

**Amendment in section 36(1)(va) requiring payment of employees' contribution to the relevant funds on or before the due date specified in the relevant Act is prospective in nature and would therefore not apply to any AY, prior to AY 2021-22**

**Flying Fabrication vs. DCIT (133 taxmann.com 84) (Del.)**  
**(In favour of: Assessee)**

#### Relevant facts

The Assessee was engaged in the business of providing security/ labour/ manpower services. It had filed return of income for AY 2018-19 and AY 2019-20, wherein the Assessee had not made any disallowance under section 36(1)(va) on account of delay in deposit of employees' contribution towards PF/ ESI on the ground that the payment to these funds were made within the due date of filing of tax return under section 139(1) of the Act.

The Central Processing Centre, Bangalore ('CPC Bangalore') however made adjustment to the total income while passing intimation under section 143(1). The National Faceless Assessment Centre ('NFAC') passed the order confirming the action of CPC Bangalore. The Finance Act 2021 inserted Explanation 2 to section 36(1)(va) which clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the "due date" under this clause. The NFAC after considering the wording of Explanation 2 observed that amendment in section 36(1)(va) is clarificatory in nature and would therefore apply for AY 2018-19 and AY 2019-20.

#### Held

The Delhi Tribunal took note of the decision of Supreme Court in the case of CIT vs. Vinay Cement Ltd. (213 ITR 268) and Delhi High Court decision in the case of CIT vs. AIMIL Ltd. (321 ITR 508).

Following the said decisions, the Delhi Tribunal held that disallowance as per section 36(1)(va) of the Act would only apply where employees' contribution is not deposited till the due date of filing of tax return as per section 139(1). It was further held that Explanation 2 requiring the Assessee to deposit employee contributions to the relevant funds before the due date of making contributions as per the relevant Act would only apply from AY 2021-22.

**The Bombay High Court quashes assessment orders passed by NFAC without following the procedure laid down under section 144B**

Golden Tobacco Ltd. vs. NFAC (132 taxmann.com 296)(Bom.)

Abacus Real Estate (P.) Ltd. vs. DCIT (133 taxmann.com 277)(Bom.)

(In favour of: Assessee)

### Relevant facts

The assessment orders in the above cases were passed by NFAC under section 143(3) read with section 144B of the Act.

In the case of petitioners, the NFAC passed final assessment orders against the assessee without issuing a show-cause notice in form of draft assessment order.

The Bombay High Court took note of section 144B(1)(xvi)(x) of the Act which requires the NFAC to provide an opportunity to the assessee, in case, any variation prejudicial to the interest of assessee is proposed, by serving a notice calling upon him to show cause as to why the proposed variation should not be made. The Bombay High Court also took note of section 144B(9) of the Act which provides that any assessment made shall be non-est, if such assessment is not made in accordance with the procedure laid down under this section.

### Held

The Bombay High Court observed that any order passed without following the procedure laid down under section 144B would be non-est. Accordingly, the orders passed by NFAC were quashed with the direction to make assessment following the procedure prescribed under section 144B.

**Education cess not allowable as deduction in computing the income chargeable under the head 'profits and gains, business or profession'. The Kolkata Tribunal disagrees with view taken by the Bombay and Rajasthan High Courts**

Kanoria Chemicals & Industries Ltd

[TS-1129-ITAT-2021(Kol.)]

(In favour of: Income tax department)

### Relevant facts

The Assessee had filed an appeal before the Kolkata Tribunal on various issues. In the course of appeal, the Assessee filed additional grounds of appeal claiming deduction of education cess contending that education cess does not fall within the meaning of section 40(a)(ii) of the Act. As per section 40(a)(ii) of the Act, 'any rate or tax levied' on profits and gains of business or profession' shall not be deducted in computing the income chargeable under the head 'profits and gains, business or profession'.

Following the said decisions, the Delhi Tribunal held that disallowance as per section 36(1)(va) of the Act would only apply where employees' contribution is not deposited till the due date of filing of tax return as per section 139(1). It was further held that Explanation 2 requiring the Assessee to deposit employee contributions to the relevant funds before the due date of making contributions as per the relevant Act would only apply from AY 2021-22.

## Held

The Kolkata Tribunal disregarded the above High Court decisions. The Kolkata Tribunal observed that the issue of allowability of education cess is squarely covered by the decision of the Supreme Court in the case of CIT vs. K. Srinivasan (83 ITR 346), wherein it was held that "Income tax" would include surcharge and additional surcharge.

The Kolkata Tribunal took note of the fact that 'education cess' was brought in for the first time by the Finance Act, 2004, wherein it was mentioned that "an additional surcharge, to be called the Education Cess introduced to finance the Government's commitment to universalise quality basic education, is proposed to be levied at the @ 2% on the amount of tax deducted or advance tax paid, inclusive of surcharge."

The Kolkata Tribunal referred to the provisions of the Finance Act 2011 relevant to the AY 2012-13 wherein it was mentioned that "The amount of income-tax as specified in sub-sections (1) to (10) and as increased by a surcharge for purposes of the Union calculated in the manner provided therein, shall be further increased by an additional surcharge for purposes of the Union, to be called the "Education Cess on income-tax", calculated @ 2%."

Considering the aforesaid provisions of the Finance Act 2004 and Finance Act 2011 it was held that 'education cess' is an additional surcharge levied on the income-tax.

The Kolkata Tribunal observed that the above decision of Supreme Court and the provisions of Finance Act, 2004/ 2011 were not brought into the notice of the High Courts in the cases of Sesa Goa Ltd & Chambal Fertilisers.

Since the decision of the Supreme Court prevails over the decision of the High Courts, the assessee's appeal was dismissed.

The Kolkata Tribunal, accordingly, held that education cess would not be allowable as deduction in computing the income chargeable under the head 'profits and gains, business or profession'.

## KEY TAKE AWAY

- Amendment in section 36(1)(va) requiring payment of employees' contribution to the relevant funds on or before the due date specified in the relevant Act is prospective in nature and would therefore not apply to any AY, prior to AY 2021-22
- The Bombay High Court quashes assessment orders passed by NFAC without following the procedure laid down under section 144B
- Education cess not allowable as deduction in computing the income chargeable under the head 'profits and gains, business or profession'. The Kolkata Tribunal disagrees with view taken by the Bombay and Rajasthan High Courts



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