IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'H': NEW DELHI

BEFORE DR. B.R.R. KUMAR, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

ITA Nos.145 & 146 /Del/2021
(ASSESSMENT YEARS 2014-15 & 2015-16)

M/s. RSWM Ltd. Khari Gram, Gulabpura, Rajasthan-311021 PAN : AAACR 9700M	Vs.	DCIT, Central Circle-31, New Delhi
(Appellant)		**(Respondent)**

ITA Nos.1928 & 1929/Del/2020
(ASSESSMENT YEARS 2014-15 & 2015-16)

DCIT, Central Circle-31, New Delhi	Vs.	M/s. RSWM Ltd. Khari Gram, Gulabpura, Rajashthan- 311021 PAN : AAACR 9700M
(Appellant)		**(Respondent)**

Appellant by	Sh. S. S. Naagar, CA
Respondent by	Ms. Sapna Bhatia, CIT-DR

Date of Hearing	07/11/2023
Date of Pronouncement	31/01/2024

ORDER

PER YOGESH KUMAR U.S., JM:

The above captioned appeals filed by Assessee as well as Revenue against the order of Learned Commissioner of Income Tax (Appeals)-30, New Delhi ["Ld. CIT(A)", for short], dated 17/09/2020 for Assessment Years 2014-15 & 2015-16 respectively. Grounds taken in these appeals are as under:

ITA No. 145/Del/202 for A.Y. 2014-15 (Assessee)

"1(i) That on facts and circumstances of the case, the Ld. CIT(A) was not justified in upholding disallowance to the extent of Rs. 81,01,633/- u/s 14A read with Rule 8D of the Income tax Act, 1961 even though the assessing officer has not recorded requisite satisfaction in terms of provision of section 14A(2)&(3) of the Act.

(ii) That in absence of recording of valid satisfaction u/s 14A(2) & (3) which is sine qua non *for invoking Rule 8D, the consequential disallowance is illegal and arbitrary.*

(iii) That the entire investment being out of interest free funds and in absence of incurring of any expenses in relation of exempt income or any nexus between borrowed funds and investments yielding exempt income, the disallowance of Rs. 81,01,633/- is on mechanical basis and not sustainable under the law.

2(i) That on facts and circumstances of the case, the Ld. CIT(A) has grossly erred in confirming addition of Rs. 1,52,45,000/- u/s 69 on the alleged ground of unexplained investment in total disregard to facts and submissions of the appellant.

(ii) That the addition being based on dumb document having no evidentiary value, the upholding of addition was illegal and not sustainable on facts and under the law.

(iii) That the seized annexure being an uncorroborated document and assessing officer having failed to establish the allegation of cash payment with some independent material, the addition u/s 69 is misconceived and without any basis.

(iv) That there being no case of any unrecorded cash payment or unexplained investment, the impugned addition u/s 69 is contrary to facts and invalid.

3(i) That on the facts and circumstances of the case, the Ld. CIT(A) was not justified in rejecting the claim of education cess of Rs. 81,43,988/- even though same is eligible deduction under the provisions of the Income tax Act, 1961.

(ii) *That in absence of any prohibition or restriction in the Income tax Act regarding claim of education cess which does not form part of income tax as referred u/s 40(a)(ii), the non acceptance of claim is on arbitrary basis and without justification.*

(iii) *That education cess paid during the year being an eligible deduction u/s 37(1) of the Act and also liable to adjusted from book profit u/s 115JB, the rejection of claim is illegal and not in accordance with law.*

(iv) *That the decision of Ld. CIT(A) is contrary to settled legal position and scheme of the Income tax Act.*

4. *The orders passed by lower authorities are not justified on facts and are bad in law.*

5. *That the appellant craves leaves to add, alter, amend, forgot any of the grounds of appeal at the time of hearing."*

ITA No.146/Del/2021 for A.Y. 2015-16 (Assessee)

"1(i) That on facts and circumstances of the case, the Ld. CIT(A) was not justified in upholding disallowance to the extent of Rs.60,27,158/- u/s 14A read with Rule 8D of the Income tax Act, 1961 even though the assessing officer has not recorded requisite satisfaction in terms of provision of section 14A(2)&(3) of the Act.

(ii) That in absence of recording of valid satisfaction u/s 14A(2)&(3) which is sine qua non for invoking Rule 8D, the consequential disallowance is illegal and arbitrary.

(iii) That the entire investment being out of interest free funds and in absence of incurring of any expenses in relation of exempt income or any nexus between borrowed funds and investments yielding exempt income, the disallowance of Rs.60,27,158/-is on mechanical basis and not sustainable under the law.

2(i) That on the facts and circumstances of the case, the Ld. CIT(A) was not justified in rejecting the claim of education cess of Rs.80,19,858/- even though same is eligible deduction under the provisions of the Income Tax Act, 1961.

(ii) That in absence of any prohibition or restriction in the Income tax Act regarding claim of education cess which does not form part of income tax as referred u/s 40(a)(ii), the non acceptance of claim is on arbitrary basis and without justification.

(iii) *That education cess paid during the year being an eligible deduction u/s 37(1) of the Act and also liable to adjusted from book profit u/s 115JB, the rejection of claim is illegal and not in accordance with law.*

(iv) *That the decision of Ld. CIT(A) is contrary to settled legal position and scheme of the Income tax Act.*

3. *The orders passed by lower authorities are not justified on facts and are bad in law.*

4. *That the appellant craves leaves to add, alter, amend, forgot any of the grounds of appeal at the time of hearing."*

ITA No.1928/Del/2020 for A.Y. 2014-15 (Revenue)

"1. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in restricting the addition to Rs. 81,01,633/- (to the extent of dividend income) as against Rs. 6,10,36,000/-, made u/s 14A by the AO, without appreciating the detailed reasons given in the assessment order.

2. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs. 18,96,23,522/- (incentive under FAS/ FMS of Rs.18,96,23,522/- as capital receipt,) without appreciating the detailed reasons given in the assessment order. On similar issue in the case of M/s Nitin Spinners Ltd., Department has filed SLP in Hon'ble Supreme Court.

3. That on the facts and in the circumstances of the case, the Ld.CIT(A) has erred in law and on facts in deleting the addition of Rs. 31,67,12,369/- (interest subsidy under TUFS of Rs. 31,67,12,369/- as capital receipt,) without appreciating the detailed reasons given in the assessment order. On similar issue in the case of M/s Nitin Spinners Ltd., Department has filed SLP in Hon'ble Supreme Court.

4. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs. 4,70,52,567/- (interest subsidy under RIPS of Rs. 4,70,52,567/- as capital receipt,) without appreciating the detailed reasons given in the assessment order. On similar issue in the case of M/s Nitin Spinners Ltd., Department has filed SLP in Hon'ble Supreme Court.

5. That the order of Ld. CIT(A) is erroneous and is not tenable on facts and in law.

6. That the grounds of appeal are without prejudice to each other.

7. The appellant craves leave to add, alter or forgo any ground(s) of appeal either before or at the time of the hearing of the appeal."

ITA No.1929/Del/2020 for A.Y. 2014-15 (Revenue)

"1. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in restricting the addition to Rs. 60,27,000/- (to the extent of dividend income) as against Rs.5,08,44,000/-, made u/s 14A by the AO, without appreciating the detailed reasons given in the assessment order.

2. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.14,65,42,563/- (incentive under FPS/ FMS of Rs.14,65,42,563/- as capital receipt,) without appreciating the detailed reasons given in the assessment order. On similar issue in the case of M/s Nitin Spinners Ltd., Department has filed SLP in Hon'ble Supreme Court.

3. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.26,33,12,680/- (interest subsidy under TUFS of Rs.26,33,12,680/- as capital receipt,) without appreciating the detailed reasons given in the assessment order. On similar issue in the case of M/s Nitin Spinners Ltd., Department has filed SLP in Hon'ble Supreme Court.

4. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs. 2,68,18,318/- (interest subsidy under RIPS of Rs. 2,68,18,318/- as capital receipt,) without appreciating the detailed reasons given in the assessment order. On similar issue in the case of M/s Nitin Spinners Ltd., Department has filed SLP in Hon'ble Supreme Court.

5. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs. 6,74,06,326/- (subsidy under SHIS of Rs. 6,74,06,326/- as capital receipt,) without appreciating the detailed reasons given in the assessment order. On similar issue in the case of M/s Nitin Spinners Ltd., Department has filed SLP in Hon'ble Supreme Court.

6. That the order of Ld. CIT(A) is erroneous and is not tenable on facts and in law.

7. That the grounds of appeal are without prejudice to each other.

The appellant craves leave to add, alter or forgo any ground(s) of appeal either before or at the time of the hearing of the appeal."

2. As the issues involved in the captioned appeals of the Assessee and the Revenue are identical for the A.Y.2014-15 and 2015-16, all the appeals are heard together and decided in this common order.

3. For the purpose of convenience, the brief facts of the A.Y.2014-15 are considered which are mentioned in the order of the Ld. CIT(A), that the Assessee is a listed Company in which public is substantially interested engaged in the business of manufacturing of yarn. The original return of income u/s 139(1) of the Act was filed on 26/11/2014 declaring total of Rs.107,07,43,530/- which was subsequently revised on dated 08/09/2015 declaring total income of Rs.123,72,26,800/- and again on 22/03/2016 declaring total income of Rs.55,88,53,820/-. Subsequently, search action u/s 132 of the IT Act was carried out in Bhilwara group on dated 04/08/2016 and the premises of the assessee were also covered. The assessee has filed return of income u/s 153A of the Act on dated 05/03/2018 at total income of Nil (after setting off with b/f losses of 111,55,93,312/-). The learned Assessing Officer completed the assessment vide order dated 30/12/2018 u/s 153A of Income Tax Act, 1961 ("Act", for short) on assessed income of Rs.78,02,55,263/- (after setting off with b/f losses of Rs.94,97,62,507/-) under normal provisions and book profits of Rs.133.39,86,575/- under section 115JB after making following additions.

Under normal provisions of IT Act.

Particulars	Amount
TUFF subsidy	31,67,12,369/-
RIP subsidy	4,70,52,567/-
FPS/FMS subsidy	18,96,23,522/-
Disallowance u/s 14A	6,10,36,000/-
Undisclosed investment	1,52,45,000/-
Total additions under normal provisions	62,96,69,458/-

Under book profit u/s 115JB of the IT Act.

Particulars	Amount
TUFF subsidy	31,67,12,369/-
RIP subsidy	4,70,52,567/-
FPS/FMS subsidy	18,96,23,522/-
Total additions under normal provisions	55,33,88,458/-

Further, setoff of business losses and unabsorbed depreciation was reduced from Rs.1,11,55,93,392/- as claimed in return of income of Rs.94,97,62,507/-.

4. During the assessment proceedings, the assessee claimed that education cess was not deducted out of total income, which should be considered as an allowable expenditure, however, learned AO rejected the claim stating that it is not acceptable as it was not claimed in original return as well as in return filed u/s 153A of the Act and further held education cess is part of income tax which is not allowable expenditure under Income Tax Act, 1961.

5. Aggrieved by the assessment order dated 30.12.2018, the assessee filed appeal before the Ld. CIT(A). The Ld. CIT(A) vide order dated 17/09/2020 upheld the disallowance to the extent of Rs.81,01,633/- u/s 14A read with Rule 8D of the Income Tax Rules, 1962. Further confirmed the addition of Rs.1,52,45,000/- made u/s 69 of the Act on account of unexplained investment. Further, rejected the claim of education cess of Rs.81,43,988/-. As against the above said sustained additions/disallowance, the assessee preferred appeal in ITA No.145/Del/2021 and as against the deletion of the partial additions, the Department of Revenue preferred an appeal in ITA 1929/Del/2020 on the grounds mentioned above.

6. Ground No.1 of both Assessees and Revenue are regarding disallowance made u/s 14A r.w.Rule-8D of the Act. Facts in brief are that the assessee made investment in various group of Companies and received exempt income of Rs.81,01,633/- as dividend. The assessee claimed to have not made any disallowance as no expenditure was incurred to earn the said income. The Ld. AO invoked the provisions of section 14A r.w.s 8D(2) of Income Tax Rules by making disallowance under Rule 8D(2)(ii) and under Rule 8D(2)(iii) of Rs.6,10,36,000/-. The Ld. CIT(A) partly allowed and directed to make disallowance to exempt income of Rs.81,01,633/-.

7. The Ld. Counsel for the assessee submitted that for the Financial Year 2013-14, the share capital was Rs.2,314.87 lacs, Reserves and Surplus

was Rs.37,089.85 lacs and total was Rs.39,404.72 lacs, Investment (Opening) Rs.8,393.14, Investment (Closing) Rs.9,535.78. Thus, the own interest-free reserves are far more than the amount of investment, therefore, no disallowance u/s 14A r.w.r 8D(2)(ii) should be made with regard to the interest element. Further, the Ld. Counsel for the assessee relied on the order of the Co-ordinate Bench in assessee's own case ITA No.142-143/Del/2021 for the AY 2011-12 and 2012-13. The Ld. Counsel has also relied on the order of the Co-ordinate Bench of Tribunal in the case of ACIT vs. M/s Vireet Investments (P.) Ltd. (ITA No.502/Del/2013) and submitted that notional disallowance u/s 14A r.w.r 8D(2)(iii) has to be computed considering only investment from which exempt income is earned.

8. Per contra, the Ld. DR submitted that the Ld. CIT(A) erred in law and facts in restricting the addition to Rs.81,01,633 as against Rs.6,10,36,000/- made u/s 14A by the AO without appreciating the detail reasons given in the assessment order, therefore, sought for dismissal of Ground No.1 of the assessee and prayed for allowing the Ground No.1 of the Revenue.

9. We have heard the parties and perused the materials. It is the case of the assessee that the own interest free reserves are far more than the amount of investment, therefore, no disallowance u/s 14A r.w.r 8D(2)(ii) of the Rules should have been made with regard to the interest element.

The assessee has also produced audited financial and the details are as under:

Financial Year	Share Capital	Reserves & Surplus	Total	Investment (Opening)	Investment (Closing)
2013-14	2,314.87	37,089.85	39,404.72	8,393.14	9,535.78

10. The said issue has been decided in Assessee's own case for A.Y.2011-12, 2012-13 in ITA No.142-143/Del/2021 dated 03/07/2023 and for A.Y.2013-14 in ITA No.71/Jodh/2018 dated 23/01/2023. By respectfully following the orders of the Co-ordinate Bench in assessee's own case, we are of the opinion that disallowance under Rule-8D(2)(ii) of the IT Rules should not have made by the AO, thus, the disallowance made by the AO is hereby deleted. Further, we direct the AO to compute the disallowance u/s 14A r.w.Rule-8D(2)(iii) of the Rules by considering only investment from each exempt income is earned. Accordingly, ground No.1 of the Revenue and the assessee are disposed off.

11. The Ground No.2 of Assessee's appeal, is regarding addition of Rs.1,52,45,000/- made on account of unexplained investment. Brief facts are that the assessee had purchased land during the captioned assessment years. A search was conducted on the assessee on 04/08/2016, wherein an estimated working was seized from the Laptop of the employee of the assessee containing details of certain land which was registered in the name of the assessee. The assessee was asked by the A.O to file details of land purchased along with the copy of the registered deed, proof of payment

along with source of investment and charges paid for registration of the plot. The assessee made reply as under:

> *"The details of land purchased along with the statement of account and copies of registry towards land purchased for Kanyakheri Unit are enclosed herewith marked as Annexures 1.11 to 1.11 here we would also like to submit that the Company has not made any payment in cash towards purchase of the said land. The amount of cash as referred in the notice is in fact a rough estimate of civil construction which was later on got done through civil contractors against payment through account payee cheques only."*

12. The Ld. AO observed that the assessee was confronted with the seized document, but assessee has not furnished any details. As assessee failed to explain the source of cash payment of Rs.1,52,45,000/-, the said amount has been computed as cash payment made for the purchase of land which has been considered as unaccounted and the same has been added by the AO to the total income of the assessee. The Ld. CIT(A) while affirming the said addition held as under:

> *"10.1. During the search proceedings an **estimated uncompleted** working was seized from the laptop of Mr. Vineet Agarwal employee of the appellant company obtaining details of certain land which was registered / to be registered in name of appellant company alongwith estimated cost of construction/development of said land.*
>
> *10.2. The working as being prepared by the employer for estimating total project cost and bank funding required completing the project on the said land. The employee was using template of some other MIS to prepare the working of this project. The working was not in final shape as certain information still required to complete it; therefore, it was saved showing misleading information.*
>
> *10.3. The investigation officer contended that the amount of Rs.1,52,45,000/- as mentioned in the seized sheet pertaining to cash payments made to acquire the said land which was never accepted by Mr. Vineet Agarwal in his statements recorded during the search.*
>
> *10.4. The investigating officer has not found any evidence in support of his contention that payments were made in cash to acquire the land.*

10.5 The promoters and/or employees have not confirmed in their statements recorded u/s 132(4) of the Income Tax Act, 1961 during search proceedings that any cash payment was made in acquisition of land.

10.6. During the search and post search enquires, the investigating officer has not found any source of generation of cash to substantiate the cash payments.

10.7 The company has filed registration deeds of land and source of payment to acquire the land during the assessment proceedings u/s 153A of the Income Tax Act, 1961 which clearly evident that no cash payment is made in purchase of land.

10.8 The investigation officer/learned assessing officer has not made enquiry from the seller of the land/registering authority to substantiate that cash payment is made in transferring the land.

10.9 In light of above submission we request your goodself that the additions made of Rs.1,52,45,000/- on account of cash payment in purchase of land is purely on the wrong interpretation of seized information, therefore, may we request your goodself to delete the same."

13. The Ld. Counsel for the assessee submitted that, the addition has been made based on the loose papers which cannot be sustained under the law in the absence of any corroborative evidence. Further submitted that the document relied upon by the Department was not even a part of regular books of account, but merely a loose working retrieved from a third person's laptop. Thus, in the absence of corroborative evidence to prove the authenticity of the seized material, the AO cannot make additions in assessee's income on the basis of said loose paper. The assessee has relied on the following judicial pronouncements:-

i) CBI v. V. C. Shukla & Ors. 1998 (3 SCC 410) (SC)
ii) Common Cause v. UOI [2017] 394 ITR 220 (SC)
iii) T. S. Venkatesan v. ACIT [2000] 74 ITD 298 (Cal.)

iv) D.S. Suresh v. ACIT (ITA No.462 & 463/Bang/2020, dated 22-02-2021)
v) Aurum Platz Pvt. Ltd. v. DCIT (2004 & 2005/Mum/2021, dated 20-03-2023)

14. The Ld. Counsel for the assessee further submitted that, the assessee has not been provided with opportunity to cross examine the person from whose laptop the document has been seized. Therefore, submitted that the addition made by the AO which was sustained by the Ld. CIT(A) is liable to be deleted. In support of the said contention, the Ld. AR relied on following decisions:-

i) Andaman Timber Industries vs. CCE, (Civil Appeal No.4228 of 2006).
ii) R.W. Promotions P. Ltd. vs. ACIT (ITA 1489 of 2013) (Bom. HC).
iii) Rajeshwar Singh Yadav vs. DCIT (ITA No.1909-1910/Del/2022).
iv) Sree Trading Corporation vs. ITO (151 Taxmann.com 486) Telengana HC).

15. Per contra, the Ld. DR relying on the orders of the lower authorities sought for dismissal of assessee's ground.

16. We have heard the parties and perused the materials on record. During the search proceedings, from the laptop of Mr. Vineet Agarwal an employee of the assessee company an uncompleted working was seized, wherein details of certain land which was registered/to be registered in the name of Assessee Company along with estimated costs of construction/development of said land has been reflected. It is the case of the assessee that the working has been prepared by the employee for estimating total project cost and bank fund requirement in completing the

project on the said land and the said employee was using the same template for some other MIS to prepare the working of the said project.

17. Admittedly, as mentioned in the assessment order, the said working seized from the laptop was 'incomplete estimation' and not ending final shape as certain information still to be required to complete the said estimation. The AO even after considering the said material as 'estimated uncompleted working', made as basis for making the addition u/s 69 of the Act. The Investigating Officer observed that Rs.1,52,45,000/- mentioned in the seized sheet pertaining to cash payment made to acquire the land and the said inference of the Investigating Officer is neither supported by any material evidence nor the employee Mr. Vineet Agarwal has accepted the said inference in his statement recorded during the search. The Investigating Officer had not found any evidence in support of the said inference that the payment were made in cash to acquire the land. There is no confirmation from any of the sellers or the employees in their statement recorded u/s 132(4) of the Act during the search proceedings to substantiate that the cash payment was made to acquire the land by the assessee. The investigation does not reveal any source generation of cash to substantiate the allegation of cash payment. On the contrary, as per the registered sale deed of the land depicts that no payment has been made in cash. At no point of time, Investigation Officer/AO have made any enquiry from the seller of the land, or registering authority to substantiate that the cash payment has been made in transferring the land.

18. It is well settled law that the dumb documents having no evidentiary value cannot be taken as sole basis for determination of undisclosed income of the assessee. If the Department of Revenue wants to make use of dumb documents, then the onus on the Revenue Department to collect cogent corroborative evidences. The Hon'ble High Court of Allahabad in the case of Mumar Trading Co. Vs. Commissioner of Trade Tax, 2008 taxmann.com 1672 (Allahabad) held that, it is settled principle of law that if the Revenue wants to rely upon the entries of the document, seized from the premises of third party, the burden lies upon the Revenue Authorities to prove the genuineness and authenticity of the said entries to connect the said entry with the dealer.

19. Further, it is found that the person from who's possession the seized document is recovered, was not subject to the cross examination of the assessee and no opportunity of cross examination has been given to the assessee. Therefore, for the detailed discussion made above, in our considered opinion, the Ld. AO as well as the Ld. CIT(A) have committed error in making the addition u/s 69 of the Act which deserves to be deleted. Accordingly, the ground No.2 of the assessee is allowed and the subject addition sustained by the Ld. CIT(A) is deleted.

20. Ground No.3 is regarding allow-ability of claim of education Cess. Facts in brief that the assessee raised claim the education Cess as eligible business expenditure u/s 40(a)(ii) of the Act. The contention of the assessee that prohibition contained in section 40(a)(ii) of the Act is only with reference

to payment of Income Tax and same does not apply to claim of education Cess paid along with Income Tax. The assessee also made reference to CBDT Circular No. F. No.91/58/66-ITJ(19) dated 18/05/1967 *and the decision of M. M. Aqua Technologies Ltd. vs. CIT [2021] 129 taxmann.co. 145*. The above contentions of the assessee has been negated by the Ld. CIT(A) on the ground that additional surcharge are part of income tax and as such the same is not allowable in terms of express provision of section 40(a)(ii) of the Act.

21. We have heard both the parties and perused the material available on record. The issue regarding allow-ability of education Cess has been considered by the ITAT Kolkata in the case of Kanoria Chemicals and Industries Ltd. ITA No. 2184/Kol/2018 (TS-1129-ITAT 2021 Kol) wherein it is held that the Cess is not allowable deduction the relevant portion of the order are as under:-

> *"9.1. The above additional ground and submissions of the assessee are carefully considered, The appellant assessee in its above submission has stated that 'cess' being not covered within the ambit of section 40(a)(ii) of the Act, and is legally allowable as a deduction u/s 37(1) of the IT Act. The appellant assessee has also relied on the decision Hon'ble Rajasthan High Court in Chambal Fertilizers Ltd. reported in 107 taxmann.com 484 (Raj.) and decision of the Hon'ble Bombay High Court in Sesa Goa Ltd. [423 ITR 426 (Bom.)] in which both have concluded that it is not covered and hence is allowable as deduction u/s 37(1) of the Act.*
>
> *9.2. With respect to the above decision, attention is also drawn to the latest decision of jurisdictional Hon'ble ITAT of Kolkata in the case of 'Kanoria Chemicals & Industries Ltd' ITA No, 2184/Kol/2018 (TS-1129- ITAT 2021 Kol) which has held that the "Cess" is not to be allowed as deduction. The relevant portion of the judgment is reproduced as below:*

"19. However, with due respect to the decisions of the Hon'ble Bombay High Court and Hon'ble Rajasthan High Court and of co-ordinate Benches of this Tribunal, we find that the issue is squarely covered by the decision of the Hon 'ble Apex Court of the country in the case of "CIT Vs. K. Srinivasan" (1972) 83 ITR 346; wherein the following questions came for adjudication before the Hon'ble Apex Court:- " Whether the words Income tax" in the Finance Act of 1964 in subs (2) and sub-s.(2)(b) of s, 2 would include surcharge and additional surcharge."

20. The Hon'ble Supreme Court answered the question in favour of revenue observing as underpin our judgment it is unnecessary to express any opinion in the matter because the essential point for determination is whether surcharge is an additional mode or rate for charging income tax. The meaning of the word ''surcharge" as given in the Webster's New international Dictionary includes among others "to charge (one) too much or in addition" also "additional tax". Thus the meaning of surcharge is to charge in addition or to subject to an additional or extra charge. If that meaning is applied to s, 2 of the Finance Act 1963 it would lead to the result that income tax and super tax were to be charged in four different ways or at four different rates which may be described as (i) the basic charge or rate (in part I of the First Schedule); (ii) Sur- charge; (iii) special surcharge and (iv) additional surcharge calculated in the manner provided in the Schedule. Read in this way the additional charges form a part of the income tax and super tax".

The Hon'ble Supreme Court, therefore, has decided the issue in favour of the revenue and held that surcharge and additional surcharge are part of the income tax. At this stage, it is pertinent to mention here that 'education cess' was brought in for the first time by the Finance Act, 2004, wherein it was mentioned as under:-

> *An additional surcharge, to be called the Education Cess to finance the Government's commitment to universalise quality basic education, is proposed to be levied at the rate of two per cent on the amount of tax deducted or advance tax paid, inclusive of surcharge."*

22. *The provisions of the Finance Act 2011 relevant to the Assessment Year under consideration i.e. 2012-13 are also relevant. For the sake of ready reference, the same is reproduced hereunder:-*

> *2(11) The amount of income-tax as specified in sub-sections (1) to (10) and as increased by a surcharge for purposes of the Union calculated in the manner provided therein, shall be further increased by an additional surcharge for purposes of the Union, to be called the "Education Cess on income-tax", calculated at the rate of two per cent, of such income-tax and surcharge, so as to fulfill the commitment of the Government to provide and finance universalized quality basic education.*

23. A perusal of the aforesaid provisions of the Finance Act and Finance Act 2011 would show that it has been specifically provided that 'education cess' is an additional surcharge levied on the income-tax. Therefore, in the light of the decision of the Hon'ble Supreme Court in the case of "CIT Vs. K. Srinivasan" (supra) the additional surcharge is part of the income-tax. The aforesaid decision of the Hon'ble Apex Court and the provisions of Finance Act, 2004 and the relevant provisions of section 2(11) & (12) of the subsequent Finance Acts have not been brought into the knowledge of the Hon'ble High Courts in the cases of "Sesa Goa Ltd" & "Chambal Fertilisers" (supra). Since the decision of the Hon'ble Supreme Court prevails over that of the Hon'ble High Courts, therefore, respectfully following the decision of the Hon 'ble Supreme Court in the case of "CIT Vs. K Srinivasan" (supra), this issue is decided against the assessee. The additional ground of assessee's appeal is accordingly dismissed."

9.3. Moreover the explanation-3 to section 40(a)(ii) of the act has been amended by finance act 2022, with retrospective effect from 1st April, 2005 (applicable from AY 2005-06) that the term "tax" shall include and shall be deemed to have always included any surcharge or cess, by whatever name called, on such "tax" shall include and shall be deemed to have always included any surcharge or cess, by whatever name called, on such "tax". Thus in light of this amended section 40(a)(iii) and

explanation-3, there on, and by relying on the judgment of Hon'ble ITAT Kolkata in the case Kanoria Chemicals & Industries Ltd' ITA No. 2184/Kol/2018 (TS1129- ITAT 2021 Kol), it is held that the "education cess" can't be allowed as an allowable expense of the assessee u/s 37(1), and accordingly the additional grounds of assessee in this regard are hereby dismissed".

In view of the above settled position of law, we hold that the education Cess can't be allowed as an allowable expense, accordingly, we find no merit in Ground No. 3 of the assessee and the Ground No. 3 of the assessee is dismissed.

22. The Ground No. 2 of the Revenue is regarding claim of FPS/FMS as capital receipt received as per foreign trade policy in computing the total income of the assessee. Brief facts are that the assessee availed FPS/FMS subsidy in the form of export during the captioned Assessment Year, which was subject to the addition made by the A.O. The Ld. CIT(A) while deleting the addition relied on the Judgment of Hon'ble Rajasthan High Court in the case of PCIT Vs. Nitin Spinners Ltd. wherein it was held that the subsidy has to be treated as capital in nature and is excludable from book profit u/s 115JB of the Act. The Ld. Counsel for the assessee submitted that the issue involved in Ground No. 2 of the Revenue is squarely covered in Assessee's own case for Assessment Year 2013-14 by the order of the Co-ordinate Bench in ITA No. 71/Jodh/2018 dated 23/01/2023 and also relied on the various judicial pronouncements.

23. Heard. It is found that the issue of claim of FPS/FMS as capital receipt received as per foreign trade policy in computing total income has

been dealt and decided by the Co-ordinate Bench of the Tribunal in Assessee's own case for Assessment Year 2013-14 in favour of the assessee. Apart from the same, the Hon'ble High Court of Rajasthan in the case of Principal Commissioner of Income Tax, Ajmer Vs. Nitin Spinners Ltd. vide order dated 19/09/2019 reported in 2019 (2020) 116 Taxman.com 26 (Rajasthan held as under:-

> *"As far as the question with regard to Focus Marketing Scheme was concerned, apparently the Central Government gave the subsidy to enhance Indian export potential in the international market. It was not granted to meet the cost of expenditure to meet the competition of the Indian textile market. The ITAT took note of judgment in Ponni Sugars & Chemicals Ltd. (supra) and held that the amount was not an export incentive, but rather capital receipt and therefore, not taxable. This Court is of the opinion that there is no infirmity with the reason."*

24. The Judgment of the Hon'ble High Court of Rajasthan has also been affirmed by the Hon'ble Supreme Court wherein the SLP filed by the Department has been dismissed which is reported in 130 taxmann. Com 402(S.C). By respectfully following the ratio laid down by the Hon'ble High Court and the Hon'ble Supreme Court, we find no reason to entertain the Ground No. 2 of the Revenue as the same is devoid of merit, accordingly the Ground No. 2 of the Revenue is dismissed.

25. Ground No. 3 is regarding claim of interest subsidy under TUFFS as capital receipt in computing the total income and Ground No. 4 is regarding claim of interest under RIPS as capital receipt in computing the total

income. The assessee received interest subsidy by virtue of Technology Up-gradation Fund (TUF) granted by Ministry of Textile, Government of India and interest subsidy under Rajasthan Investment Promotion Scheme (RIPS). The Ld. A.O. made additions which have been deleted by the Ld. CIT(A) by relying on the Judgment of the Hon'ble High Court of Rajasthan in the case of PCIT Vs. Nitin Spinners Ltd. and held that subsidy were treated as capital in nature and is excludable from book profit under 115JB of the Act.

26. The Ld. Counsel for the assessee submitted that the issue regarding allow ability of claim of interest subsidy under TUFFS and RIPS have been decided by the Hon'ble High Court of Rajasthan in the case of PCIT Vs. Nitin Spinners Ltd. which has been confired by the Hon'ble Supreme Court by dismissing SLP filed by the Department. The Counsel for the assessee relied on following Judgments:-

(i) PCIT Vs. Nitin Spinners Ltd. (116 Taxmann.com26) (Rajasthan High Court).

(ii) PCIT Vs. Nitin Spinners Ltd. (130 Taaxmann.com 402)(S.C).

27. We have heard both the parties and perused the material available on record. The allow-ability of claim of interest subsidy under TUFFS and RIPS have been decided by the Hon'ble High Court of Rajasthan in the case of PCIT vs. Nitin Spinners Ltd. 116 Taxman.com 26 (Rajasthan High Court) wherein held as under:-

> *"5. In its order, the ITAT took note of several previous Bench ruling as well as judgment of the Punjab and Haryana High Court in CIT v. Sham Lal Bansal [2011] 11 taxmann.com 396/200*

Taxman 14 (Mag.) (Punj & Har.). In Shyam Lal Bansal (supra) the Punjab and Haryana High Court observed as follows:

> *"6. The purpose of scheme under which the subsidy is given, has been discussed by the Tribunal. To TUFS sustain and prove the competitiveness and overall long term viability of the textile industry, the concerned Ministry of Textile adopted the TUFS scheme, envisaging technology upgradation of the industry. Under the scheme, there were two options, either to reimburse the interest charged on the lending agency on purchase of technology upgradation or to give capital subsidy on the investment in compatible machinery. In the present case, the assessee has taken term loans for technology upgradation and subsidy was released under agreement dated 12-7-2005 with Small Industry Development Bank of India. The relevant clause of the agreement under which the subsidy was given is as under:-*
>
> > *Para 8. to prevent mis-utilization of capital subsidy and to provide an incentive for repayment, the capital subsidy will be treated as a non interest bearing term loan by the Bank/Fis. The repayment schedule of the term loan however will be worked out excluding the subsidy amount and subsidy will be adjusted against the term loan account of the beneficiary after a lock in period of three years on a pro-rate basis in terms of release of capital subsidy. There is no apparent or real financial*

loss to a borrower since the countervailing concession is extended to the loan amount."

7. In view of the above, the view taken in Sahney Steel & Press Works Ltd., could not be applied in the present case, as in said case the subsidy was given for running the business. For determining whether subsidy payment was 'revenue receipt' or 'capital receipt', character of receipt in the hands of the assessee had to be determined with respect to the purpose for which subsidy is given by applying the purpose test, as held in Sahney Steel & Press Works Ltd. itself and reiterated in later judgment in CIT v. Ponni Sugars & Chemicals Ltd. & Ors. (2008) 306 ITR 392, referred to in the impugned order of the Tribunal."

5. *This Court notices that the Punjab and Haryana High Court took into account the previous binding ruling of the Supreme Court in CIT v. Ponni Sugars & Chemicals Ltd. [2008] 174 Taxman 87/306 ITR 392 and Sahney Steel & Press Works Ltd. v. CIT [1997] 94 Taxman 368/228 ITR 253. In these circumstances, the Court is of the opinion that the amount was received as capital stream and therefore, not taxable.*

6. *A similar view was taken by the Calcutta High Court in CIT v. Gloster Jute Mills Ltd. [2018] 96 taxmann.com 303/257 Taxman 512/[2019] 416 ITR 458."*

28. By respectfully following the ratio laid down by the Rajasthan High Court (supra), we find no merit in the Ground No. 3 and 4 of the Revenue, accordingly, Ground No. 3 & 4 of the Revenue are dismissed.

ITA NO. 146/DEL/2021 (ASSESSEE) & ITA NO. 1929/DEL/2020 (REVENUE) (A.Y 2015-16).

29. The issues involved in the Appeals of the Assessee as well as the Revenue for Assessment Year 2014-15 are identical to the above appeals filed by the Assessee and the Revenue for the Assessment Year 2015-16.

30. The Ground No. 1 of the assessee is regarding disallowance made u/s 14A read with Rule 8D of the Act. The said issue has been already considered in Ground No. 1 of both the Revenue and the assessee in A.Y 2014-15, finding the parity the disallowance made under Rule 8D(2)(ii) are hereby directed to be deleted and we further direct the A.O. to compute the disallowance u/s 14A read with Rule 8D (2) (iii) of the Rules by considering only investment from each exempt income is earned, accordingly, Ground No. 1 of the Revenue and the assessee in ITA No. 146/Del/2021 and 1929/Del/2020 for Assessment Year 2015-16 are disposed off.

31. The Ground No. 2 of the assessee is regarding rejection of allow-ability of education Cess, the said issue has already been dealt and decided in ITA No. 145/Del/2021 against the assessee. Finding the parity and following the consistency the Ground No. 2 and its sub Ground of the assessee in ITA No. 146/Del/2021 is dismissed.

32. The Ground No. 2 of the Revenue is regarding deletion of addition received as incentive under FPS/FMS as capital receipt. The said issue has been dealt and decided against the Revenue for the Assessment Year 2014-15, wherein the Judgment of Hon'ble High Court of Rajasthan and also the Judgment of Hon'ble Supreme Court in the case of Principal Commissioner of Income Tax, Ajmer Vs. Nitin Spinners Ltd. has been relied and held that the above subsidy has to be treated as capital in nature and is excludable from book profit u/s 115JB of the Act. By finding the parity, we find no merit in Ground No. 2 of the Revenue, accordingly, Ground No. 2 of the Revenue is dismissed.

33. The Ground No. 3, 4 & 5 of the Revenue are on deletion of interest subsidy under TUFS, RIPS and SHIS. The said issues have also been considered in Assessee's own case for the Assessment Year 2014-15 wherein by relying on the judgment of Hon'ble Rajasthan High Court and the Judgment of Hon'ble Supreme Court in the case of PCIT, Ajmer Vs. Nitin Spinners Ltd., we have dismissed the Grounds of appeal of the Revenue. Finding the parity and following the principals of consistency, we find no merit in Ground Nos. 3, 4 & 5 of the Revenue, accordingly, Ground No. 3, 4 & 5 of the Revenue are dismissed.

34. Ground No. 6 & 7 are being general in nature requires no adjudication.

35. In the result, the Appeals filed by the assessee in ITA No. 145/Del/2021(A.Y 2014-15) and ITA No. 146/Del/2021(A.Y 2015-16) are partly allowed for statistical purpose and the Appeal filed by the Revenue in ITA No. 1928/Del/2020 (A.Y 2014-15) and ITA No. 1929/Del/2020 (A.Y 2015-16) are dismissed.

Order pronounced in open Court on 31st January, 2024.

Sd/-	Sd/-
(DR. B.R.R.KUMAR)	**(YOGESH KUMAR U.S.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 31/01/2024
B.R./P.K/R.N Sr. Ps.

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI