IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "A", BANGALORE

Before Shri George George K, JM & Shri Laxmi Prasad Sahu, AM

ITA No.603/Bang/2020 : Asst.Year 2010-2011

M/s.Ray+Keshavan Design Associates Private Limited (Now known as BU India Pvt.Ltd.) 4th & 5th Floor, Empire Plaza II CTS No.9, Village Hariyali LBS Marg, Vikhroli (West) Mumbai – 400 083. **PAN : AABCR7274F**	v.	The Deputy Commissioner of Income-tax, Circle 1(1)(2) Bengaluru.
(Appellant)		(Respondent)

Appellant by : Sri.Chinthan Ghelani, Advocate
Respondent by : Sri.Sankarganesh K., JCIT-DR

Date of Hearing : 10.05.2022		**Date of Pronouncement : 11.05.2022**

O R D E R

Per George George K, JM :

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 16.03.2020. The relevant assessment year is 2010-2011.

2. The grounds raised read as follows:-

"1. On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) erred in holding that the reimbursement of expenses of Rs.1,20,013/- to appellant's associated enterprises was a sum chargeable to tax and hence, inadmissible under section 40(a)(i) of the Act as tax has not been deducted.

2. On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) erred in charging write back of excess provisions for salary of Rs.10,00,000/- to tax in as such excess provision has already been charged to tax in assessment year 2009-2010 and hence, resulting into double taxation.

> *3. On the facts and circumstances of the case and in law, it should be held that the education cess, including secondary and higher education cess (cess) is not inadmissible as per section 40(a)(ii) of the Act and hence, the amount of Rs.9,27,389/- or such other amount as may be determined for the assessment year under reference should be allowed as an admissible deduction in computing the total income.*
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> *4. It is humbly prayed that the reliefs as prayed for hereinabove should be granted.*
>
> *5. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."*

We shall adjudicate the above grounds as under:-

Disallowance u/s 40(a)(i) of the I.T.Act amounting to Rs.1,20,013 (Ground 1)

3. The Assessing Officer had disallowed Rs.1,20,013 u/s 40(a)(i) of the I.T.Act. The contentions raised by the assessee and the findings of the A.O. read as follows:-

> *"3. The assessee company has reflected an amount of 1,20,013/- as reimbursement to M/s.Brand Union Worldwide Ltd. - London. During-scrutiny, it was stated vide letter dated 18.01.2012 that this amount represents payment of annual charges against invoices raised for the usage of Lotus Note E-mail and Abode Photoshop, being reimbursement of proportionate cost incurred by the Brand Union Worldwide Ltd. - London. It was stated that the said charges are without any mark-up and which in turn are payable by Brand Union Worldwide Ltd. - London to WPP 2005 Ltd., and are debited under the head printing and stationery. It was further stated that the expenses are re-imbursement in nature and there is no income embedded therein which accrues and arisen in India and consequently the said re-imbursement is not chargeable to tax in India.*
>
> *4. On consideration of the assessee submission, it is seen that the contention of the assessee that the aforesaid re-imbursement is not chargeable to tax in India is not acceptable. First of all, the assessee's contention that the amounts paid are only re-imbursement of cost without any mark-up is of no consequence, because the actual payment*

was made in respect of usage of Lotus Note E-mail and Abode Photoshope, which is in the nature of payment for professional serivces. The assessee had availed the services in India and hence it definitely comes under the purview of section 195 of the Income tax act. Therefore, an amount of Rs.1,20,013/- is disallowed as per the provisions of section 40(a)(ia) of the income tax act and added back to the return income of the assessee."

3.1 The CIT(A) confirmed the view taken by the Assessing Officer. The relevant finding of the CIT(A) reads as follows:-

"12. I find that the appellant has paid the amount of Rs.1,20,013/- to M/s.Brand Union Worldwide Ltd London. The amount is given by the appellant to M/s.Brand Union Worldwide Ltd London for using Lotus Note E-mail and Adobe Photoshop. The services provided by both the software are like sending emails, making notes and editing the images respectively. These kinds of services are professional in natures and the assessee has availed these services in India. Hence all the provisions of the IT Act apply and the TDS is to be made on these payments.

13. Further the appellant has paid the total charges for all its subsidiaries, but the appellant has not distinguished that the amount paid was irrespective of utilization. There is no evidence that the assessee has specifically utilized that technology."

3.2 Aggrieved, the assessee raised this issue before the Tribunal. The learned AR submitted that the issue in question is squarely covered in favour of the assessee by the order of the Tribunal in assessee's own case for assessment year 2011-2012 in ITA No.723/Bang/2020 (order dated 04.04.2022).

3.3 The learned Departmental Representative was unable to controvert the above assertion of the learned AR.

3.4 We have heard rival submissions and perused the

material on record. The Tribunal in assessee's own case for assessment year 2011-2012 (supra) on identical facts had held that license fees has been paid for the use of software. It was further held by the Tribunal that the assessee's holding company procures software from third party and shared the cost with the assessee along with other group companies on a proportionate basis without any mark up. Therefore, it was concluded by the ITAT that the reimbursement of such expenses by the assessee cannot be held liable for TDS. The relevant finding of the Tribunal in assessee's own case for assessment year 2011-2012 (supra) reads as follows:-

> *"We have perused submissions advanced by both sides in light of records placed before us.*
>
> *8. We note that, the payment made by the assessee is towards license fee in respect of the use of software. The said issue is no Page 6 of 9 ITA No. 723/Bang/2020 more res integra by the decision of Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt.Ltd. vs CIT reported in (2012) 432 ITR 471. It is not the case of revenue that there is a transfer of right to use in respect of these software is owned by Brand Union worldwide Ltd. It is also not disputed by the revenue that, these software are developed by the parent company. Instead we note that Brand Union worldwide Ltd., has been procured these software and has allotted to the group companies, against which, cost have been allocated. Such an allocation cannot be held to be 'royalty' in order to be subjected to TDS provisions.*
>
> *9. As Brand Worldwide Ltd., procures these software from somewhere else and is shared to the assessee along with other group companies against a proportionate cost, without any markup, the reimbursement of such expenses by assessee cannot be held liable for TDS."*

3.5 In view of the Co-ordinate Bench order of the ITAT in assessee's own case for assessment year 2011-2012 (supra), which is identical to the facts of the instant case, we hold that the assessee is not liable for TDS in respect of payment to

M/s.Brand Union Worldwide Limited, London. Therefore, the expenditure cannot be disallowed by invoking the provisions of section 40(a)(ia) of the I.T.Act. It is ordered accordingly.

3.6 In the result, ground 1 is allowed.

Write back of excess provision towards additional salary of Rs.10,00,000 (Ground 2)

4. The assessee had provided an amount of Rs.10 lakh towards additional salary and as it was only a provision, the same was disallowed by the A.O. and added back to the income of the assessee for assessment year 2009-2010. For the current assessment year the assessee did not make any claim as regards non-taxability of write back of provision of Rs.10 lakh, during the course of assessment proceedings before the A.O. However, the claim was made as an additional ground before the CIT(A). The CIT(A) rejected the claim of the assessee.

4.1 Aggrieved, the assessee has raised this issue before the Tribunal. The learned AR has relied on the remand report submitted by the A.O. (remand report dated 21.10.2019) (refer page 87 to 89 of the paper book submitted by the assessee).

4.2 The learned Departmental Representative supported the order of the CIT(A).

4.3 We have heard rival submissions and perused the material on record. The Assessing Officer in the remand

report has clearly stated that the claim of the assessee is correct. The relevant portion of the remand report reads as follows:-

> *"In the return of income for the A.Y. 2010-11, assessee has write back the provision and offered to tax. However, A.Y. 2009-10, then AO has disallowed those expenses as provision on salary and added back to income. Now, Assessee is claiming that as the provisions on salary were added to Total income in previous year assessment proceedings, the relief may be given for A.Y. 2010-11, so as to avoid double taxation. As per assessment records of A.Y.2009-10 & 2010-11, it was observed that assessee claim is correct."*

4.4 In view of the remand report, it is clear that for the current assessment the assessee had added back the provision on salary and offered the same as income. In the meanwhile the A.O. for assessment year 2008-2009 had disallowed the said expenses as provision and added back the same to income, which tantamount to double taxation of provision of additional salary. Since the A.O. in the remand report has clearly stated that the assessee's claim is correct, we direct the A.O. to delete a sum of Rs.10 lakh from the taxable income for the relevant assessment year, since the same had suffered tax in previous assessment year, namely, A.Y. 2009-2010. It is ordered accordingly.

4.5 In the result, ground 2 is allowed.

Allowability of education cess paid as a tax deductible expenditure (Ground 3)

5. The above ground relates to the claim of deduction of education cess including secondary and higher educational

cess as deduction while computing the total income.

5.1 We have heard rival submissions and perused the material on record. The Kolkata Bench of the Tribunal in the case of Kanoria Chemicals & Industries Ltd Vs. Addl. CIT (ITA No.2184/Kol/2018 dated 26.10.2021) had held that the education cess is an additional surcharge levied on income tax and hence it partakes the character of income tax. Accordingly it held that the education cess is not allowable as deduction. The Tribunal also noted the judgment rendered by Hon'ble Bombay High Court in the case of Sesagoa Ltd. 117 Taxmann.com 96 and by Hon'ble Rajasthan High Court in the case of Chambal Fertilisers & Chemicals Ltd. Vs. JCIT (ITA No.52/2018 dated 31.7.2018), wherein it was held that the education cess is allowable as deduction. However, the Tribunal observed that the judgment rendered by Hon'ble Supreme Court in the case of CIT Vs. K. Srinivasan (1972) 83 ITR 346 was not brought to the notice of the Hon'ble High Courts. The Tribunal had expressed the view that the decision rendered by Hon'ble Supreme Court in the case of K. Srinivasan (supra) shall prevail on this issue and accordingly held that the education cess is not allowable as deduction.

5.2 Following the above said decision of Kolkata bench of Tribunal in the case of Kanoria Chemicals & Industries Ltd (supra), we hold that payment of education cess including secondary and higher education cess is not allowable as deduction. Therefore, we reject ground 3 raised by the assessee.

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

Order pronounced on this 11th day of May, 2022.

Sd/-	Sd/-
(Laxmi Prasad Sahu)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore; Dated : 11th May, 2022.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT(A)-12, Bangalore.
4. The Pr.CIT-1, Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore