INFORMATION MEMORANDUM :

In a recent ruling, the Bombay High Court held that Education Cess is a deductible expenses and the claim made by the assessee through a written letter before the AO should have been considered by the appellate authorities instead of refusing the same on mere technicalities.

Sesa Goa Limited v. JCIT

ITA no. 17 and 18/2013 (Bom. HC at Goa), Order dated 28th February, 2020

Section 40(a)(ii) does not include the word "cess" and hence, the claim of expense cannot be disallowed

Facts of the case :

The assessee filed its return of income without claiming deduction on account of "education cess" and "higher and secondary education cess" ("**cess**"). It was only for the first time in the assessment proceedings, the assessee claimed deduction before the AO through a letter. The AO rejected the said claim stating that as per section 40(a)(ii) the said cess is not eligible for a deduction. He also rejected the claim on the ground that the said claim was not made in the return of income nor the said return was validly revised to include the claim of cess as expense. The lower courts rejected the claim of the assessee.

Question before High Court :

(A) Whether the expression "any rate or tax levied" as it appears in section 40(a)(ii) includes "cess" so as to disentitle the assessee to claim the said Cess as an expenditure?

(B) Whether a claim made by assessee through a letter without including it in the return of income was admissible?

Issue (A) : Allowability of cess as a deductible expenses :

Assessee's submission : The expression "any rate or tax levied" in section 40(a)(ii) disallowing the sums as expenditure does not include "cess". Therefore, the amounts paid towards "cess" are eligible to be deducted in computing the income chargeable under the head "Profits of gains from business or profession".

Revenue's contention : "Cess" is included in the scope and import of the section 40(a)(ii) especially because it's apart of "tax". Consequently, the amount paid towards "cess" is not liable for deduction while computing the income chargeable under the head "Profits of gains from business or profession".

High Court verdict :

The court held that the provision is silent as regards the word "cess" and hence the said word cannot be read into the provision. Accordingly, cess will be allowed as an expenditure. The Court relied upon the following decisions to lay down the rule:

(i) *New Shorrock Spinning and Manufacturing Co. Ltd. v. Raval*[1] – if the language employed gives the rule in words asufficient clarity and precision, nothing more requires to be done. No words can be added.

(ii) *CIT v. Motors & General Stores*[2] – it is well established that no tax can be imposed on the subject without words in the Act clearly showing an intention to lay a burden on him.

(iii) *CIT v. Radhe Developers*[3] - one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied, into the provisions which has not been provided by the legislature.

(iv) *Goodyear v. State of Haryana*[4] - No tax can be imposed by inference or analogy. It is also not permissible to construe a taxing statute by making assumptions and presumptions.

(v) *AGS Tiber v. CIT*[5] : The provisions of deduction, exemption or relief should be so construed as to effectuate the object of the legislature and not to defeat it.

[1] (1959) 37 ITR 41 (Bom.)
[2] (1967) 66 ITR 692 (SC)
[3] (2012) 341 ITR 403 (Guj)
[4] (1991) 188 ITR 402 (SC)
[5] (1998) 233 ITR 207 (Mad)

The High Court after analysing the above rules of interpretation stated that since section 40(a)(ii) does not include the term "cess" as a disallowable item there can be no disallowance. The High Court further held that "Cess" may be collected as a part of income tax, but that does not render such "cess", ineligible for deduction u/s. 40(a)(ii). The mode of collection, is really not determinative in such matters. The High Court further relied upon the case of Privy Council in the case of *CIT v. Gurupada Dutta*[6] and held that where the cess was not 'assessed on the basis of profits' it was allowable as a business expense. The High Court further cited the decision of Supreme Court in *Jaipuria Samla Amalgamated Collieries Ltd. v. CIT*[7] to hold that the expression 'profits or gains of any business or profession' has reference only to profits and gains as determined in accordance with Section 29 of this Act and that any rate or tax levied upon profits calculated in a manner other than that provided by that section could not be disallowed under this sub-clause.

The High Court further relied upon the CBDT *Circular no. F. No. 91/58/66-ITJ(19) dated 18/05/1997* which states that the word "cess" has been omitted from section 40(a)(ii). This means that only taxes paid are to be disallowed. Thus, the legislature did not intent to prevent the deduction of amounts paid by the assessee towards "cess" (Chambal Fertilizers and Chemicals Ltd. v. CIT[8]).

Issue (B) : Fresh Claim in assessment :

Revenue's contention : The assessee did not claim the deduction on account of "cess" either in the original return of income or revised return. The AO relied upon the decision in the case of Goetz (India) Ltd. CIT[9] and stated that he had no power or jurisdiction to grant such a deduction to the assessee.

Assessee's submission : The claim was made through a letter which was filed before the AO during the course of assessment proceedings.

High Court verdict :

The High Court relied upon the decision of Bombay High Court in the case of *Ahmedabad Electricity Co. Ltd. v. CIT*[10] to lay down the proposition that the appellate authorities have very wide powers while

[6] (1946) 14 ITR 100 (PC)
[7] (1971) 82 ITR 580 (SC)
[8] ITA no. 52/2018 (Raj. HC), order dt. 31/07/2018
[9] (2006) 204 ITR 323 (SC)
[10] (1993) 199 ITR 351 (Bom)

considering an appeal as it may confirm, reduce, enhance or annul the assessment of remade the case to the AO. Hence, if such claim is not allowed by the AO, then the appellate authorities are enabled to allow such claims. The decision of *Goetze India Ltd. (supra)* as relied by Respondent was not applicable to appellate authorities.

The High Court further relied upon the decision of Bombay High Court in the case of *CIT v. Pruthvi Brokers & Shareholders Pvt. Ltd.*[11] wherein additional claim was allowed on the ground that the appellate authorities under the IT Act has sufficient powers to permit the deduction which was not made in original return of income. Accordingly, the High Court held that the claim made by the assessee through a written letter before the AO should have been considered by the appellate authorities instead of refusing the same on mere technicalities.

Acelegal Analysis :

The Courts have time and again gravitated towards the taxing of real income. It is a trite law that the state cannot claim unjust enrichment on technical grounds. Even if an assessee wrongly does not claim an expense which he is otherwise entitled to then the AO is duty bound to grant the said claim suo moto. The purpose of an assessment proceeding is to correctly compute the taxable income of an assessee. The department should not take advantage of assessee's mistake or ignorance and deny a benefit which is rightfully due to him under the law. There cannot be an estoppel against the law.

The Court has reiterated the rule of literal construction. The Court laid down that we cannot add to the provision what is not provided for merely on the ground of intendment. The courts cannot provide for causus omissus. Hence, if the words cess were not included in the provision for disallowance no such disallowance be read into it.

Key Principles :

1. The provisions of section 40(a)(ii) is silent as regard the word "cess" and hence, it is a deductible expense.

2. Appellate authorities have wide powers while considering an appeal and hence, they can consider the fresh claim made by the assessee.

[11] (2012) 349 ITR 336 (Bom)

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