आयकर अपीलीय अधिकरण
मुंबई पीठ "ई", मुंबई पीठ
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री गगन गोयल, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
आअसं. 1256/मुं/ 2022 (नि.व.2017-18)
ITA NO. 1256/MUM/2022(A.Y. 2017-18)

Tech Mahindra Business Services Limited.
Ground Floor, Spectrum Towers,
Mindspace, Chincholi Bunder Link Road,
Malad West, Mumbai – 400 064.
PAN: AABCH-8136-L ..... अपीलार्थी / Appellant

बनाम Vs.
The Assistant Commissioner of Income Tax,
Circle – 13(3)(2),
Room No.229, 2nd Floor,
Aaykar Bhavan, MK Road,
Mumbai – 400 020. ..... प्रतिवादी / Respondent

अपीलार्थी द्वारा/ Appellant by	:	Shri J.D,Mistri, Sr. Advocate with Shri Harsh Kapadia, Advocate
प्रतिवादी द्वारा/ Respondent by	:	Ms. Richa Gulati, Sr.AR
सुनवाई की तिथि/ Date of hearing	:	28/04/2023
घोषणा की तिथि/ Date of pronouncement	:	24/07/2023

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [in short 'the CIT(A)'] dated 30/03/2022, for the Assessment Year 2017-18.

2. The assessee in appeal has raised solitary ground assailing disallowance made u/s. 14A of Income Tax Act, 1961 (in short 'the Act') r.w. Rule 8D of the Income Tax Rules, 1962 (in short 'the Rules') amounting to Rs.80,08,567/-. The assessee vide application dated 13/09/2022 has raised an additional ground

for allowing education cess including secondary and higher education cess paid on Income Tax. The additional ground raised by the assessee reads as under:

> *"1. On facts and circumstances of the case and in law, the Appellant prays that the Education cess, including secondary and higher education cess paid on income-tax for the year should be allowed as deductible expense while computing the taxable income of the Appellant for the year under consideration."*

3. Shri J.D,Mistri, Sr. Advocate appearing on behalf of the assessee submitted that the additional ground raised in the appeal is purely legal. The facts necessary for adjudication of the said ground are already on record and no fresh documentary evidence is required to be furnished for adjudication of the said ground. The ld.Counsel for the assessee placed reliance on various decisions including the decision rendered in the case of Jute Corporation of India Ltd., 187 ITR 688(SC), New India Industries Ltd., 207 ITR 1010 (Guj) and Contoller of Estate Duty vs. R. Brahadeeswaran, 163 ITR 680 (Mad) for admission of additional ground.

4. Ms. Richa Gulati representing the Department vehemently opposed admission of additional ground at this belated stage.

5. We have heard the submissions made by rival sides on the admission of additional ground. We find that the additional ground raised by the assessee is legal in nature and no fresh evidence is required to be adduced for adjudication of the said ground. In light of the decision rendered by Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. vs. CIT, 229 ITR 383(SC), additional ground raised by the assessee is admitted for adjudication.

6. The ld.Counsel for the assessee in respect of ground assailing disallowance u/s. 14A r.w.r. 8D of the Act submitted that during the period

relevant to assessment year under appeal, the assessee has earned exempt income of Rs.5.20 crores. The assessee made suo-motu disallowance of Rs.7,43,248/- for earning income exempt from tax. The suo-motu disallowance made by the assessee has two segments: (i) Direct cost Rs.5,69,000/- and;(ii) Overhead cost Rs.1,74,248/-. The direct cost is in respect of salaries paid to the employees involved in decision making for investment and managing the shares. Overhead cost includes travelling and conveyance expenses, printing and stationary, courier and communication expenses and facility maintenance charge. No borrowed funds were utilized for making investments, hence, no expenditure towards interest was made. The ld.Counsel for the assessee pointed that investments are in nature of mutual funds. The total investments in mutual funds is Rs.1992 millions, whereas own funds of the assessee comprising of share capital and reserves and surplus are to the tune of Rs.3809 million.

7. During scrutiny assessment proceedings a query was raised by the Assessing Officer inter-alia on the issue of expenses debited to P&L Account for earning exempt income. The assessee furnished a detailed report from the Chartered Accountants giving the particulars of investments, total investments, own fund position, the details of employees involved in fund management and investment, the working of direct cost and overhead cost including basis

of apportionment of the expenditure. The Assessing Officer without considering assessee's submissions, invoked the provisions of rule 8D. At the outset the Assessing Officer observed that the disallowance of Rs.7,43,248/- made by assessee u/s. 14A of the Act is on lower side as against investment of Rs.199.20 crores and the exempt income earned during the period is Rs.5.20 crores. The Assessing Officer was swayed by the quantum of exempt income

earned and did not appreciate the basis of allocation of direct cost and overhead cost. The ld.Counsel for the assessee vehemently asserted that the Assessing Officer cannot recompute disallowance u/s. 14A r.w.r. 8D merely for the reason that the assessee has not computed disallowance in accordance the Rule 8D. In support of his submissions the ld.Counsel for the assessee placed reliance on the following decisions:

(i) HT Media Ltd. vs. DCIT, 85 taxmann.com 113 (Del).

(ii) Ashok Kirthanlal Shah vs. Addl. CIT,132 taxmann.com 185 (Mum-Trib)

(iii) Smartchem Technologies Ltd. vs. ACIT, 85 taxmann.com 43 (Mum-Trib)

(iv) DCIT vs. NSE Clearing Ltd. in ITA NO.6727/Mum/2019 A.Y. 2011-12 decided on 03/01/2022.

8. The Ld. Departmental Representative vehemently defended the impugned order in upholding disallowance made by Assessing Officer u/s. 14A r.w.r. 8D. The ld. Departmental Representative submitted that 40% to 50% funds of the assessee are utilized towards investments. The assessee has total funds of Rs.380.90 crores, out of which Rs.199.20 crores are utilized towards investment. The assessee has 22 employees working in the Finance Department, out of which only three employees are stated to be directly associated with investment activities and two other employees are authorized signatories at managerial level, It is highly improbable that the assessee is utilizing only services of three commerce graduates for managing investment portfolio of Rs.200.00 crores, approximately. As per assessee's own submissions the employees are only utilizing thirty two minutes per day in managing the investment activities of the assessee and no senior official of the company is involved in decision making process. The assessee was given sufficient opportunity to explain the method of decision making for the

purpose of investment, however, the assessee failed to furnish requisite information. The ld. Departmental Representative in support of his submissions placed reliance on the decision in the case of Indiabulls Finance Services Ltd. vs. DCIT, 76 taxmann.com 268(Del).

9. Rebutting the contentions raised by Revenue, the ld.Counsel for the assessee placed on record relevant extracts of the manual of the assessee company relating to banking and treasury operations. He pointed that as a matter of policy excess funds of the assessee are utilized for investment in mutual funds (debt funds) only. He also placed on record a copy of Board Resolution dated 28/10/2014, whereby the Board of Directors approved investment of surplus fund in gilt/income/short term/liquidity/debt units of any mutual funds and Government securities. The ld.Counsel for the assessee asserted that the investments are made only in mutual funds in the nature of debt funds as approved by the Board of Directors. Thus, for the purpose of selecting mutual funds in the course of day today investments there is no involvement of any senior managerial personnel. The investments are made in accordance with the decision of the Board.

10. We have heard rival submissions and have examined the orders of authorities below. The assessee has assailed the findings of CIT(A) in upholding disallowance u/s. 14A r.w.r. 8D of the Act. Undisputedly, the assessee has earned dividend income to the tune of Rs.5.20 crores during F.Y. 2016-17. The assessee has made suo-motu disallowance of Rs.7,43,248/- for earning income exempt from tax. The amount of disallowance has been calculated by the assessee in respect of direct cost i.e. cost toward salaries paid to employees Rs.5,69,000/- and overhead cost which includes travelling, printing and stationary, courier and communications expenses and facility maintenance

expenses Rs.1,74,248/-. During the assessment proceedings, the Assessing Officer raised a query asking the assessee to explain calculation of disallowance made u/s. 14A of the Act. The assessee furnished details viz. direct expenditure and indirect expenditure with reasoning and method of allocation of the same for earning exempt income. The Assessing Officer rejected the working of the assessee and proceeded to invoke rule 8D for computing disallowance u/s. 14A of the Act. The Assessing Officer worked disallowance u/r.8D(2)(iii) Rs.87,51,815/-, i.e. after reducing suo-motu disallowance made by assessee, a further disallowance of Rs.80,08,567/- was made. The contention of the assessee is that the Assessing Officer while rejecting assessee's working of apportionment of expenditure, has not pointed any error in theory of apportionment adopted by the assessee.

10.1 A perusal of the assessment order shows that the Assessing Officer in para 5.3 onwards of the order has expressed his dissatisfaction regarding assessee's suo-motu working of disallowance. Before we proceed further it would be relevant to refer to the opening lines of para 5.3 from the assessment order. The same are reproduced herein below:

> *"5.3. Since, the disallowance of Rs.7,43,240/- u/s. 14A of the Act against the investment of Rs.199.20 crore and exempt income Rs.5.2 Cr. was considered as too lower side ……"*

A perusal of the above would show that the trigger to reject assessee's suo-motu disallowance is the quantum of investment and exempt income vis-à-vis suo-motu disallowance made by the assessee. The rest of the discussion in the assessment order flows to justify the rejection of working made by the assessee. It is true that there is no prescribed method for Assessing Officer to

record his (dis) satisfaction. The Assessing Officer is expected to record his dissatisfaction objectively. Once the Assessing Officer records his (dis) satisfaction over the correctness of the claim of the assessee, he has to determine the amount of expenditure incurred in relation to earning of exempt income in accordance with the provisions of Rule -8D. The assessee in reply to notice u/s. 142(1) of the Act dated 16/08/2019 has furnished the working of the suo-motu disallowance. The assessee has worked out suo-motu disallowance u/s. 14A of the Act on the theory of apportionment. The primary reason for rejection of assessee's working by Assessing Officer is that the total number of employees (22) vis-à-vis the number of employees engaged in managing the investment and the time allocated to the employees for managing the investment activities is not justified. The chart given by the assessee for allocation of employees cost is as under:

Sr.No.	*Employee designation*	*Annual Emoluments (In Rs.)*	*% attributable to investment activity*	*Attributed amount (In Rs.)*
1	*Authorized Signatory*	*50,00,000*	*1%*	*50,000*
2	*Manager*	*14,40,000*	*10%*	*1,44,000*
3	*Asst.Manager*	*9,00,000*	*20%*	*1,80,000*
4	*Executive*	*3,00,000*	*50%*	*1,50,000*
5	*Office Assistant*	*90,000*	*50%*	*45,000*
			TOTAL	*5,69,000*

The assessee has also given basis of allocation of overhead cost which includes travelling, printing and stationary, courier and communication expenses and disallowed maintenance expenses. Though quantum of investment is quite enormous, we find that the assessee has substantially narrowed down selection of funds where investments are to be made. The assessee is making investments only in gilt/short term/liquid/debt units, mutual funds and Government securities. The ld.Counsel for the assessee referring to page 13

of the paper book has pointed that investments are made in limited segments of mutual funds. From perusal of investments we find that the spectrum of portfolio of assessee's investment is not very broad. Investments have been made during the relevant period only in nine mutual funds. The assessee's method of apportionment of expenditure is scientific and based on reasons and logic. We observe that in principle the Assessing Officer has not objected to the theory of apportionment. The primary objection of the Assessing Officer is assignment of weights / percentage of allocation of various factors. It is pertinent to mention here that in Maxopp Investment Ltd. vs. CIT, 402 ITR 640 (SC) the Hon'ble Apex Court approving the principle of apportionment of expenses, held that the said principle is engrained in section 14A of the Act . The ld.Counsel for the assessee has pointed that the Assessing Officer has made specific reference to overhead expenditure viz. travelling expenses -Rs.2.94 cores. He pointed that out of total travel expenditure domestic travel is only to the extent of Rs.92.00 lacs, the remaining expenditure is towards international travel. In any case for the purpose of domestic investment only domestic travel expenditure should be taken into consideration. We find merit in the submissions of the assessee. Taking into consideration entire facts, we are of considered view that disallowance made by the Assessing Officer on the basis of apportionment of direct and overhead cost is justified, hence, no further disallowance u/r.8D is warranted.

10.2 In the result, the solitary ground raised in appeal by the assessee is allowed.

11. In respect of additional ground of appeal relating to allowability of education cess while computing taxable income, the ld.Counsel for the

assessee submits that the assessee had raised the ground of education cess for the first time before the CIT(A). The CIT(A) refused to admit additional ground on the pretext that the same does not arise from the assessment order. The CIT(A) has erred in not following the decision of Hon'ble Jurisdictional High Court in the case of Sesa Goa Ltd. Vs. JCIT, 117 taxmann.com 96(Bom).

12. The ld.Counsel for the assessee made two fold submissions on the issue. The first submission of ld.Counsel for the assessee is that provisions of section 40(a)(ii) of the Act were amended by the Finance Act, 2022 by way of insertion of Explanation –3. The said Explanation has been made effective retrospectively from 01/04/2005. He pointed that by way of insertion of Explanation – no part of the substantive law has changed. Further the said amendment can only be effective prospectively and not retrospectively.

13. The second plank of argument by the ld. Counsel for the assessee is that the Legislature by way of amendment cannot retrospectively overturn a judicial pronouncement and declare it to be a nullity. The ld.Counsel for the assessee submitted that the expression used in section 40(a)(ii) of the Act is “any rate or tax levied”. There is no reference to “cess” in section 40(a)(ii) of the Act. To read cess into the words “any rate or tax levied” would amount to reading something in the text of the provisions which is not found in that provision. He then referred to the Income Tax Bill 1961 vide which sub-clause (ii) was inserted. He pointed that in the original text of sub-clause (ii) the word “cess” was mentioned , however the Select Committee of the Parliament decided to omit the word “cess” deliberately, hence, no question of reintroducing cess by way of Explanation-3 that to when there is no mention of the same in the substantive provision in clause (ii). He further pointed that

CBDT in Circular dated 18/05/1967 emphatically accepts that ' cess' is not tax. Hence, education cess is an allowable deduction. To support his submissions he placed reliance on the following decisions:

(i) Sesa Goa vs. JCIT (supra)

(ii) Chambal Fertilizers & Chemicals Ltd. vs. JCIT , 107 taxmann.com 484 (Raj)

He further submitted that various Benches of the Tribunal in umpteen cases including assessee's own case in ITA NO.1326/Mum/2014 for Assessment Year 2009-10 decided on 15/09/2021 and in ITA NO.766/Mum/2016 for Assessment Year 2011-12 decided on 30/06/2021 allowed deduction in respect of education cess.

14. The ld.Counsel for the assessee vehemently submitted that a perusal of Explanatory Memorandum to the Finance Bill, 2022 would show that one of the reason behind insertion of Explanation -3 to section 40Ia0(ii) of the Act is that the judgment rendered in the case of Sesa Goa Ltd. (supra) and Chambal Fertilizers& Chemicals Ltd.(supra) are per in-curium. Such a question does not lie within the scope and ambit of the Legislature and hence it is against the Legislative intent. A judicial pronouncement is always binding except where the entire basis of that judgment is removed by the Legislature. In that case only the Amendment could apply retrospectively. It is only when the Legislature retrospectively removes the substratum of a judgment to make the decision ineffective, the power of the sovereign legislature to legislate within its field, both prospectively and retrospectively, cannot be questioned. But where there is mere validation without the defect being legislatively removed, such Legislative action cannot apply retrospectively. He referred to the decision in the case of State of Karnataka vs. Karnataka Pawn Brokers

Association, 91 taxmann.com 228 (SC) to contend that legislature cannot by way of introducing amendment overturn a judicial pronouncement and declare it to be wrong or a nullity. He further referred to the decision of Hon'ble Supreme Court of India in the case of Baharul Islam and Others Vs. Indian Medical Association in SLP No.32592-93 of 2015 decided on 24/01/2023 and the decision of Hon'ble Bombay High Court in the case Rohan Lobo vs. State of Goa & Others in bunch of Writ Petitions, lead case being Writ Petition No.23 of 2021 decided on 20/04/2023.

15. Per contra, the ld. Departmental Representative vehemently countered the arguments raised by the ld.Counsel for the assessee on additional ground. She submitted that a perusal of para-9 of the Memorandum explaining amendment to section 40(a)(ii) of the Act would show that the interpretation of the provisions by two Hon'ble High Courts in the case of Sesa Goa Ltd.(supra) and Chambal Fertilizers & Chemicals Ltd. (supra) were contrary to the intention of Legislature and were not in line with the judgment rendered by Hon'ble Supreme Court in the case of CIT vs. K. Srinivasan, 83 ITR 346. Hence, in order to make the intention of legislature clear and to make it free from any misinterpretation, Explanation – 3 was inserted retrospectively w.e.f. 01/04/2005. She further pointed that the decision of Hon'ble Rajasthan High Court in the case of Chambal Fertilizers & Chemicals Ltd.(supra) has been overturned by Hon'ble Supreme Court of India in 147 taxamnn.com 285. Thereafter, the Tribunal in various decisions including the following decisions has accepted that education cess cannot be allowed as deduction.

1. Cypress Semiconductor Technology India (P) Ltd., Vs. DCIT
   142 taxmann.com 480 (Bang-Trib)
2. CC Engineers Pvt. Ltd. vs. ITO, ITA No.698/PUN/2021, A.Y.2018-19

decided on 07/11/2022

3. DCIT vs. National Bank for Agriculture & Rural Development vs. Addl.CIT, ITA No.3650/Mum/2016, A.Y.2010-11 decided on 24/08/2022

16. Without prejudice to the primary arguments ld. Departmental Representative submitted that vires of the amendment made by Finance Act, 2022 by way of insertion of Explanation -3 to Section 40(a)(ii) of the Act can only be challenged before the Constitutional court. The Tribunal lacks jurisdiction in entertaining any issue which challenges the validity of any provision of the Act or amendment made thereto by Legislature.

17. Controverting the arguments made on behalf of the Department, the ld. Counsel for the assessee asserted that in so far as the decision by Hon'ble Apex Court in the case of Chambal Fertilizers & Chemicals Ltd (supra) is concerned, the same was made on the basis of concession given by the Counsel of the respondent/assessee. He placed reliance on the decision in the case of Uptron India Ltd. vs. Shammi Bhan & Others (1998) 6 SCC 538 to contend that wrong concession on a question of law made by Counsel is not binding and such concession cannot constitute a binding precedent. For the similar proposition he also placed reliance on the decision in the case of Concord of India Insurance Co. Ltd. vs. Smt. Nirmala Devi, 118 ITR 507.

18. We have heard exhaustive arguments made by rival sides with respect to additional ground raised in the appeal. The Finance Act, 2022 has inserted an Explanation -3 to section 40(a)(ii) of the Act . The relevant provisions of section 40(a)(ii) after amendment reads as under:

> ***"(ii) any sum paid on account of any 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.***

Explanation 1.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes and shall be deemed always to have included any sum eligible for relief of tax under section 90 or, as the case may be, deduction from the Indian income-tax payable under section 91.

Explanation 2.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes any sum eligible for relief of tax under section 90A;

Explanation 3. For the removal of doubts, it is hereby clarified that for the purposes of this sub-clause, the term "tax" shall include and shall be deemed to have always included any surcharge or cess, by whatever name called, on such tax;"

The intent behind insertion of Explanation -3 can be seen from explanatory notes to the Finance Bill, 2022. The relevant extract of the same is reproduced herein below:

5. Rajasthan High Court has also relied upon the circular dated 18.05.1967 issued by CBDT, which is being reproduced as under:

"Interpretation of provision of s.40(a)(ii) of IT Act, 1961-Clarification regarding 18/05/1967 BUSINESS EXPENDITURE 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 s.10(4) of the old Act and s.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:

"(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 year 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."

6. In the above referred Circular issued by CBDT, 'Cess' is to be allowed under sub-clause (ii) of clause (a) of section 40 of the Act. However, it is to be noted that 'Cess' is imposed not only by the Central Government through Finance Act for a financial year, but also by various State Governments. It is pertinent to mention that in the above referred Circular of CBDT, there is no reference to the 'Cess' imposed by the Central Government through Finance Act for a particular

year. This CBDT circular needs to be seen from the perspective that "Education Cess" imposed by Finance Act 2004 and subsequent Acts and then designated as "Education and Health Cess" are actually tax in the form of additional surcharge, as stated clearly in each of the relevant Finance Act imposing such "Cess". It is only called "Cess" since they were imposed for a particular purpose of fulfilling the commitment of the Government to provide and finance quality health services and universalized quality basic education and secondary and higher education.

7. This circular was in reference to "Cess" imposed by State Government which is actually of the nature of "Cess" and not of the nature of "Additional Surcharge" being termed as "Cess" in the relevant Finance Act. When an additional surcharge is imposed by the Central Government and it is named as "Cess", then its allowability needs to be examined whether an additional surcharge is allowed to be a deduction or not. Hon'ble Supreme Court in the case of K Srinivasan has held that "surcharge" and "additional surcharge" are tax. Hence, the additional surcharge named as "Cess"and imposed by the Central Government through the Finance Act is nothing but a tax and hence, needs to be disallowed under sub-clause (ii) of clause (a) of section 40 of the Act. The relevant part of Hon'ble Supreme Court judgment is as under:

> *7. The above legislative history of the Finance Acts, as also the practice, would appear to indicate that the term "Income tax" as employed in Section 2 includes surcharge as also the special and the additional surcharge whenever provided which are also surcharges within the meaning of Article 271 of the Constitution. The phraseology employed in the Finance Acts of 1940 and 1941 showed that only the rates of income tax and supertax were to be increased by a surcharge for the purpose of the Central Government. In the Finance Act of 1958 the language used showed that income tax which was to be charged was to be increased by a surcharge for the purpose of the Union. The word "surcharge" has thus been used to either increase the rates of income tax and super tax or to increase these taxes. The scheme of the Finance Act of 1971 appears to leave no room for doubt that the term Income tax" as used in Section 2 includes surcharge."*

8. Since the judgments of Rajasthan High Court and Bombay High Court did not consider the judgment of Hon'ble Supreme Court discussed above, the judgments of these two High Courts appear to be per incuriam. It may be mentioned that in paragraph 578 at page 297 of Halsbury's Laws of England, Fourth Edition, the rule of per incuriam is stated as follows:

> *"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must be decided which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force."*

9. From the above discussion it may be seen that the interpretations of two High courts and various ITATs are against the intention of legislature and not in

line with the judgment of Hon'ble Supreme Court. Hence, in order to make the intention of the legislation clear and to make it free from any misinterpretation, it is proposed to include an Explanation retrospectively in the Act itself to clarify that for the purposes of this sub-clause, the term "tax" includes and shall be deemed to have always included any surcharge or cess, by whatever name called, on such tax. Amendment is made retrospectively to make clear the position irrespective of the circular of the CBDT.

10. This amendment will take effect retrospectively from 1st April, 2005 and will accordingly apply in relation to the assessment year 2005-06 and subsequent assessment years."

19. Thereafter, the Hon'ble Apex Court in SLP filed by the Department in the case of Chambal Fertilizers Ltd. (supra) reversed the decision of Hon'ble Rajasthan High Court and allowed the appeal of the Department. The relevant extract of the order by Hon'ble Apex Court reads as under:

"Learned senior advocate appearing on behalf of the respondent-assessee states that in view of the amendment vide the Finance Act, 2022 with retrospective effect from 01.04.2005 to Section 40(a) (ii) of the Income Tax Act, 1961, the present appeal has to be allowed.

In view of the statement made, we direct that the Education cess paid by the respondent-assessee would not be allowed as an expenditure under Section 37 read with 40 (a) (ii) of the Income Tax Act, 1961.

Learned senior advocate appearing on behalf of the respondent- assessee states that they have also paid the applicable tax on the disallowance .

Recording the above, the appeal is allowed in the aforesaid terms, without any order as to costs."

20. The ld. Counsel for the assessee has vehemently argued that by way of retrospective amendment the Legislature cannot overturn or set-aside the judgment when the substantive provisions of the section remain unchanged. He submitted that the retrospective amend by the legislature is an attempt to nullify the writ of mandamus issued by the Court, this is a case of judicial overreach, hence, cannot be allowed. Such retrospective amendments are illegal and invalid. To support this argument the ld. Counsel for the assessee has placed reliance on the decision rendered in the case of Karnataka Pawn

Brokers Association(supra) and also on the decision rendered in the case of Baharul Islam (supra) and Rohan Lobo (supra).

21. The arguments raised by the ld. Counsel for the assessee appear to be quite attractive but we are unable to accept the same. To challenge the vires of any amendment made by the Legislature, the Tribunal is not the forum. The Tribunal is a creature of a statute and has defined limited jurisdiction.. The Tribunal is empowered to adjudicate the issues arising out of dispute in respect of appeals arising from appealable orders specified u/s. 253 of the Act and cannot exercise its jurisdiction to test vires of amendments made by legislature to the statute, out which it has been created.

22. As regards retrospective applicability of the amendment, we find that the Hon'ble Apex Court while allowing the appeal of Revenue accepted the statement of Counsel for the assessee that amendment vide Finance Act, 2022 is effective retrospectively w.e.f. 01/04/2005. Further, we find that the Co-ordinate Bench in the case of National Bank for Agriculture & Rural Development (supra) has rejected the assessee's claim of deduction of Education Cess holding amendment by Finance Act, 2022 as retrospective. Similar view has been taken in the case of CC Engineers Pvt. Ltd. (supra). **.** Hence, we are unable to accept the arguments advanced by the ld. Counsel for the assessee, qua additional ground of appeal. Consequently, the additional ground raised in appeal is dismissed.

23. In the result, appeal by the assessee is partly allowed.

Order pronounced in the open court on Monday the 24th day of July, 2023.

Sd/-	Sd/-
(GAGAN GOYAL)	(VIKAS AWASTHY)
लेखाकार सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 24/07/2023
Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT
4.. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar), ITAT, Mumbai

	Details	Date	Initials	Designation
1	Draft dictated on			Sr.PS/PS
2	Draft Placed before author			Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM