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IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES " **B** " BENCH: BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA No.1210/Bang/2018
(Assessment Year: 2010-11)

M/s. Honeywell Technology Solutions Lab Pvt. Ltd.,
151/1, Bannerghata Road, Doraisanpalya,
Bangalore-560 076 ….Appellant
PAN AAACH 4151J

Vs.

Dy. Commissioner of Income Tax,
Circle 3(1)(2), Bangalore. ……Respondent.

Assessee By:	Smt. Shreya Loyalka, C.A.
Revenue By:	Shri B.K. Panda, CIT (D.R)

Date of Hearing :	17.12.2020.
Date of Pronouncement :	07.01.2021.

O R D E R

PER SHRI CHANDRA POOJARI, AM :

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals), Bangalore dt.24.01.2018.

1.1 In this appeal, the first issue is with regard to disallowance of deduction of claim under Section 80JJAA of the Income Tax Act, 1961 ('the Act').

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2. The facts of the issue are that during the A.Y. 2010-11, the assessee claimed a deduction u/s. 80JJAA of the Act amounting to Rs.23,25,88,302 in respect of salary paid to new regular workmen. However, while computing the taxable income, the Assessing Officer has denied the entire claim u/s. 80JJAA on account of following reasons :

- HTSL is not an industrial undertaking;
- HTSL is not in the business of manufacturing or production of article or thing and is a service provider;
- HTSL does not pay wages to its employees; and
- HTSL does not employ any workmen within the definition of Industrial Disputes Act, 1947.

3. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the CIT(A). Before the CIT(A), the assessee was specifically asked to produce the appointment letters of the employees as well as the hierarchy of the employees and the management. However, according to the CIT(A), these details were not produced despite of being given repeated opportunities and time of more than 5 months. The CIT(A) observed that the above documents could only have shown as to whether these employees were working in any supervisory capacity or not. On perusal of the designation of these employees, the CIT(A) found that the same include Principal Consultants, Senior Programmer, Lead

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Consultants, Team Leader, Technical Leader, Senior Engineer, Senior Sourcing Engineer, Senior Consultant, Engineer, Technology Specialist etc. and the salaries paid to several of these employees exceeded Rs.10,00,000/-. According to the CIT(A), only hierarchy chart of these employees could have shown as to which employees is reporting to which other employee and there is always a system of annual performance appraisal report in the companies and the supervisory authority records such appraisal of the employees reporting to him. In absence of details provided by the assessee, the CIT(A) was of the view that it is not possible to determine as to whether all these 556 employees are working in supervisory capacity or not. The CIT(A) was of the view that the onus was on the assessee to show that these employees were not working in any supervisory capacity, however the assessee had failed to discharge this onus. Therefore, according to the CIT(A), these employees cannot be considered to be satisfying the condition of being considered as workmen. In view of above also, the entire claim of the assessee needs to be rejected.

3.1 In addition to above, the CIT(A) noticed that as per Form No.10DA the assessee had claimed deduction u/s 80JJAA of the Act in relation to new regular workmen employed during FY 2007-08 and in relation to which deduction u/s 80JJAA of the Act was claimed for first time during A Y 2008-09. Before the CIT(A) , the assessee had claimed that it is eligible for the third installment of

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such deduction @30% on an amount of Rs.26,39,22,189/- being the wages paid to these workers. Here, the CIT(A) mentioned that Section 80JJAA of the Act allows deduction to be claimed at the rate of 30% of the additional wages for three assessment years including the assessment year related to the previous year in which such employment is provided. On perusal of the details furnished by the assessee vide letter dt 12.10.2017, the CIT(A) found that during the year under consideration the deduction (3rd installment) claimed by the assessee included deduction in respect of 66 such employees in relation to A Y 2008-09, who had left employment during FY 2009-10. It was found that the assessee had claimed deduction in relation to salary of Rs.2,08,58,689/- paid to these 89 employees. As per provisions of Section 80JJAA of the Act, the CIT(A) was of the view that deduction can be claimed in respect of only such employees who satisfy the definition of 'regular workman' which requires that the workman should have been employed at least three hundred days during the previous year in relation to which deduction is to be claimed. In the case under consideration, the CIT(A) found that out of these 89 employees, 68 had resigned on or before 25.01.2010, as such these employees did not complete period of 300 days in the employment and so, the salary of Rs 1,59,48,714/- paid to these employees cannot be considered for the purpose of computation of deduction under Section 80JJAA of the Act.

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3.2 Similarly in relation to deduction claimed for the first time under Section 80JJAA of the Act during A Y 2009-10, the CIT(A) observed that deduction could be claimed second time during the year under consideration. On perusal of the details furnished by the assessee vide letter dt 12.10.2017, the CIT(A) found that during the year under consideration the deduction (2nd installment) claimed by the assessee includes deduction in respect of 66 such employees in relation to A Y 2009-10, who had left employment during FY 2009-10 and the assessee had claimed deduction in relation to salary of Rs.1,91,25,302/- paid to these 66 employees. The CIT(A) observed that as per provisions of Section 80JJAA of the Act, deduction can be claimed in respect of only such employees who satisfy the definition of 'regular workman' which requires that the workman should have been employed at least three hundred days during the previous year in relation to which deduction is to be claimed. In the case under consideration, the CIT(A) observed that of these 66 employees, 50 had resigned on or before 25.01.2010, as such these employees did not complete period of 300 days in the employment and hence, the salary of Rs 1,91,25,302/- paid to these employees cannot be considered for the purpose of computation of deduction under Section 80JJAA of the Act.

3.3 As regards the eligibility of deduction @30% on the balance amount of Rs. 24,79,73,475/- for A Y 2008-09 (3rd claim) and Rs 35,79,14,149/- for A Y 2009-10 (2nd Claim), the CIT(A) felt that the issue could have been decided on the basis of

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information regarding the employees i.e. whether they are working in the supervisory capacity or not. However, according to the CIT(A), the assessee has not produced the requisite details to ascertain this aspect. Since the assessee failed to discharge the onus that these employees were not working in supervisory capacity during the initial year as well as during the year under consideration, the CIT(A) denied the benefit of deduction in relation to above amounts to the assessee.

3.4 The CIT(A) observed that salary paid to a worker who is not employed for a minimum of 300 days during the year is not to be considered for the purpose of deduction under Section 80JJAA of the Act. Further, on the issue of whether a workman employed for a period of less than 300 days during the previous year would be eligible for deduction in the next year in which it remains employed for 300 days, the CIT(A) relied on the decision of the ITAT Delhi in the case of LG Electronics India (P.) Ltd. v. Assistant Commissioner of Income-tax, Circle Noida, UP[20I3] 33 taxmann.com 465 (Delhi - Trib.) wherein it was held as follows:

" 12. As regards the merits of the case, regarding claim u/s 80JJAA the section reads as under:-

(1) Where the gross total income of an assessee being an Indian Company includes any profits and gains derived from any industrial undertaking engaged in the manufacture or production of articles of things there shall subject to the

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conditions specified in sub-section (2) be allowed as deduction of an amount equal to 30% of additional 'wages paid to the new regular workmen employed by the assessee in the previous year for three assessment years including the assessment year relevant to the previous year in which such employment is provided."

13. The Explanation to section 80JJAA defines regular workmen which does not include-

(a) Casual worker.

(b) Any other "workmen employed for a period of less than 300 days during the previous year.

(c) A workmen employed through contract labour.

The definition of new workmen in section along with explanation clearly provides that deduction will be available only if the new workmen is employed for a period of 300 days in the previous year and there is no reference to the new employees employed in the preceding year for eligibility u/s 80JJAA. Form No.10DA which is required for making claim u/s 80JJAA also does not have any column in respect of employee employed during the preceding year. The argument taken by Ld AR that employees employed in the preceding year who had not completed 300 days in that year should be taken in the current year when he completes 300 days is of no force. In view of the above, 'we do not see any reason to interfere in the order of Id CIT(A)."

3.5 Thus, the CIT(A) observed that such a workman cannot be considered for the purpose of deduction under Section 80JJAA of the Act even if it completes 300 days in the subsequent year as in the initial year it was not considered as new workman and in the subsequent year it is not a new workman, as already employed as on the first day of such year. Since in the case under consideration the assessee had admitted that it is taking into consideration such employees, who were not employed for a period of 300 days in the initial year, for purpose of

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deduction under Section 80JJAA of the Act, the CIT(A) held that deduction in relation to such employees employed in FY 2007-08 and FY 2008-09 was wrongly claimed in A Y 2008-09 and A Y 2009-10 and hence, the 3rd and 2nd claim in relation to these earlier deductions for A Y 2008-09 and A Y 2009-10 in relation to such employees needs to be rejected.

3.6 Further, the CIT(A) noticed that one of the reason for the claim of the assessee having failed for the year under consideration is that after excluding workman employed for less than 300 days, the number of remaining new workmen employed during the year fell below the limit of 10% of the workmen as on the last day of the previous year and the same could be the situation in relation to A Y 2008-09 and A Y 2009-10. Therefore, the CIT(A) held that the 3rd and 2nd claim in relation to these earlier claims would not be allowable in the year under consideration.

3.7 The CIT(A) observed that in the absence of data of workmen as on the last day of the previous year the percentage of new regular workman was computed on the basis of data of regular workman as on the last day of the previous year, as only the same was available in the Form 10DA. According to the CIT(A), if the number of workmen is considered then the percentage will go down further. The CIT(A)

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relied on the decision of the ITAT, Delhi in the case of Panacea Biotec Lid v. Assistant Commissioner of Income-tax, Circle 14(1) [2008] 25 SOT I (Delhi) wherein the issue of the definition of workman and regular workman was considered and held as follows:

"2. The only issue for consideration relates to sustaining of disallowance of Rs. 26,99,432 under section 80JJAA of the Income-tax Act, 1961 [hereinafter referred to as 'the Act']. The facts of the case stated in brief are that the assessee claimed deduction under section 80JJAA of the Act of Rs. 52,75,173. According to the Assessing Officer, the additional wages means the wages paid 10 workmen in excess of 100 workmen employed during the year. In effect the workmen employed during the year should be more than 100 and the wages paid to the worker in excess of 100 workers shall be additional wages. The Assessing Officer further noted that 236 new regular workmen were employed by the assessee during the year under consideration. He, therefore, deduction of 30 per cent of additional wages paid to 136 new workmen.

3. The matter was carried in appeal before the ld. CIT (Appeals). It was submitted that section 80JJAA of the Act was inserted by the Finance (No.2) Act, 1998 with effect from 1-4-1999 with an object to promote employment at a large scale and 10 provide tax incentives to the employers employing a large number of persons. The Assessing Officer had also not disputed the eligibility of the assessee to claim deduction under section 80JJAA of the Act. Out of Rs. 52,75,173, the amount of Rs.7,69,770 relates to additional wages paid to the workmen employed in previous year relevant to assessment year 2001-02. As on 31-3-2000 there were 961 regular 'workmen which increased to 1160 as on 31-3-2001. Thus there was net increase in number of regular workmen to 207 giving increase of 21.34 per cent as against 10 per cent required under the law. The condition that the increase in number of regular workmen during the year should not be less than 10 per cent of the existing workmen stood satisfied. Once this condition was satisfied, the assessee was eligible for deduction of 30 per cent additional wages in respect of 63 workmen, who were employed for a period of more than 300 days during the year. Therefore, the assessee was entitled for deduction to the tune of Rs.7,69,770. As regards the balance amount of additional wages paid at Rs. 45,05,403, the regular workmen as on 31-3-2002 were 1653, which increased to 1926 as on 31-3-2003 giving an increase of regular workmen at 273 [16.52 per cent). Since the condition of increase in regular workmen not less than 10 per cent was satisfied, the assessee was eligible for deduction under section 80JJAA of the Act at the rate of 30 per cent of additional wages paid to 236 new regular workmen employed for a period of 300 days or more during the relevant previous year.

4. The ld. CIT (Appeals) in respect of wages paid to new regular workmen employed in the previous year relevant to assessment year 2000-01 noted that the regular workmen who worked for a period of 300 days or more were 63 as against the regular workmen at the beginning of year was at 961. Since the increase in new regular workmen employed during

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the year for a period of 300 days or more were less than 10 per cent of the existing number of regular workmen as on 31-3-2000, ld. CIT(A) came to the conclusion that the assessee was not entitled for deduction under section 80JJAA of the Act, in respect of assessment year 2001-02. As regards the new regular 'workmen employed for period of 300 days or more during previous year relevant to assessment year 2003-04, the assessee was found to be eligible for deduction under section 80JJAA of the Act as the increase in the number was more than 10 per cent. But for the purpose of quantification of deduction under section 80JJAA, he was of the view that as per the provisions of the Explanation to section 80JJAA, the additional wages would mean the wages paid to the new regular workmen in excess of 100 workmen employed during the previous year. Since 236 new regular workmen were employed during the year under consideration, the wages paid to 100 regular workmen was not to be considered for the purpose of computing 30 per cent of additional wages. The deduction was available at the rate of 30 per cent of additional wages paid to the remaining 136 regular workmen. He accordingly upheld the disallowance made by the Assessing Officer in respect of a sum of Rs. 19,29,662 also.

5. Before us, the ld. AR of the assessee submitted that deduction under section 80JJAA of the Act is available to an Indian company to the extent of 30 per cent of additional wages paid to new regular workmen employed by the assessee in the previous year for three assessment years including the assessment year relevant to previous year in which such an employment is provided. The expressions "additional wages" and "regular 'workmen" have been defined in the Explanation to section 80JJAA of the Act. The ld. counsel for the assessee further submits that under proviso to clause (i) of the Explanation in case of an existing undertaking additional wages will be NIL if the increase in the number of regular workmen employed during the year is less than 10 per cent of the existing number of workmen employed in such undertaking as on the last day of the preceding year. Further the regular workmen has been defined in clause (ii) of the Explanation which does not mean a casual workman or a workman employed through contract labour or any other workman employed for a period of less than 300 days during the previous year. He further submits that the interpretation of words 'new regular workmen' in excess of 100 workmen employed during the previous year adopted by CIT(A) is incorrect in the sense that the deduction will be available only if regular workmen employed during the year for more than 300 days exceeds 100. These words are to be interpreted with reference to the other condition for allowability of deduction that the regular workmen employed should not be less than 10 per cent of workmen employed as on the last day of the preceding year. In view of above it has been pleaded that the ld. CIT (Appeals) has not correctly appreciated the provisions of law. Since assessee has employed regular new workmen as provided under law, the assessee is entitled for deduction of Rs. 19,29,662 in respect of such workmen. However, in respect of disallowance of Rs. 7,69,770 the Id. AR of the assessee fairly conceded that the assessee is not entitled for deduction as the number of regular workmen employed if previous year 2000-01 were less than 10 per cent of the regular "workmen employed as on 31-3-2000. On the other hand, the ld. DR relied on the orders of the Assessing Officer and the ld. CIT (Appeals).

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6. We have heard both the parties. Under section 80JJAA of the Act in case of an assessee being an Indian company, which derives profits and gains front industrial undertaking engaged in the manufacture or production of article or thing shall be allowed a deduction of an amount equal to 30 per cent of "additional wages" paid to the new "regular workmen" employed by the assessee in the previous year for three assessment years including the assessment year relevant to the previous year in which such employment is provided. Sub-section (2) of section 80JJAA of the Act provides certain conditions to be fulfilled. These include (i) the industrial undertaking is not formed by splitting up or reconstruction of an existing undertaking or amalgamation with industrial undertaking; and (ii) the assessee furnishes along with the return of income a report of the accountant giving such particulars as prescribed in the report. Explanation 10 section 80JJAA defines the terms "additional wages", "regular workman" and "workman" which reads' as under :-

The language employed in the Explanation is plain and clear. For the purposes of section 80JJAA every employee is not a workman and every workman is not a regular workman. Clause (s) of section 2 of the Industrial Disputes Act, 1947 defines the term "workman" as below :-

7. On the basis of definition of word "workman" as per section 2(5) of the Industrial Disputes Act, 1947 and words "regular workman" of clause (ii) of the Explanation to section 80JJAA of the income-tax Act, 1961, all employees in an undertaking can be grouped in the following categories:

(a) Employees employed in managerial or administrative capacity. It also includes employees employed in supervisory capacity and drawing salary exceeding Rs.1,600 per month.

(b) Casual workman and workman employed through contract labour but do not include employees coming in (a).

(e) Other workmen if employed for less than 300 days during the previous year but not coming in categories (a) and (b).

(d) Other workman if employed for 300 days or more during the previous year but not coming in categories (a) and (b).

From above one can find that "regular workmen" are those who come under category (d) whereas the employees under categories (b), (c) and (d) are "workmen". in other words employees of categories (b) and (c) are 'workmen' but they are not "regular 'workmen", Clause (i) of the Explanation defines the expression "additional wages" which means the wages paid to the new regular workmen in excess of one hundred workmen employed during the previous year. The Legislature has employed words "in excess of one hundred workmen employed" in clause (i) of the Explanation. Therefore, all employees falling in

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categories (b), (c) and (d) taken together 'will constitute "workmen" employed in an industrial undertaking. Thus for becoming eligible for deduction under section 80JJAA in case of a new industrial undertaking there should be minimum 100 workmen employed during the previous year. The additional wages should be paid to the new regular workman in excess of one hundred workmen so employed during the previous year. Proviso to clause (i) of the Explanation carves out an exception that in the case of an existing undertaking the additional wages shall be NIL if the increase in the number of regular workmen employed during the year is less than 10 per cent of existing number of workmen employed in such undertaking as on the last day of the preceding year. In the proviso the expression "existing number of workmen employed" has been used and not the expression "existing number of regular workmen employed". Therefore, the percentage increase in the number of regular workmen has to be determined with reference to existing number of workmen employed in the undertaking. In other words the increase in number of regular workmen falling in category (d) will be seen with reference to the workmen consisting of employees of categories (b), (c) and (d).

8. Now we will explain the method of computation of-deduction under section 80JJAA of the Act. In case of a new industrial undertaking we have to first find out whether number of workmen [(i.e., category (b) + (c) + (d)] employed during the previous year is more than 100. If yes, then the wages paid to new regular workmen falling in category (d) in excess of 100 workmen employed during the year has to be determined. 30 per cent of the wages determined in the second step is the amount of deduction under section 80JJAA of the Act. For computing deduction under section 80JJAA of the Act in case of an existing industrial undertaking, first we have to find out whether number of workmen [category (b) + (c) + (d)] employed during the previous year is more than 100. If answer is yes, then the number of regular workmen falling in category (d) newly employed during the year is to be determined,' and whether it is equal to or more than 10 per cent of existing number of workmen [i.e., category (b) + (c) + (d)] employed in the undertaking on the last day of the preceding year. If answer to this question is yes, then the wages paid to new regular workmen [i.e., category (d)] in excess of 100 workmen employed during the year is to be determined. 30 per cent of wages so determined will be the amount of deduction under section 80JJAA of the Act.

9. There is no dispute that the case of assessee is of an existing undertaking. Therefore, for computing additional wages the percentage increase in the number of regular workmen has to be determined with reference to the workmen employed in the undertaking as on the last day of the preceding year. From the order of ld. CIT(A) we find that in this case, the increase in the number of regular workmen has been determined with reference to regular workmen and not with reference to workmen employed in the undertaking as on the last day of the preceding year. For computation of deduction in respect of regular workmen employed for 300 days or more in previous year 2002-03 relevant to assessment year 2003-04, the Assessing Officer has not computed deduction with reference to new regular workmen in ex in excess of 100 workmen employed during the year. For this purpose as discussed above the percentage increase in the number of regular workmen has to be determined with reference to workmen employed in the undertaking as on the last day of the preceding year. This has also not been done. We, therefore, set aside the mailer to the file

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of the Assessing Officer with the directions to compute deduction under section 80JJAA of the Act discussed as above.

10. We may like to clarify that in a case if the assessee fulfils both the conditions that workmen employed during the year were 100 and percentage increase of regular workmen as compared to last day of preceding year is not less than 10 per cent, the assessee will be eligible for the benefit in excess of 100 workmen employed. In other words the law does not require that in the year the number of regular workmen appointed should be more than 100 and only excess of 100 regular workmen so employed will be eligible for benefit of section 80JJAA of the Act. The ld. CIT(A) as well as Assessing Officer have gone wrong in excluding 100 regular workmen out of 236 workmen employed during previous year relevant to assessment year 2003-04. The Assessing Officer will bear in mind this position of law while computing additional wages for the purposes of deduction under section 80JJAA of the Act.

11. As regards the disallowance of additional wages in respect of new regular workmen employed in the previous year relevant to the assessment year 2001-02, Sh. Salil Agarwal, the ld. counsel for the assessee has fairly conceded that increase in the number of regular workmen with reference to the existing regular workmen employed as on the last day of the preceding year was less than 10 per cent. From the details given in the order of the ld. CIT (Appeals) we find that the increase in the number of regular workmen employed during the year 2000-01 has been determined with reference to existing regular workmen employed as on the last day of the preceding year and not with reference to the existing number of workmen employed as on that date. The number of workmen employed discussed as above is normally higher than the regular workmen as it takes into its fold the casual workmen, the labour hired on contract basis, the workmen employed less than 300 days and also the workmen employed for 300 days or more. When the percentage increase with reference to regular 'workmen is less than 10 per cent, it will be further less when the percentage increase will be worked out with reference to the total number of workmen employed. Therefore, in any case the assessee will not be eligible for deduction in respect of regular workmen employed during the assessment year 2001-02. The order of CIT(A) is upheld in this regard.

12. In the result, the appeal filed by the assessee, is partly allowed for statistical purposes.

3.8 Thus, according to CIT(A) , workman includes:

b. Casual workman and workman employed through contract labour but do not include employees coming in (a).

c. Other workmen if employed for less than 300 days during the previous year but not coming in categories (a) and (b).

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d. Other workman if employed for 300 days or more during the previous year but not coming in categories (a) and (b).

Here, according to the CIT(A), the category (a) is as follows:

a. Employees employed in managerial or administrative, capacity. It also includes employees employed in supervisory capacity and drawing salary exceeding Rs. 1,600 per month.

3.9 The CIT(A) relied on the decision of the jurisdictional ITAT in the case of Texas Instruments (India) (P.) Ltd. v. Deputy Commissioner of Income-tax, LTU, Bangalore[2017 (l82 taxman 264). Therefore, the CIT(A) held that the claim of the assessee regarding percentage increase in regular workmen could have been considered by applying this method only.

3.9.1 On perusal of Form No 10DA for claiming deduction tender Section 80JJAA of the Act, the CIT(A) found that it carries following note:

"8) A position has been taken that the benefit is available for new regular workmen' employed in the year and the reference to 'in excess of 100 'workmen employed' in the definition of 'additional wages' under Explanation, only provides a threshold in respect of the minimum number of new regular workmen that would need to be employed and does not per se require exclusion of the amount of wages paid to 100 workmen. "

3.9.2 On perusal of the above note, the CIT(A) found that the method employed by the assessee for computation of deduction u/s 80JJAA of the Act is faulty. According to the CIT(A) , the method to be employed has been spelt in the case of Panacea Biotech Ltd. (supra) and as per the same, the number of workmen (being

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category b, c and d as in the order of ITAT) is different from number of regular workmen (being category d as in the order of ITAT). The CIT(A) noticed that if this method is employed, the threshold level of 100 workmen can be achieved without employing any regular person. According to the CIT(A) , in the above said decision the ITAT has clearly held that additional wages will be the wages paid to the new regular workmen in excess of 100 workmen employed during the year. The CIT(A) gave an example that if the workers of category band a are 80 and regular workmen as in the category d are 30 workmen, then total number of workmen will be 110. Here, the CIT(A) observed that the benefit of deduction Section 80JJAA of the Act will be available in relation to 10 regular workmen only if condition of proviso is also satisfied. Similarly, in another example, the CIT(A) explained that if the workers of category b and c are 100 and regular workmen as in the category d are 30, then total no. of workmen will be 130. Here, according to the CIT(A), the benefit of deduction Section 80JJAA of the Act will be available in relation to all the 30 regular workmen.

4. Aggrieved by the order of the CIT(A), the assessee is in appeal before us. The learned Authorised Representative relied on the order of the co-ordinate bench of this Tribunal in the case of Manhattan Associates (India) Development Centre Pvt. Ltd. in ITA No.150/Bang/2019 dt.23.10.2019 wherein it was held that the

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assessee would be eligible for deduction under Section 80JJA of the Act provided fulfillment of the following conditions :

- The eligible assessee should be an Indian Company
- The gross total income of the assessee should include profits and gains derived by an industrial undertaking engaged in the manufacture of production of article or thing
- The eligible undertaking should employ atleast 100 workmen. Further, the additional employees should be in excess of 10% of the workforce as on the last day of the immediately preceding previous year.
- The term “regular workman” does not include casual workman, workman employed through contract labour or any other workman employed for a period of less than three hundred days during the previous year.
- An audit report in the prescribed format giving details of the deduction should be enclosed along with the return of income

4.1 The Ld. AR submitted that the term “regular workman” is defined in a negative manner under section 80JJAA of the Act. The Act provides that the following categories or classes of employees are said not to constitute “regular workman”:

- a casual workman;
- a workman employed through contract labour; or
- any other workman employed for a period of less than 300 days during the previous year.

In this regard, the Ld. AR submitted that the assessee had claimed deduction under section 80JJAA of the Act even for those workman who have been employed for less than 300 days in the previous year on the understanding that section 80JJAA of the Act is a beneficial section for advancement of employment in the industries

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and the same must be construed liberally. Further, the Ld. AR relied on the following technical arguments in this regard:

(a) The definition does not positively state as to who shall be regarded as a "regular workman". In the absence of a positive definition, the term "regular" in the phrase "regular workman" would have to be understood as not seasonal, not temporary, not irregular and not casual. The first two limbs of the definition exclude impermanent employees. The same principle should, therefore, be attached to the third limb of the definition. This would be on the principle of 'ejusdem generis'. The intention appears to exclude persons who have given been temporary jobs, for example, in a seasonal industry. In the case of Company, the conditions for a workman to be excluded from the category of "regular workman" are not attracted.

4.2 In this context, the Ld. AR drew our attention to Circular No 772 dated 23-12-1998 wherein the objective of introducing section 80JJAA of the Act was explained as follows:

"Despite increase in employment of new workmen, economic growth and the employment growth rate have not been high enough to absorb addition to the work-force. In order to encourage employers to create more employment opportunities, it was considered necessary to provide fiscal incentives in the Income tax Act. With this objective, a new section 80JJAA has been inserted in the Income tax Act".

4.3 Further, the Ld. AR referred to the speech of the Finance Minister while presenting the Finance (No 2) Bill, 1998 by observing as follows:

- *"other areas in the social sector for which new tax incentives are proposed or existing ones being increased include employment generation, improvement of environment………* ***I propose to allow a new deduction to companies with a view to encourage them to employ additional work force.*** *An amount equal to 30 per cent of additional wages paid to the new workmen will be allowed as a deduction against profits, subject to certain conditions".* (Emphasis supplied)

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4.4 The Ld. AR submitted that the condition of 300 days as prescribed under section 80JJAA of the Act cannot be understood as a threshold condition of number of days completed by the employed workmen during the previous year itself. It was submitted that in case the new workmen are employed in the midst of the previous year then even if, said workmen continuing in the service and having completed more than 300 days of employment, they may not complete 300 days during the previous year because of joining the employment after the month of June of the previous year. According to the Ld. AR, if the condition for 300 days is understood and applied in the technical manner then the very purpose and object of this scheme of generating more employment by the industry would be defeated. The condition of 300 days completed during the previous year cannot be applied in case when a new workmen is employed on regular basis and in continuous employment of more than 300 days. According to the Ld. AR, denying the deduction to workmen employed after 4th June would defeat the very purpose and object of the incentive provided under section 80JJAA.

4.5 Further, the ld. AR referred to clause (c) of explanation to section 80JJAA which defines regular workmen as requiring persons to be employed for a period of 300 days in all and not necessarily 300 days in the previous year as it would defeat the very object of the incentive intended to be granted by its provision. In this

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regard, the Ld. AR drew our attention to the Memorandum explaining the provisions of the Finance (No 2) Bill, 1998 which reads as follows:

> *"The existing provisions of the Act provide various fiscal concessions to spur growth of business and industry. The country is faced with problems relating to lack of employment opportunities. In order to encourage the employers to further generate more employment opportunities, it is proposed to insert a new section 80JJAA to provide an incentive in the form of a special deduction against business profits of a company. The deduction would be over and above the expenditure on wages or salary, which is otherwise allowable as expenditure to the company. The quantum of deduction is proposed to be 30% of the aggregate wages or salary paid to the new workers provided the following conditions are satisfied…….*
>
> *For the purposes of claiming the benefit, the term 'worker' shall have the same meaning as 'workman' as defined in the Industrial Workers Disputes Act. Such an employee should be a regular worker and should have been employed for a period of at least **300 days in a year**, and the return should be accompanied by particulars certified by the tax auditor in the prescribed form." (emphasis supplied)*

4.6 Based on all of the above, the Ld. AR submitted that section 80JJAA of the Act was introduced to facilitate generation of new employment opportunities. An incentive was, therefore, offered to the assessee giving employment to a specified minimum number of employees. The Ld. AR submitted that the intention of the Parliament is to provide long term and sustainable employment in industrial undertakings and the memorandum states that an employer should employ regular workmen for a period of 300 days in a year. Therefore, according to the Ld. AR, the year must be counted from the date of employment and not as the previous year. The Ld. AR submitted that it was not the intention of the legislature to

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restrict or circumscribe the benefit of the workmen for 300 days in the previous year without defining the parameter while computing the period of the year. According to the Ld. AR, the interpretation of the section should be in a manner which promotes the objective sought to be achieved and not frustrate it. Being a beneficial provision, it must be liberally construed.

4.7 The ld. AR drew our attention to the literal reading of the above definition which could lead to the interpretation that all workmen employed subsequent to June 4 should not be considered as "Regular Workmen" since they would not be able to satisfy the 300 day criterion, even though the workmen might continue to be employed with the Company even after March 31 of the subject previous year. According to the Ld. AR, such interpretation would effectively result into permanent loss of the deduction in respect of wages paid to workmen employed subsequent to June 4 of any financial year and continuing on the payroll of the company, since for the first year of employment, they would not be able to meet the 300 day criterion and for the subsequent years, they would not meet the condition of being newly employed in such subsequent years. Given the above evident disconnect and relying on the intent behind introduction of the provisions of section 80JJAA of the Act, being an incentive to promote employment of workmen, the Ld. AR submitted that the criteria that employee has to be employed for a minimum period of 300 days would be against the intent of the law. Hence, it

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was urged that such beneficial provision has to be interpreted liberally. In this regard, the Ld. AR placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Bajaj Tempo Ltd vs CIT (196 ITR 188).**

4.8 Further, according to the Ld. AR, if the deduction under Section 80JJAA of the Act is allowed for the first year, the same can be claimed for continuous period of 3 years as a standard deduction irrespective of the fact that whether or not the said employee works for a period of more than 300 days in the current assessment year. She drew our attention to the decision of the Tribunal in the case of Page Industries Ltd. in ITA Nos.1231 to 1233/Bang/2014 dt.24.07.2015 wherein in para 7 this issue was dealt by the Bench and held in favour of the assessee by observing as follows:

> *" Therefore, the expression additional wages paid to new workmen employed by the assessee in the previous year is the criteria to be fulfilled and to be tested in the first year of the claim of deduction and once deduction is allowable in the first year then, 30% of such additional wages is allowable as deduction in each of the subsequent two years. As we have already discussed in the facts emerging from the record, the Assessing Officer has not disputed the completion of 300 days of employment by these new regular workmen employed by the assessee during the earlier two years and therefore once the said condition is satisfied, the condition of continuity in employment does not emanate from the provisions of section 80JJAA of the Act. Accordingly, we do not find any reason to interfere with the impugned order of the CIT (Appeals) qua this issue."*

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5. On the other hand, the ld. DR submitted that the claim of the assessee under Section 80JJA of the Act is in relation to the regular workmen employed during the year which needs to be disallowed as it does not specify the basic condition laid down in the proviso to Expln.2 to Section 80JJA of the Act. According to the Ld. DR, in the case under consideration, the assessee is an existing undertaking and thus it is required to satisfy the condition laid down in the proviso i.e. increase in the number of regular workmen employed during the year should be at least 10% of existing number of workmen employed as on the last date of the preceding year. According to the Ld. DR, as per Form 10DA, the assessee has reported that number of regular workmen as on 1.4.2009 was 4,744 and so, 10% of the same would be 474 employees and hence, during the year under consideration, the regular workmen employed during the year should be increased to at least 474. However, according to the Ld. DR, as against this, number of such regular workmen employed during the year under consideration is only 56, even if it is considered for the time being the same was not employed in any supervisory capacity. Therefore, considering above, the Ld. DR submitted that the assessee does not satisfy the condition laid down in above said proviso to Section 80JJAA of the Act and hence, the assessee is not eligible for any deduction u/s 80JJAA of the Act in relation to employment provided by it during the year under consideration. Further, the Ld. DR submitted that the balance claim of the assessee

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in relation to employment provided to 56 employees also needs to be rejected. The Ld. DR submitted that the salary paid to these employees during the year under consideration works out to Rs.2,70,94,148/- and the assessee had claimed 30% deduction on the same, which works out to Rs.81,28,244/-. Therefore, the Ld. DR submitted that the claim of the assessee to this extent is found to be excessive and the same needs to be disallowed. Considering above, the entire claim of the assessee in relation to regular workmen employed during the year needs to be disallowed as it does not satisfy the basic condition laid down in the proviso to Explanation to Section 80JJAA of the Act.

6. We have heard the rival contentions, perused and carefully considered the material on record. Similar issue came up for consideration before this Tribunal in the case of Honeywell Technology Solution Pvt. Ltd. in ITA No.862/Bang/2013 vide order dt.14.11.2014 and remitted the issue to the file of Assessing Officer by observing as follows :

> " 11.5.1 We have heard the rival contentions and perused and carefully considered the material on record, including the judicial decisions cited. We find that this issue in question has been examined and considered by a co-ordinate bench of this Tribunal in the assessee's own case for Asst. Year 2007-08 in IT(TP)A No.1344/Bang/2011 dt.28.3.2013, wherein at para 36 thereof it was held as under :-
>
> > *" 36. We also find that the Tribunal in the case of Texas Instruments P. Ltd. In ITA No.1/Bang/2011, dt.7.9.2012, for the assessment year 2005-06, at para No.10.7, has remitted the matter back to the CIT(A) for fresh consideration. Hence, we are inclined to restore this issue back to the file of the A.O. with a direction to reduce the issue be passing a speaking order, of*

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course, after giving effective opportunity of hearing to the assessee. The assessee is also hereby directed to co-operate with the A.O. by producing the details as called for by him. It is ordered accordingly."

11.5.2 Following the above referred decision of the co-ordinate bench of this Tribunal in the assessee's own case for A.Y. 2007-08 (supra), we are of the considered view that it would be just and fair to restore this issue, of deduction u/s. 80 JJA of the Act, back to the file of the A.O. with the direction to re-examine and re-adjudicate this issue by passing a reasoned and speaking order; only after affording the assessee adequate opportunity of being heard and to file required details. The assessee is also hereby directed to co-operate in the matter by producing / filing the details / explanations called for by the A.O. It is ordered accordingly."

In view of the above binding order of the Tribunal, taking a consistent view to remit the issue to the file of Assessing Officer on similar directions. The lower authorities have to take same view on this issue as taken in the A.Y. 2008-09. This ground of appeal is allowed for statistical purposes.

7. The next ground is with regard to disallowance of Annual Maintenance Contract and software expenses.

8. Regarding this issue, the learned Authorised Representative submitted that the learned CIT(A) has erred, in law and in facts, in disallowing Annual Maintenance Contract ("AMC") expenses of Rs. 3,24,89,688/- under section 40(a)(i)/ 40(a)(ia) of the Act on account of non-deduction of tax at source. The ld. AR further submitted that the learned CIT(A) has erred, in law and in facts, in not granting the benefit of second proviso to section 40(a)(ia) read with first proviso to

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section 201(1) of the Act with respect to Rs. 1,67,40,236/- in relation to AMC expenses where the vendors have filed their tax returns in India. The ld. AR submitted that the learned CIT(A) has erred, in law and in facts, in concluding that software purchases to the extent of Rs. 5,18,62,176/- whose shelf life is more than 2 years should be treated as capital in nature. It was submitted by the ld. AR that the learned CIT(A) ought to have appreciated that such software are not perpetual in nature, software do not result in any enduring benefit and are not part of any "profit making apparatus" and hence, such software expenses are revenue in nature. The ld. AR further submitted that the learned CIT(A) has erred, in law and in facts, in mentioning that the software expenses on which taxes have not been withheld needs to be disallowed under section 40(a)(i) of the Act. The Ld. AR submitted that the learned CIT(A) ought to have appreciated that that the payments made by the assessee towards purchase of software is not covered within the meaning of 'royalty'/ 'royalties' under the applicable DTAA and hence, the Appellant was not under the obligation to withhold taxes. The ld. AR submitted that notwithstanding and without prejudice to Ground No. 14 and 15, the learned CIT(A) has erred in law in not considering that law does not compel a man to do what he cannot possibly perform. She submitted that the learned CIT(A) ought to have appreciated that it was impossible for the assessee to deduct the tax on payments due to retrospective amendment in the Act and recover the same from

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the vendors since the payments have already been made before the amendment was introduced in the Act. She further submitted that the learned CIT(A) has erred in law in mentioning that software expenditure needs to be disallowed as prior period expenditure if the invoice relates to earlier year without appreciating that the expenditure has to be accounted on accrual basis irrespective of the year in which invoice has been raised.

9. The learned Departmental Representative submitted that the payment of AMC attracts the provisions of Section 194C/195 of the Act. The Ld. DR submitted that the assessee itself has deducted tax at source on majority of such payments. According to the Ld. DR, as regards the applicability of second proviso to Section 40(a)(ia) of the Act read with first proviso to Section 201(1) of the Act, the same is not automatic. The Ld. DR submitted that as per first proviso to Section 201(1), the onus is on the assessee to furnish a certificate in prescribed form to this effect from an accountant to show that the payee has complied with the conditions laid down in the said proviso. The ld. DR submitted that the assessee has not brought anything on record to show that such a certificate was furnished before the Assessing Officer. Considering the above, the ld. DR submitted that the issue of retrospective applicability of the second proviso to Section 40(a)(ia) of the Act becomes academic in nature and the same does not require any adjudication.

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Regarding software expenses, the ld. DR relied on the judgment of the Hon'ble Karnataka High Court in the case of **CIT Vs. Samsung Electronics Ltd. 203 taxmann 47**7 (Kar) and submitted that similar issue was decided against the assessee and the same to be followed.

10. We have heard the rival contentions, perused and carefully considered the material on record. This issue was considered by the co-ordinate bench of this Tribunal in the case of Acer India Pvt. Ltd. Vs. JCIT dt.5.10.2020 in IT (IT) A No.107 to 114/Bang/2018 wherein it was held in paras 6 & 7, it was held as under :

"6. In the case of M/s Teekays Interior Solutions Pvt Ltd (supra), the co-ordinate has considered the issue of making disallowance u/s 40(a)(ia) of the Act on the basis of subsequent decision rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics Co Ltd (supra). The decision rendered by the co-ordinate bench is extracted below:-

"9. The next issue contested by the assessee relates to disallowance of expenditure claimed towards software purchase. The assessee had purchased a software named AutoCAD version 2011 at a cost of Rs.1,10,775 and claimed the same as revenue expenditure. The A.O., however, held the same to be capital in nature. The A.O. also noticed that the assessee has not deducted tax at source u/s 194J of the Act. Accordingly, he proceeded to disallow the depreciation by invoking the provisions of section 40(a)(ia) of the Act. In the appellate proceedings, the learned CIT(A) took support of the decision rendered by the Hon'ble Karnataka High Court in the case of M/s.Samsung Electronics Company Limited [(2011) 203 taxmann.com 477 (Kar.)] and held that the payment made for purchase of software is in the nature of royalty. Accordingly, he directed the A.O. to treat the expenditure on purchase of software as revenue in nature. Since the assessee has failed to deduct tax at source on the said payment, the learned CIT(A) confirmed the disallowance made u/s 40(a)(ia) of the Act.

10. Since the revenue has not filed any appeal challenging the order passed by Ld CIT(A), the issue that requires consideration is whether the disallowance of cost of software u/s 40(a)(ia) of the Act is justified or not. The Ld A.R submitted that the decision holding that the payment made towards purchase of software is in the nature of Royalty attracting TDS provisions, was rendered by the Hon'ble Karnataka High Court in the case of Samsung Electronics Company Ltd. (supra) on 15.10.2011, whereas the impugned transaction of purchase of software has

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taken place before 31.03.2011. The Ld A.R submitted that the law relating to nature of software purchases was pronounced by the Hon'ble High Court only on 15.10.2011, where as the impugned transaction has taken place prior to that. She submitted that before the decision of Hon'ble High Court, the assessee was under bonafide belief with the support of certain case laws that there was no requirement to deduct tax at source from the payment made towards software purchases. Accordingly, by placing her reliance on the decision rendered by the coordinate bench in the case of Allegis Services India Pvt. Ltd. v. DCIT [(2017) 51 CCH 0083], the learned AR submitted that the liability to deduct tax at source, in the facts of the present case, cannot be fastened upon the assessee retrospectively.

11. We heard the learned DR and perused the record. We noticed that an identical issue was considered by the coordinate bench in the case of Allegis Services India Pvt. Ltd. (supra) and identical disallowance made was deleted by the coordinate bench on the reasoning that the TDS liability cannot be fastened upon the assessee retrospectively. For the sake of convenience, we extract below the operating portion of the order passed by the co-ordinate bench:-

> *"4. Ground Nos.2 to 5 are regarding disallowance under Section 40(a)(ia) of the Income Tax Act, 1961 (in short 'the Act') of payment towards software licenses treated by the Assessing Officer as royalty for want of TDS. The assessee has also raised additional grounds which are as under : Corporate tax matters*
>
> > *21. " Without prejudice to the grounds 2 to 4, the Learned CIT(A) has failed to appreciate that during the Financial Year 2008-09 relevant to the Assessment Year 2009-10, the Appellant was not liable to withhold tax on the payments made as there was no provision under the Act mandating the deduction of tax at source on the payments made on purchase of computer software and there were many favorable judicial precedence including the jurisdictional tribunal rulings.*
> >
> > *22. Without prejudice to the grounds 2 to 4, the learned CIT(A) erred in not appreciating the fact that explanation 5 to Section 9(1)(vi) was inserted vide Finance Act, 2012 with effect from 1 June 1976 and was hit by the doctrine of 'impossibility of performance'."*

The additional grounds raised by the assessee are not new issues but an additional plea/argument raised by the assessee regarding the disallowance made by the Assessing Officer under Section 40(a)(ia) of the Act. Therefore in view of the fact that the substantial issue has been raised in the main ground, the additional grounds raised by the assessee on the same issue are admitted for consideration and adjudication along with the Ground Nos.2 to 5.

5. The learned Authorised Representative of the assessee has submitted that prior to the decision of Hon'ble jurisdictional High Court in the case of CIT Vs. Samsung Electronics Co. Ltd. 320 ITR 209, the assessee was under the bona fide belief that the payment on account of software licenses does not fall under the definition of royalty and therefore the assessee was under no obligation to deduct tax at source on the said payment for software license. He has further submitted that there were number of judicial precedents on this issue wherein this Tribunal has held that the payment made for purchase of software does not fall under the

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definition of royalty provided under Section 9(1)(vi) of the Act. Thus he has submitted that a subsequent amendment or a decision cannot be thrust upon the assessee for deduction of tax in respect of a transaction completed much prior to the said decision. In support of his contention, he has relied upon decision of the co-ordinate bench of this Tribunal dt.23.11.2016 in the case of ACIT Vs. Aurigene learned Authorised Representative has submitted that disallowance made by the Assessing Officer is not justified when there was no such law or declaration of law at the time of payment made by the assessee to cast the duty on the assessee to deduct tax.

6. On the other hand, the learned Departmental Representative has submitted that the decision of Hon'ble jurisdictional High Court in the case of CIT Vs. Samsung Electronics Co. Ltd. (supra) though was subsequent to the transaction in question however, the said decision has not brought into statute any new law but it is only a declaration and interpretation of existing law. He has relied upon the orders of the authorities below.

7. We have considered the rival submissions as well as the relevant material on record. There is no dispute that the transaction in question regarding payment of purchase of software was completed in the F.Y.2008-09 whereas the decision of Hon'ble jurisdictional High Court in the case of CIT Vs. Samsung Electronics Co. Ltd. (supra) was passed on 15.10.2011 much later than the time of transaction carried out by the assessee. It is also not in dispute that this issue of considering the payment for purchase of software as royalty is a highly debatable issue and various High Courts have taken divergent views on this issue. The co-ordinate Bench of this Tribunal in the case of ACIT Vs. Aurigene Discovery Technologies (P) Ltd. (supra) has considered an identical issue in paras 3 to 5 as under :

> *" 03. We heard the rival submissions and gone through the relevant orders. The assessee resubmitted the plea taken before the lower authorities and placed on the ruling of the Hon'ble Bangalore ITAT in Sonata Information Technology Ltd v. ACIT (103 ITD 324) which had held that payments for software licenses do not constitute royalty under the provisions of the Act and hence disallowance under section40(a) (ia) of the Act would not be applicable. The change in the legal position on taxation of computer software was on account of the ruling of the Karnataka High Court in CIT v. Samsung Electronics Co. Ltd. (320 ITR 209), which was pronounced on 15.10.11 that is much later than the closure of the FY 2010-11. Subsequently, the Finance Act 2012 also introduced, retrospectively, Explanation 4 to section 9(1 (vi) of the Act to clarify that payments for, inter alia. license to use computer software would qualify as royalty. During the FY 10-11, the assessee did not have the benefit of clarification brought by the respective amendment. As such, for the FY 2010-11, in light of the provisions of section 9(1)(vi) of the Act read with judicial guidance on the taxation of computer software payments, tax was not required to be deducted at source. Given the practice in prior assessment years, the assessee was of the bona fide view that the payment of software license fee was not subject to tax deduction at source under section194J/195 of the Act. It is submitted that liability to deduct tax at source cannot be fastened on the assessee on the basis of retrospective amendment to the Act (Finance Act 2012 amendment thedefinition of royalty with retrospective effect from 01.04.1976) or asubsequent ruling of a court (the Karnataka HC in CIT v Samsung*

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Electronics Co. Ltd. (16 taxmann.com 141) was passed on October 15,2011). Courts have consistently upheld this principle as seen in:

- ITO v. Clear Water Technology Services (P.) Ltd. (52 taxmann.com115)
- Kerala Vision Ltd v. ACIT (46 taxmann.com 50)
- Sonic Biochem Extractions (P.) Ltd v. ITO (35 taxmann.com 463)
- Channel Guide India Ltd v. ACIT (25 taxmann.com 25)
- DCIT v. Virola International (20 14(2) TMI 653)
- CIT v. Kotak Securities Ltd. (20 taxmann.com 846).

04. The relevant portion of the CIT(A) order is extracted as under :

" Disallowance of expenses under 40(a)(i) / 40(a)(ia) :

5.1. As regards disallowance of expenses under 40(a)(i)/40(a)(ia), it has been submitted that the company had determined the rate of tax to be deducted and following the judgments that were prevalent at the time of tax deduction, Supreme Court in the case of Tata Consultancy Services and jurisdictional Tribunal in the case of Samsung Electronics Co. Ltd, the appellant submitted that the said judgment shall not be applicable since it was pronounced on 15/10/2011 and Velankani Mauritius Ltd., whereas the liability to deduct tax for the appellant was the F.Y. 2010-11. The appellant has relied on the judgment of Cochin Tribunal in the case of Kerala Vision Ltd and Agra Tribunal in the case of Virola International, wherein it was held that – "The law amended was undoubtedly retrospective in nature but so far as tax withholding liability is concerned, it depends on the law as it existed at the point of time when payments, from which taxes ought to have been withheld, were made. The tax-deductor cannot be expected to have clairvoyance of knowing how the law will change in future." Further, software payment was included in definition of royalty only vide Explanation to section 9(1)(vi)inserted retrospectively vide Finance Act, 2012 and when the purchase was made, the appellant did not have the benefit of clarification brought by the retrospective amendment. It is impossible to fasten liability for deducting tax at source retrospectively as tax is to be deducted at source at the time when the payment is credited or made. This view has been upheld by the Bangalore Tribunal in the case of DCIT vs M/s WS Atkins India Pvt Ltd (ITA No 14671Bang12014 and the Mumbai Tribunal in the case of Channel Guide India Ltd. vs ACIT ([2012] 25 taxmann.com 25).

5.2 The ITAT 'C' Bench in the case M/s WS Atkins India Pvt. Ltd and in the case of Infotech Enterprises Ltd of the Hyderabad Bench of the Tribunal wherein it has been held that section 40(a)(ia) would not apply to disallow payments when TDS was not d o n e a n d s u b s e q u e n t l y b e c o m e t a x a b l e o n a c c o u n t o f a retrospective legislation. It has also referred to in the case of Sonic Biochem Extractions Pvt. Ltd. (supra), identical issue was considered and decided by the Mumbai Tribunal. Following were the relevant observations:-

"The assessee purchased software, capitalized the payment to the computers account as the software came along with the hardware of computers and claimed depreciation. On

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the ground that purchase of software is essentially purchase of copyright which attracts tax deduction at source under section 194J, the Assessing Officer involved the provisions o f section 40(a) (i a) and disallowed the depreciation claimed . The Commissioner (Appeals), confirmed the action of the Assessing Officer on the ground that the purchase of software amounted to acquisition of intangible asset and therefore, the payment was royalty and disallowable.
On appeal:
Held, (i) that mere purchase of software, a copyrighted article, for utilisation of computers cannot be considered as purchase of copyright and royalty. The assessee did not acquire any rights for making copies, selling or acquiring which generally could be considered within the definition of "royalty". Explanation 2 to section 9(1)(vi) cannot be applied to purchase of a copyrighted software, which does not involve any commercial exploitation thereof. The assessee simply purchased software delivered along with computer hardware for utilization in the day-to-day business."

5.3 Relying on the above decision, the ITAT `C'Bench, Bangalore upheld the order of the CIT(A) who had observed that the assessee did not have the benefit of the clarification brought brought about by the retrospective amendment that the payments tantamount to payment for royalty and consequently tax was to be deducted u/s 194J. The law as extant on the date when the payment for obtaining the software was made, has not categorically laid down that tax is required to be deducted. It is impossible to fasten liability for deducting tax at source retrospectively.

5.4 In view of the above decisions, it is correct to say that it is not possible to fasten liability for deducting tax at source retrospectively as tax is to be deducted at source at the time when the payment is credited or made. When purchase of software was made the assessee did not have the benefit of the clarification brought about by the retrospective amendment. The contention of the appellant is correct that the software payment disallowed by the AO did not warrant withholding o f the tax u/s 40(a) (ia) and 40(a)(ia) (by an order of corrigendum dt 20.11.2015) o f the Ac t. Therefore disallowance made by the AO on account of software payment want of withholding of tax is hereby deleted."

05. The CIT(A) followed the decision of this Tribunal in M/s WS Atkins India Pvt. Ltd, supra, which referred the decisions of Hyderabad Bench of the Tribunal in Infotech Enterprises Ltd in ITA 115/HYD/2011 wherein it has been held that section 40(a)(ia) would not apply to disallow payments when TDS was not d o n e a n d s u b s e q u e n t l y b e c o m e t a x a b l e o n ac c o u n t o f a retrospective legislation. It has also referred to the decisions of the Delhi & Mumbai Tribunal in SMS Demag Pvt Ltd , 132 ITJ 498 & Sonic Biochem Extractions Pvt. Ltd. 23 ITR (Trib) 447, respectively. We uphold the decision of the CIT(A) and dismiss the grounds raised by the Revenue." Thus it is clear that the co-ordinate Bench of this Tribunal while deciding this issue has taken note of various decisions in favour of the assessee on the point that the payment for purchase of software does not fall in the definition of royalty. Respectfully following the decision of co-ordinate Bench of this Tribunal, we delete the disallowance made by the Assessing Officer."

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12. Consistent with the view taken on the above case, we also hold that the assessee cannot be fastened with the liability to deduct tax at source retrospectively and accordingly, we set aside the order passed by the learned CIT(A) on this issue and direct the A.O. to delete the impugned addition."

7. In our considered view, the principles set out in the above said decisions could be applied to the instant cases also, even though the issue involved in these cases relate to the demand raised u/s 201(1) and consequent interest charged u/s 201(1A) of the Act. In the instant case also, the assessee was under bonafide belief that there was no required to deduct tax at source from the payments made for purchase of software, since there were certain decisions holding so. However, the jurisdictional High Court held that the payments made for purchase of software is in the nature of royalty and the said IT(IT)A Nos.107 to 114/Bang/2018 M/s. Acer India Private Limited, Bangalore Page 14 of 15 decision came to be pronounced on 15.10.2011. Accordingly, following the principles laid down by the co-ordinate benches in the above cited cases, we hold that the assessee cannot be treated as an assessee in default in respect of payments made for purchase of licensed software prior to 15.10.2011, being the date of pronouncement of the decision in the case of Samsung Electronics Co. Ltd (supra). Accordingly, the demand raised in the hands of the assessee u/s 201(1) and 201(1A) for assessment years 2009-10 to 2011-12 could not be sustained and the demands raised in respect of payments made prior to 15.10.2011 in assessment year 2012-13 could also not be sustained."

10.1 In view of the above, we are of the opinion that the assessee cannot foresee the changes in the Act which was made wherein Expln. 5 to Section 9(1)(vi) of the Act was inserted vide Finance Act, 2012 w.e.f. 1.6.2016 since these payments are made prior to this amendment. Being so, following the Tribunal order in the case of Acer India Pvt. Ltd. Vs. JCIT (supra), we allow the above ground taken by the assessee.

11. The assessee has raised the following additional grounds :

"With regard to the additional legal ground relating to deduction of education cess and secondary higher education cess, it is submitted that the Appellant out of abundant caution had not claimed the said deduction in the return of income for the year under consideration in the absence of clarity in respect of the said issue."

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12. However, the Ld. AR submitted that recently, the Bangalore Tribunal in the case of Aptean India Private Limited (ITA No.2679/Bang/2017) dated 6 November 2020 and Wipro Limited (IT(TP)A No.99/Bang/2014) dated 5 October 2020, relying on the judgment of Rajasthan High Court judgment in the case of CIT vs. Chambal Fertilisers and Chemicals Ltd. (ITA No. 52 of 2018) dated 31 July 2018, has held that education cess and secondary higher education cess is allowable as an expenditure while computing the total income. The Ld. AR submitted that the above deduction of "cess" has been allowed by placing reliance on Circular No. F. No.91/58/66-ITJ(19), dated 18th May, 1967 issued by the CBDT which reads as follows :-

"Interpretation of provision of s. 40(a)(ii) of IT Act, 1961-

Clarification regarding

BUSINESS EXPENDITURE - SECTIONS 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".*

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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 ITOs so that further litigation on this account may be avoided."

In light of the above judicial development, the Appellant request your Honours to kindly accept the additional legal ground of appeal and allow deduction of education cess and secondary higher education cess paid on income-tax under section 37(1) of the Act."

12.1 The Ld. AR submitted that deduction in respect of Education Cess and significant higher income tax under Section 37(1) of the Act is to be allowed. The learned AR submitted that this is a legal issue raised by the assessee for the first time before the Tribunal as the final judgment came to the knowledge of the assessee only after passing of the order by the first appellate authority in the following cases :

i) Sesa Goa Limited (Tax Appeal No.17 & 18 of 2013 dt.28.02.2020) (Bombay High Court).

ii) Wipro Limited (IT(TP)A No.99/Bang/2014 Dt. 05.10.2020) (Bangalore Tribunal)

iii) DCIT Vs. Graphite India Limited (ITA No.472 & 474 and CO No.64 & 66/Kol/2018 dt.22.11.2019) (Kol. Tribunal).

iv) Tata Steel Ltd. (ITA No.5616, 4043/M/2012 dt.12.09.2019) (ITAT, Mumbai).

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v) Peerless General Finance and Investment and Co. Ltd. (ITA No.1469 an 1470/Kol/2019 dt.5.12.2019) (Kol. Tribunal).

vi) Atlas Copco India Ltd. (ITA No.736/Pun/2011 dt.5.08.2019) (Pune Tribunal).

vii) Bajaj Allianz General Insurance Co. LTd. (ITA No.1111,1112/Pn/2017 Dt.24.07.2017) (Pune Tribunal)

viii) ITC Ltd. (ITA No.685/Kol/2014 dt.27.11.2018) (Kol. Tribunal). .

Further the ld. AR relied on the following judgments -

a) National Thermal Power Co. Ltd. (229 ITR 383) (SC)

b) Jute Corportion of India Ltd. (187 ITR 688)(SC)

c) Ahmedabad Electricity Co. Ltd. (199 ITR 351)(Bom FB)

d) M/s. WheelsIndia Ltd. (ITA No.251/Mds/2010 dt.14.03.2014) (Mad.)

e) All Cargo Global Logistics Ltd. Vs.DCIT (ITAT, Special Bench, ITA No.5018/Mum/2010 dt.21.05.2012)

In the above cases, the Ld. AR submitted that since there is no question of investigation of fresh facts, the additional ground is a legal issue to be admitted by the Tribunal.

12.2 The learned Departmental Representative strongly opposed the admission of additional ground on legal issue filed by the assessee.

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13. We have heard the rival contentions, perused and carefully considered the material on record. There is no question of investigation of fresh facts on the issue, and the ground is a legal ground, we are inclined to admit the additional ground by placing reliance on judgment in the case of NTPC Ltd. Vs. CIT 229 ITR 383 (SC). We admit the additional ground raised by the assessee.

14. Regarding the additional legal ground relating to deduction of education cess and secondary higher education cess, the Ld. AR submitted that the assessee out of abundant caution had not claimed the said deduction in the return of income for the year under consideration in the absence of clarity in respect of the said issue. She submitted that, recently, the Bangalore Tribunal in the case of **Aptean India Private Limited (ITA No.2679/Bang/2017)** dated 6 November 2020 and **Wipro Limited (IT(TP)A No.99/Bang/2014)** dated 5 October 2020, relying on the judgement of Rajasthan High Court judgment in the case of CIT vs. Chambal Fertilisers and Chemicals Ltd. (ITA No. 52 of 2018) dated 31 July 2018, has held that education cess and secondary higher education cess is allowable as an expenditure while computing the total income. She further submitted that the above deduction of “cess” has been allowed by placing reliance on Circular No. F. No.91/58/66-ITJ(19), dated 18th May, 1967 issued by the CBDT which reads as follows :-

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"Interpretation of provision of s. 40(a)(ii) of IT Act, 1961-

Clarification regarding

BUSINESS EXPENDITURE - SECTIONS 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 years 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."

14.1 In light of the above judicial development, the ld.AR prayed to kindly accept the additional legal ground of appeal and allow deduction of education cess and secondary higher education cess paid on income-tax under section 37(1) of the Act.

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15 The learned Departmental Representative submitted that the assessee has filed additional ground of appeal to claim deduction of Education Cess and Secondary Higher Education Cess paid on income tax for the year and has merely cited judicial decisions in favour. The Ld. DR submitted that this claim is made for the first time before the ITAT. According to the Ld. DR, the argument is mainly on the premises at section 40(a)(ii) of the Act uses the term "any rate or tax levied" and there is no reference to the term "cess". It is submitted that the relevant Finance Act provides for levy of Education Cess and it was brought in for the first time by Finance Act, 2004. Relevant extracts are of Section 2(11) is reproduced hereunder:

> *"(11) The amount of income-tax as specified in sub-sections (4) 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 (or purposes of the Union, to be called the "Education Cess on income-tax", so as to fulfil the commitment o(the Government to provide and finance universalised quality basic education, calculated at the rate o[two per cent o[such income-tax and surcharge. "*

15.1 The Ld. DR submitted that Finance Act, 2020, has introduced "Health and Education Cess", as under:

> *"(11) The amount of income-tax as specified in sub-sections (1) to (3) and as increased by the applicable surcharge, for the purposes of the Union, calculated in the manner provided therein, shall be further increased by an additional surcharge, for the purposes of the Union, to be called the "Health and Education Cess on income-tax", calculated at the rate of four per cent of such income-tax and surcharge so as to fulfil the commitment of the Government to provide and finance quality health services and universalised quality basic education and secondary and higher education.*

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(12) The amount of income-tax as specified in sub-sections (4) to (10) and. as increased by the applicable surcharge, for the purposes of the Union, calculated in the manner provided therein, shall be further increased by an additional surcharge, for the purposes of the Union, to be called the "Health and Education Cess on income-tax", calculated at the rate of four per cent of such income-tax and surcharge so as to fulfil the commitment of the Government to provide and finance quality health services and universalised quality basic education and secondary and higher education:

Provided that nothing contained in this sub-section shall apply to cases in which tax is to be deducted or collected under the sections of the Income-tax Act mentioned' in sub-sections (5), (6), (7) and (8), if the income subjected to deduction of tax at source or collection of tax at source is paid to a domestic company and any other person who is resident in India. "

From the aforesaid extract, the Ld. DR submitted that it is amply clear that cess has been levied as an additional surcharge for the purposes of the Union, so as to fulfil commitment of the Centre to provide and finance quality health services and education. It has only been termed as a cess.

15. 2. The Ld. DR referred to dictionary meaning of the word' "surcharge" which means "to charge too much or in addition" and also "additional tax". 'Surcharge' is also defined as an additional charge or tax levied on an existing tax. The Ld. DR relied on the judgment of the Hon'ble Supreme Court in the case of K. Srinivasan (83 ITR 346) which elucidated the concept of surcharge and equated it with an additional tax. It was held that the term 'income-tax' as employed in section 2 includes surcharge and additional surcharge whenever provided. The Ld. DR relied on the judgment of the Hon'ble Karnataka High Court in the case of International

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Instruments (P.) Ltd. 144 ITR 936 wherein it was held that Surtax levied on the chargeable profits is nothing but an additional tax on profits and gains of the assessee's business, hence, not deductible in computing the total income under the Income-tax Act. Further, the Ld. DR relied on the judgment of the Hon'ble Kerala High Court in the case of A. V. Thomas and Co. Ltd. 159 ITR 431 wherein it was held as under:

> "*Income-tax is not an expenditure laid out for the purpose of the business. It in fact is paid out of the profits; it is an application of the profits after they have been earned. Thus, taxes such as income-tax, excess profits tax, super-tax, surcharge or surtax being charges on profits, are not deductible.*"

15.3 According to the Ld. DR, it would also be pertinent to examine whether amount paid as education cess is an expenditure in the first place, as it is nothing but distribution of profits/application of income. The Ld. DR relied on the judgment of the Supreme Court in the case of Indian Aluminium Co. Ltd. 84 ITR 735, wherein while dealing with the issue whether wealth tax paid on business assets would be allowable as a deduction or not, the Supreme Court observed that where profits, the net gains of business determined after making all deductions, are taxed, the disbursements to meet such taxes cannot be deducted. However, the Supreme Court observed, that where the tax was levied, OR capital assets used for the purpose of earning profits, it was a permissible deduction. The Ld. DR relied on the judgment of the Hon'ble Calcutta High Court in the case of Molins of India Ltd. 144 ITR 317 wherein it was held that surtax is of the same character as that of

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income tax and similar treatment would follow for surtax too and therefore, it cannot be held that it is incurred wholly and exclusively for the purpose of business. Similar view has been taken by the Hon'ble Gujarat High Court in the case of S.L.M Maneklal Industries Ltd. 172 I1R 176, where it was held that the question of payment of surtax would arise only after the profit or income is earned. According to the Ld. DR, it is an event which takes place after the income is earned, impliedly to mean that payment of surtax is an application of the profits. The Ld. DR relied on the judgment of the Hon'ble Apex Court in the case of Smith Kline & French India Ltd. vs. CIT, 219 ITR 581 wherein it was held that surtax falls within the mischief of Section 40(a)(ii) of the Act and cannot be allowed as a deduction.

15.4 The Ld. DR submitted that the assessee has relied on decision of ITAT Bangalore in Aptean India Pvt Ltd which follows the judgments of Hon'ble Bombay HC and Hon'ble Rajasthan HC. Here, the Ld. DR submitted that the attention of the Hon'ble Bombay High Court in Sesa Goa case (117 taxmann.com 96) was not invited to the language used in Finance Act that cess is an additional surcharge only. It is also submitted that the Hon'ble Rajasthan High Court in Chambal Fertilisers and Chemicals (ITA No. 5212018 dated July 31, 2018) reversed the order of the Tribunal wherein it was held by the Tribunal that cess is

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nothing but an additional surcharge by relying upon the language used in the Finance Act. However, it was submitted that apparently no reasoning has been advanced for discarding the argument that Finance Act has levied additional surcharge terming it to be cess.

15.5. In view of above facts and judicial decisions, it was the submission of the Ld. DR that it may kindly be held that cess being an additional surcharge only would not be allowed as a deduction. Thus, the Ld. AR submitted that the contentions of the assessee raised are liable to be rejected and the additional ground of appeal is not sustainable.

15.6 Without prejudice to above, it was the submission of the Ld. DR that if the Bench admits the Additional Ground of Appeal of the assessee, the same may be remanded back to the AO for deciding as per law, since this issue was never raised before AO or the CIT(A). It was submitted that the assessee has also failed to file a revised return to claim this deduction before the AO in accordance with the judgment of the Hon'ble SC in the case of Goetze (India) Ltd. Vs Commissioner of Income Tax (2006) 284 ITR 323.

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16. We have heard the rival contentions, perused and carefully considered the material on record. In the case of Voltas Limited in ITA No.6612/Mum/2018 for the Assessment Year 2012-13, the Mumbai Bench of Tribunal vide order dt.30.06.2020 observed in para 7 as under :

" 7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, and also the judicial pronouncements relied upon by them. We shall first adjudicate the additional ground of appeal raised by the assessee. Insofar the claim of the Ld. A.R that unlike "rates" and "taxes" the amount paid by an assessee towards "Education Cess" or any "other cess" viz. the Secondary and Higher Education Cess is not a disallowable expenditure u/s 40(a)(ii) of the Income-tax Act, 1961, we find that the said issue is squarely covered by the recent order of the Hon'ble High Court of Bombay in the case of Sesa Goa Limited vs. Joint Commissioner of Income-tax (2020) 107 CCH 375 (Bom). In the case before the Hon"ble High Court the following substantial question of law was inter alia raised :

"iii. Whether on the facts and in the circumstances of the case and in law, the Education Cess and Higher and Secondary Education Cess is allowable as a deduction in the year of payment."

After exhaustive deliberations, the Hon'ble High Court had observed that the legislature in Sec. 40(a)(ii) had though provided that "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 of business or profession", but then there was no reference to any "cess". Also, the High Court observed that there was no scope to accept that "cess" being in the nature of a "tax" was equally not deductible in computing the income chargeable under the head "profits and gains of business or profession". It was further observed that if the legislature would had intended to prohibit the deduction of amounts paid by an assessee towards say, "education cess" or any other "cess", then, it could have easily included a reference to "cess" in clause (ii) of Section 40(a). On the basis of its aforesaid observations, the Hon'ble High Court had concluded that now when the legislature had not provided for any prohibition on the deduction of any amount paid towards "cess" in clause (ii) of Sec. 40(a), therefore, holding to the contrary would amount to reading something which is not to be found in the text of the provision of Sec. 40(a)(ii). Accordingly, the Hon'ble High Court had concluded that there was no prohibition on the deduction of any amount paid towards "cess" in Sec. 40(a)(ii), while computing the income chargeable under the head "profits and gains of business or profession", observing as under :

"16. The aforesaid question arises in the context of provisions of Section 40(a)(ii) which inter alia provides that notwithstanding anything to the contrary in sections 30 to 38 of the IT Act, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",
(a) in the case of any assessee –

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(ia)..........................
(ib)..............................
(ic) ....

(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;]

17. Therefore, the question which arises for determination is whether the expression "any rate or tax levied" as it appears in Section 40(a)(ii) of the IT Act includes "cess". The Appellant – Assessee contends that the expression does not include "cess" and therefore, the amounts paid towards "cess" are liable to be deducted in computing the income chargeable under the head "profits and gains of business or profession".
However, the Respondent – Revenue contends that "cess" is also included in the scope and import of the expression "any rate or tax levied" and consequently, the amounts paid towards the "cess" are not liable for deduction in computing the income chargeable under the head "profits and gains of business or profession".

18. In relation to taxing statute, certain principles of interpretation are quite well settled. In New Shorrock Spinning and Manufacturing Co. Ltd. Vs Raval, 37 ITR 41 (Bom.), it is held that one safe and infallible principle, which is of guidance in these matters, is to read the words through and see if the rule is clearly stated. If the language employed gives the rule in words of sufficient clarity and precision, nothing more requires to be done. Indeed, in such a case the task of interpretation can hardly be said to arise : Absoluta sententia expositore non indiget. The language used by the Legislature best declares its intention and must be accepted as decisive of it.

19. Besides, when it comes to interpretation of the IT Act, 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. The subject cannot be taxed unless he comes within the letter of the law and the argument that he falls within the spirit of the law cannot be availed of by the department. [See CIT vs Motors & General Stores 66 ITR 692 (SC)].

20. In a taxing Act 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 [See CIT Vs Radhe Developers 341 ITR 403]. One can only look fairly at the language used. No tax can be imposed by inference or analogy. It is also not permissible to

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construe a taxing statute by making assumptions and presumptions [See Goodyear Vs State of Haryana 188 ITR 402(SC)].

21. There are several decisions which lay down rule that the provision for deduction, exemption or relief should be interpreted liberally, reasonably and in favour of the assessee and it should be so construed as to effectuate the object of the legislature and not to defeat it. Further, the interpretation cannot go to the extent of reading something that is not stated in the provision [See AGS Tiber Vs CIT 233 ITR 207].

22. Applying the aforesaid principles, we find that the legislature, in Section 40(a)(ii) has provided that "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 of business or profession". There is no reference to any "cess". Obviously therefore, there is no scope to accept Ms. Linhares's contention that "cess" being in the nature of a "Tax" is equally not deductable in computing the income chargeable under the head "profits and gains of business or profession". Acceptance of such a contention will amount to reading something in the text of the provision which is not to be found in the text of the provision in Section 40(a)(ii) of the IT Act.

23. If the legislature intended to prohibit the deduction of amounts paid by a Assessee towards say, "education cess" or any other "cess", then, the legislature could have easily included reference to "cess" in clause (ii) of Section 40(a) of the IT Act. The fact that the legislature has not done so means that the legislature did not intend to prevent the deduction of amounts paid by a Assessee towards the "cess", when it comes to computing income chargeable under the head "profits and gains of business or profession".

24. The legislative history bears out that the Income Tax Bill, 1961, as introduced in the Parliament, had Section 40(a)(ii) which read as follows :

> *"(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"*

25. However, when the matter came up before the Select Committee of the Parliament, it was decided to omit the word "cess" from the aforesaid clause from the Income Tax Bill, 1961. The effect of the omission of the word "cess" is that only any rate or tax levied on the profits or gains of any business or profession are to be deducted in computing the income chargeable under the head " profits and gains of business or profession". Since the deletion of expression "cess" from the Income Tax Bill, 1961, was deliberate, there is no question of reintroducing this expression in Section 40(a)(ii) of IT Act and that too, under the guise of interpretation of taxing statute.

26. In fact, in the aforesaid precise regard, reference can usefully be made to the Circular No. F. No.91/58/66-ITJ(19), dated 18th May, 1967 issued by the CBDT which reads as follows :-

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"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 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 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.91/58/66-ITJ(19), dated 18-5-1967.]"

27. The CBDT Circular, is binding upon the authorities under the IT Act like Assessing Officer and the Appellate Authority. The CBDT Circular is quite consistent with the principles of interpretation of taxing statute. This, according to us, is an additional reason as to why the expression "cess" ought not to be read or included in the expression "any rate or tax levied" as appearing in Section 40(a)(ii) of the IT Act.

28. In the Income Tax Act, 1922, Section 10(4) had banned allowance of any sum paid on account of 'any cess, rate or tax levied on the profits or gains of any business or profession'. In the corresponding Section 40(a)(ii) of the IT Act, 1961 the expression "cess" is quite conspicuous by its absence. In fact, legislative history bears out that this expression was in fact to be found in the Income Tax Bill, 1961 which was introduced in the Parliament. However, the Select Committee recommended the omission of expression "cess" and consequently, this expression finds no place in the final text of the provision in Section 40(a)(ii) of the IT Act, 1961. The effect of such omission is that the provision in Section 40(a)(ii) does not include, "cess" and consequently, "cess" whenever paid in relation to business, is allowable as deductable expenditure.

29. In Kanga and Palkhivala's "The Law and Practice of Income Tax" (Tenth Edition), several decisions have been analyzed in the context of provisions of Section 40(a)(ii) of the IT Act, 1961. There is reference to the decision of Privy Council in CIT Vs Gurupada Dutta 14 ITR 100, where a union rate was imposed under a Village Self Government upon the assessee as the owner or occupier of business premises, and the quantum of the rate was fixed after consideration of the 'circumstances' of the assessee, including his business income. The Privy Council held that the rate was not 'assessed on the basis of profits' and was allowable as a business expense. Following this decision, the Supreme Court held in Jaipuria Samla Amalgamated Collieries Ltd Vs CIT [82 ITR 580] that the expression 'profits or gains of any

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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. Similarly, this sub-clause is inapplicable, and a deduction should be allowed, where a tax is imposed by a district board on business with reference to 'estimated income' or by a municipality with reference to 'gross income'. Besides, unlike Section 10(4) of the 1922 Act, this sub-clause does not refer to 'cess' and therefore, a 'cess' even if levied upon or calculated on the basis of business profits may be allowed in computing such profits under this Act.

30. The Division Bench of the Rajasthan High Court (Jaipur Bench) in Income Tax Appeal No.52/2018 decided on 31st July, 2018 (Chambal Fertilisers and Chemicals Ltd. Vs CIT Range-2, Kota), by reference to the aforesaid CBDT Circular dated 18th May, 1967 has held that the ITAT erred in holding that the "education cess" is a disallowable expenditure under Section 40(a)(ii) of the IT Act. Ms. Linhares was unable to state whether the Revenue has appealed this decision. Mr. Ramani, learned Senior Advocate submitted that his research did not suggest that any appeal was instituted by the Revenue against this decision, which is directly on the point and favours the Assessee.

31. Mr. Ramani, in fact pointed out three decisions of ITAT, in which, the decision of the Rajasthan High Court in Chambal Fertilisers and Chemicals Ltd.(supra) was followed and it was held that the amounts paid by the Assessee towards the 'education cess' were liable for deduction in computing the income chargeable under the head of "profits and gains of business or profession". They are as follows :-

> *(i) DCIT Vs Peerless General Finance and Investment and Co. Ltd. (ITA No.1469 and 1470/Kol/2019 decided on 5th December, 2019 by the ITAT, Calcutta;*
>
> *(ii) DCIT Vs Graphite India Ltd. (ITA No.472 and 474 Co. No.64 and 66/Kol/2018 decided on 22nd November, 2019)by the ITAT, Calcutta;*
>
> *(iii) DCIT Vs Bajaj Allianz General Insurance (ITA No.1111 and 1112/PUN/2017 decided on 25th July, 2019) by the ITAT, Pune.*

32. Again, Ms. Linhares, learned Standing Counsel for the Revenue was unable to say whether the Revenue had instituted the appeals in the aforesaid matters. Mr. Ramani, learned Senior Advocate for the Appellant submitted that to the best of his research, no appeals were instituted by the Revenue against the aforesaid decisions of the ITAT.

33. The ITAT, in the impugned judgment and order, has reasoned that since "cess" is collected as a part of the income tax and fringe benefit tax, therefore, such "cess" is to be construed as "tax". According to us, there is no scope for such implications, when construing a taxing statute. Even, though, "cess" may be collected as a part of income tax, that does not render such "cess", either rate or tax, which cannot be deducted in terms of the provisions in Section 40(a)(ii) of the IT Act. The mode of collection, is really not determinative in such matters.

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34. Ms. Linhares, has relied upon M/s Unicorn Industries Vs Union of India and others, 2019 SCC Online SC 1567 in support of her contention that "cess" is nothing but "tax" and therefore, there is no question of deduction of amounts paid towards "cess" when it comes to computation of income chargeable under the head profits or gains of any business or profession.

35. The issue involved in Unicorn Industries (supra) was not in the context of provisions in Section 40(a)(ii) of the IT Act. Rather, the issue involved was whether the 'education cess, higher education cess and National Calamity Contingent Duty (NCCD)' on it could be construed as "duty of excise" which was exempted in terms of Notification dated 9th September, 2003 in respect of goods specified in the Notification and cleared from a unit located in the Industrial Growth Centre or other specified areas with the State of Sikkim. The High Court had held that the levy of education cess, higher education cess and NCCD could not be included in the expression "duty of excise" and consequently, the amounts paid towards such cess or NCCD did not qualify for exemption under the exemption Notification. This view of the High Court was upheld by the Apex Court in Unicorn Industries (supra).

36. The aforesaid means that the Supreme Court refused to regard the levy of education cess, higher education cess and NCCD as "duty of excise" when it came to construing exemption Notification. Based upon this, Mr. Ramani contends that similarly amounts paid by the Appellant – Assessee towards the "cess" can never be regarded as the amounts paid towards the "tax" so as to attract provisions of Section 40(a)(ii) of the IT Act. All that we may observe is that the issue involved in Unicorn Industries (supra) was not at all the issue involved in the present matters and therefore, the decision in Unicorn Industries (supra) can be of no assistance to the Respondent – Revenue in the present matters.

37. Ms. Linhares, learned Standing Counsel for the Revenue however submitted that the Appellant – Assessee, in its original return, had never claimed deduction towards the amounts paid by it as "cess". She submits that neither was any such claim made by filing any revised return before the Assessing Officer. She therefore relied upon the decision of the Supreme Court in Goetze (India) Ltd. Vs Commissioner of Income Tax (2006) 284 ITR 323 (SC) to submit that the Assessing Officer, was not only quite right in denying such a deduction, but further the Assessing Officer had no power or jurisdiction to grant such a deduction to the Appellant – Assessee. She submits that this is what precisely held by the ITAT in its impugned judgments and orders and therefore, the same, warrants no interference.

38. Although, it is true that the Appellant – Assessee did not claim any deduction in respect of amounts paid by it towards "cess" in their original return of income nor did the Appellant – Assessee file any revised return of income, according to us, this was no bar to the Commissioner (Appeals) or the ITAT to consider and allow such deductions to the Appellant – Assessee in the facts and circumstances of the present case. The record bears out that such deduction was clearly claimed by the Appellant – Assessee, both before the Commissioner (Appeals) as well as the ITAT.

39. In CIT Vs Pruthvi Brokers & Shareholders Pvt. Ltd. 349 ITR 336, one of the questions of law which came to be framed was whether on the facts and circumstances of the case, the

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ITAT, in law, was right in holding that the claim of deduction not made in the original returns and not supported by revised return, was admissible. The Revenue had relied upon Goetze (supra) and urged that the ITAT had no power to allow the claim for deduction. However, the Division Bench, whilst proceeding on the assumption that the Assessing Officer in terms of law laid down in Goetze (supra) had no power, proceeded to hold that the Appellate Authority under the IT Act had sufficient powers to permit such a deduction. In taking this view, the Division Bench relied upon the Full Bench decision of this Court in Ahmedabad Electricity Co. Ltd Vs CIT (199 ITR 351) to hold that the Appellate Authorities under the IT Act have very wide powers while considering an appeal which may be filed by the Assessee. The Appellate Authorities may confirm, reduce, enhance or annul the assessment or remand the case to the Assessing Officer. This is because, unlike an ordinary appeal, the basic purpose of a tax appeal is to ascertain the correct tax liability of the Assessee in accordance with law.

40. The decision in Goetze (supra) upon which reliance is placed by the ITAT also makes it clear that the issue involved in the said case was limited to the power of the assessing authority and does not impinge on the powers of the ITAT under section 254 of the said Act. This means that in Goetze (supra), the Hon'ble Apex Court was not dealing with the extent of the powers of the appellate authorities but the observations were in relation to the powers of the assessing authority. This is the distinction drawn by the division Bench in Pruthvi Brokers (supra) as well and this is the distinction which the ITAT failed to note in the impugned order.

41. Besides, we note that in the present case, though the claim for deduction was not raised in the original return or by filing revised return, the Appellant – Assessee had indeed addressed a letter claiming such deduction before the assessment could be completed. However, even if we proceed on the basis that there was no obligation on the Assessing Officer to consider the claim for deduction in such letter, the Commissioner (Appeals) or the ITAT, before whom such deduction was specifically claimed was duty bound to consider such claim. Accordingly, we are unable to agree with Ms. Linhare's contention based upon the decision in Goetze (supra).

42. For all the aforesaid reasons, we hold that the substantial question of law No.(iii) in Tax Appeal No.17 of 2013 and the sole substantial question of law in Tax Appeal No.18 of 2013 is also required to be answered in favour of the Appellant – Assessee and against the Respondent Revenue. To that extent therefore, the impugned judgments and orders made by the ITAT warrant interference and modification. 43. Thus, we answer all the three substantial questions of law framed in Tax Appeal No.17 of 2013 in favour of the Appellant – Assessee and against the Respondent -Revenue. Similarly, we answer the sole substantial question of law framed in Tax Appeal No.18 of 2013, in favour of the Appellant – Assessee and against the Respondent – Revenue." Accordingly, we respectfully following the aforesaid judgment of the Hon"ble High Court of Bombay in the case of Sesa Gold Limited (supra), therein conclude that "Education Cess" and the Secondary and Higher Education Cess is not disallowable as a deduction u/s 40(a)(ii) of the Act. The additional ground of appeal raised by the assessee is allowed."

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16.1 In the present case, the facts are similar and identical to the case considered by the Mumbai Bench of Tribunal cited supra and the arguments of both the parties are similar. Accordingly, taking a consistent view, we allow the additional ground taken by the assessee. Ordered accordingly.

17. In the result, the assessee's appeal is partly allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(N.V. VASUDEVAN)	**(CHANDRA POOJARI)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Dated: 07.01.2021.

*Reddy GP

Copy to

1. The appellant
2. The Respondent
3. CIT (A)
4. Pr. CIT
5. DR, ITAT, Bangalore.
6. Guard File

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore