appeals) -03, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the A.Y.2008-09.

2. The assessee has raised the following grounds: -

“1. On the facts and circumstances of the case and in law, the Hon’ble CIT(A) erred in upholding the action of the Assistant Commissioner of Income Tax- LTU(1), Mumbai (“the AO”) in disallowing a sum of Rs.19,24,95,632/- u/s 14A of the Act being the disallowance computed as per Rule 8D of the Income Tax Rules.



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2. *The appellant prays that the AO be directed to delete the disallowance u/s 14A of the Act amounting to Rs.19,24,95,632/- or that the disallowance be appropriately reduced.*

GROUND NO.II: DISALLOWANCE OF EDUCATION CESS:

1. *On the facts and the circumstances of the case and in law, the AO erred in treating Education Cess and Secondary and Higher Education Cess (collectively called as 'Education Cess') as disallowable expenditure under Section 40(a)(ii) of the Act.*

2. *The appellant prays that the AO be directed to allow deduction of Education Cess while computing the total income of the appellant.*

GROUND NO.III: GENERAL

The appellant craves leave to add, alter, amend or vary the above grounds of appeal either before or at the time of hearing."

3. The brief facts of the case are that the AO has passed the order u/s 143(3) r.w.s. 254 of the Act to consider the additional ground u/s 148 of the Act to consider the Education Cess etc. The AO passed the order dated 16.05.2016 assessing the disallowance u/s 14A to the tune of Rs.83,85,78,993/-. The total income was assessed to the tune of Rs.115,80,55,501/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who dismissed the appeal of the assessee, therefore, the assessee has filed the present appeal before us.

ISSUE NO.1

4. Under this issue the assessee has challenged the disallowance of expenditure to earn the exempt income of Rs.19,24,95,632/- u/s 14A r.w.



Rule 8D. The Ld. Representative of the assessee has argued that only those investment which yielded the dividend income is liable to be considered for the purpose of disallowance u/s 14A r.w. Rule 8D(2)(iii). In support of this contention, the Ld. Representative of the assessee has placed reliance upon the decision in the case of **ACIT Vs. Vireet Investments (P.) Ltd. (2017) 58 ITR 313 (Delhi) and others**. However, on the other hand, the Ld. Representative of the Department has refuted the said contention. In the case of **ACIT Vs. Vireet Investment (P.) Ltd. (supra)** the Hon'ble Special Bench has held as under: -

“We have considered the rival submissions of the parties and gone through the orders of the tax authorities below. As noted above the ld AR for the assessee have confined his submissions to the extent that only those investment which yielded exempt income during the year should be considered for computing the average value of investment which yielded exempt income during the year as held by Special bench of Delhi Tribunal in Vireet Investment P. Ltd. (supra). After considering the submission of ld. AR of the assessee, we find convincing force in his submission that only those investments which yielded exempt income during the year be considered for computing the average value of investment. Therefore, the assessing officer is directed to re-compute the disallowance under Rule 8D(2)(iii) by following the decision of Special Bench of Delhi Tribunal in Vireet Investment P. Ltd. (supra). Needless to order that before re-computing the disallowance under Rule 8D(2)(iii), the assessing officer shall grant opportunity of hearing to the assessee. The assessee is also directed to provide necessary details and information to the assessing officer.”



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5. Accordingly, we set aside the finding of the CIT(A) on this issue and direct the AO to assess the expenditure to earn the exempt income by considering those investments which yielded the dividend income for the purpose of disallowance u/s 14A r.w. Rule 8D(2)(iii) of the Act. Accordingly, this issue is being decided in favour of the assessee against the revenue.

ISSUE NO.2

6. Under this issue the assessee has challenged the disallowance of Education Cess. The assessee has taken the following additional ground of appeal:-

“Additional Ground. I. On the facts and circumstances of the case and in law, the Assessing Officer/ CIT(A) ought to have allowed deduction of Education Cess amounting to Rs. 3,19,95,9981- in terms of law laid down by the Hon'ble Rajasthan High Court in Chambal Fertilizers and Chemicals Ltd. [ITA No. 52/Raj/2018 ruling dt. 31.7.2018] and further Hon'ble Kolkata Tribunal in case of ITC Ltd. [ITA No. 685/Kol/2014 ruling dt. 27.11.20 18]

7. In the case of Kanoria Chemicals & Industries Ltd. Vs Addl. CIT (ITAT, Kolkata) in ITA. No.2184/Kol/2018 for the A.Y.2012-13 dated 26.10.2021 has held as under:-

16. As per the provisions of section 40(a)(ii) of the Income-tax Act, 1961 (in short, the 'Act') '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, business or profession.



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17. *The Ld. Counsel for the assessee has submitted that 'Cess' has not been specifically mentioned in the aforesaid provisions of section 40(a)(ii) and, therefore, Cess is an allowable expenditure. He in this respect has relied upon the "CBDT Circular No. 91/58/66-ITJ(19) dated 18-05-1967", wherein it has been interpreted that the 'Cess' shall not be disallowable. The said Circular for the sake of ready reference is reproduced as under:- "Interpretation of provision of Section 40(a)(ii) of IT Act, 1961 - Clarification regarding.-*

"Recently a case has come to the notice of the Board where the Income Tax Officer 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 Income Tax Officer is not correct. Clause 40(a)(ii) of the Income Tax Bill, 1961 as introduced in the Parliament stood as under:-*

"(ii) 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 Income Tax Officers so that further litigation on this account may be avoided.{Board's F . No.91/5B/66-ITJ(19), dated 18-5-1967.*

18. *The Learned Counsel for the assessee in this respect has further relied upon the decision of the Hon'ble Bombay High Court in the case of "Sesa Goa Limited Vs. JCIT" (2020) 117 taxmann.com 96*



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and further on the decision of the Hon'ble Rajasthan High Court in the case of "Chambal Fertilizers & Chemicals Ltd Vs. JCIT": D.B Income-tax Appeal No. 52/2018 decided on 31-07-2018, wherein, the Hon'ble High Court/s relied upon the aforesaid CBDT Circular Dt. 18-05-1967(supra) and in view of the interpretation made by the CBDT have held that 'education cess' can be claimed as an allowable deduction while computing the income chargeable under the heads of profits and gains of business or profession. The Learned Counsel has further relied upon the following decisions of the Co-ordinate Benches of this Tribunal, who have followed the aforesaid judgments of the Hon'ble High Courts: a. Decision of Kolkata Bench of the Tribunal in the case of DCIT Vs. ITC Infotech India Ltd, ITA No. 67/Kol/2015 dt. 23-10-2019 b. Decision of Kolkata Bench of the Tribunal in the case of Tega Industries Ltd Vs. ACIT, ITA No. 404/Kol/2017 dt. 23-8-2019 c. Decision of Kolkata Bench of the Tribunal in the case of SREI Infrastructure Finance Ltd Vs. Addl. CIT, R-9, ITA No. 1318/Del/2012 dt. 31-12-2019.

19. However, with due respect to the decisions of the Hon'ble Bombay High Court and Hon'ble Rajasthan High Court and of co-ordinate Benches of this Tribunal, we find that the issue is squarely covered by the decision of the Hon'ble Apex Court of the country in the case of "CIT Vs. K. Srinivasan" (1972) 83 ITR 346, wherein the following questions came for adjudication before the Hon'ble Apex Court:-

" Whether the words "Income tax" in the Finance Act of 1964 in sub-s (2) and sub-s.(2)(b) of s. 2 would include surcharge and additional surcharge."

20. The Hon'ble Supreme Court answered the question in favour of revenue observing as under:-



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“In our judgment it is unnecessary to express any opinion in the matter because the essential point for determination is whether surcharge is an additional mode or rate for charging income tax. The meaning of the word "surcharge" as given in the Webster's New International Dictionary includes among others "to charge (one) too much or in addition " also "additional tax". Thus the meaning of surcharge is to charge in addition or to subject to an additional or extra charge. If that meaning is applied to s. 2 of the Finance Act 1963 it would lead to the result that income tax and super tax were to be charged in four different ways or at four different rates which may be described as (i) the basic charge or rate (In part I of the First Schedule); (ii) Sur- charge; (iii) special surcharge and (iv) additional surcharge calculated in the manner provided in the Schedule. Read in this way the additional charges form a part of the income tax and super tax”.

21. The Hon'ble Supreme Court, therefore, has decided the issue in favour of the revenue and held that surcharge and additional surcharge are part of the income-tax. At this stage, it is pertinent to mention here that 'education cess' was brought in for the first time by the Finance Act, 2004, wherein it was mentioned as under:-

“ An additional surcharge, to be called the Education Cess to finance the Government's commitment to universalise quality basic education, is proposed to be levied at the rate of two per cent on the amount of tax deducted or advance tax paid, inclusive of surcharge.”

22. The provisions of the Finance Act 2011 relevant to the Assessment Year under consideration i.e. 2012-13 are also relevant. For the sake of ready reference, the same is reproduced hereunder:-
2(11) The amount of income-tax as specified in sub-sections (1) to (10) and as increased by a surcharge for purposes of the Union



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calculated in the manner provided therein, shall be further increased by an additional surcharge for purposes of the Union, to be called the "Education Cess on income-tax", calculated at the rate of two per cent of such income-tax and surcharge, so as to fulfil the commitment of the Government to provide and finance universalised quality basic education.

23. A perusal of the aforesaid provisions of the Finance Act 2004 and Finance Act 2011 would show that it has been specifically provided that 'education cess' is an additional surcharge levied on the income-tax. Therefore, in the light of the decision of the Hon'ble Supreme Court in the case of "CIT Vs. K. Srinivasan" (supra) the additional surcharge is part of the income-tax. The aforesaid decision of the Hon'ble Apex Court and the provisions of Finance Act, 2004 and the relevant provisions of section 2(11) & (12) of the subsequent Finance Acts have not been brought into the knowledge of the Hon'ble High Courts in the cases of "Sesa Goa Ltd" & "Chambal Fertilisers" (supra). Since the decision of the Hon'ble Supreme Court prevails over that of the Hon'ble High Courts, therefore, respectfully following the decision of the Hon'ble Supreme Court in the case of "CIT Vs. K. Srinivasan" (supra), this issue is decided against the assessee. The additional ground of assessee's appeal is accordingly dismissed."

7. Subsequently, the Finance Bill, 2022 has been passed in which the preposition of Education Cess has been dealt with and accordingly the Education Cess is being treated as part and parcel of the tax and the claim of expenses in connection with the Education Cess is not liable to be allowed. Accordingly, we affirm the finding of the CIT(A) and decide this issue in favour of the revenue against the assessee.



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8. In the result, the appeal filed by the assessee is hereby partly allowed.

Order pronounced in the open court on 18/04/2022.

Sd/-

(SHAMIM YAHYA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 18/04/2022.

Vijay Pal Singh (Sr. P.S.)

Sd/-

(AMARJIT SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai