*IN THE INCOME TAX APPELLATE TRIBUNAL*
*BENCH "B" KOLKATA*

**Before Shri Sanjay Garg, Judicial Member** and
**Dr. M.L.Meena, Accountant Member**

| आयकर अपील सं.य/<br>ITA No. 2184/Kol/2018<br>Assessment Year:2012-13 |
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| M/s. Kanoria Chemicals & Industries Ltd<br>C/o Salapuria Jajodia & Co. 7 Chittaranjan Avenue, Kolkata-72.<br>PAN: AABCK1291K | बनाम /<br>**V/s.** | Addl. CIT, Range-10, Kolkata<br>P-7 Chowringhee Square, Kolkata-700 069. |
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| अपीलार्थी /Appellant | .. | प्रत्यर्थी /Respondent |

| आयकर अपील सं.य/<br>ITA No. 2439/Kol/2018<br>Assessment Year:2012-13 |
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| DCIT, Circle-10<br>P-7 Chowringhee Square, Kolkata-700 069, 3rd Floor. | बनाम /<br>**V/s.** | M/s. Kanoria Chemicals & Industries Limited, Park Plaza, 7th Fl., 71 Park Street, Kolkata-700 016. |
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| अपीलार्थी /Appellant | .. | प्रत्यर्थी /Respondent |

**Hearing through video Conferencing**

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| अपीलार्थी की ओर से/By Appellant | Shri S. Jhajharia, AR |
| प्रत्यर्थी की ओर से/By Respondent | Shri Manish Kanojia, CIT, DR |
| सुनवाई की तारीख/Date of Hearing | 02-08-2021 |
| घोषणा की तारीख/Date of Pronouncement | 26-10-2021 |

**आदेश /O R D E R**

**Per Bench :**

The captioned are cross appeals one by the department and other by the assessee against the order dated 06-08-2018 of the Commissioner of Income Tax (Appeals)-4, Kolkata [ hereinafter referred to as 'CIT(A).

2. First we take up the department's appeal-ITA No. 2439/Kol/2018 for the A.Y 2012-13.

**ITA No. 2439/Kol/2018 for the A.Y 2012-13**.

3. In this appeal the department has taken following grounds of appeal:-

*1] That on the fact and circumstances of the case, the Ld. CIT(A)-4, Kolkata erred in deleting the disallowance computed under Rule 8D(2)(ii). That with regard to disallowance determined under Rule 8D(2)(iii), the Ld.CIT(A)-4 was not correct in restricting the disallowance to such exempt income.*

*2] That on the facts and circumstances of the case, the Ld.CIT(A)-4, Kolkata erred in holding that Rs.6,lS,27,170/-, being payment of premium on redemption of FCCB and claimed by the appellant is allowable expenses subject to disallowance u/s 43A of the Act, whereas FCCB issue proceeds were utilized towards funding of capital expenditure and related issue expenses and it was also observed that no such provision had been made in the Profit and Loss Accounts.*

*3] That on the facts and circumstances of the case, the Ld.CIT(A)-4, Kolkata erred in holding that the sum of Rs.S9,91,093/- from Renukoot unit claimed as bad debts written off may be taken into consideration in calculation of net worth of Renukoot unit when the unit was already transferred through slump sale.*

*4] That the appellant craves to add, delete or modify any of the grounds of appeal before or at the time of hearing.*

**Ground no. 1** :

4. The department through ground no. 1 has contested the action of the Ld. CIT(A) in deleting the disallowance made by the Learned Assessing Officer ( in short, the Ld. AO) u/s. 14A of the Income-tax Act, 1961 (hereinafter referred to as the 'Act) read with Rule 8D of the Income-tax Rules, 1962 ( in short, the 'Rules') on account of

expenditure incurred to earn tax exempt income. The Ld. AO made a disallowance of Rs. 4,00,13,918/- u/s. 14A of the Act read with Rule 8D(2)(ii) & (iii) of the I.T Rules calculating the disallowance as per formula prescribed under the aforesaid Rules. However, the Ld. CIT(A) deleted the disallowance under Rule 8D(2)(ii) made out of interest expenditure observing that the loan taken by the assessee was for specific purposes and further that the assessee had sufficient own funds in the shape of share capital and surplus to make the investments. He, therefore, relied on the decision of the Hon'ble Jurisdictional Calcutta High Court in the case of "CIT Vs. REI Agro Industries Ltd" in G.A of 2013/ITAT 161 of 2013 dt. 23rd December, 2013.

The Learned Departmental Representative ( in short, the Ld. DR) could not point out any error in the above findings of the Ld. CIT(A).

5. So far as the disallowance made under Rule 8D(2)(iii) was concerned, the Ld. CIT(A) relying on the decision of the Hon'ble Calcutta High Court in the case of 'CIT Vs. REI Agro' (supra) and the Hon'ble Delhi High Court in the case of "ACB India Ltd Vs. ACIT" reported in 374 ITR 108(Del) directed the Ld. AO to consider only those investments upon which exempt income had been earned by the assessee. The Ld. DR could not point out any contrary decision on this issue. In view of this, this ground of appeal of the revenue is dismissed.

**Ground no. 2:**

6. The department through ground no. 2 has contested the action of the Ld. CIT(A) in deleting the disallowance of Rs. 61527,170/- made by the Ld.AO being the payment of premium on redemption of FCCB( Foreign Currency Convertible Bonds).

7. The brief facts relevant to the issue are that the assessee issued foreign currency convertible bonds and paid premium on the same on their maturity. The Ld. AO, however, disallowed the same observing that the premium/interest expenditure was not routed through P & L account and further that the assessee had purchased fixed capital asset out of the funds received by issuance of aforesaid bonds even before the

maturity of the bonds. The ld. CIT(A), however, deleted the disallowance so made by the Ld. AO observing that the premium paid was in the nature of interest on borrowed funds used for business purposes.

8. Before us, the Learned Counsel for the assessee has relied upon the provisions of section 36(1) (iii) of the Act and submitted that the amount of interest paid in respect of capital borrowed for the purpose of the business or profession is allowable as deduction. He has further drawn our attention to the relevant part of the assessment order and submitted that the Ld. AO has also mentioned that the assessee has paid premium on the capital borrowed by issuance of FCCBonds, which was in the nature of interest paid. He has further submitted that the Ld. AO has disallowed the aforesaid interest/premium only on the ground that the assessee has not routed the said expenditure through P & L account. The Ld. Counsel in this respect has submitted that it has been held time and again that irrespective of the accounting entries, the allowability of the claim is to be examined as per provisions of the Income Tax Act. The Learned Counsel for the assessee in this respect has also relied on the decision of the Co-ordinate Bench in the own case of the assessee dt. 16-11-2018 in ITA No. 1880/Kol/2014 & Ors.

9. We have head the Ld. DR on this issue. The Ld. DR has fairly admitted that the accounting entries are made as per Companies Act, 1956. The expenditure claimed on account of premium is otherwise admissible as per relevant provisions of the Income Tax Act. The Ld. DR has further admitted that this issue has been decided in favour of the assessee in the earlier assessment year by the Co-ordinate Bench of this Tribunal. In view of this, this ground of the revenue's appeal is hereby dismissed.

**Ground no. 3**:

10. The department through this ground has agitated the action of the Ld. CIT(A) in allowing the claim of bad debts written off of Rs. 59,91,093/- from the Renukoot Unit, which was already sold out/transferred.

11 Brief facts of the case are that the assessee had already transferred the Renukoot Unit on 23-05-2011 by way of slump sale. However, the assessee company claimed certain past advances as bad debts written off during the year under consideration relating to the said unit. The AO observed that on slump sale of the unit, the assets and the liabilities of the unit were transferred to the purchaser i.e Aditya Birla Chemicals (India) Ltd. However, in appeal , the Ld. CIT(A) directed that if the assessee has taken the net worth till the date of transfer of undertaking in that case the Bad Debts may be taken into consideration in calculation of net worth of Renukoot unit.

12. Before us the Learned Counsel for the assessee has submitted that the debtors of the assessee were part of its residual assets. After hearing the Learned Counsel for the assessee at length, we are not convinced by his argument. The Renukoot Unit in question was sold out by way of slump sale on 23/05/2011, whereas, the assessee has calculated the net worth of the unit as on 31.03.2011 and claimed bad debts in the relevant A.Y 2012-13. Further, on slump sale, the assets/liabilities get transferred to the purchaser. In our view the assessee deliberately kept the entries continued in its accounts so as to claim the aforesaid loss on account of bad debts at the end of the year, which in our view is not at all justified. This ground of appeal of appeal is accordingly allowed in favour of the department and the order of the Ld. AO on this issue is restored.

In view of aforesaid observations, the appeal of the department (ITA No. 2439/Kol/2018 A.Y 2012) is treated as partly allowed.

Coming to assessee's appeal-ITA No. 2184/Kol/2018 for the A.Y 2012-13.

**ITA No. 2184/Kol/2018 for the A.Y 2012-13**.

13. The assessee in this appeal (ITA No.2184/Kol/2018 for the AY 2012-13) has taken also following grounds:-

*1. For that in view of the facts and in the circumstances, the Ld CIT(A) erred in affirming the action of the AO in not allowing the claim as bad debt written off*

*amounting to Rs. 59,91,093/- and in view of the facts and in the circumstances it may kindly be held accordingly.*

*2. Without prejudice to Ground No. 1, above, the Ld CIT(A) erred in not appreciating the, fact that the sum of Rs. 59,91,093/- was considered as income in the preceding years and hence it is allowable as bad debts being written off and in view of the facts and in the circumstances it may kindly be held accordingly.*

*3. For that in view of the facts and in the circumstances, the Ld CIT(A) failed to appreciate the fact that the Capital Gain so offered by the appellant in respect of the slump sale under section 50B of the "Renukoot Unit" needs to be recomputed due to the adjustments in the costs of the corresponding Plant & Machinery of such unit in Assessment years 2008-09 to 2011-12 and in view of the facts and in the circumstances it may kindly be held accordingly.*

*4. For that in view of the facts and in the circumstances, the Ld CIT(A) erred in not directly re-computing the depreciation of assets, particularly that of the Plant & Machinery of the "Renukoot Unit" and also the Block of Asset of Plant & Machinery of the appellant Company as a whole and in view of the facts and in the circumstances it may kindly be held accordingly.*

*5. For that the appellant craves right to raise additional grounds / and / or modify or to alter/amend/modify present Grounds on or before the date of hearing of the Appeal.*

14. All the grounds are relating to the claim of bad debts written off of Rs.59,91,093/- . This issue has already been discussed and adjudicated vide our observations made above while deciding the ground no. 3 of the department's appeal. In view of this, we do not find any merit in assessee's above grounds of appeal and the same are accordingly dismissed.

15. 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 o. 52/Raj/2018 ruling dt. 31.7.2018] and further Hon'ble Kolkata Tribunal in case of ITC Ltd. [ ITA No. 685/Koll20 14 ruling dt. 27.11.20 18 ]*

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.

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 ot, 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 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:-

> *"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 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.

. In view of our above discussion, the appeal of the department (ITA No. 2439/Kol/2018 for the A.Y 2012-13 is partly allowed and appeal of the assessee (ITA No. 2184/Kol/2018 for the A.Y 2012-13 is dismissed.

Order pronounced in open court at the time of hearing on 26-10 -2021

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| Sd/- | Sd/- |
| (Dr. M.L.Meena) | (Sanjay Garg) |
| Accountant Member | Judicial Member |

Dated 26-10 -2021

**PP/SPS

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. अपीलार्थी/Appellant/Assessee: M/s. Kanoria Chemicals & Industries Ltd C/o Salarpuria Jajodia & Co. 7 Chittaranjan Avenue, Kolkata-72 / M/s. Kanoria Chemicals & Industries Limited, Park Plaza, 7th Fl., 71 Park Street, Kolkata-16.
2. प्रत्यर्थी/Respondent-The Addl CIT, Range-10, Kolkata/DCIT, Cir-10(1), P-7 Chowringhee Square, 3rd Fl., Kolkata-69.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

Senior Private Secretary/D.D.O