

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-2', NEW DELHI**

Before Ms. Suchitra Kamble, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

(Through Video Conferencing)

ITA No. 6421/Del/2019 : Asstt. Year : 2015-16

Qualcomm India Pvt. Ltd., Unit No. 201, 2 nd Floor, Tolstoy House, 15, Tolstoy Marg, New Delhi-110001	Vs	Addl. CIT, Special Range-7, New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AAACQ0231C		

Assessee by : Ms. Ananya Kapoor, Adv.

Revenue by : Ms. Anshu Shukla Pandey, CIT DR

Date of Hearing: 06.10.2021	Date of Pronouncement: 01.11.2021
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ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order dated 29.05.2019 passed by the AO u/s 143(3) r.w.s. 144C of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

i. Rejection of economic analysis:

The DRP erred in upholding the TPO's action of not accepting the economic analysis undertaken by the assessee in accordance with the provisions of the Act read with the Income Tax Rules, 1962 ("IT Rules/Rules"), and modifying the economic analysis for the determination of the arm's length price and undertaking a fresh analysis.

ii. Selection of functionally different companies as comparable to Business support services:

The DRP erred in upholding the TPO's action of not undertaking an objective and comparative analysis and inter alia selecting the following company as comparable to software development services rendered by the Appellant which is functionally different:

a. Killick Agencies & Mktg. Ltd.

iii. Rejection of companies selected as comparable to the Business support services:

The DRP erred in upholding the TPO's action of not undertaking an objective comparative analysis and inter alia rejecting the following companies as comparable to the software development services rendered by the Appellant:

a. India Tourism Development Corporation Ltd.

b. MCI Management (India) Ltd.

c. Concept Public Relations India Ltd.

iv. Interest on outstanding receivables:

The DRP erred in upholding the TPO's action of making transfer pricing adjustment and imputing the interest on outstanding receivables as on 31st March 2015 relating to provision of services to the AEs:

a. Not appreciating the fact that the receivables are consequential/closely linked to provision of services to the AEs;

b. Not appreciating the facts and circumstances surrounding the receivables and re-characterizing the outstanding receivables as loans advanced to the AEs.

v. Incorrect computation of margins:

The AO erred in not giving effect to the directions of DRP who directed to verify and take correct margins

of the comparables and adopted an inconsistent approach while computing operating margin of the comparable companies used in the determination of the ALP resulting in incorrect margins of the comparable companies.

vi. Risk adjustment:

The TPO and DRP erred in not adjusting the net margins of the comparable companies taking into account the functional and risk differences between the international transaction of the assessee, being only a captive service provider and a risk free entity and the comparable transactions in accordance with the provisions of rule 10B(1)(e) of the Income Tax Rules, 1962 ('the Rules').

vii. Depreciation adjustment:

The DRP erred in not adjudicating on the adjustment to be made for the differences in depreciation policy followed by the Appellant and the comparable companies."

3. The Qualcomm India Pvt. Ltd. (QIPL) is a Private Limited company incorporated in India and is engaged in the business of rendering software development services, IT support services and business support services. QIPL has a 100% Export Oriented Unit (EOU) for the development of the software at Development Centers in Hyderabad, Bangalore and Chennai which are registered under the Software Technology Parks of India (STPI) scheme. The Development Centers are engaged in rendering software development services and IT support services to its Associated Enterprises (AEs). Further, QIPL also provides business support Services (BSS) to its AEs through its Mumbai unit.

4. For the A.Y. 2015-16, QIPL filed its return of income on 27.11.2015 with an income of Rs.507,69,49,710/-. The Assessing Officer vide his draft assessment order, proposed to determine the total income of the assessee at Rs.737,26,39,771/-. While passing the draft assessment order, the AO has considered adjustment of Rs.229,56,90,061/- in accordance with the Transfer Pricing Order dated 30.10.2018 passed u/s 92CA(3) of the Income Tax Act, 1961 by the DCIT, Transfer Pricing Officer-3(2)91), New Delhi. The TPO has rejected the transfer pricing documentation undertaken by QIPL u/s 92C(3)(c) of the Act for determination of the Arm's Length Price (ALP) of the said international transactions and based on the fresh analysis concluded that the price received by QIPL for provision of Software, IT support and BSS is not at Arm's length. Further, the TPO has also proposed adjustment on account of interest on the outstanding receivables of Rs.16,20,061/-.

5. The summary of the arm's length range determined by the TPO and the adjustment made to the ALP of the international transactions of the company in the TP order is summarized in the table below:

Particulars	Software	IT Support	BSS
Average unadjusted margin of comparable companies as determined by the TPO	24.53%	21.16%	28.81%
Transfer price of the international transactions of the assessee	25,982.11	930.25	532.72
ALP for the international transactions as determined by the TPO	28,135.22	980.09	623.84
Adjustment made by the TPO	2153.11	49.84	91.12

6. Aggrieved with the draft Assessment Order, the assessee filed objection before the Id. DRP. In pursuance of the order of

the Id. DRP, the AO passed final Assessment Order determining the total income at Rs.511,77,90,550/-.

7. Aggrieved the assessee filed appeal before us.

Exclusion of Comparables:

8. With regard to the inclusion of comparable namely, "Killick Agencies and Marketing Ltd. (Killick)", it was argued before us that the comparable was functionally different whereas the Id. DRP held that the business model and type of income does not matter with reference to functional comparability. The Id. DRP also held that the comparable provides lot of services which help the companies to sustain the market.

9. We find that "Killick" is engaged in acting as agent for various foreign principals for sale of dredgers, dredging equipment, steerable rudder propellers, maritime and aviation lighting, acoustic communication equipment etc. and sales services. Apart from this, the company is involved in exports of micro switches, engineering items, acoustics items & headsets. It is engaged in the business of marine equipment like specialized propulsion systems, marine engines, industrial & marine gear boxes, ballast water treatment system, special purpose sea going vessels, industrial & marine exhaust system, ship lighting & navigation lighting systems, dredges and dredge equipment, ship building presses, rescue boats and specialized davits, reverse osmosis water systems and special acoustic communication equipment for defence. "Killick" provides after sales services for the equipment's supplied by its principals.

10. Whereas, the assessee is involved in corporate services and market research & business development. The corporate service includes assisting the day-to-day management of the organization (e.g. finance, human resources, information systems etc.). With respect to human resources, financial management, routine administration etc., QIPL Mumbai is responsible for arranging the necessary resources. It is responsible for managing its own cash flows, accounts payable, accounts receivables, employee management, management information system and training and hiring employees. Though QIPL Mumbai drafts its policies within the broad framework of Qualcomm, it receives Nil or little support from its overseas entities in terms of implementation of those policies.

11. With regard to the marketing strategy functions includes those activities that determine the positioning of a firm's product in a market and that establish marketing techniques that bring the products to the customers' attention. The AEs are responsible for branding activities to ensure that a consistent message is conveyed across the globe. Further, the business unit leaders of the AEs develop market strategies and relay this information to QIPL so that QIPL may undertake market research and business development activities on behalf of the AEs in India, and augment the AE's efforts in raising awareness of Qualcomm's technology to manufacturers in India.

12. Thus, on going through the functions, we find that the comparable "Killick" is functionally different from the assessee, hence, we hereby direct the same may be excluded from the list of final comparables.

Inclusion of Comparables:

13. The assessee has argued for inclusion of three comparables namely, India Tourism Development Corporation (ITDC), Concept Public Relations India Ltd. (CPRIL) and Management (India) Ltd. (MIL). The assessee did not press for inclusion of ITDC.

14. With regard to CPRIL, we find that the company engaged in organizing conferences, tours, demonstration o products, seminars, publicity campaign through various media channel, demonstrations of client products, hotel bookings, conference literature etc.

15. Having gone through the functions of the assessee which have been duly mentioned in the above paras of this order, we hold that the comparable CPRIL is functionally dissimilar.

16. With regard to MIL, we find that the comparable Offers Consultancy in the areas asset development, community and experience management, strategic event management and communication & marketing. We find that the functions of this comparable are different from that of the assessee. Hence, we decline to interfere with the order of Id. DRP in this comparable.

Interest on Receivables:

17. The TPO made adjustment and imputed interest on outstanding receivables on account of services provided to the AEs.

18. The Id. AR argued extensively as to how adjustment with regard to interest on receivables cannot be resorted to. Primarily, we find that the assessee is a debt free company and has no claim of interest payable. Hence, in the specific financial conditions of the assessee, we hold that no adjustment is required on this ground.

Incorrect Computation of Margins:

19. The TPO erred in not giving effect to the directions of Id. DRP who directed to verify and take correct margins of the comparables and adopted an inconsistent approach while computing operating margin of the comparable companies used in the determination of the ALP resulting in incorrect margins of the comparable companies. Detailed computation of margins of comparables provided to TPO pursuant to Id. DRP directions. We have perused the same in the paper book at page nos. 1709 to 1747. The AO is directed to re-compute the margins. The assessee would furnish the clarifications promptly, if any, required by the Assessing Officer.

20. The assessee has also raised the additional grounds of appeal which reads as under:

"The Appellant prays that a deduction amounting to Rs.4,97,69,088/- be allowed in respect of Education Cess remitted by the Appellant for the subject AY in light of the favourable ruling of the Hon'ble Rajasthan High Court in the case of Chambal Fertilizers Chemical Ltd. Vs JCIT (ITA No. 52/2018) and Hon'ble Mumbai High Court in the case of Sesa Goa Ltd. Vs JCIT (ITA No. 1718 of 2013)."

21. Before us, it was argued that a legal ground can be taken up any time before the higher authorities. The Id. AR relied on the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. Vs CIT (1998) 229 ITR 383. Admission of the additional ground has been opposed in principle by the Id. DR.

22. Keeping in view, the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. Vs CIT (1998) 229 ITR 383, the additional ground filed by the assessee is accepted. The relevant portion of the judgment is as under:

"5. Under Section 254 of the Income-tax Act, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.

6. In the case of Jute Corporation of India Ltd. v. C.I.T. . this Court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate

authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.

7. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal [vide, e.g., C.I.T. v. Anand Prasad (Delhi), C.I.T. v. KaramchandPremchand P. Ltd. and C.I.T. v. Cellulose Products of India Ltd. . Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.

8. The reframed question, therefore, is answered in the affirmative, i.e., the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. We remand the proceedings to the Tribunal for consideration of the new grounds raised by the assessee on the merits.”

23. Respectfully following the above judgment of the Hon'ble Apex Court, the additional grounds taken up by the assessee are hereby admitted.

24. Reading the provisions of Section 40(a)(ii), the assessee argued that education cess paid on Income Tax doesn't come under the purview of the definition as it is levied on the amount of Income Tax but not on profits of business. The Id. AR relied on the Circular No. 91/58/66-ITJ(19) by CBDT dated 18.05.1967, which states the effect of the omission of the words 'cess' from Section 40(a)(ii) is that only taxes paid are to be disallowed in the assessment for the assessment years 1962-63 onwards.

25. The Id. AR also relied on the judgment of Hon'ble Rajasthan High Court in the case of Chambal Fertilizers and Chemicals Ltd. Vs JCIT in ITA No. 52/2018 dated 31.07.2018 wherein the same issue has been decided in favour of the assessee and particularly held that education cess is an allowable expenditure.

26. Further, he argued that in the case of ITC Vs ACIT in ITA No. 685/Kol/2014 dated 27.11.2018 wherein it was held that the education cess is an allowable expenditure.

27. The Id. AR has also relied in the case of Peerless General Finance & Investment Co. Ltd. Vs DCIT in ITA No.937 & 938/Kol/2018 dated 24.03.2019 wherein it was held that education cess is not tax and is an allowable expenditure.

28. The Id. DR argued that it is not the appropriate forum to raise the issue at this juncture. Since, there is no dispute between the assessee and the Assessing Authorities, a non-dispute cannot be adjudicated. He argued that the education cess is a part of the Income Tax and is a charge on the

assessee. Hence, it cannot be treated as expense eligible for deduction.

29. Heard the arguments of both the parties and perused the material available on record.

30. Regarding the claim of education cess as an allowable expenditure, we find that the CBDT vide Circular No. 91/58/66 – ITJ(19) clarified as under:

"Interpretation of provisions of Section 40(a)(ii) of the I.T Act – clarification regarding.

Section 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 Section 10(4) of the old Act and Section 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:

"(a) 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."

31. The similar issue of allowability of cess u/s 37 has been examined by the Co-ordinate Bench of ITAT in ITA No. 685/Cal./2014 wherein the amount of the cess paid has been held to be an allowable deduction.

32. Further, we find that the Hon'ble High Court of Judicature for Rajasthan at Jaipur in ITA No. 52/2018 in the case of Chambal Fertilizers and Chemicals Ltd. held that in view of the Circular of CBDT where the word 'cess' is deleted, the claim of the assessee for deduction is acceptable. In that case, the Hon'ble High Court held that there is difference between the cess and tax and cess cannot be equated with the cess.

33. We have also gone through the provisions of Sec. 115 of the Income Tax act 1961 which are as under:

"Explanation 2 to section 115JB (2) of the Act defines the term 'Income-tax' in an inclusive manner, which includes cess. Provision of the explanation 2 to section 115JB is as given below:-

For the purposes of clause (a) of Explanation 1, the amount of income-tax shall include—

- (i) any tax on distributed profits under [section 115-O](#) or on distributed income under [section 115R](#);*
- (ii) any interest charged under this Act;*
- (iii) surcharge, if any, as levied by the Central Acts from time to time;*
- (iv) Education Cess on income-tax, if any, as levied by the Central Acts from time to time; and*
- (v) Secondary and Higher Education Cess on income-tax, if any, as levied by the Central Acts from time to time.*

34. Thus, wherever the legislature wanted to include this term specifically in the statute it has done so under the Act. The term 'tax' has been defined in section 2(43) of the Act to include only Income-tax, Super Tax and Fringe Benefit Tax (FBT). Provision of the section 2(43) is as given below:

"tax" in relation to the assessment year commencing on the 1st day of April, 1965, and any subsequent assessment year means income-tax chargeable under the provisions of this Act, and in relation to any other assessment year income-tax and super-tax chargeable under the provisions of this Act prior to the aforesaid date and in relation to the assessment year commencing on the 1st day of April, 2006, and any subsequent assessment year includes the fringe benefit tax payable under [section 115WA](#)."

35. Surcharge on income-tax finds place in the First Schedule, but that is not the case so far as Education Cess is concerned. Therefore, the education cess on this reasoning cannot be equated as tax or surcharge. Based on this, it can be said that since the word 'Cess' is not specifically included in the definition, it cannot be considered a part of tax, and accordingly, it should not be disallowed in u/s 40(a)(ii) of the Act.

36. Further, we are guided by the judgment of the Constitutional bench which was also referred in the case of Dewan Chand Builders & Contractors Vs Union of India & Others in Civil Appeal No. 1830 of 2008 dated 18.11.2011.

37. The Constitution Bench of this Court in Hingir Rampur Coal Co. Ltd. Vs. State of Orissa² was faced with the challenge to the constitutional validity of the Orissa Mining Areas Development Fund Act, 1952, levying Cess on the petitioner's colliery. The Bench explained different features of a 'tax', a 'fee' and 'cess' in the following passage:

"The neat and terse definition of Tax which has been given by Latham, C.J., in Matthews v. Chicory Marketing Board (1938) 60 C.L.R. 263 is often cited as

a classic on this subject. "A Tax", said Latham, C.J., "is a compulsory exaction of money by public authority for public purposes enforceable by law, and is not payment for services rendered". In bringing out the essential features of a tax this definition also assists in distinguishing a tax from a Fee. It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, a fee 1 AIR 1954 SC 282 2 1961 (2) SCR 537 is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee. Tax recovered by public authority invariably goes into the consolidated fund which ultimately is utilised for all public purposes, whereas a cess levied by way of Fee is not intended to be, and does not become, a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied."

38. We also find that the proceeds from collection of "Education Cess" are not credited to Consolidated Fund but to a non-lapsable Fund for elementary education-"**Prarambik Shiksha Kosh**". Since the proceeds from collection of Education Cess are kept separate for a specified purpose, applying the principles in the aforesaid decision of Apex Court in the case of **M/s Dewan Chand Builders (supra)**, it can be said that the same is not in the nature of tax. Hence, it is allowable as deduction.

39. Further, Provisions of Section 37 are perused which are as under:

"37. (1) Any expenditure (not being expenditure of the nature described in [sections 30 to 36](#) and not being in the nature of **capital expenditure** or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".

*Explanation 1.—For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an **offence** or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.*

*Explanation 2.—For the removal of doubts, it is hereby declared that for the purposes of sub-section (1), any expenditure incurred by an assessee on the activities relating to **corporate social responsibility** referred to in section 135 of the Companies Act, 2013 (18 of 2013) shall not be deemed to be an expenditure incurred by the assessee for the purposes of the business or profession."*

40. From the above, we find that Education Cess is not of the nature described in sections 30 to 36, Education Cess is not in the nature of capital expenditure, Education Cess is not personal expense of the assessee, it is mandatory for it to pay Education Cess and for the purpose of computation of Education Cess, the Income 'Tax' is taken as the criteria for computational purpose. Thus, the expense of Education Cess is mandatory expenses to be paid but does not fall under capital expense and personal expenditure and hence may be allowed as deduction.

41. We have also gone through the various judgments of judicial authorities pan India wherein the fresh claim of the assessee is considered and the deduction u/s 37 of Education Cess has been allowed. The Hon'ble High Court of Bombay held that the appellate authorities may confirm, reduce, enhance or annul the assessment or remand the case to the AO, because the basic purpose of a tax appeal was to ascertain the correct tax liability in accordance with the law. To mention a few,

- *DCIT Vs M/s. Agrawal Coal Corporation Pvt. Ltd ITA Nos. 801 to 803/Indore/2018.*
- *Atlas Copco India Ltd. Vs ACIT in ITA No. 736/Pune/2011*
- *Tata Autocomp Hendrickson Vs DCIT in ITA No. 2486/Pune/2017*
- *Symantec Software India Pvt. Ltd. Vs DCIT in ITA No. 1824/Pune/2018*
- *Sicpa India Pvt. Ltd. Vs ACIT in ITA No. 704/Kol/2015*
- *Philips India Ltd. Vs ACIT in ITA No. 2612/Kol/2019*
- *ITC Limited Vs ACIT in ITA No. 685/Kol/2014*
- *DCIT Vs The Peerless General Finance & Investment & Co. Ltd. in ITA No. 1469/Kol/2019.*
- *ACIT Vs ITC Infotech in ITA No. 220/Kol/2017*
- *Reckitt Benckiser India Pvt. Ltd. Vs DCIT (2020) 117 taxmann.com 519 (Kol.)*
- *Crystal Crop. Protection Pvt. Ltd. Vs JCIT in ITA No. 1539/Del/2016*
- *Midland Credit Management India Vs ACIT in ITA No. 3892/Del/2017*
- *Voltas Ltd. Vs ACIT in ITA No. 6612/Mum/2018*
- *Sesa Goa Ltd. Vs JCIT (2020) 117 taxmann.com 96 (Bom.)*
- *Chambal Fertilisers and Chemicals Vs JCIT in ITA No. 52 of 2018 (Raj. HC)*

42. Hence, keeping in view the provisions of the Act pertaining to Section 40(a)(ii) and Section 115JB, Circular of the CBDT No. 91/58/66-ITJ(19), the orders of Co-ordinate Benches of ITAT and judicial pronouncements of the Hon'ble High Court of Bombay and Hon'ble High

Court of Rajasthan, we hereby hold that the assessee is eligible to claim the deduction of the 'Education Cess' as per the provisions of Section 37 of the Income Tax Act.

43. In the result, the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 01/11/2021.

Sd/-

(Suchitra Kamble)
Judicial Member

Dated: 01/11/2021

Subodh Kumar, Sr. PS

Copy forwarded to:

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

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR