

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, MUMBAI

**BEFORE SHRI PRASHANT MAHARISHI, AM AND
MS. KAVITHA RAJAGOPAL, JM**

ITA No. 3140/Mum/2022
(Assessment Year: 2018-19)

ACIT-3(1)(1) Mumbai	Vs.	M/s. Axis Capital Limited Axis House, P. B. Marg, Mumbai-400 025
PAN/GIR No. AAACU 8367 M		
(Appellant)	:	(Respondent)
Assessee by	:	Shri Rajnikant V. Chaniyari
Revenue by	:	Shri Manoj Kumar Sinha
Date of Hearing	:	09.03.2023
Date of Pronouncement	:	07.06.2023

ORDER

Per Kavitha Rajagopal, J M:

This appeal has been filed by the Revenue, challenging the order of the learned Commissioner of Income Tax (Appeals) ('Id.CIT(A) for short), National Faceless Appeal Centre ('NFAC' for short) u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2018-19.

2. The Revenue has challenged the order of the Id. CIT(A) in allowing the assessee's additional claim of 'Educational Cess' and 'Secondary and Higher Education Cess' as deduction while computing income under the head 'profit and gains from business and profession' without considering the amendment of the Finance Bill, 2021 Explanation 3 inserted in section 40(a)(ii) of the Act deemed to be inserted w.e.f. 01.04.2005.

3. The brief facts are that the assessee company is engaged in the business of investment solutions in the areas of investment banking and institutional broking. The

assessee filed its return of income dated 29.09.2018 declaring total income under the normal provisions of the Act at Rs.2,14,94,52,810/- and intimation u/s. 143(1) of the Act dated 21.12.2019 was issued by CPC, determining the total demand of Rs.1,09,97,330/- by making various additions/disallowances.

4. The assessee was in appeal before the Id. CIT(A) against the said intimation. The assessee's case was selected for complete scrutiny assessment under CASS and the assessment order u/s. 143(3) of the Act dated 22.02.2021 was passed by the A.O. accepting the returned income filed by the assessee. It is observed that the A.O. while passing the assessment order has not considered the additional claim for educational cess filed by the assessee.

5. The assessee was in appeal before the Id. CIT(A) by way of additional claim otherwise than by filing of the revised return on this issue. The Id. CIT(A) allowed the claim of the assessee by relying on the CBDT Circular of 1967 and the decision of the Hon'ble Jurisdictional High Court in the case of *Sesa Goa Limited vs. JCIT* [2020] 17 taxmann.com (Bom), wherein it was held that educational cess and the secondary and higher education cess has to be allowed as deduction while computing business income.

6. The Revenue is in appeal before us, challenging the order of the Id. CIT(A) in allowing the additional claim of education cess and the secondary and higher education cess as allowable deduction while computing the income under the head 'profit and gains from business and profession'.

7. We have heard the rival submissions and perused the materials available on record. It is observed that the A.O. has disallowed Rs.2,67,13,182/- on account of

education cess during the impugned year, which was incurred by the assessee as an additional liability for education cess on dividend distribution tax (DDT). The assessee contends that it had paid TDS and advance tax along with DDT and had computed Rs.2,06,11,817/- towards education cess and Rs.61,01,365/- towards education cess on DDT aggregating to Rs.2,67,13,182/- as allowable deduction u/s. 37 r.w.s. 43B of the Act while computing the business income. The assessee had filed an additional claim for the impugned amount during the assessment proceeding specifying that its failure to claim deduction during the original return was not willful. The assessee relied on the decision of the Hon'ble Jurisdictional High Court in the case of *CIT vs. Pruthvi Brokers & Shareholders Pvt. Ltd.* [2012] 23 taxmann.com 23 (Bom), wherein it was held that the assessee was entitled to claim for deduction before the appellate authority even if the same was not claimed in the tax return or before the A.O. The assessee has also relied on the decision of the Hon'ble Jurisdictional High Court in the case of *Sesa Goa Ltd. v JCIT* [2020] 423 ITR 426 (Bom), wherein it was held that education cess is not in the nature of the tax and, hence, is an allowable expenditure while computing the business income without any limitation on account of provision of section 40(a)(ii) of the Act. The assessee has also relied on the CBDT Circular No. 91/58/66-ITJ(19) dated 18.05.1967 which is said to have clarified the word 'cess' was not included in the purview of section 40(a)(ii) of the Act and does not include 'any rate or tax levied'. The assessee has also relied on the decision Hon'ble Rajasthan High Court in the case of *Chambal Fertilizers and Chemicals Ltd. vs. JCIT* (in ITA No.52/2018 vide order dated 31.07.2018), wherein it was held that education cess is not a tax and, therefore, the same is an allowable expenditure. The assessee further contended that education cess with regard to dividend

and distribution tax was also an allowable deduction and had relied on the decision of the Tribunal in the case of *M/s. Sicpa India Ltd. vs. ACIT Range -8, Kolkata* (in ITA No. 704/Kol/2015 vide order dated 1304.2018) which has held that education cess on DDT and fridge benefit tax was an allowable deduction.

8. The Revenue, on the other hand, has controverted the said facts and has relied on the amendment vide Finance Act, 2022 which have specified that Education cess paid by the assessee would not be allowed as an expenditure u/s. 37 r.w.s. 40(a)(ii) of the Act. Further to this, the Hon'ble Apex Court has held in *Chambal Fertilizers and Chemicals Ltd.* (supra) held that amendment to section 40(a)(ii) vide Finance Act, 2022 was with retrospective effect from 01.04.2005. It is also observed that the Explanation 3 to section 40(a)(ii) of the Act has included 'cess' under the ambit of "tax". Hence, we find merit in the submission of the Revenue and thereby set aside the order of the Id. CIT(A).

9. In the result, the appeal filed by the Revenue is allowed.

Order pronounced in the open court on 07.06.2023.

Sd/-

(Prashant Maharishi)
Accountant Member

Sd/-

(Kavitha Rajagopal)
Judicial Member

Mumbai; Dated :

Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai